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CORRECTING THE IMBALANCE: THE NEW MEXICO PUBLIC EMPLOYEE BARGAINING ACT AND THE STATUTORY RIGHTS PROVIDED TO PUBLIC EMPLOYEES

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I. INTRODUCTION

With the rise of industrialization in the nineteenth century, private and public employee organizations in the United States began to take hold.[1] These organizational efforts, which utilized the collective strength of employees to improve wages and working conditions, were met with active resistance by employers.[2] Private employee unions began to gain acceptance in the 1930s, but unionization by public employees was still confronted with resistance. In 1935, private employees gained statutorily protected rights with the passage of the National Labor Relations Act (NLRA).[3] Public employees, however, did not receive the same protection as private employees. Public employees were specifically excepted from the NLRA[4] and were prohibited from striking and almost all collective bargaining until the 1950s.[5] It was not until the 1960s that statutory protections for public employees began to emerge.[6]

In 1959, Wisconsin became the first state to pass a statute protecting the rights of public employees to engage in collective bargaining.[7] Almost twenty years later, the federal government enacted the Civil Service Reform Act (CSRA), which provided collective bargaining rights to federal employees.[8] It was not until 1992 that the State of New Mexico provided similar statutory protections to its public employees[9]

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1. *See generally* Leroy D. Clark, *Movements in Crisis: Employee-Owned Businesses—A Strategy for Coalition Between Unions and Civil Rights Organizations*, 46 HOW. L.J. 49, 52 (2002).

2. *Id.* Employers often blacklisted employees that expressed an interest in unionization and required them to agree not to join labor unions. *Id.* at 52–53.

3. *Id.* at 53; *see also* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 71–73 (2004).

4. 29 U.S.C. § 152(2) (2000).

5. SLATER, *supra* note 3, at 6.

6. *Id.* at 71 ("[W]hile labor in the private sector won formal institutional protections through the NLRA of 1935, analogous statutes for government workers did not even begin to emerge until around the 1960s.").

7. *Id.* at 158; *see also* Op. N.M. Att'y Gen. No. 87-41 (Aug. 10, 1987). Colorado's Industrial Relations Act of 1915 provided a qualified right to strike for both private and public employees but did not provide for a right to engage in collective bargaining. *See* Martin v. Montezuma-Cortez Sch. Dist. RE-1, 841 P.2d 237, 241–47 (Colo. 1992) (en banc).

8. 5 U.S.C. §§ 7101–7135 (2000).

9. Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 3, 962 P.2d 1236, 1239. *But see* Local 2238 of the Am. Fed'n of State, County & Mun. Employees v. Stratton, 108 N.M. 163, 165, 769 P.2d 76, 78 (1989) (finding that government entities had the implied power to enter into collective bargaining agreements with state employees, "unless such bargaining is inconsistent with an existing statutory or state, county or municipal merit system or with one which will come into existence" (emphasis omitted)).

by enacting the Public Employee Bargaining Act (PEBA).[10] This legislation came fourteen years after federal public employees received similar rights under the CSRA[11] and a half-century after private employees received more expansive rights under the NLRA.[12]

This initial legislation was short-lived. The 1992 version of the PEBA contained a sunset provision that took effect seven years later, in 1999.[13] It was another four years before New Mexico reinstated this protection with the 2003 version of the PEBA.[14] Furthermore, the statutory protections provided by the 1992 and 2003 versions of the PEBA do not provide the same protections to public employees as are guaranteed to private employees under the NLRA.[15]

This Article examines the 2003 version of the PEBA and the protection that it provides to New Mexico's public employees with respect to their ability to organize and bargain effectively. Part II compares the difference between the rights afforded to public and private employees. Specifically, it reviews (1) select provisions of the NLRA, the CSRA, and various state statutes; (2) the scope of bargaining permitted;

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10. Public Employee Bargaining Act, ch. 9, 1992 N.M. Laws 131 (codified as amended at NMSA 1978, §§ 10-7D-1 to -26 (repealed 1999)).

11. *See* 5 U.S.C. §§ 7101–7135.

12. *See* 29 U.S.C. §§ 151–169 (2000).

13. *See* 1992 N.M. Laws at 159; *see also* State *ex rel.* Am. Fed'n of State, County & Mun. Employees v. Johnson, 1999-NMSC-031, 994 P.2d 727. Legislators made repeated attempts to repeal the sunset clause prior to the 1992 PEBA's expiration on July 1, 1999. *See, e.g., id.* ¶ 1, 994 P.2d at 727–28. These attempts were thwarted by then-Governor Gary Johnson through the exercise of his veto power. *See id.*; John F. Kennedy, *On Again off Again in New Mexico*, LEADERSHIP INSIDER: PRAC. PERSP. ON SCH. L. & POL'Y (Nat'l Sch. Bds. Ass'n, Alexandria, Va.), May/June 2006, at 10, 10–11, *available at* http://www.nsba.org/site/docs/38500/ 38490.pdf. Prior to the sunset repeal of the Act, Governor Johnson stated that formal bargaining with unions was "onerous" and declared that after the sunset date, state agencies would no longer undergo formal collective bargaining with state employee unions. Mark Oswald, *Johnson Says No Collective Bargaining*, SANTA FE NEW MEXICAN, Feb. 4, 1999, at A2. Even after the sunset of the Act, New Mexico legislators attempted to enact new legislation during Governor Johnson's tenure that provided for public employee bargaining rights, but they were unsuccessful. *See, e.g.*, Steve Terrell, *Despite Likelihood of Veto, Senate OKs New Union Measure*, SANTA FE NEW MEXICAN, Mar. 3, 2001, at A7.

14. Public Employee Bargaining Act, ch. 5, 2003 N.M. Laws 72 (codified as amended at NMSA 1978, §§ 10-7E-1 to -26 (2005)). Governor Bill Richardson, who took office in 2002, approved the current version of the law on March 7, 2003. Upon signing the legislation, Governor Richardson stated:

> "[P]ublic employees courageously put their lives on the line for all of us. Yet, even in New Mexico we took our public employees for granted. Those days are gone....All of those valued employees deserve a fair shake when it comes to negotiating salaries, workplace safety and other aspects of the jobs they perform."

Bill Richardson, Governor of N.M., Remarks at Signing of Public Employee Collective Bargaining Legislation (Mar. 7, 2003), *quoted in* NEA-NM.org, Daily Hotline: End of Session Summary, http://www.nea-nm.org/2002legislature/2003%20Hotlines/Current.htm (last visited May 2, 2007).

15. *See infra* Part III.C. The actual provisions of the PEBA, however, have not been subject to extensive interpretation, as neither the 1999 nor 2003 version of the PEBA have generated much litigation. In fact, up to the time of this writing, only one New Mexico case exists interpreting the provisions of the 2003 version of the Act. *See* City of Deming v. Deming Firefighters Local 4251, 2007-NMCA-069, 160 P.3d 595. Although other cases regarding the PEBA have been decided since the passage of the new legislation in 2003, each of these cases was decided based on the legislation that sunset in 1999. *See, e.g.*, Callahan v. N.M. Fed'n of Teachers —TVI, 2006-NMSC-010, ¶ 2 & n.1, 131 P.3d 51, 53 & n.1.

The 1992 version of the PEBA also saw very little litigation in New Mexico courts. As noted by the New Mexico Supreme Court in 1998, just one year before the sunset provision of the 1992 Act took effect, the PEBA "ha[d] generated very little jurisprudence in New Mexico." Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 18, 962 P.2d 1236, 1243. The lack of case law interpreting the provisions of both versions of the Act is due, in part, to the creation of state and local boards to hear disputes arising under the PEBA. *See* NMSA 1978, §§ 10-7D-8 to -12, 10-7E-8 to -12. Thus, most disputes are resolved at the administrative level.

and (3) the role that arbitration plays within the bargaining process. Part III provides a brief synopsis of the history of public employee bargaining in New Mexico, discusses the specific provisions of the PEBA, and analyzes the New Mexico legislation in light of the protection provided to other employees. This Article concludes with a critique of the limitations placed on the ability of New Mexico's public employees to engage in collective bargaining under the PEBA.

II. A COMPARISON OF THE STATUTORY PROTECTIONS PROVIDED TO PUBLIC AND PRIVATE EMPLOYEES

In 1928, Herbert Hoover, while campaigning for the United States presidency, advocated for disparate treatment of public employees, stating, "'[T]he government by stringent civil service rules must debar its employees from their full political rights as free men. It must limit them in the liberty to bargain for their own wages....'"[16] While the bargaining environment for public employees has improved since 1928, restrictions are still placed on the bargaining and association rights of federal employees and many state employees across the country. Under some statutory schemes, the ability of public employees to effectively bargain regarding a number of issues, especially those relating to economic concerns, is essentially nullified by provisions that undermine true collective bargaining.[17] This disparity in the treatment of public and private workers has led some to comment that "true collective bargaining within an adversarial context [is] a mere public sector illusion."[18]

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16. Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 736 n.21 (1983) (quoting Herbert Hoover, Presidential Campaign Speech: Rugged Individualism (Oct. 22, 1928), *quoted in* STERLING D. SPERO, GOVERNMENT AS EMPLOYER 6 (1948)).

17. *See infra* Parts II.C, III.C.2; *see also* W.J. Usery, Jr., Special Assistant to the President & Dir., Fed. Mediation & Conciliation Serv., Remarks at the Collective Bargaining Symposium for Labor Relations Executives (July 8, 1974), *quoted in* Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 188 (1990). Usery explained as follows:

> "The reason there is so little true collective bargaining in the federal sector is because there is so little that can be bargained for. Congress preempts the economic issues....
>
> Many of the primary noneconomic issues—seniority, job transfers, discipline, promotion,...are nonnegotiable—because of a combination of law, regulation, management rights, and the thousands of pages in the Federal Personnel Manual."

Id. (first alteration in original).

18. Janet C. Fisher, Note, *Reinventing a Livelihood: How United States Labor Laws, Labor-Management Cooperation Initiatives, and Privatization Influence Public Sector Labor Markets*, 34 HARV. J. ON LEGIS. 557, 567 (1997). Various reasons have been offered to explain the different treatment of public and private employees. *See generally* McMillion, *supra* note 17; Meltzer & Sunstein, *supra* note 16. In a letter to the President of the National Federation of Federal Employees in 1937, President Franklin D. Roosevelt stated:

> "All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures, or rules in personnel matters."

Letter from President Franklin D. Roosevelt to Luther C. Steward, President, Nat'l Fed'n of Fed. Employees (Aug. 31, 1937), *quoted in* Christine Godsil Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509, 511–12 (1980). For a discussion of reasons in favor of not providing the same rights to public

A. An Overview of Select Federal and State Legislation

The right of private employees to unionize and bargain collectively was codified by national legislation in 1935. The National Labor Relations Act (NLRA) was intended to

> alleviate impediments to the free flow of commerce by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[19]

Despite multiple revisions to the NLRA since its passage in 1935,[20] the purpose and policy of the legislation have remained largely the same, which is

> to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.[21]

The protections provided by the NLRA are restricted to private employees. Section 152 limits which employers are subject to the Act and expressly excludes "the United States or any wholly owned Government corporation, or any Federal

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employees in New Mexico (prior to the PEBA), see New Mexico Attorney General Opinion No. 87-41 (Aug. 10, 1987). Much of the debate regarding the rights of public employees focuses on the right to strike. *See generally* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153 (1987); Meltzer & Sunstein, *supra* note 16; Timothy M. Gill, Comment, *Public Employee Strikes: Legalization Through the Elimination of Remedies*, 72 CAL. L. REV. 629 (1984); Michael Matheson, Note, *Have Michigan Public School Teachers Lost Their Ability to Strike Under 1994 PA 112?*, 75 U. DET. MERCY L. REV. 415 (1998).

19. N. PETER LAREAU, NATIONAL LABOR RELATIONS ACT: LAW AND PRACTICE § 1.01[1] (2d ed. 1999) (internal quotation marks omitted); *see also* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939) ("[T]he purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights."); NLRB v. Williamson-Dickie Mfg., 130 F.2d 260, 263 (5th Cir. 1942) ("The statute has in mind the maintenance and furthering of industrial amity....").

20. Early revisions attempted to balance the rights afforded to both employees and employers. The initial legislation was "decidedly biased in favor of organized labor." LAREAU, *supra* note 19, § 1.01[1]. This bias was reflected in Congress's failure to acknowledge and protect against the possibility of abuse by unions. While the Act prohibited unfair labor practices by employees, no similar provision for unions existed. *See id.* Twelve years later, Congress modified the NLRA by enacting the Labor Management Relations Act, Pub. L. No. 80-120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187 (2000)). While the purpose and policy remained in large part the same, the revised legislation provided balance by proscribing unfair labor practices by both employers and unions and prescribing employee and employer rights. LAREAU, *supra* note 19, § 1.01[2].

