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State Regulation of Local Labor Relations: The Demise of Home Rule in California?

By JOHN W. WITT*

CALIFORNIA cities governed under the framework of constitutionally authorized city charters are, in legal theory at least, supposed to be free from state interference in the management of their own "municipal affairs."¹ Nothing would appear to be more of a "municipal affair" than the relationship of a city government to its employees. Indeed, if it is assumed that the most important function of the municipal legislative body, the city council, is to oversee the expenditure of the public funds entrusted to it, it is hard to imagine how it can do so effectively unless it has full control over its largest expenditure item—the public payroll. Nevertheless, bills are introduced at each session of the legislature which, if passed, would dictate to California cities the details of municipal labor relations.² The end result of this practice may be to remove the most substantial part of the city council's traditional power over the municipal purse strings and to substitute state-mandated salary and fringe benefit minimums for city employees and third-party dispute-settling schemes in municipal labor disputes. In essence, this situation foreshadows the virtual demise of the home rule concept in California.

The purpose of this article is to examine the relationship between the state and charter cities in California with respect to municipal labor relations. To do so it is necessary to study the California concept of home rule and the various legislative schemes enacted, pro-

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1. CAL. CONST. art. XI, § 5.

2. *E.g.*, Cal. S.B. 333, 1971 Reg. Sess.; Cal. A.B. 98, 1970 Reg. Sess. See text accompanying notes 49-70 *infra*; see note 26 *infra*.

posed and otherwise contemplated which would affect employer-employee relationships at the local government level.

The Concept of Home Rule in California

Statutory History

Section 5 of Article XI of the California Constitution provides:

(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

In effect, section 5 says that where a city charter provides the city legislative body with power to legislate concerning municipal affairs, municipal ordinances and regulations pertaining thereto are effective irrespective of the existence of state law on the same subject.³ The difficulty, of course, is in determining whether a matter is a "municipal affair."

The concept of "home rule" is not unique to charter cities in California. It was incorporated in the constitution of 1879 for general law cities by a number of provisions designed to guarantee all California cities a substantial degree of autonomy.⁴ In 1883, enactment of the Municipal Corporations Act⁵ further defined the permissible forms and powers of those municipal corporations not organized under charters. In addition, a provision for the formation of charter cities was also included in the 1879 state constitution.⁶ This provision permitted the voters of a city of more than 100,000 population⁷ to draft a charter for the city's government.

In 1914, charter cities were finally freed completely from interference by the state legislature in their municipal affairs. In that year,

3. See *Bellus v. City of Eureka*, 69 Cal. 2d 336, 346, 444 P.2d 711, 717, 71 Cal. Rptr. 135, 141 (1968).

4. E.g., CAL. CONST. art. IV, § 25 (1879). See W. CROUCH, D. MCHENRY, J. BOLLENS & S. SCOTT, CALIFORNIA GOVERNMENT AND POLITICS 240-42 (2d ed. 1960).

5. Cal. Stat. 1883, ch. 49, at 93-279. With substantial modifications, the law is now found at CAL. GOV'T CODE §§ 34000-45345 (West 1968), *as amended*, (Supp. 1971).

6. CAL. CONST. art. XI, § 8 (1879), *now id.* § 3.

7. The population minimum of 100,000 was amended downward to 10,000 in 1887 and eventually to 3500 in 1890. The 1970 constitutional revision deleted the minimum population provision entirely.

the language now found in section 5 of article XI⁸ was added to the state constitution which granted authority to charter cities to make and enforce ordinances and regulations in respect to their municipal affairs.

The Case Law Controversy

The ascendancy of the state's power to legislate in derogation of charter cities' jurisdiction in matters which arguably are municipal affairs reached its height in the celebrated case of *In re Lane*.⁹ In the majority opinion, written by Mr. Justice McComb, the municipal affairs clauses of old article XI of the state constitution were never even mentioned. Instead, the court bluntly recited the so-called "pre-emption" doctrine, a legal theory which thereafter became much in vogue in respect to state-local governmental relations.

A local municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law. . . .

Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned. . . .

In determining whether the Legislature intended to occupy a particular field to the exclusion of all local regulation, we may look to the "whole purpose and scope of the legislative scheme" and are not required to find such an intent solely in the language used in the statute.¹⁰

The concurring opinion of Mr. Chief Justice Gibson disposed of the municipal affairs question merely by assuming that the Los Angeles ordinance¹¹ did not address itself to a subject matter which could be labeled a municipal affair. No extensive analysis of the question was undertaken.

Two and a half years after the *Lane* case, the California Supreme Court softened its position relative to charter city powers in *In re Hubbard*.¹² In considering a Long Beach ordinance forbidding

8. Prior to the revision of article XI approved by the voters in June 1970, the "municipal affairs" clause of section 5 was found in both section 6 and section 8 of article XI.

9. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

10. *Id.* at 102-03, 372 P.2d at 899, 22 Cal. Rptr. at 859. For an excellent discussion of the doctrine of pre-emption see Note, *The California City Versus Preemption by Implication*, 17 HASTINGS L.J. 603 (1966).

11. LOS ANGELES, CAL., MUNICIPAL CODE § 41.07 (1972). The municipal law dealt with "resorting" to some location for the purpose of having sexual intercourse with one to whom the accused was not married.

12. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

the playing of a game of chance for money, the court determined the gaming statutes found in the Penal Code¹³ did not constitute a full occupation of the field of gambling.¹⁴ This time the court recognized the municipal affairs clauses of article XI and attempted to grapple with them:

The exclusive right of a chartered city or county to regulate turns on whether or not the subject matter is a municipal affair. In other words, if it is exclusively a matter of state concern, chartered cities have no authority to act at all. . . . Of course, a particular subject may be both a municipal affair and of statewide concern. Since the question whether the subject is of state concern is often determined by whether or not the state has enacted legislation, preemption or full occupation of the field may become one, but only one, test of whether the given subject is a municipal affair. With these concepts in mind, it has been held that a chartered city or county may not legislate in regard to those matters covered by general law if (a) the local legislation attempts to impose additional requirements [citing *Lane*], or (b) the subject matter is one of state concern, and the general law occupies the entire field . . . or (c) the subject matter is of such statewide concern that it can no longer be deemed a municipal affair. . . .¹⁵

The court, in *Hubbard*, ruled the Long Beach ordinance concerned a "municipal affair," thus upholding its validity. No attempt was made to define the term "municipal affair"; instead, that was left for determination after an analysis of the facts surrounding each particular case.¹⁶

The *Hubbard* court did, however, limit the municipal affairs concept by holding that the power of charter cities to legislate in regard to municipal affairs ceases to exist when a legislative subject matter is "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern" or the general law is phrased in such a manner "as to indicate clearly that a paramount state concern will not tolerate further or additional local action," or that the matter has been partially covered by state law and the ordinance in question adversely affects transient citizens in a manner outweighing the benefit to the local community.¹⁷

In its most recent definitive tussle with the municipal affairs concept, the California Supreme Court in *Bishop v. City of San Jose*¹⁸ has

13. CAL. PEN. CODE §§ 330-37h (West 1970).

14. 62 Cal. 2d at 125, 396 P.2d at 813, 41 Cal. Rptr. at 397.

15. *Id.* at 127, 396 P.2d at 814, 41 Cal. Rptr. at 398.

16. *Id.* at 127-28, 396 P.2d at 814, 41 Cal. Rptr. at 398.

17. *Id.* at 128, 396 P.2d at 815, 41 Cal. Rptr. at 398-99.

18. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

given the venerable old doctrine new life. The case involved the relations between the charter city of San Jose and its city employees. Specifically, the dispute before the court concerned the applicability of the prevailing wage provisions of the California Labor Code¹⁹ to electricians permanently employed by San Jose to work on additions, modification, maintenance and repair of city electrical facilities. The trial court ruled that the kind of work performed by the electricians "and the setting and payment of salaries for the city's own year-round, full-time, civil service employees are purely municipal affairs"²⁰ to which the Labor Code provisions in question do not apply. The California Supreme Court affirmed.