21. 29 U.S.C. § 141(b) (2000). Congress further articulated the purpose of the NLRA as intending to address

> [i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, [which] can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

Id.

Reserve Bank, or any State or political subdivision thereof."[22] The protection of the right of public employees to bargain collectively and to join and assist labor organizations is a more recent development.

Legislation providing federal public employees the right to engage in collective bargaining did not occur until 1978 with the enactment of the Civil Service Reform Act.[23] This legislation marked a distinct change in Congress's rhetoric regarding public employees' labor rights. Congressional policy abandoned claims of the negative impact of extending collective bargaining to the public sector[24] and adopted findings that such rights would safeguard the public interest.[25] The legislation, however, was not only intended to ensure collective bargaining rights, but also to "strengthen the authority of federal management to hire and to discipline employees,"[26] allegedly providing "'a fair package of balanced authority for management'" and employees.[27]

Prior to the enactment of the CSRA, federal public employees were only provided the right to join labor organizations—a right that is guaranteed under the First

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22. *Id.* § 152(2).

23. 5 U.S.C. §§ 7101–7135 (2000). The CSRA is also referred to as the Federal Service Labor-Management Relations Statute and became effective on January 11, 1979. The CSRA created three independent agencies responsible for handling the issues arising within the federal work force: the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority. John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 165–66 (1995). The Office of Personnel Management manages the federal work force. *See id.* at 166 & n.8. The Merit Systems Protection Board handles employee appeals, performs merit systems studies, and reviews significant actions by the Office of Personnel Management. *See id.* at 166 & n.9. The Federal Labor Relations Authority oversees federal labor-management relations and "is analogous to that of the National Labor Relations Board under the National Labor Relations Act." Dep't of Def., Army-Air Force Exch. Serv. v. FLRA, 659 F.2d 1140, 1144 (D.C. Cir. 1981). The Federal Labor Relations Authority is responsible for "(1) resolving complaints of unfair labor practices, (2) determining the appropriateness of units for labor organization representation, (3) adjudicating exceptions to arbitrator's awards, (4) adjudicating legal issues relating to duty to bargain/negotiability, and (5) resolving impasses during negotiations." Federal Labor Relations Authority, http://www.flra.gov (last visited May 2, 2007). The Federal Labor Relations Authority is the successor to the Federal Labor Relations Council, which was established by President Nixon via Executive Order 11491. *Dep't of Def.*, 659 F.2d at 1144. The Federal Labor Relations Authority is intended to be independent from management and to be bipartisan, unlike the Federal Labor Relations Council, which had been criticized for being comprised solely of management officials. *See id.* at 1144–45.

24. *See supra* notes 16–18 and accompanying text.

25. Congress found as follows:

> [E]xperience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment....

5 U.S.C. § 7101(a)(1).

26. *Dep't of Def.*, 659 F.2d at 1145. According to one of the representatives involved in drafting the labor relations chapter of the CSRA, "'[O]ne of the fundamental purposes of this bill is to make it easier and not harder to discharge incompetent employees....'" *Id.* at 1145 (second alteration in original) (quoting 124 CONG. REC. H9372 (daily ed. Sept. 11, 1978) (statement of Rep. Udall)). Additionally, Senator Percy stated as follows: "'At the core of the legislation, the conference agreed to provisions expediting and easing the process for disciplining and removing unfit Federal employees.'" *Id.* (quoting 124 CONG. REC. S17083 (daily ed. Oct. 4, 1978) (statement of Sen. Percy)).

27. *Id.* at 1160 n.109 (quoting 124 CONG. REC. H9647 (daily ed. Sept. 13, 1978) (statement of Rep. Ford)); *see also id.* at 1145–46 (discussing the balance of the CSRA in the context of its statutory provisions).

Amendment's Freedom of Association Clause.[28] Although public employees are constitutionally guaranteed the right to organize, the U.S. Supreme Court held that public employers were not required to recognize or bargain with such public employee associations.[29] The passage of the CSRA allowed federal employees to engage in collective bargaining, but this legislation only came after the executive branch had provided some protection by executive order.[30]

Unlike the nationally applicable protection available to private employees under the NLRA, the CSRA is limited to employees of the federal government.[31] Public employees of state governments must rely on the individual state to provide comparable protection by statute or through common law. Currently, most states have enacted legislation providing for some form of public employee bargaining.[32] The protection afforded to public employees varies widely by state, and some states refuse to provide their employees with *any* right to bargain collectively. For example, North Carolina,[33] Texas,[34] and Virginia[35] prohibit their state governments from entering into collective bargaining agreements with their employees. North Carolina went one step further and made such action illegal.[36]

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28. Smith v. Ark. State Highway Employees Local 1315, 441 U.S. 463, 464–65 (1979) (per curiam).

29. *Id.* at 465. The Court stated:

> 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 affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. (citations omitted).

30. Exec. Order No. 10,988, 3 C.F.R. 521 (1959–1963). On January 17, 1962, President Kennedy issued Executive Order 10,988 protecting the right of federal employees to "freely and without fear of penalty or reprisal,...form, join and assist any employee organization or to refrain from any such activity." *Id.*

31. 5 U.S.C. § 7101(b) (2000) ("It is the purpose of this chapter to prescribe certain rights and obligations of the *employees of the Federal Government*...." (emphasis added)).

32. *See infra* note 68.

33. N.C. GEN. STAT. § 95-98 (2005) (making contracts between a governing authority and its employees "illegal, unlawful, void and of no effect").

34. TEX. GOV'T CODE ANN. § 617.002 (Vernon 2004) (providing that any collective bargaining contracts entered into between an official or subdivision of the state and a labor organization regarding wages, hours, or conditions of employment shall be void).

35. VA. CODE ANN. § 40.1-57.2 (2002) ("No state, county, municipal or like governmental officer, agent or governing body is vested with or possesses any authority...to collectively bargain or enter into any collective bargaining contract....").

36. N.C. GEN. STAT. § 95-99. North Carolina's legislation, titled "Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions," originally made it illegal for public employees to join labor organizations. Section 95-97, which was repealed in 1998, provided:

> "No employee of the State of North Carolina, or of any agency, office, institution or instrumentality thereof, or any employee of a city, town, county, or other municipality or agency thereof, or any public employee or employees of an entity or instrumentality of government shall be, become, or remain a member of any trade union, labor union, or labor organization which is, or may become, a part of or affiliated in any way with any national or international labor union, federation, or organization, and which has as its purpose or one of its purposes, collective bargaining with any employer mentioned in this article with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work of such employees. Nor shall such an employee organize or aid, assist or promote the organization of any such trade union, labor union, or labor organization, or affiliate with any such organization in any capacity whatsoever."

Atkins v. City of Charlotte, 296 F. Supp. 1068, 1071 (W.D.N.C. 1969) (quoting N.C. GEN. STAT. § 95-97 (repealed 1998)). In 1969, approximately ten years after its enactment, the U.S. District Court for the Western District of North Carolina, in *Atkins*, found this law to be unconstitutional on its face based on its obvious abridgement of public employees' freedom of association guaranteed by the First and Fourteenth Amendments. *Id.* at 1075.

Other states continue to require legislation explicitly authorizing government entities to engage in collective bargaining, but that legislation remains absent. For instance, both Alabama and West Virginia have failed to enact legislation providing public employees with the ability to engage in collective bargaining despite the existence of case law in each state that requires legislation to be enacted in order to provide public employees such protection.[37]

A small minority of states limit collective bargaining in the public sector to specific professions. For example, Kentucky,[38] Idaho,[39] and Wyoming[40] only permit persons employed as firefighters to bargain collectively. Similarly, Indiana exclusively reserves these rights for teachers and public utility employees,[41] Tennessee extends these rights to teachers only,[42] and Oklahoma limits such rights solely to municipal employees.[43]

As a general rule, even public employees who have the right to engage in collective bargaining are not treated the same as private employees.[44] For instance, the District of Columbia, which constitutionally provided public and private employees with the right to engage in collective bargaining and the right to strike,

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Currently, North Carolina is faced with a number of public employee strikes, despite the statutory provisions making strikes by public employees Class 1 misdemeanors. *See* Ashaki Binta, *Denied Collective Bargaining, North Carolina Public Employees Turn More Militant*, LAB. NOTES, Feb. 2007, *available at* http://labornotes.org/node/520. In addition, a group of labor organizations from Mexico, the United States, and Canada, representing millions of workers, filed a joint charge against the United States with Mexico's federal ministry of labor. *Media Advisory: U.S., Mexican and Canadian Labor Organizations Charge North Carolina with Violating NAFTA Labor Rules*, CAN. NEWS WIRE, Oct. 17, 2006, *available at* http://www.newswire.ca/en/releases/archive/October2006/17/c8694.html. The charge contends that North Carolina and the United States are violating the North American Agreement for Labor Cooperation—"the labor side agreement to the North American Free Trade Agreement"—and international law by denying 650,000 public employees in the state of North Carolina the ability to engage in collective bargaining with their employers. *Id.*

37. Nichols v. Bolding, 277 So. 2d 868, 870 (Ala. 1973) ("[A] public governing body cannot enter into a valid labor contract with a labor organization concerning wages, hours, and conditions of employment in the absence of express constitutional or statutory authority to do so."); Kirkpatrick v. Mid-Ohio Valley Transit Auth., 423 S.E.2d 856, 857 (W. Va. 1992) ("'[A] public employer is not required to recognize or bargain with a public employee association or union in the absence of a statutory requirement.'" (quoting City of Fairmont v. Retail, Wholesale, & Dep't Store Union, 283 S.E.2d 589, 589 (W. Va. 1980))).

38. KY. REV. STAT. ANN. §§ 345.010 to 336.1664 (West 2006).

39. IDAHO CODE ANN. §§ 44-1801 to -1812 (2006).

40. WYO. STAT. ANN. § 27-10-102 (1999). Although Wyoming has enacted a statute permitting organized labor and expressing a state policy in favor of organization and collective bargaining, *see id.* § 27-7-101 (1999), the Wyoming Supreme Court has concluded that it only applies to private industry. *See* Retail Clerks Local 187 v. Univ. of Wyo., 531 P.2d 884, 888 (Wyo. 1975); *accord Nichols*, 277 So. 2d at 876 ("'Constitutional and statutory provisions granting the right to private industry to bargain collectively do not confer such right on public employers and employees.'" (quoting Int'l Union of Operating Eng'rs, Local 321 v. Water Works Bd., 163 So. 2d 619, 622 (Ala. 1964))).

41. IND. CODE ANN. § 20-29-6-1 (LexisNexis 2005) (establishing a duty by school employers to bargain collectively with school employees); *id.* §§ 22-6-2-1 to -15 (establishing a procedure for labor disputes between public utility employees and their employers).

42. TENN. CODE ANN. §§ 49-5-601 to -613 (2002) (creating a statutory scheme for collective bargaining and organizational rights of public teachers); *see also id.* § 8-44-201 (2002).

43. OKLA. STAT. ANN. tit. 11, §§ 11-51-101 to -113 (West 1994) (establishing the right of members of fire and police departments in any municipality to bargain collectively); *id.* tit. 11, §§ 11-51-200 to -220 (Supp. 2007) (establishing the right of employees of any municipal employer to organize and bargain collectively).

44. *See, e.g.*, Martin v. Montezuma-Cortez Sch. Dist. RE-1, 841 P.2d 237, 247 (Colo. 1992) ("By choosing to treat public and private labor relations in the same manner, Colorado clearly departed from the general practice in other jurisdictions of dealing with the two spheres of labor relations differently.").

has created exceptions to public employees' right to strike. The 1982 version of the "Constitution of the State of New Columbia" provides:

> Persons in private and public employment shall have the right to organize and bargain collectively, through representatives of their own choosing. The right to strike is fundamental and is an inherent part of the right to organize and bargain collectively. *The right of public employees to strike shall not be abridged unless the abridgement serves a compelling government interest and is narrowly drawn so as to serve that interest, and it is clear that no alternative form of regulation is possible.*[45]

Typically, state statutes and regulations distinguish between the labor rights possessed by private and public employees.

B. Specific Provisions of Federal and State Legislation

1. Employee Rights Provisions

One of the clearest distinctions that can be found between the protections afforded to public and private employees is seen by reviewing the employee rights provisions of various statutory schemes. There exists a great deal of variation in the statutory rights provided to public versus private employees and even among employees of different states.[46] Furthermore, distinctions between the language contained in the NLRA and various other statutes has been given great weight.

Under section 157 of the NLRA, private employees

> shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,* and shall also have the right to refrain from any or all of such activities.[47]

The language included in section 157 of the NLRA and emphasized above has been interpreted as providing private employees with a broad range of protections.

The term "concerted activities" has been interpreted as encompassing a wide range of employee rights.[48] A "concerted activity" is an employee activity "'engaged in with the objective of initiating or inducing or preparing for group action'" or having "'some relation to group action in the interest of the employees.'"[49]

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45. NEW COLUMBIA CONST. of 1982, art. XII, § 1 (emphasis added).

46. In addition to rights provided by statute, public employees are also afforded protection against constitutional violations by their employer and may file *Bivens* or section 1983 actions to enforce such rights. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see also* 42 U.S.C. § 1983 (2000); *Ex parte* Young, 209 U.S. 123 (1908).

47. 29 U.S.C. § 157 (2000) (emphasis added).

48. *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969) ("The lines defining [the right to engage in concerted activities] have of necessity been painted with broad strokes.").

49. Rinke Pontiac Co., 216 N.L.R.B. 239, 241–42 (1975) (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).

In accordance with this understanding of concerted activities, actual group activity does not have to exist in order for the action to be protected. Employees are free to collaborate or organize without the involvement of a union or a labor organization, and both preliminary discussions, without organized action, and activities by a single

Furthermore, concerted activities need not be directly related to collective bargaining but may be for the purpose of "other mutual aid or protection."[50] The only real requirement under this definition of concerted activity is that the action relate to a dispute over a condition of employment.[51]

Under the NLRA, if an employee activity is protected, employers are prohibited from retaliating against the employee based on those actions.[52] Whether an employer knows that the activity undertaken was protected, or mistakenly believes that it was not, is immaterial.[53] Furthermore, even if there is a legitimate basis for termination or disciplinary action, but it is also in response to a protected activity, the termination or disciplinary action will be considered an unfair labor practice.[54]

While the courts and the National Labor Relations Board (NLRB) have recognized limitations to a private employee's right to engage in concerted activities, these restrictions are limited in scope.[55] Concerted activity that is unlawful,[56]

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employee attempting to enlist the support of others are protected as "concerted activities" pursuant to section 157. *See* Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 1259 (8th Cir. 1981) (explaining that employees' concerted activity does not have to take place in a union setting in order to be protected); NLRB v. City Yellow Cab Co., 344 F.2d 575, 582 (6th Cir. 1965) (explaining that employees have the right to engage in concerted activity without retaliation by employers even though no union activity is involved or no collective bargaining is contemplated); Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (explaining that "concerted activities for mutual aid or protection" are not limited to union activities); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (explaining that employees have the right to engage in concerted activities even though no union activity or collective bargaining is involved or even contemplated); *see also Rinke Pontiac Co.*, 216 N.L.R.B. at 242 ("'[P]reliminary discussions are [not] disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands.'" (second alteration in original) (quoting *Mushroom Transp. Co.*, 330 F.2d at 685)). It is required, however, that the conduct or conversation engaged in, even if related to employee interests, must at the very least *appear* to have been "engaged in with the object of initiating or inducing or preparing for group action." *Mushroom Transp. Co.*, 330 F.2d at 685. Otherwise, the activity remains unprotected. *See, e.g., id.*

50. 29 U.S.C. § 157. Employees are allowed to engage in efforts to improve their position through channels outside of the collective bargaining process, *see supra* note 49, and as a result, private employees may attempt to resolve employment issues by going beyond the immediate employer-employee relationship, *see* NLRB v. Coca Cola Bottling Co. of Buffalo, 811 F.2d 82, 88–89 (2d Cir. 1987), and regarding matters over which the employer may not even be able to exercise control. Eastex, Inc. v. NLRB, 550 F.2d 198, 202 (5th Cir. 1977) (finding that protection is not limited to only those matters over which an employer can exercise control), *aff'd*, 437 U.S. 556 (1978). Thus, employees are protected under the NLRA if they choose other avenues by which to improve working conditions, job security, or other employment related concerns. *See* NLRB v. S. Cal. Edison Co., 646 F.2d 1352, 1364 (9th Cir. 1981) (explaining that employees are protected in their efforts to lobby for changes in national policy regarding job security); Bethlehem Shipbuilding Corp. v. NLRB, 114 F.2d 930, 937 (1st Cir. 1940) (explaining that an employee's testimony before a legislative committee is protected).

51. *E.g.*, Hagopian & Sons v. NLRB, 395 F.2d 947, 951 (6th Cir. 1968) ("But to be protected by the Act, the concerted activity in this case must have been directed toward a dispute concerning conditions of employment....").

52. *See* 29 U.S.C. § 158(a)(1) (stating that one example of "an unfair labor practice" would be for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title").

53. Cusano v. NLRB, 190 F.2d 898, 902–03 (3d Cir. 1951).

54. *Rinke Pontiac Co.*, 216 N.L.R.B. at 241 ("Even if the discharge is caused in part only by the employee's protected concerted activities, it is similarly unlawful, despite the existence of good grounds for terminating him.").

55. *See Hagopian & Sons*, 395 F.2d at 952.

56. *E.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253–54 (1939) (explaining that an illegal seizure of buildings as part of a strike to keep an employer from lawfully using them was not protected activity); Hoover Co. v. NLRB, 191 F.2d 380, 386 (6th Cir. 1951) (holding that an unlawful boycott was not protected); NLRB v. Perfect Circle Co., 162 F.2d 566, 568 (7th Cir. 1947) (holding that preventing an employer from entering property was unlawful and not protected).

violent,[57] insubordinate,[58] or indefensible[59] is not protected. Furthermore, if the concerted activity breaches an agreement with the employer, the activity is not protected by the NLRA even though it might otherwise be protected absent the breach.[60] Thus, only under these limited circumstances is retaliation, including discharge, by an employer against an employee engaging in what otherwise might be considered a concerted activity permitted.

The rights provided to federal employees under the CSRA are not, nor were they ever, equal to the protections provided to private employees. The disparity between the rights guaranteed to public employees as compared to private employees is evidenced by the language of section 7102, which prescribes employees' rights under the CSRA. Section 7102 provides:

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—
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> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization...

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57. *E.g.*, *Fansteel Metallurgical Corp.*, 306 U.S. at 257. Yet, an employee only forfeits the protection of the NLRA if his or her conduct is "sufficiently egregious." Teledyne Indus. v. NLRB, 911 F.2d 1214, 1217 (6th Cir. 1990). According to the Seventh Circuit Court of Appeals, "Trivial rough incidents or moments of animal exuberance must be distinguished from misconduct so violent or of such a serious character as to render the employee unfit for further service." Advance Indus. Div.–Overhead Door Corp. v. NLRB, 540 F.2d 878, 882 (7th Cir. 1976).

For cases in which employee conduct has been found to be sufficiently violent to lose the protection of section 157, see, for example, *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 441 (5th Cir. 1978) ("Threats to a fellow employee or the destruction of a fellow employee's property is...sufficient cause for dismissal.") and *Advance Indus.–Div.-Overhead Door Corp.*, 540 F.2d at 882 (finding that "displaying a handgun on or near a picket line" was sufficiently serious to warrant dismissal).

58. *E.g.*, NLRB v. Barberton Plastics Prods., Inc., 354 F.2d 66, 71 (6th Cir. 1965). In *Hagopian & Sons*, the Sixth Circuit Court of Appeals noted that the term "insubordination" does not take on the same meaning as normally understood. 395 F.2d at 952–53. Thus, a walk-out or a strike, while normally considered an insubordinate act, does not justify termination under the NLRA. *Id.* at 953 n.4. However, a walk-out or strike can justify termination if it is in breach of an employment agreement. *See infra* note 60.

59. *E.g.*, NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 475–78 (1953) (finding that the concerted activity of libeling an employer in an attempt to ruin his business was not a protected act under the NLRA and was "indefensible").

60. *See Hagopian & Sons*, 395 F.2d at 953. In *Hagopian & Sons*, the Sixth Circuit pointed out that an employer can prevent "arbitrary and unreasonable disturbances" by establishing a procedure and/or rules by which grievances should be presented. *Id.*; *see also* NLRB v. Williamson-Dickie Mfg., 130 F.2d 260, 264 (5th Cir. 1942) (indicating that employers may make rules to maintain order and discipline and discharge employees for breach). For Tenth Circuit Court of Appeals cases on this issue, see, for example, *Serv-Air, Inc. v. NLRB*, 395 F.2d 557 (10th Cir. 1968), *Boeing Airplane Co., Wichita Div. v. NLRB*, 140 F.2d 423 (10th Cir. 1944), and *NLRB v. Denver Tent & Awning Co.*, 138 F.2d 410 (10th Cir. 1943).

Once a procedure governing grievances has been established via a contract between the worker and the employer, the worker's violation of those procedures provides justification for discharge. For example, in *Plumbers & Steamfitters Union Local 598 v. Washington Public Power Supply System*, the Washington Court of Appeals found that an organized effort by union employees to stop other employees from boarding non-union buses to go to work was not a protected activity. 724 P.2d 1030, 1034–36 (Wash. Ct. App. 1986). In that case, the employer and the union had entered into an agreement specifically providing that "'strikes, work stoppages, slowdowns or other collective actions which [would] interfere with, or stop the efficient operation of, construction work...[would] be cause for discharge....'" *Id.* at 1034 (quoting the "stabilization agreement" between the employer and the union) (final alteration in original). Because the workers' interference with the ingress and egress of employees violated their agreement with their employer, their activities were not protected.

(2) to engage in collective bargaining with respect to conditions of employment....[61]

In contrast to the guarantee of employee rights under the NLRA, no language protecting "concerted activities" engaged in for "mutual aid or protection" is contained in the CSRA. Based on the absence of this language, the Federal Labor Relations Authority (FLRA)[62] has held that "all concerted activity is not protected under the [CSRA] as it is under the NLRA."[63] Thus, "[t]he employee activities protected under section 7102 are...somewhat circumscribed in comparison to those protected by [section 157] of the National Labor Relations Act....'[T]he [CSRA] does not expressly cover concerted activities....'"[64] Because concerted activities are not specifically addressed under section 7102, the determination of whether a federal employee's activity is protected is based on the activity's relation to the right to join or assist a labor organization.[65] This results in a more narrow scope of protection under the CSRA than under the NLRA.[66] Unlike the protection afforded employees under the NLRA, section 7102 "does not offer protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization."[67]

Legislation also differs from state to state in the scope of protection afforded to public employees who engage in concerted activities. Many states provide rights that are equivalent to those afforded private employees under the NLRA by including statutory language guaranteeing employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[68] Other states, however, provide protections that are narrower in scope, often limited to assisting in the collective bargaining process.[69] When a state opts to

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61. 5 U.S.C. § 7102 (2000).

62. *See supra* note 23.

63. U.S. Dep't of Labor Employment & Training Admin., S.F., Cal., 43 F.L.R.A. 1036, 1039 (1992).

64. Fed. Bureau of Prisons Office of Internal Affairs, D.C., 53 F.L.R.A. 1500, 1535–36 (1998) (quoting *U.S. Dep't of Labor Employment & Training Admin.*, 43 F.L.R.A. at 1038).

65. "Given this narrower scope, the Authority has focused on whether the record indicates that an employee who was alleged to have engaged in protected activities was acting on behalf of a union or acting in any other manner to invoke the assistance of a union." *Id.* at 1536 (citing U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Baltimore, Md., 42 F.L.R.A. 22, 23–24 (1991); Dep't of Treasury, IRS, Andover Serv. Ctr., 13 F.L.R.A. 481, 489–90 (1983)).

66. The FLRA has outlined those activities protected under section 7102, finding that "employees may hold leadership positions within a union or act in a representational capacity and, in this capacity, they have the right to file and process grievances, they may assist in organizational campaigns, and they may engage in various solicitation activities on behalf of a labor organization." U.S. Dep't of Justice, Immigration & Naturalization Serv., U.S. Border Patrol, San Diego, Cal., 38 F.L.R.A. 701, 712 (1990) (citations omitted).