After a brief recitation of the pre-emption doctrine, the court noted that California law does not preclude the legislature from legislating in regard to the municipal affairs of a charter city nor does it prohibit a city from legislating on subjects not of a local nature. Rather, if a conflict exists between the two, or if the legislature has disclosed an intent to preempt the field, the question is whether general law or local regulation is superior. The answer hinges on the question of whether the court determines the matter is a state or municipal affair.²¹

The court further indicated that weight must be given to legislative intent to preempt the field and it may be that the factors which caused the legislature to act may lead the courts to conclude the matter is of statewide application to the exclusion of local regulation. The legislative intent alone, however, is not enough:

[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.²²

In a footnote²³ the court specifically rejected any statements to the contrary found in *Hubbard*. Consequently, it may be concluded as a result of the *Bishop* case that a mere statement by the legislature that a statute is applicable to charter cities does not, by itself, disqualify

19. CAL. LABOR CODE §§ 1771-77 (West 1971).

20. 1 Cal. 3d at 61, 460 P.2d at 140, 81 Cal. Rptr. at 468.

21. *Id.* at 62-63, 460 P.2d at 140-41, 81 Cal. Rptr. at 468-69.

22. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

23. *Id.* at 63n.6, 460 P.2d at 141n.6, 81 Cal. Rptr. at 469n.6.

such a city from enacting ordinances in conflict with the state legislation if the court views the subject matter to be a municipal affair within the meaning of section 5 of article XI of the state constitution.²⁴

The Effect of State Labor Legislation on Local Budgets

In California, state legislation setting standards in the areas of wages, fringe benefits, and working conditions for local governmental employees has been rather limited.²⁵ Although most proposed legislation which would mandate state imposed policies have failed,²⁶ two major pieces of legislation on the subject have been enacted: the Myers-Milias-Brown Act²⁷ and the Winton Act.²⁸ Since provisions of the state constitution relating to municipal affairs apply only to charter cities and charter counties,²⁹ and since the Winton Act applies to school districts and not to charter cities,³⁰ the question presented is whether the Myers-Milias-Brown Act (Public Employment Relations Act) or any similar piece of state legislation purporting to affect municipal labor relations, is legally applicable to charter cities under the California Constitution.

Basically, the Myers-Milias-Brown Act is an attempt to establish

24. The *Bishop* case was a narrow 4-3 decision. Two pro tem judges, one on each side of the decision, heard the case. The majority opinion was rendered by Justice Burke, with Chief Justice Traynor, Justice McComb and Presiding Justice Murray Draper of the Court of Appeal for the First Appellate District concurring. The dissent was written by Justice Peters, with Justice Mosk and Associate Justice Richard M. Sims, Jr., of the Court of Appeal for the First Appellate District concurring. Justices Tobriner and Sullivan disqualified themselves. Since Chief Justice Traynor now has retired, another case on the same issues coming before the full court would be heard by Chief Justice Wright, by two justices who, like Chief Justice Wright, were not involved in the decision in the *Bishop* case and by two justices who heard the case, one on each side, majority and minority.

25. An example of such legislation is CAL. GOV'T CODE §§ 45000-345 (West (1964), as amended, (Supp. 1971)). See D. BOWEN, P. FEUILLE & G. STRAUSS, UNIONIZATION OF MUNICIPAL EMPLOYEES: THE CALIFORNIA EXPERIENCE 107-08 (Univ. of Cal. Inst. of Indust. Rel. 1971).

26. E.g., Cal. S.B. 333, 1971 Reg. Sess.; Cal. A.B. 98, 1970 Reg. Sess.; Cal. A.B. 374, 1969 Reg. Sess. Assembly Bill 374 in 1969 was passed by the assembly but died in the senate. Assembly Bill 98 in 1970 was reported out of committee without further action. Senate Bill 333 died on the floor of the senate in 1971. Other public sector labor relations legislation which failed in the 1970 legislature included Assembly Bill Nos. 1140, 1285 (vetoed), 1622, 2210 and 2215 and Senate Bill Nos. 33, 719, 1293 and 1294.