67. *Dep't of Treasury, IRS, Andover Serv. Ctr.*, 13 F.L.R.A. at 489 (citing Veterans Admin. Med. Ctr., Bath, N.Y., 4 F.L.R.A. 76 (1980)); *see also* Veterans Admin. Med. Ctr., Bath, N.Y., 4 F.L.R.A. 563, 571 (1980) ("[I]n the absence of any indication in the legislative history that it was the intent of Congress to extend the protection of the Statute to other than Union related activities, I find that the [CSRA] does not offer any protection to employees participating in concerted activities unrelated to membership in, or activities on behalf of, a labor organization.").

68. ALASKA STAT. § 23.040.080 (2006); *see also* CONN. GEN. STAT. ANN. § 5-271 (West 1998); DEL. CODE ANN. tit. 19, § 1303 (2005); HAW. REV. STAT. ANN. § 89-3 (LexisNexis 2003); 5 ILL. COMP. STAT. ANN. 315/6 (West 2005); IOWA CODE ANN. § 20.8 (West 2001); MASS. GEN. LAWS ANN. ch. 150E, § 2 (West 2004); MICH. COMP. LAWS ANN. § 423.209 (West 2001); MONT. CODE ANN. § 39-31-201 (2005); OHIO REV. CODE ANN. § 4117.03 (LexisNexis 2001); VT. STAT. ANN. tit. 21, § 1722 (2003).

69. *E.g.*, NMSA 1978, § 10-7E-5 (2003) (allowing public employees to participate in union activities "for the purpose of collective bargaining"); *see also* KAN. STAT. ANN. § 75-4324 (1997) (providing public employees with the right to participate in union activities "for the purpose of meeting and conferring with public employers").

follow the employee-rights language of the NLRA, use of such language provides strong support for affording public employees the same rights provided to private employees under section 157 of the NLRA, absent a clear reason to the contrary.[70] This arguably includes the right to strike.[71]

2. Scope of Bargaining

The scope of bargaining permitted by collective bargaining statutes limits the subject matter employees may try to affect through the collective bargaining process and differs between private and public employees. Generally, the scope of bargaining revolves around whether a bargaining subject has been classified as mandatory or permissive.[72]

Mandatory bargaining subjects include those issues that "settle an aspect of the relationship between the employer and employees."[73] Under the NLRA, bargaining is required regarding "wages, hours, and other terms and conditions of employment."[74] The mandatory bargaining subjects in the NLRA include, among others, wages (inclusive of all compensation for services), retirement plans, health and welfare benefits, and hours.[75] In contrast, permissive bargaining subjects are those that the parties may, but are not required to, bargain about and, under the NLRA, include the right to bring unfair labor practice charges, use of union labels, and agreements regarding interest-based arbitration.[76]

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70. State *ex rel.* Dep't of Highways v. Pub. Employees Craft Council of Mont., 529 P.2d 785, 786–88 (Mont. 1974) (finding that Montana courts should apply the same meaning to the phrase "concerted activities" in a state labor law statute as had been developed under the NLRA). New Mexico has taken a similar approach, stating:

> Our legislature's selection of language that so closely tracks the NLRA indicates general approval of the operation of that statute. Although the special circumstances of public employment may on occasion require an interpretation of the PEBA different from the interpretation of essentially the same language in the NLRA, the general thrust is clear. Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted.

Las Cruces Prof'l Fire Fighters v. City of Las Cruces, 1997-NMCA-031, ¶ 15, 938 P.2d 1384, 1388; *see also* Bravo v. Dolsen Cos., 888 P.2d 147, 153 (Wash. 1995). In the same vein, the New York Court of Appeals found that the absence of the term "concerted activities" in New York's statute indicated an intention to limit the rights of public employees to the ability to form, join, or participate in an employee organization. Rosen v. Pub. Employment Relations Bd., 526 N.E.2d 25, 28 (N.Y. 1988).

71. There is some authority for the position that including similar employee-rights language as that of the NLRA (i.e., "concerted activities") would convey a right to strike to public employees. *See generally Pub. Employees Craft Council of Mont.*, 529 P.2d 785. In *Public Employees Craft Council of Montana*, the Montana Supreme Court rejected the argument that the term "concerted activities" should mean something different for public employees and held that when language identical to that included in the NLRA was used, it took on the meaning given to it under federal law, which included a right to strike. *Id.* at 787–88; *see also* L.A. Metro. Transit Auth. v. Bhd. of R.R. Trainmen, 355 P.2d 905, 907 (Cal. 1960) (holding that granting public employees the right to engage in "concerted activities" included a right to strike because there was no difference in the term for public versus private employees), *overruled in part by* County Sanitation Dist. No. 2 v. L.A. County Employees' Ass'n, 699 P.2d 835 (Cal. 1985).

72. *See generally* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

73. *Id.*

74. 29 U.S.C. § 158(d) (2000). While this is not a fixed list of mandatory bargaining subjects, it effectively limits the subjects that may be considered mandatory bargaining subjects. Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburg Plate Glass Co., 404 U.S. 157, 178 (1971).

75. LAREAU, *supra* note 19, § 13.03.

76. *Id.* § 13.04.

For public employees, there is the additional consideration of whether the subject matter has been preempted from bargaining by legislation. With respect to federal employees, these limitations are reflected in the CSRA. The CSRA limits a federal employee's right to engage in collective bargaining to "conditions of employment."[77] "Conditions of employment" is defined by the CSRA as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions."[78] While this definition seems fairly broad, excluded from "conditions of employment" are any matters "specifically provided for by Federal statute,"[79] "inconsistent with any Federal law or any Government-wide rule or regulation,"[80] or any regulation for which there is a compelling need.[81] For example, the General Schedule of the Civil Service Act establishes the wages and fringe benefits for an overwhelming majority of the federal executive branch's employees.[82] This results in the exclusion of bargaining regarding wages and fringe benefits for most federal employees.[83]

Whether a matter is classified as mandatory or permissive has a significant impact on the rights that employers and employees—through their exclusive representative—may exercise during the bargaining process. The mandatory/permissive distinction impacts employers' and employees' ability to take economic actions, such as employer lockouts and employee strikes, and the consequences of taking such actions.[84] Further, neither party may make unilateral changes regarding a mandatory subject matter unless the parties have reached an impasse in negotiations.[85] In contrast, when a bargaining subject is characterized as permissive,

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77. 5 U.S.C. § 7102(2) (2000); *see also id.* § 7114(b)(2).

78. *Id.* § 7103(a)(14).

79. *Id.* § 7103(14)(C).

80. *Id.* § 7117(a)(1).

81. *Id.* § 7117(a)(2); Def. Logistics Agency v. FLRA, 882 F.2d 104, 105 (4th Cir. 1989) ("An agency's duty to bargain does not extend to proposals which are inconsistent with federal law or government-wide rule or regulation, or an agency rule or regulation for which there is a compelling need.").

82. *See* 5 U.S.C. § 5332 (2000).

83. There are, of course, exceptions to the general preclusion of bargaining over wages and benefits. *See, e.g.*, Fort Stewart Sch. v. FLRA, 495 U.S. 641 (1990) (holding that the wages of employees of Army-owned and operated schools were negotiable under the CSRA because the wages were not covered by the General Schedules of the Civil Service Act); Dep't of the Army v. FLRA, 914 F.2d 1291 (9th Cir. 1990) (holding that the Army was required to negotiate fringe benefits for "Nonappropriated Fund" employees but holding that "Nonappropriated Fund" employees may still not be able to bargain regarding wages because of the Prevailing Rate Act).

84. If employees decide to strike in reaction to economic concerns, employers may refuse to reinstate them following the strike. *See* Winn-Dixie Stores, Inc. v. NLRB, 448 F.2d 8, 12 n.11 (4th Cir. 1971); Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 (7th Cir. 1969). However, if an employer refuses to bargain regarding the same subject matter, that refusal constitutes an unfair labor practice. If employees strike based on an unfair labor practice, the "striking employees cannot lose their jobs as a result of the strike, even when replacements have been hired." Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 515 (4th Cir. 1998) (citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956)). "Unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work...." *Id.* at 510 n.1.

85. Dist. No. 1—Marine Eng'rs Benefit Ass'n v. GFC Crane Consultants, Inc., 331 F.3d 1287, 1293 (11th Cir. 2003) ("Under the 'unilateral change' doctrine, when an existing agreement has expired and negotiations on a new agreement have yet to be completed, a unilateral change in those terms and conditions of the agreement that are subject of mandatory bargaining under the NLRA constitutes a breach of the statutory requirement of good faith." (citing NLRB v. Katz, 369 U.S. 736, 743 (1962))).

either party may refuse to bargain, and economic actions are not generally permitted. Thus, a permissive bargaining matter does not invoke the same bargaining rights.[86]

Furthermore, whether an issue is a mandatory or permissive bargaining subject under the CSRA does not impart the same rights to employees as under the NLRA. Economic actions, such as lockouts and strikes, are prohibited under the CSRA.[87] In fact, a federal employee that engages in a strike will face disciplinary action.[88] However, whether an issue is negotiable is still important with respect to other provisions of the CSRA. For instance, employer or employee proposals regarding negotiable issues may be submitted to binding arbitration pursuant to the CSRA.[89] Thus, "'[a] duty to bargain over a proposal...does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding.'"[90] When the negotiability of an issue is in dispute, the issue can be presented to the FLRA for a determination of whether bargaining on the disputed issue is mandatory.[91]

Under the NLRA, certain issues are also precluded from mandatory bargaining based on the managerial prerogative exception. Managerial prerogatives are those decisions that are not subject to mandatory bargaining because they "'are fundamental to the basic direction'" of an employer or "'impinge only indirectly upon employment security.'"[92] Yet, even if a decision constitutes a managerial prerogative, an "employer may still be required to bargain about the effects [and consequences] of his insulated decision."[93] Further, if an employer's fundamental decision may adversely affect wages and working conditions, the decision may fall within the scope of mandatory bargaining.[94]

Similar to the managerial prerogative exception under the NLRA, the CSRA reserves certain managerial rights, excluding them from negotiation or bargaining.[95] Specifically, section 7106(a) of the CSRA provides that management shall retain the authority

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> (2) in accordance with applicable laws—

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86. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (explaining that an employer cannot refuse to enter into a collective bargaining agreement simply because an agreement has not been reached on a permissive bargaining subject).

87. 5 U.S.C. § 7116(b)(7)(A) (2000).

88. Miller v. Bond, 641 F.2d 997, 1001 (D.C. Cir. 1981) (stating that federal employees that engage in strikes are subject to termination or suspension without pay).

89. 5 U.S.C. § 7119(b)(2).

90. Soc. Sec. Admin. v. FLRA, 956 F.2d 1280, 1282 (4th Cir. 1992) (quoting U.S. Dep't of Health & Human Servs. v. FLRA, 844 F.2d 1087, 1089 (4th Cir. 1988)), *abrogated by* Nat'l Fed'n of Fed. Employees, Local 1309 v. Dep't of the Interior, 526 U.S. 86 (1999).

91. *See* 5 U.S.C. § 7117(c); *see also* 5 C.F.R. § 2424 (2006). Note also that pursuant to section 7103(b), the President has the express authority to exclude agencies from complying with all or part of the CSRA if certain issues regarding national security exist. 5 U.S.C. § 7103(b).

92. Medicenter, Mid-South Hosp., 221 N.L.R.B. 670, 676 (1975) (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964)).

93. *Id.* at 676 n.22.

94. *See, e.g.*, Claremont Police Officers Ass'n v. City of Claremont, 139 P.3d 532, 540 (Cal. 2006).

95. *See Soc. Sec. Admin.*, 956 F.2d at 1281 (explaining that federal service labor legislation "imposes significant restrictions on the scope of an agency's duty to bargain").

> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
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> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operation shall be conducted;
>
> (C) with respect to filling positions, to make selections for appointments from—
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.[96]

State public labor law statutes vary in their definition of mandatory bargaining subjects, but many follow the general language of the NLRA and require bargaining regarding wages, hours, and conditions of employment.[97] However, the scope of bargaining for state public employees is generally limited by preemptive state legislation.[98]

Additionally, the managerial prerogative exception generally applies.[99] Thus, issues such as staffing, criteria for promotion and payment of salary increments, and back pay are often excluded from mandated bargaining between state employers and their employees.[100] While some cases have held that issues that impact policy should not be excluded from bargaining based on managerial prerogative,[101] the fact

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96. 5 U.S.C. § 7106(a). This retention of authority is qualified by section 7106(b), which provides that agencies and labor organizations are not precluded from negotiating regarding (1) "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work" *at the election of the agency*; (2) the procedures by which management exercises authority under section 7106(a); or (3) "arrangements for employees adversely affected by the exercise of authority" under section 7106(a). *Id.* § 7106(b).

97. *See, e.g.*, ALASKA STAT. § 23.40.250 (2006) (requiring bargaining concerning wages, hours, and other terms and conditions of employment for all public employees except school teachers); CAL. GOV'T CODE §§ 3504, 3516, 3529 (West 1995) (requiring bargaining concerning wages, hours, and other terms and conditions of employment for all public employees); DEL. CODE ANN. tit. 2, § 1613, tit. 14, § 4002, tit. 19, § 1301 (2001) (requiring bargaining concerning wages, salaries, hours, and other terms and conditions of employment for transportation workers, school teachers, and public employees); FLA. STAT. ANN. § 447.309 (West 2002) (requiring bargaining concerning wages, hours, and terms and conditions of employment for all public employees); HAW. REV. STAT. ANN. § 89-3 (LexisNexis 2003) (requiring bargaining concerning wages, hours, and other terms and conditions of employment for all public employees); MICH. COMP. LAWS ANN. §§ 423.211, 423.215 (West 2001) (requiring bargaining concerning wages, hours, and other terms and conditions of employment for all public employees except classified state employees); 43 PA. CONS. STAT. ANN. § 1101.701 (West 1991) (requiring bargaining concerning wages, hours, and other terms and conditions of employment for all public employees).

98. *See, e.g.*, Am. Fed'n of State, County & Mun. Employees, Council 4, Local 387 v. Dep't of Corr., No. CV000501766, 2001 Conn. Super. LEXIS 2890 (Oct. 3, 2001) (holding that the authority of the state labor board was limited by the prerogative of the legislature to fix the compensation of public employees).

99. *See, e.g.*, Sacramento Police Officers Ass'n v. City of Sacramento, 54 Cal. Rptr. 3d 167 (Ct. App. 2007); Commonwealth, Office of Admin. v. Commonwealth, Penn. Labor Relations Bd., 598 A.2d 1274 (Pa. 1991); W. Bend Educ. Ass'n v. Wis. Employment Relations Comm'n, 357 N.W.2d 534 (Wis. 1984).

100. *See, e.g.*, Appeal of Town of Bedford, 706 A.2d 680 (N.H. 1998); Randolph Twp. Bd. of Educ. v. Randolph Educ. Ass'n, 746 A.2d 507 (N.J. Super. Ct. App. Div. 2000); Clifton Teachers Ass'n, Inc. v. Bd. of Educ., 346 A.2d 107 (N.J. Super. Ct. App. Div. 1975); Civil Serv. Employees Ass'n Inc., Local 1000 v. State of N.Y. Pub. Employment Relations Bd., 669 N.Y.S.2d 761 (N.Y. App. Div. 1998).

101. Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R. 3D 242, 291–93 (1978).

remains that managerial prerogative places a substantial limitation on the scope of bargaining.[102]

3. Arbitration

Arbitration is a common method of resolving disputes between management and labor and has been portrayed as an alternative to the right to strike in the public sector.[103] In the labor context, arbitration provisions typically fall into one of two categories: (1) grievance arbitration or (2) interest arbitration.[104] Grievance arbitration deals with the breach of a collective bargaining agreement or unfair labor practice.[105] Interest arbitration, on the other hand, deals with the establishment and negotiation of the terms of the collective bargaining agreement itself.[106] The existence and type of arbitration provisions—along with the procedures employed when arbitration is provided—vary from state to state and among federal and private legislation.[107]

For example, the NLRA contains no provisions regarding arbitration. In fact, section 160 provides that the NLRB's power "shall not be affected by any other means of adjustment or prevention."[108] While the NLRB is not required to enforce an agreement to arbitrate or an arbitrator's decision or award,[109] in recognition of the national policy in favor of arbitration, the NLRA encourages the voluntary settlement of labor disputes and indicates that an agreement between the parties is the preferred means to settle grievance disputes.[110]

The CSRA, however, has specific provisions addressing arbitration. Under the CSRA, arbitration is generally required in two circumstances. First, section 7121 provides that all collective bargaining agreements entered into pursuant to the provisions of the CSRA must contain a "negotiated grievance procedure" by which federal employees can pursue any claims that they may have arising under the collective bargaining agreement.[111] These procedures must include a requirement for binding arbitration when the negotiated grievance procedures fail to result in the

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102. *Id.* at 260–62.

103. *See generally* Anderson & Krause, *supra* note 18.

104. *Id.* at 153.

105. *Id.*; Brian J. Malloy, Note, *Binding Interest Arbitration in the Public Sector: A "New" Proposal for California and Beyond*, 55 HASTINGS L.J. 245, 245 (2003).

106. Anderson & Krause, *supra* note 18, at 153; Malloy, *supra* note 105, at 245.

107. Anderson & Krause, *supra* note 18, at 153; Malloy, *supra* note 105, at 245.

108. 29 U.S.C. § 160(a) (2000).

109. Spielberg Mfg., 112 N.L.R.B. 1080, 1090 (1955) ("It is quite clear that as a matter of law the [NLRB] is not bound by the arbitration award and the implied agreement of the discriminatees to comply therewith."); *see also* NLRB v. Walt Disney Prods., 146 F.2d 44, 48 (9th Cir. 1944) ("Clearly, agreements between private parties cannot restrict the jurisdiction of the [NLRB].").

110. *See* 29 U.S.C. § 173(d). In *United Technologies Corp.*, the NLRB stated:

> Arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy. The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract.

268 N.L.R.B. 557, 558 (1984).

111. 5 U.S.C. § 7121(b)(1) (2000).

satisfactory settlement of the grievance.[112] Pursuant to section 7122, the arbitrator's decision may be appealed to the FLRA.[113] While FLRA decisions are generally subject to judicial review under section 7123, under section 7122 a party may not seek judicial review of a final FLRA decision reviewing an arbitrator's decision.[114] The only exception arises if the arbitrator's decision involved a determination regarding an unfair labor practice.[115] If the award is based solely on an interpretation of the collective bargaining agreement, however, the arbitrator's decision remains largely unreviewable unless the arbitrator's award "'is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining agreement.'"[116]

Arbitration may also be employed when a negotiation impasse between the federal agency and the exclusive representative exists. Under such circumstances, the parties may utilize services provided by the Federal Mediation and Conciliation Service.[117] If the impasse remains unresolved, either party may request the services of the Federal Service Impasse Panel or, if both parties agree and the Panel approves, the issue may be submitted to binding arbitration.[118] When the services of the Panel are requested, the Panel has the authority to recommend certain action, which is often mediation. If, after following the Panel's recommendation, the parties

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112. *Id.* § 7121(b)(1)(C)(iii). The negotiated grievance procedures, in combination with arbitration, are the exclusive administrative remedies for issues arising under the collective bargaining agreement. This does not mean, however, that federal employees are foreclosed from pursuing judicial remedies. Judicial remedies were not initially available to federal employees with grievances under their collective bargaining agreement. In *Carter v. Gibbs*, the Federal Circuit Court of Appeals held that the exclusive remedies available for federal employees with grievances covered by their collective bargaining agreement were the negotiated grievance procedures contained in the agreement itself. 909 F.2d 1452, 1457–58 (Fed. Cir. 1990). In 1994, following the *Carter* decision, Congress inserted the word "administrative" into section 7121(a)(1) of the CSRA, thus providing that the negotiated grievance procedure was the "'exclusive *administrative* procedure[] for resolving grievances which fall within [the collective bargaining agreement's] coverage.'" O'Connor v. United States, 308 F.3d 1233, 1237 (Fed. Cir. 2003) (quoting 5 U.S.C. § 7121(a)(1)). In *Mudge v. United States*, the court held that the addition of the word "administrative" effectively overruled *Carter* and allowed federal employees to seek judicial relief for grievances that would otherwise be subject to negotiated grievance procedures. 308 F.3d 1220, 1225–27 (Fed. Cir. 2002).

Additionally, there are exceptions to the exclusivity provision contained in section 7121 in which the aggrieved employee may select between available statutory procedures and the negotiated procedure. *See, e.g.*, 5 U.S.C. § 7121(d)–(e), (g). For instance, if an employee is subject to a suspension of more than fourteen days, grade or pay reductions, or removal or demotions based on unacceptable performance, the employee may choose between the negotiated grievance procedures established by the collective bargaining agreement or can seek review under the Merit System Protection Board. *See* Local 2578, Am. Fed'n of Gov't Employees v. Gen. Servs. Admin., 711 F.2d 261, 264 n.11 (D.C. Cir. 1983). When the grievance is based on an unfair labor practice, the employee may choose between filing a grievance under the negotiated procedure and bringing a claim of unfair labor practice in federal court. 5 U.S.C. § 7116(d); *see also* Dep't of Commerce, Bureau of the Census v. FLRA, 976 F.2d 882, 888 (4th Cir. 1992) (explaining that once an employee chooses between the negotiated grievance procedure and the unfair labor practice procedure, "the other avenue is foreclosed").

113. 5 U.S.C. § 7122.

114. *Id.* § 7123(a)(1). Section 7123(a)(2) also precludes judicial review of FLRA decisions regarding appropriate bargaining unit determinations. *Id.* § 7123(a)(2).

115. *Id.* § 7123(a)(1); *see also* Griffith v. FLRA, 842 F.2d 487, 490–91 (D.C. Cir. 1988) (explaining that federal judicial review of FLRA decisions concerning arbitral awards is precluded except for rulings on unfair labor practices).

116. Devine v. Brisco, 733 F.2d 867, 871 (Fed. Cir. 1984) (quoting Devine v. Nutt, 718 F.2d 1048, 1053 (Fed. Cir. 1983)); *see also Local 2578*, 711 F.2d at 262.

117. 5 U.S.C. § 7119(a).

118. *Id.* § 7119(b).

"remain at loggerheads,"[119] the Panel has the authority to "'take whatever action is necessary...to resolve the impasse.'"[120]

Many state labor law statutes provide for some form of arbitration.[121] A large number of those states have interest arbitration provisions for the resolution of disputes that arise during negotiations over new collective bargaining agreements between public employees and employers.[122] States also, by and large, require arbitration for the resolution of grievances based on existing contracts or statutory rights.[123]

With respect to interest arbitration, state statutes vary in the type of arbitration procedures that they establish. Some states give the arbitrator the authority to resolve the dispute based on the parties' evidence and arguments along with relevant statutory criteria.[124] Other states, such as New Mexico, employ final offer arbitration, which only permits the arbitrator to pick between the final offer of the employee or the employer.[125]

III. PUBLIC EMPLOYEE BARGAINING IN NEW MEXICO

New Mexico, like many other states, has historically excluded public employees from collective bargaining and has only recently protected the rights of public employees through legislation. Even with legislation providing for unionization and collective bargaining in the public sector, New Mexico continues to distinguish between the right of public and private employees to bargain collectively. Furthermore, specific provisions of the PEBA may actually undermine the ability of public employees within New Mexico to bargain effectively.

A. Collective Bargaining in New Mexico Prior to the PEBA

Prior to most states' enactment of specific legislation regarding public employee bargaining, the majority common-law rule provided that, in the absence of specific statutory authorization, "public officials or state agencies d[id] not have the authority to enter into collective bargaining agreements with public employees."[126] At least until 1971, the New Mexico Attorney General's Office "consistently

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119. Patent Office Prof'l Ass'n v. FLRA, 26 F.3d 1148, 1150 (D.C. Cir. 1994).

120. *Id.* (quoting 5 U.S.C. § 7119(c)(5)(B)(iii) (1988)) (alteration in original).

121. *See, e.g.*, ALASKA STAT. § 23.40.200 (2006); CONN. GEN. STAT. ANN. § 5-276 (West 1998); 5 ILL. COMP. STAT. ANN. 315/12 to /14 (West 2005); IOWA CODE ANN. § 20.22 (West 2001); KAN. STAT. ANN. § 75-4330 (1997); NMSA 1978, §§ 10-7E-10 to -11 (2003); OKLA. STAT. ANN. tit. 11, §§ 11-51-202, -214, -215 (West 1994).

122. Anderson & Krause, *supra* note 18, at 157 (explaining that, as of 1987, "[a]t least twenty states [had] enacted laws providing for interest arbitration"); Malloy, *supra* note 105, at 246 ("Currently, about thirty states (or localities therein) have some sort of interest arbitration statute.").

123. Philip J. Ruffo, *The Misperception and Ensuing Error Concerning the Presumption of Arbitrability in New York Public Employment*, 63 ALB. L. REV. 477, 487 n.61 (1999) ("'In the state and local sectors, nine out of ten agreements between government organizations and unions contained provisions for grievance arbitration. The trend in federal-, state-, and local-sector agreements toward duplication of the prevalence of arbitration procedures in private-sector agreements is clear, and further emphasizes the coming of age of grievance arbitration in labor agreements.'" (quoting REED C. RICHARDSON, COLLECTIVE BARGAINING BY OBJECTIVES: A POSITIVE APPROACH 207 (1977))).