27. CAL. GOV'T CODE §§ 3500-511 (West 1966), as amended, (Supp. 1971).

28. CAL. EDUC. CODE §§ 13080-88 (West 1969), as amended, (Supp. 1971).

29. CAL. CONST. art. XI, § 5.

30. CAL. EDUC. CODE § 13080 (West Supp. 1971).

machinery for labor-management communications in labor disputes.³¹ In enacting the measure the legislature left little doubt it intended to affect charter cities. In its definition of "public agency," to which the act applied, the legislature included "every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not."³² The section of the act in which the foregoing language is contained, however, is preceded directly by a section including the following provision:

Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agency by which they are employed.³³

The apparent inconsistency in these two provisions of the act may possibly be resolved by referral to the *Bishop* decision.

[I]n the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other.³⁴

The court also said:

[T]he Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.³⁵

Because the court in *Bishop* affirmed the ruling of the trial court that the salaries of municipal employees are a municipal affair, and indicated that the concept of what constituted a municipal affair was not governed by legislative language, the argument can be made that despite the equivocal contrary declaration by the legislature in the Myers-Milias-Brown Act, the act does not apply to charter cities because the

31. The purpose of the act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment . . ." CAL. GOV'T CODE § 3500 (West Supp. 1971). There is no attempt in the act to establish standards for the wages, hours and other terms and conditions of employment themselves.

32. *Id.* § 3501(b) (West 1966).

33. *Id.* § 3500 (West Supp. 1971).

34. 1 Cal. 3d at 62, 460 P.2d at 140, 81 Cal. Rptr. at 469.

35. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

area sought to be regulated is a municipal affair. If so, the charter cities are free to disregard it and legislate freely in the subject matter area.

Even in view of the fact that the Myers Act may not apply to charter cities, and ignoring side issues such as whether the act may prevail anyway absent specific local legislation on the subject, the crucial question the passage of the act raises is whether the state government *should*, in the future, be allowed to legislate on labor matters directly affecting the budgets of local governmental agencies in a manner which would require involuntary spending on the part of those agencies.

In theory, at least, one of the major powers, if not *the* major power, of the legislative branch of government in the American system lies in its control over expenditures of public funds. The city council, as the legislative body of municipal government, controls the finances of the city.³⁶ Quite obviously, any state legislation which requires expenditures by a municipality without providing revenue sources to match the required expenditures substantially dilutes the control of the legislative body over municipal finances.

Salaries paid to city employees and payments made to employee retirement funds constitute the lion's share of any city's budget. In San Diego, for example, the amount provided for fiscal year 1971-72 for salaries and retirement purposes was \$61,390,226 or 69.4 percent of the total budget.³⁷ Legislative enactments of the state government which mandate that municipalities must pay salaries set at minimums established by the state, fund pensions at levels set by the state or hire personnel of classes or numbers dictated by the state, would limit seriously the ability of the public's elected representatives at the local level—the city council—to manage the funds entrusted to them for expenditure in the public interest. Certainly, if the California home rule cities are to be in control of their own local destiny, the power to control all labor relations must be found by the courts to be a "municipal affair." There appears to be, however, a continual legislative attempt to "pre-empt" the area through the introduction of a series of proposed bills calling for state domination in the crucial areas of labor relations.

36. *E.g.*, CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO, § 72; CHARTER OF THE CITY OF LOS ANGELES, §§ 347-48; CHARTER OF THE CITY OF SAN DIEGO, CAL. § 71.

37. City of San Diego, Annual Budget, Fiscal 1972, at ii.

Enacted and Proposed Legislation Affecting Municipal Labor Relations

The Meyers-Milias-Brown Act

As previously indicated, the only attempts at statewide legislation aimed at comprehensive coverage of labor relations in the local governmental sector are the Myers-Milias-Brown Act³⁸ and the Winton Act.³⁹ As mentioned earlier, the latter applies to public school employers only and will not be discussed. The professed aim of the Myers-Milias Brown Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."⁴⁰ The act establishes a relatively informal framework for labor relations between public employees and those employers who fit into the definition of "public agency" found in the Code.⁴¹

The act requires the governing body of a public agency or its representatives to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of . . . recognized employee organizations . . ."⁴² To "meet and confer in good faith" is defined to mean that the public agency and the recognized employee organization are mutually obliged

personally to meet and confer within a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.⁴³