124. Anderson & Krause, *supra* note 18, at 157.

125. *Id.*; *see also* NMSA 1978, § 10-7E-18(B) (2003).

126. Local 2238 of the Am. Fed'n of State, County & Mun. Employees v. Stratton, 108 N.M. 163, 167, 769 P.2d 76, 80 (1989) (emphasis omitted).

followed the common-law rule in opinions issued to [New Mexico] state officials."[127] This, however, did not mean that public employees were prohibited from organizing or forming unions,[128] although early attorney general opinions expressed some doubt as to these rights.[129] Instead, public employees, while allowed the right to organize, had no right to demand recognition of their organization or to engage in collective bargaining.[130]

In 1965, the State of New Mexico passed its first piece of legislation allowing employees of a public entity to engage in collective bargaining.[131] The legislation was limited specifically to municipal transit employees and "authorize[d] municipalities to recognize an appropriate union representing employees of the municipal transit system in order to qualify for a federal grant under the Urban Mass Transportation Act of 1964."[132] This legislation did not explicitly extend beyond municipal employees nor was it interpreted to provide collective bargaining rights to other public employees.[133] In fact, in 1987 the New Mexico Attorney General's Office interpreted the legislation's limitation to city transit workers as the legislature having "specifically rejected collective bargaining for all other[] [public employees]."[134] The Attorney General's Office supported this interpretation with two references to legislative history by noting (1) that during the same legislative session in which the municipal transit authorities were authorized to designate a union, the New Mexico "legislature failed to approve House Bill 181, which would have permitted all public employees to engage in collective bargaining,"[135] and (2) that there had been at least seventeen failed attempts between 1963 and 1987 to enact similar legislation.[136]

The New Mexico Supreme Court first addressed public sector collective bargaining in *International Brotherhood of Electrical Workers, Local Union No. 611 v. Town of Farmington*.[137] In *Farmington*, the court held that the Town of Farmington had the authority to enter into a collective bargaining agreement with the International Brotherhood of Electrical Workers despite the lack of statutory authority expressly authorizing such conduct.[138] The court based its decision on a lack of conflict between the collective bargaining agreement and "the regulatory

127. Op. N.M. Att'y Gen. No. 87-41 (Aug. 10, 1987).

128. Am. Fed'n of State, County & Mun. Employees, Local 2183 v. N.M. State Personnel Bd., 81 L.R.R.M. (BNA) 2397 (1972).

129. Op. N.M. Att'y Gen. No. 6308 (Nov. 1, 1955) ("[I]t is the general rule that if membership in such organization is contrary to orders or ordinances prohibiting the same, such may be insubordination and grounds for dismissal."); Op. N.M. Att'y Gen. No. 6207 (June 27, 1955) (stating that it was "extremely doubtful" that public employees could organize because no legislation authorizing such organization existed).

130. *See* Op. N.M. Att'y Gen. No. 63-52 (May 10, 1963); Op. N.M. Att'y Gen. No. 59-30 (Apr. 1, 1959); Op. N.M. Att'y Gen. No. 6308.

131. NMSA 1978, §§ 3-52-14 to -15 (1965).

132. Leonard Gilbert Espinosa, Note, *Public Labor Disputes—A Suggested Approach for New Mexico*, 1 N.M. L. REV. 281, 283 (1971) (citing 49 U.S.C. §§ 1601–1611 (1964)).

133. *See* Op. N.M. Att'y Gen. No. 87-41 (Aug. 10, 1987); Espinosa, *supra* note 132, at 283.

134. Op. N.M. Att'y Gen. 87-41.

135. *Id.*

136. *Id. But see* Local 598, Council 58 Am. Fed'n v. City of Huntington, 317 S.E.2d 167, 168–69 (W. Va. 1984) (concluding that the state legislature's failure to pass a law allowing collective bargaining was no indication that it had not intended to allow such a practice to develop).

137. 75 N.M. 393, 405 P.2d 233 (1965).

138. *Id.* at 397, 405 P.2d at 237.

power of the municipality under a civil service or merit system."[139] However, while the court recognized an implied right to engage in collective bargaining based on a lack of conflicting regulations or legislation,[140] it limited its decision to the facts presented, specifically to the fact that the Town was acting in a proprietary capacity.[141]

In 1989, the New Mexico Supreme Court revisited this issue in *Local 2238 of the American Federation of State, County & Municipal Employees v. Stratton*.[142] In *Local 2238*, the court rejected the majority common-law rule and adopted the minority rule, which "require[s] *less* specific legislative authority before collective bargaining is permitted."[143] The court acknowledged that although there had never been an express grant of legislative authority providing for it, collective bargaining had been ongoing in the public sector for seventeen years.[144] The court, in considering this issue, was mindful that applying the majority rule could result in "grave injustice and harm."[145] Therefore, instead of applying the majority rule, the court held that the legislature had "conferred upon the [State Personnel] Board by implication the power to bargain collectively [under the State Personnel Act]."[146] However, this implied authority only existed to the extent that the Board's collective bargaining did not conflict with other statutory or regulatory provisions.[147] Furthermore, the scope of collective bargaining under the rules promulgated by the New Mexico State Personnel Board was "extremely narrow."[148]

Collective bargaining for public employees continued in this manner until New Mexico provided express legislative authority for public employees and public entities to engage in collective bargaining.[149] This legislation came in the form of the 1992 version of the PEBA, which was enacted just a few years after the New Mexico Supreme Court's decision in *Local 2238*.[150] Although the 1992 Act's sunset provision took effect in 1999, the current version of the PEBA remains, in large part, the same as its predecessor.[151]

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139. *Id.* at 396, 405 P.2d at 235.

140. *See id.* at 396–97, 405 P.2d at 236–37; *see also* Bd. of County Comm'rs v. Padilla, 111 N.M. 278, 282, 804 P.2d 1097, 1101 (Ct. App. 1990) ("Our supreme court has determined that legislation is not necessary to confer that authority upon public bodies.").

141. *Farmington*, 75 N.M. at 396, 405 P.2d at 236; *see also* Local 2238 of the Am. Fed'n of State, County & Mun. Employees v. Stratton, 108 N.M. 163, 165, 769 P.2d 76, 78 (1989) ("*Farmington* narrowed its holding to the fact that the town was functioning in a proprietary capacity in operating an electrical utility....").

142. 108 N.M. 163, 769 P.2d 76.

143. *Id.* at 167, 769 P.2d at 80. In adopting the minority rule, New Mexico joined the company of Arizona, Arkansas, Colorado, Connecticut, Indiana, and Ohio, among others. *Id.* at 167–68, 769 P.2d at 80–81.

144. *Id.* at 168, 769 P.2d at 81.

145. *Id.*

146. *Id.* at 170, 769 P.2d at 83.

147. *Id.* at 171, 769 P.2d at 84; *see also* Local 2839 of Am. Fed'n of State, County & Mun. Employees v. Udall, 111 N.M. 432, 435–36, 806 P.2d 572, 575–76 (1991); Bd. of County Comm'rs v. Padilla, 111 N.M. 278, 282, 804 P.2d 1097, 1101 (Ct. App. 1990).

148. *Local 2238*, 108 N.M. at 170, 769 P.2d at 83. Wages were considered among the subjects that were non-negotiable. *Id.* ("[E]xcluded from the scope of bargaining are matters of classification, retirement benefits and salaries."). Remnants of this limitation against the negotiation of wages still exist in the current legislation. *See infra* Part III.C.3 (discussing reapportionment).

149. *See generally Padilla*, 111 N.M. 278, 804 P.2d 1097; *Local 2839*, 111 N.M. 432, 806 P.2d 572.

150. *See supra* notes 142–148 and accompanying text.

151. The most extensive changes between the two versions can be found in the section governing impasse

B. Administrative Structure of Public Labor Law in New Mexico

The PEBA establishes the Public Employee Labor Relations Board (PELRB) as the administrative board to ensure compliance with the Act. As part of this review structure, the PEBA allows for the establishment of both a single state board—the PELRB—and various local boards under the oversight of the PELRB. The PELRB is comprised of three members, appointed by the governor, who serve three-year terms.[152] The governor is required to appoint a member that has been recommended by organized labor, a member that has been recommended by public employers, and a member that the two other appointees have jointly recommended.[153] The PELRB's authority includes, in addition to a general grant of power to enforce the provisions of the PEBA, the power to designate bargaining units; oversee "selection, certification and decertification of exclusive representatives"; hear prohibited practices complaints; conduct studies; and approve the creation of local boards.[154]

Pursuant to the PEBA, public employers, other than the State of New Mexico, may create local boards similar in nature to the PELRB.[155] The PELRB is responsible for overseeing and approving the creation of local boards. The local boards must be similar to the PELRB, not only in their make-up but also in the policies and procedures that they follow.[156] The PELRB strictly enforces the requirement that local boards be similar to the composition and operation of the state board, requiring that "[a]ll proposed resolutions, ordinances or charter amendments...follow [a] board approved template[]."[157] This template, which provides the basic structure for the enacting ordinance or regulation, must be followed unless the PELRB determines that "unique facts and circumstances of the

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resolution. *Compare* NMSA 1978, § 10-7E-18 (2003), *with id.* § 10-7D-18 (repealed 1999). Substantive changes were also made to the arbitration provision. *See* City of Deming v. Deming Firefighters Local 4251, 2007-NMCA-069, ¶ 22, 160 P.3d 595, 601 ("Although the current version of the PEBA requires binding arbitration to resolve an impasse in the negotiation of a collective bargaining agreement, § 10-7E-18, the original version required only advisory mediation, NMSA 1978, § 10-7D-18(B) (1992) (repealed 1999)."). In addition, sections 27 through 30 of the original Act are not present in the 2003 version. This includes the delayed repeal provision, which resulted in the sunsetting of the original Act in 1999. Public Employee Bargaining Act, ch. 9, 1992 N.M. Laws 131, 159.

Additionally, the purpose of the Act remained the same. The purpose in enacting both the 1992 and 2003 versions of the PEBA was to "guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978, § 10-7E-2 (2003); *id.* § 10-7D-2 (repealed 1999).

152. NMSA 1978, § 10-7E-8 (2003).

153. *Id.* § 10-7E-8(A). These members are not permitted to hold "any other political office or public employment or be an employee of a labor organization" during their tenure. *Id.* § 10-7E-8(C).

154. *Id.* § 10-7E-9(F).

155. *Id.* § 10-7E-10.

156. *See id.* The requirements for appointing members to local boards are similar to the state board requirements. *See id.* § 10-7E-10(B) ("One member shall be appointed on the recommendation of individuals representing labor, one member shall be appointed on the recommendation of individuals representing management and one member shall be appointed on the recommendation of the first two appointees."). These requirements mirror those imposed on the composition of the PELRB. *See id.* § 10-7E-8(A). Section 10-7E-8(A) states, "The [PELRB] consists of three members appointed by the governor. The governor shall appoint one member recommended by organized labor representatives actively involved in representing public employees, one member recommended by public employers actively involved in collective bargaining and one member jointly recommended by the other two appointees." *Id.*

157. 11.21.5.9(B) NMAC.

relevant local public employer" require a deviation.[158] Beyond these deviations, the PELRB must also determine if the proposed "resolution, ordinance or charter amendment...conforms to the requirements of the act and [the PELRB's] rules."[159] A number of local boards have been created in New Mexico for a variety of different public employers. Cities, counties, universities, and public schools throughout the state have established such boards.[160] Once a local board has been created and approved, pursuant to section 10(A), the local board "shall assume the duties and responsibilities of the [PELRB]."[161]

1. Comparing New Mexico's State and Local Board Structure with the Structure of Boards in Other States

The review structure established by the New Mexico PEBA, which provides for both a state board and independent local boards, stands in contrast to other state administrative structures governing public employee bargaining rights. While a number of states have established state labor boards that are similar in composition to New Mexico's,[162] the vast majority of states do not provide for the establishment of local boards in their statutory schemes.[163]

Some states, however, exclude specific municipalities from their state board's jurisdiction. For example, the Illinois Public Labor Relations Act[164] establishes a local board and provides it with jurisdiction to handle matters arising out of collective bargaining agreements "between employee organizations and units of

158. *See* 11.21.5.9(B) to .10(A) NMAC; *see also* NMSA 1978, § 10-7E-10(B) (requiring that local boards have the same composition as the state board: members recommended by labor, management, and a jointly recommended member).