It must be stressed that the requirement to meet and confer in good faith is made mandatory on the public agency only as to "recognized employee organizations."⁴⁴ There is no requirement that an employee organization must be recognized, only that recognition may not be unreasonably withheld.⁴⁵ Myers-Milias-Brown establishes no minimum salaries, effects no public retirement plan and does not deal with hiring policies of any public agency. It does, however, refer to third-party-dispute-settling devices, rendering it permissive for public agencies and recognized employee organizations to agree upon the

38. CAL. GOV'T CODE §§ 3500-11 (West 1966), *as amended*, (Supp. 1971).

39. CAL. EDUC. CODE §§ 13080-88 (West 1969), *as amended*, (Supp. 1971).

40. CAL. GOV'T CODE § 3500 (West Supp. 1971).

41. See text accompanying note 32 *supra*.

42. CAL. GOV'T CODE § 3505 (West Supp. 1971).

43. *Id.*

44. *Id.* § 3507.

45. *Id.*

appointment of a mediator in case of failure to reach agreement.⁴⁶ Suffice it to say that the act is a far cry from legislation such as New York's Taylor Act,⁴⁷ which establishes a state public employee relations board to serve as third-party mediator and which ultimately requires governmental employers and employees to utilize the services of the board, even though the public employer is not required to accept its decision.⁴⁸

Proposed Legislation—Pensions and Dispute Settling Mechanisms

Although the Myers-Milias-Brown Act does not significantly affect the ability of local entities to maintain control of local labor relation problems, there remain two areas of potential legislation where state control could have a serious effect on the function of local government.

In the areas of pensions and dispute settling mechanisms, there have been several bills introduced in the California Legislature calling for state control.⁴⁹ In one proposal, retirement mandates have been directed at those cities which contract with the State Public Employee Retirement System.⁵⁰ The problem with this type of proposal is that even though the state legislative body will surely utilize pension programs as a means to attract and hold qualified public employees, the fact remains that the cities, in order to participate, must accept all the features of the state system. The end result is that the state is effectually allocating a large portion of the local budget. This allocation should be done by those persons chosen by the taxpayers who, in actuality, carry the burden for the expenditure.

Although it is true that the affected local governments arguably could terminate their relationships with the state system⁵¹ if they found the increased benefits to be unpalatable, whether such a termination

46. *Id.* § 3505.2.

47. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney Supp. 1971).

48. *Id.* § 209. If all the third-party procedures provided for by the Taylor Act are unsuccessful in ending the dispute, the matter is thrown back to the legislative body of the public employer agency. Section 209 requires the legislative body to conduct a hearing and "thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved."

49. *See, e.g.*, Cal. A.B. 374, 1969 Reg. Sess. Senate Bill Nos. 1293 and 1294 and Assembly Bill No. 1622 in 1970 would have mandated third-party dispute-settlers.

50. Cal. A.B. 374, 1969 Reg. Sess. That bill would have required an otherwise optional formula for pensions paid to retired policemen, firemen, and other members of safety services.

51. *See* CAL. GOV'T CODE §§ 20560-69 (West 1963), *as amended*, (Supp. 1971).

would be practical in terms of either legal effect or economic feasibility is another matter. A more disturbing spectre remains the possibility that the legislature might at some future time attempt to impose similar mandates upon all local governments, whether they contract with the state system or not. Such a possibility, although not presently indicated by current proposed legislation, may ultimately result if the trend for state control of pension legislation is not checked.

Exemplary of state legislative efforts directed toward imposing mandatory third-party dispute-settling mechanisms are California Assembly Bill 98 of 1970 and Senate Bill 333 of 1971. Assembly Bill 98⁵² would have added new sections to the Myers-Milias-Brown Act to provide that when a public employer and any "recognized employee organization representing full-time peace officers or full-time firefighters" have failed to reach an agreement after discussions relating to wages, hours, and other terms and conditions of employment, the matter must be submitted to an arbitration panel consisting of three members "for determination."⁵³ Each side would have been required to appoint a member to the arbitration board and the two members thus appointed would have been authorized to appoint a third member. The legislation would have provided "the decision on award of the arbitration board shall be in writing and shall be conclusive upon the public agency and the employee organization."⁵⁴

Senate Bill 333⁵⁵ would have added a new chapter to the Government Code to be placed in the code immediately after the Myers-Milias-Brown Act. It is directed toward the relationship between local governmental agencies and "local safety employees," a term defined to mean "any city policeman, constable, deputy sheriff, deputy marshal, district attorney investigator, city fireman, county fireman, or fireman of any fire district of the state."⁵⁶ The legislation would require the governing body of a public agency or its representatives to meet and confer⁵⁷ with representatives of recognized employee or-

52. Assembly Bill 98 (Warren) of 1970 would have added new sections 3505.4, 3505.5 and 3505.6 to the Government Code.

53. Cal. A.B. 98, 1970 Reg. Sess., at 1.

54. *Id.* at 2.

55. Senate Bill 333 (Dills) of 1971 proposes to add chapter 10.5, consisting of sections 3525 through 3539, to the Government Code.

56. Cal. S.B. 333, 1971 Reg. Sess., at 3, *as amended*, June 4, 1971.

57. "Meet and confer" means the parties are obliged "personally to meet and confer within a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation." CAL. GOV'T CODE § 3505 (West Supp. 1971).

ganizations representing a majority of the agency's safety employees at the request of the employee organization.

If agreement is reached as a result of "meet and confer" sessions, the bill provides a written memorandum of the agreement is to be prepared and, if further legislative action is required, submitted to the governing body; *i.e.*, the city council.⁵⁸ Should no agreement be reached or if the governing body should refuse to approve the written memorandum, the bill declares such a state of facts to be an impasse and each party is to submit within ten days thereafter a position statement to the other party and to the governing body if it is involved.⁵⁹ Thereafter the parties, unless they agree otherwise, are required to go into mediation. When ten days go by and there is still no agreement, the parties are required to go to fact finding. After the findings are made public, if there is still an impasse, either party may request compulsory and binding arbitration by a three member board of review.⁶⁰

The bill further provides:

After such referral, the board of review shall acquire such facts, take such testimony, and interview such witnesses as it deems necessary, and shall, not more than 30 days after the referral unless a different time is mutually agreed to by the parties, present its findings and recommendations in written form to the parties. The findings and recommendations of the board of review shall be conclusive and binding upon the parties.⁶¹

A complicated procedure for picking the members of the arbitration board is also provided including selection of the third arbitrator from a list of candidates supplied by the American Arbitration Association, the Federal Mediation Conciliation Service and the State Conciliation Service.⁶²

Compulsory and binding arbitration, such as would result from the passage of the foregoing proposed legislative measures, is presently the most powerful threat to the ability of local governmental legislative bodies to maintain control over their own budgets. In any case involving interest negotiations⁶³ between employer and employee the arbitration

58. Cal. S.B. 333, 1971 Reg. Sess., at 4, *as amended*, June 4, 1971.

59. *Id.*

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 5-6.

63. The terms "interest negotiations" and "interest arbitration" are used herein in contradistinction to "grievance negotiations" and "grievance arbitration." A subject of negotiation or arbitration is a matter of interest where salaries, wages, fringe benefits and other terms and conditions of employment are being determined. It is a grievance matter when employees are complaining that the employer has not fulfilled the terms of agreement previously reached with the employees.

award is certain to cost the governmental employer money, through enlarged salaries, additional fringe benefits, or expenses for improved working conditions. Whether or not the award is excessive, the legislative body will have no choice but to fund the new benefits despite the contrary wishes of its own members or of the citizens and taxpayers.

Traditionally, public employers and their attorneys have argued that requiring a municipality to submit its labor disputes to some sort of binding arbitration would be to require an unlawful delegation of legislative power.⁶⁴ More recently, however, several states have adopted compulsory arbitration requirements at least toward some local employees. Pennsylvania and Rhode Island have enacted binding arbitration statutes for firemen and policemen,⁶⁵ while Wyoming has done the same thing for firemen only.⁶⁶ These statutes have been held constitutional in Pennsylvania and Wyoming.⁶⁷