159. 11.21.5.10(C) NMAC; *see also In re* Application of the Univ. of N.M. for Approval of Local Bd., No. 201-06 (N.M. Pub. Employee Labor Relations Bd. May 31, 2006) (permitting the University of New Mexico to change the word "appropriate" to "allocate" since the Board of Regents *allocates* but does not *appropriate* funds).

160. A number of New Mexico counties have created local boards. *E.g.*, BERNALILLO COUNTY, N.M., CODE §§ 2-201 to -214 (2006); SANTA FE COUNTY, N.M., CODE §§ 34.01 to .18 (2003); Chaves County, N.M., Ordinance 73 (Sept. 15, 2004); Doña Ana County, N.M., Ordinance 215-04 (July 13, 2004); Eddy County, N.M., Ordinance 04-45 (July 6, 2004); Lea County, N.M., Ordinance 63 (May 17, 2005); Otero County, N.M., Ordinance 93-02 (Feb. 26, 1993); Roosevelt County, N.M., Ordinance 04-04 (Dec. 21, 2004); Sandoval County, N.M., Ordinance 04-09-16.13 (Sept. 16, 2004); Taos County, N.M., Ordinance 1985-4 (May 2, 1985). Several New Mexico cities have also created local boards. *E.g.*, ALBUQUERQUE, N.M., CODE §§ 3-1-1 to -27 (2007); LAS CRUCES, N.M., CODE §§ 15-1 to -19 (2005); SANTA FE, N.M., CODE §§ 19-1 to -12 (2006); Grants, N.M., Ordinance 04-1148 (June 21, 2004); Roswell, N.M., Ordinance 04-10 (July 8, 2004). Under the PEBA, school districts have the ability to create local boards. *E.g.*, Clovis School District, Resolution on Labor Management (Jan. 11, 2005); N.M. State University, Labor Management Relations Resolution (Mar. 14, 2005); Western N.M. University, Labor Management Relations Resolution (Apr. 5, 2005).

161. NMSA 1978, § 10-7E-10(B).

162. *See, e.g.*, OHIO REV. CODE ANN. § 4117.02 (LexisNexis 2001) (requiring a three-member labor board); N.H. REV. STAT. ANN. 273-A:2 (LexisNexis 1999 & Supp. 2006) (requiring an equal number of members to be appointed based on affiliation with organized labor and experience representing management interests).

163. California's statutory structure bears the closest resemblance to New Mexico's system of a state board and local boards. California's statute does not provide for the creation of a state labor relations board but leaves the possibility open. CAL. GOV'T CODE § 3505 (West 1995) ("The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.").

164. 5 ILL. COMP. STAT. ANN. 315/1 to /27 (West 2005 & Supp. 2006).

local government with a population in excess of 2 million persons."[165] The state board is then left with jurisdiction over those units of government with populations that do not exceed two million.[166] The Illinois state board and the local board work in concert to promulgate rules and regulations governing disputes.[167]

In New York, the Public Employees' Fair Employment Act[168] excludes the municipality of New York City from the state's Public Employment Relations Board's jurisdiction.[169] New York City is the only public employer within the state of New York permitted to form its own board.[170] New York explicitly recognizes the New York City Board of Collective Bargaining[171] in its state statutory scheme.[172] Furthermore, under New York's review structure, an aggrieved party that brings an unfair labor practice complaint before the New York City Board of Collective Bargaining has the right to appeal to the state Public Employment Relations Board.[173]

While both the New York and Illinois statutory structures provide for local boards, they bear few similarities with New Mexico's statutory scheme. New York and Illinois both allow only a single local board. Moreover, both states' local boards are responsible for units of government with populations in excess of 2 million people.[174] In contrast, New Mexico's statutory scheme essentially allows governmental units of any size or population to establish local labor boards in order to police their own actions.[175] Various non-governmental public employers, such as colleges, enjoy the same right to establish a local board.[176] While self-regulation is almost always present in the realm of administrative law, legislation in other states, such as New York and Illinois, provides a greater degree of separation between the regulatory agency or board and the entity or person being policed, which at least creates the appearance of greater impartiality.

Beyond the safeguards provided by the appointment requirements discussed above, there are very few protections in New Mexico, such as New York's right to appeal to the state board, that would guard against bias exercised by small governmental units with respect to their employees. The only other safeguards under

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165. *Id.* 315/5(b) (West 2005).

166. *Id.* 315/5(a).

167. *See id.* 315/5(i)–(m) (providing that the local and state boards may only promulgate rules when they come together for a joint session).

168. N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 1999 & Supp. 2007).

169. *Id.* § 205(5)(d).

170. *See id.*

171. N.Y. CITY ADMIN. CODE § 12-306 (2007), *available at* http://public.leginfo.state.ny.us/menuf.cgi (follow "Laws of New York" hyperlink; then follow "ADC" hyperlink).

172. N.Y. CIV. SERV. LAW § 205(5)(d).

173. *Id.*

174. *See supra* notes 165–166, 170 and accompanying text. In 2005, the population of New York City was estimated at 7,956,113. U.S. Census Bureau, American FactFinder, http://www.factfinder.census.gov (last visited May 7, 2007).

175. NMSA 1978, § 10-7E-10(A) (2003) (allowing "a public employer other than the state" to "create a local board similar to the public employee labor relations board"). There are strict requirements regarding the creation of local boards that require the PELRB to approve the local board's enabling ordinance, resolution, or charter amendments. Specific templates are available and variances from these templates must be approved by the PELRB. 11.21.5.9 to .10 NMAC; *see also* NMSA 1978, § 10-7E-10 (requiring that local boards be similar to the PELRB).

176. For the purpose of PEBA, state educational institutions shall be considered public employers. NMSA 1978, § 10-7E-4(S) (2003).

the New Mexico statutory scheme are appeals to district court under a deferential standard of review[177] or, possibly, the exercise of residual authority possessed by the PELRB.

2. Concurrent or Residual Jurisdiction Retained by the PELRB

Unlike New York's statute, which provides for appeals from the New York City Board of Collective Bargaining to the state's Public Employment Relations Board, New Mexico's PEBA provides an aggrieved party with no right to appeal a decision of the local board to the PELRB. The only appellate review available under the PEBA is to the district court under an "arbitrary, capricious or abuse of discretion" standard.[178] Public employees are required to bring any complaints regarding unfair labor practices before their local board in order to exhaust their administrative remedies.[179]

The PEBA provision that, once created, a "local board shall assume the duties and responsibilities of the public employee labor relations board"[180] leaves unresolved the issue as to what continuing jurisdiction the PELRB may retain. Other provisions of the PEBA indicate that the transfer of power to a local board does not divest the PELRB of all oversight. For example, section 10-7E-9(F) of the PEBA provides the PELRB with the authority to "enforce [the] provisions of the [PEBA] through the imposition of appropriate administrative remedies."[181] Another provision, section 10-7E-10(A), includes the requirement that local boards "follow all procedures and provisions of the [PEBA] unless otherwise approved by the board."[182]

In accordance with section 10-7E-9, the PELRB has enacted administrative regulations regarding continual review and post-approval requirements for local boards. Section 11.21.5.13 of the New Mexico Administrative Code provides that local boards must submit any changes to their enacting ordinances to the PELRB to ensure continued compliance with the PEBA.[183] In the event that the local board is no longer complying with the provisions of the PEBA, the PELRB may revoke the authority of the local board if it fails to come into compliance within thirty days of being notified by the state board.[184]

The issue of concurrent jurisdiction was recently presented to the PELRB in *Los Alamos Firefighters Ass'n, Local #3279 v. County of Los Alamos*, in which the PELRB determined that the creation of a local board does *not* result in the total divestiture of the PELRB's jurisdiction.[185] In *Local #3279*, the Hearing Examiner

177. *Id.* § 10-7E-23 (2003). The actions of a local board will be upheld in district court unless its order is "arbitrary, capricious or an abuse of discretion," is "not supported by substantial evidence," or is "otherwise not in accordance with the law." *Id.* § 10-7E-23(B).

178. *Id.* § 10-7E-23.

179. *See* Callahan v. N.M. Fed'n of Teachers—TVI, 2006-NMSC-010, ¶ 24, 131 P.3d 51, 59 ("The general rule is that a party must exhaust administrative remedies unless those administrative remedies are inadequate.").

180. NMSA 1978, § 10-7E-10(A).

181. *Id.* § 10-7E-9(F) (2003) (citation omitted).

182. *Id.* § 10-7E-10(A) (citation omitted).

183. 11.21.5.13 NMAC.

184. *See id.*; 11.21.5.14 NMAC.

185. Hearing Examiner's Decision on Respondent's Motion to Dismiss, Los Alamos Firefighters Ass'n, Local #3279 v. County of Los Alamos, No. 119-05 (N.M. Pub. Employee Labor Relations Bd. July 11, 2006) (on file with the New Mexico Law Review).

relied on sections 10-7E-9(G) and 10-7E-10(A) of the PEBA to support her holding that the PELRB retains concurrent jurisdiction.[186] Section 10-7E-9(G) vests the PELRB with the enforcement of the prohibition against the requirement of "fair share" payment from public employees.[187] The Hearing Examiner found this provision to be contrary to a total divestiture of the PELRB's authority because it "contemplates PELRB oversight or review of matters arising before a local board."[188] Similarly, the Hearing Examiner relied on section 10-7E-10(A) to support her decision that the PELRB retains continuing oversight over local boards.[189]

The PELRB has exercised this continuing jurisdiction in other cases, especially when a local board, after being approved, has failed to appoint members or promulgate rules.[190] In such circumstances, the PELRB has refused to remand cases filed with the state board to a non-functioning local board.[191] In *Local #3279*, the Hearing Examiner noted that the continuing jurisdiction of the PELRB is necessary to enforce the legislative intent of the PEBA:

> Under the County's argument, all jurisdiction would transfer upon creation and approval of a local board even if board members were never appointed, rules were never promulgated and the local board never met for business. This would be an absurd result, in which employees could be functionally denied any forum in which to enforce their PEBA rights. Such a result plainly violates legislative intent in enacting Section 10(A).[192]

However, beyond the circumstances described above, the PELRB has not exercised authority over decisions by local boards.[193] While section 10-7E-9(F) could be interpreted to provide a broader range of continuing jurisdiction, such jurisdiction must be limited by the purpose of the Act to establish self-functioning local boards that assume the responsibilities of the PELRB.[194] If the PELRB is limited to exercising concurrent jurisdiction under the circumstances set out above, such "concurrent jurisdiction" is insufficient to provide any real oversight by the PELRB over the actions of local boards.

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186. *Id.* at 5–6.

187. NMSA 1978, § 10-7E-9(G) (2003).

188. Hearing Examiner's Decision, *supra* note 185, at 5.

189. *Id.* at 5–7; *see also supra* notes 180–182.

190. *See* Hearing Examiner's Decision, *supra* note 185, at 7 (citing AFSCME v. NMSU, No. 136-04 (N.M. Public Employee Relations Board May 19, 2005)); *In re* Disqualification of Deputy Dir. Pilar Vaile, AFT v. Gadsden Indep. Sch. Dist., Nos. 132-05 & 309-05 (N.M. Pub. Employee Relations Bd. Aug. 19, 2005) (on file with the New Mexico Law Review).

191. *See, e.g.*, Hearing Examiner's Decision, *supra* note 185.

192. *Id.* at 6.

193. The PELRB will dismiss a matter subject to refiling with the local board when there is a "fully functional and actually operational local board." *Id.* at 7. The factors that make a local board fully functional and operational include (1) whether all "three members have been appointed," (2) whether rules and regulations have been promulgated, and (3) whether the local board is "meeting for business." *Id.* at 8.

194. *Id.* at 7. The Hearing Examiner in *Local #3279* stated the following:

> In concluding that Section 10(A) does not divest the PELRB of all jurisdiction, I am mindful that neither would the legislative intent behind Section 10(A) be effectuated by PELRB or PELRB staffs' routine exercise of jurisdiction where there is an approved local board that is in fact manned and meeting for business, including the promulgation of rules.

Id.

C. Limits on New Mexico Public Employee Rights

Any concerns that may arise as a result of the creation of local boards with little oversight are amplified by the limitations placed on the ability of New Mexico public employees to protect their interests and bargain regarding their employment. Many of these limitations are similar to those commonly faced by public employees of the federal government or of other states. However, to the extent that New Mexico public employers gain an additional advantage from the local board structure in New Mexico, public employees may be negatively impacted by their inability to engage in true collective bargaining.

1. Employee Rights

The protection afforded New Mexico public employees under the PEBA is limited to "form[ing], join[ing] or assist[ing] a labor organization *for the purpose of collective bargaining*."[195] The exercise of these rights is protected from interference, restraint, or coercion by public employers.[196] This language is not as expansive as that contained in the NLRA or in other state public employee labor statutes.[197] Many states provide protection in line with that provided private employees under the NLRA.[198] Protection extended to concerted activities generally covers all activities involving more than one person that "might reasonably be seen as affecting terms or conditions of employment."[199] Thus, labor statutes covering "concerted activities" allow public employees to pursue avenues other than collective bargaining to improve their employment conditions without fear of retaliation.

Under New Mexico's legislation, public employees are not explicitly provided with the same broad-reaching protection as that conveyed by legislation extending protection to other concerted activities. However, the PEBA protects public employees from retaliation based on its association with a labor organization or activities undertaken on behalf of a labor organization.[200] Furthermore, much of the protection afforded by a private labor statute protecting "concerted activities" may already be provided to public employees through various constitutional protections.[201] It is unclear, based on these additional protections, under what scenario private employees would be extended more protection than public employees.

2. Scope of Collective Bargaining Under the PEBA

Many state and federal employees are limited in their ability to bargain regarding wages, promotion schedules, and other benefits. Federal employees, for example,

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195. NMSA 1978, § 10-7E-5 (2003) (emphasis added).
196. *Id.* § 10-7E-19(B) (2003).
197. *See* 29 U.S.C. § 157 (2000); *supra* Part II.A. *But see supra* note 70.
198. *See supra* Part II.A.
199. State Employment Relations Bd. v. Union Twp. Trs., 755 N.E.2d 369, 376 (Ohio Ct. App. 2001).
200. *See* NMSA 1978, § 10-7E-19.
201. Public employees can bring constitutional claims where private employees may not be able to do so because the actions of a public employer constitute state action necessary for a constitutional claim. *See supra* note 46.

have most wage issues preempted from bargaining by federal legislation.[202] State and local public employees often face the same limitations in state legislation. While wages and other benefits still remain mandatory bargaining subjects under New Mexico's PEBA,[203] much of the bargaining on these issues is preempted by legislation and regulations governing retirement, promotions, pay, and disciplinary procedures.[204] Yet, even if there is not a statute preempting bargaining on a specific wage issue, an agreement between an employer and its employees is often limited by the amount of funds that have been appropriated.[205]

3. Interest Arbitration and Its Limitations Under the PEBA

Restrictions regarding reapportionment also arise in the context of arbitration under New Mexico's PEBA. Specifically, apportionment of funds becomes an issue in the context of the impasse procedures enumerated in the PEBA. An impasse occurs when the parties are unable to reach an agreement.[206] The PEBA provides impasse procedures that first allow the public employer and the employees' representative to request a mediator to assist the parties in reaching an agreement.[207] If the mediator's efforts are unsuccessful, the parties may request the services of an arbitrator.[208] The arbitrator is limited to choosing between "one of the two parties' complete, last, best offer."[209] The arbitrator's decision is final and binding and is only subject to judicial review under the Uniform Arbitration Act.[210] However, an arbitrator's decision cannot require that funds be reapportioned by the governing body.[211] Thus, an arbitrator's *final* decision is subject to being voided if the award would require reapportionment.

Economic considerations, such as available revenue or the apportionment of funds, often have a large impact on bargaining in the public employee context.[212] However, when a small government employer, such as a county, is apportioning the amount of money for a county department with whose employees the county is bargaining directly, the county has the ability to apportion money in a manner that will limit the range of bargaining that may take place.[213] If the public employer with

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202. *See supra* Part II.B.2.

203. NMSA 1978, § 10-7E-17(A)(1) (2003) (requiring a public employer and the employees' exclusive representative to engage in good faith bargaining regarding "wages, hours and all other terms and conditions of employment and other issues agreed to by the parties").

204. *See generally id.* §§ 10-1-1 to 10-17-12 (2006).

205. *See, e.g., id.* § 10-7E-17(E) (providing that "[a]n arbitration decision shall not require the reappropriation of funds").

206. *Id.* § 10-7E-4(K) (2003) (defining "impasse" as the "failure of a public employer and an exclusive representative, after good-faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement").

207. *Id.* § 10-7E-18(A)(3) (2003).

208. *Id.* § 10-7E-18(A)(5). When the parties request an arbitrator they receive a list of seven names from the federal mediation and conciliation service. *Id.* The arbitrator is chosen by the parties, who alternately strike names from the list until only one name remains. *Id.*

209. *Id.* § 10-7E-18(B)(2).

210. *Id.* (citing *id.* §§ 44-7A-1 to -32 (2001)).

211. *Id.* § 10-7E-17(E) (2003).

212. *See* Anderson & Krause, *supra* note 18, at 162–63.

213. For the principle that a public employer has the political power to limit the amount of funds available for bargaining, see generally Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH.

apportionment powers chooses to exercise this power in bad faith in an attempt to undermine collective bargaining, nothing can be done because there exists no safeguard against such behavior under the PEBA.[214] The only safeguard or check that exists is through normal democratic processes.

4. Strikes/Lockouts

The limitations placed on binding interest arbitration under the provisions of the PEBA become even more significant because New Mexico does not provide its public employees with the right to strike.[215] In fact, New Mexico does not make economic actions available to either employers or employees.[216] Public employees in New Mexico are not afforded the right to strike, and employers may not engage in lockouts.[217] New Mexico's ban on strikes with respect to public employees is not unusual; a large number of states prohibit striking by public employees.[218] States often justify denying public employees the right to strike by asserting that such a right would be detrimental to either the government or the public. For instance, one state claims that providing public employees with the right to strike would cause substantial harm to the general public because the services that public employees perform are essential.[219] Stoppage of these essential services could not only harm the general welfare of the public in the case of strikes by law enforcement or firefighters, but strikes by public employees that provide essential services could also place strong pressure on public employers to agree to a quick settlement.[220] This argument goes on to warn of the undue influence that unions would be able to exercise over the budget or appropriation process if they were allowed to strike.[221] In other words, legislators would be quick to yield to striking public employees, which would provide a private faction or interest group with a disproportionate amount of influence over the public budget.[222]

A number of states, however, explicitly extend public employees the right to strike.[223] Some states impose strict limitations, only allowing strikes after specific

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J.L. REFORM 313, 318–20 (1993).

214. The chance of this type of bad faith occurring at the state level seems improbable. The state legislature makes appropriations to which a state agency is bound. That state agency then enters into bargaining with their employees. Any disputes arising from that bargaining process would then be taken to the PELRB. However, in the context of local boards and local employers, bad-faith conduct seems more plausible. At the local level, county commissioners, for example, make appropriations for various departments. The proximity of the local board to the governmental power in charge of apportionment makes overreaching more of a concern.

215. *See* Anderson & Krause, *supra* note 18, at 155 (arguing that "either the right to strike or interest arbitration is needed to make collective bargaining work").

216. NMSA 1978, § 10-7E-21(A) (2003).

217. *Id.*

218. *See* Fisher, *supra* note 18, at 566 n.57 (noting that only eleven states allow public employees the right to strike and that even in those states the right is only allowed under limited circumstances).

219. *See* 5 ILL. COMP. STAT. ANN. 315/17 (West 2005) (extending a general right to strike for public employees except for those who provide "essential" services, such as police, firefighters, and paramedics).

220. *See* Fisher, *supra* note 18, at 582.

221. *Id.* at 566–67.

222. *See* Meltzer & Sunstein, *supra* note 16, at 737–42.

223. As previously discussed, some authority exists to support the position that including similar employee-rights language as that included in the NLRA (i.e., "concerted activities") would give public employees the right to strike. *See supra* note 71. Under this theory, a number of states arguably provide some or all of their public employees with the right to engage in strikes because of the protection to engage in "concerted activities." *See*

regulations have been met.[224] Illinois, for example, provides public employees with the right to strike under specific circumstances.[225] Illinois does not, however, extend the right to strike to "security employees,...Peace Officers, Fire Fighters, and paramedics employed by fire departments and fire protection districts."[226] Although it exempts certain employees from the right to strike, the Illinois statute provides a detailed structure for the quick resolution of disputes involving the excluded employees, which includes substantial oversight by the board.[227] Furthermore, despite strikes by public employees, employers in other states have not been quick to settle or yield to union demands.[228]

The ability to utilize economic actions, such as strikes or lockouts, serves an important purpose during the bargaining process.[229] The threat of an employee strike or an employer lockout can often bring about an end to bargaining where there may otherwise be no real motivation to conclude negotiations. In the absence of the ability to utilize such economic actions, as under the PEBA, bargaining often continues under an expired collective bargaining agreement until any bargaining issues are resolved.[230] Without the option to use economic actions—and considering the limitations placed on arbitration under the PEBA—the only method that New Mexico public employees or employers have to bring bargaining to a close is to file a complaint with the state or a local board alleging a failure to bargain in good faith.[231]

IV. CONCLUSION

New Mexico public employees are afforded more protection than employees in several other states because they are provided with the right to engage in collective bargaining and are protected from retaliation for assisting in the collective bargaining process. However, a review of the legislation and regulations governing these rights reveals a system that favors public employers. The New Mexico provisions regarding local boards are not solely responsible for this inequity. Issues

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statutes cited *supra* note 68 (listing statutes from Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Montana, Ohio, and Vermont).

224. *See* David Westfall & Gregor Thüsing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT'L & COMP. L. REV. 29, 34 n.35 (1999).

225. 5 ILL. COMP. STAT. ANN. 315/17 (West 2005).

226. *Id.* 315/17(a).

227. *Id.* 315/14.

228. *See, e.g.*, JOHN PATRICK PISKULICH, COLLECTIVE BARGAINING IN STATE AND LOCAL GOVERNMENT 9–10 (1992) ("[Public] unions face a harried employer with strong incentive to take a rigorous bargaining stance."); Craig A. Olson, *The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 495 (1982) (observing the overall level of resistance by public sector managers to union work stoppages and describing such resistance in Philadelphia and Minnesota); Malin, *supra* note 213, at 322–24 ("Public employers frequently resist public employee demands, even when those demands are backed by work stoppages."). *But see* Michael H. Gottesman, *Wellington's Labors*, 45 N.Y.L. SCH. L. REV. 77, 81 (2001) ("[P]ublic officials will be more likely to surrender to unreasonable union demands backed by strike threats than will their private sector counterparts."); Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123–25 (1969).

229. *See* Am. Fed'n of Gov't Employees v. FLRA, 778 F.2d 850, 863 (D.C. Cir. 1985) (Ginsburg, J., dissenting) (recognizing the importance of the right to strike and characterizing it as "the ultimate device in labor's cabinet to impel management to reach an acceptable agreement").

230. *See* NMSA 1978, §§ 10-7E-9, -19 (2003).

231. *See id.*

such as managerial prerogative, limited bargaining on wages and benefits, nullification by apportionment, and the limited rights for which public employees are afforded protection—when combined with the local boards and the additional authority that they provide to public employers—tend to increase the inequity in an already unbalanced system.

The structure provided for public employee bargaining, whether at the state or federal level, generally favors the employer. Collective bargaining in the public context must accommodate the distinct attributes of a democratic government. For instance, public employers are limited to the budgets that they receive through appropriations. Thus, restrictions based on the appropriation process are perhaps necessary. In other respects, this structure is supported by age-old rhetoric regarding theories of sovereignty and various concerns regarding the health, safety, and welfare of the general public.[232] The continued development and success of state statutory schemes that disregard such rhetoric and provide additional protection to public employees disprove the reasons offered against extending public employees additional rights and protection.

"[V]ery few bargaining tables are round."[233] Inequity exists even in bargaining conducted between private employers and employees under the structure of the NLRA. However, this inequity is both more severe and more commonly accepted in the public sector. Even though collective bargaining in the public sector must take into account the nature of government, it does not have to translate into either fewer rights for public employees or the inability to fully engage in the collective bargaining process. Even if *true* collective bargaining cannot occur in the public sector, New Mexico should take steps toward correcting this imbalance.

232. *See, e.g.*, Stanley H. Friedelbaum, *Traditional State Interests and Constitutional Norms: Impressive Cases in Conventional Settings*, 64 ALB. L. REV. 1245, 1269 (2001) ("There are fears that the shutdown of essential public services will promote instability and even give rise to conditions approaching a state of anarchy....").

233. Fisher, *supra* note 18, at 563 (stating that despite the NLRA's best intentions, "very few bargaining tables are round").