In Rhode Island the statutes came under attack as an unlawful delegation of legislative power to a nongovernmental body. The Rhode Island Supreme Court rejected the argument, finding instead that the members of the arbitration panel were public officers authorized to exercise the sovereign powers of the municipality.⁶⁸ Similarly, one of New York's supreme courts has ruled that binding arbitration agreed to in a collective bargaining agreement is not an unconstitutional delegation of legislative power.⁶⁹

In stressing the undesirable effects of state legislation in the labor relations of local government, it is necessary to point out that not all third-party dispute settling techniques deprive local legislative bodies of the ability to control municipal affairs. It is only when one speaks

64. This argument is based on a line of cases beginning with *Doughterty v. Austin*, 94 Cal. 601, 28 P. 834, 29 P. 1092 (1892), involving delegation of its power by the state legislature. Its application to delegation of legislative power by city councils is made clear in *Kugler v. Yocum*, 69 Cal. 2d 371, 375, 445 P.2d 303, 305, 71 Cal. Rptr. 687, 689 (1968); *Stoddard v. Edelman*, 4 Cal. App. 3d 544, 548, 84 Cal. Rptr. 443, 444-45 (1970), and *City of Redwood City v. Moore*, 231 Cal. App. 2d 563, 575-77, 42 Cal. Rptr. 72, 81 (1965).

65. PA. STAT. tit. 43, §§ 217.1-217.10 (1971); R.I. GEN. LAWS ANN. §§ 28-9.1 to 28-9.2-14 (1969).

66. Wyo. Stat. 1957, ch. 1967, §§ 27-265 to 27-273.

67. *Harney v. Russo*, 435 Pa. 183, 255 A.2d 560 (1969); *State v. City of Laramie*, 437 P.2d 295 (Wyo. 1968).

68. *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969).

69. *Central School Dist. v. Litz*, 60 Misc. 2d 1009, 304 N.Y.S.2d 372 (Sup. Ct. 1969).

of "compulsory" or "binding" arbitration that concepts are considered which may result in ultimate loss of authority by a local legislative body over its own budget.⁷⁰ Where voluntary arbitration is involved, the question becomes a constitutional one of whether or not a local legislative body can delegate control over its own budget to a third party not directly answerable to the electorate. A question of intergovernmental relations arises where the state government mandates to local government the requirement of compulsory and binding arbitration, again forcing the local legislative body to surrender its control over the municipal purse strings to a third party.

Conclusion

Municipal lawyers, deeply engaged in the pressing day-to-day problems of their clients, often are unaware of the continuing struggle between state and local governments over the right to determine the destiny, or at least significant parts of the destiny, of each local community in California. Ultimate control of government in a very real and practical sense lies in the hands of those who hold the power of appropriation of public funds. It seems proper that the appropriation power should be held by officials responsible to an electorate from which most of the funds in question are raised.

At the local level, perhaps at every level, the bulk of the governmental budget is spent for manpower.⁷¹ Whenever legislation enacted by the state operates to remove from the hands of local legislative bodies the authority to make the ultimate decisions relating to expenditure of funds for public personnel purposes it significantly deprives them of control over the governmental entity they were elected to supervise.

At the present time, the California Legislature has not enacted any labor legislation that has the effect of depriving local entities of

70. Arbitration can be either "advisory" or "binding," "voluntary" or "compulsory." It is "advisory" when the parties are not bound legally by the result, "binding" when they are. The arbitration is "voluntary" when it is undertaken on agreement of the parties. It is "compulsory" when it is required by law. See Anderson, *Public Employee Bargaining*, 1 URBAN LAW. 312 (1969); Stutz, *The Resolution of Impasses In the Public Sector*, 1 URBAN LAW. 320 (1969).

71. About 69.4% of the City of San Diego's annual expenditures from general government funds during Fiscal Year 1971-72 are budgeted for salaries and retirement. City of San Diego, *Annual Budget, Fiscal 1972*, p. ii. Throughout the United States, municipal expenditures for personnel constitute some 64.3% of current operations expenditures. INTERNATIONAL CITY MANAGEMENT ASSOCIATION, *THE MUNICIPAL YEAR BOOK 1970*, at 226-27.

any substantial degree of power. Proposed measures, however, indicate an increasing legislative intent to make labor relations a matter of statewide concern. Should there be a judicial determination that labor problems are not the municipal affairs of the local entities, and are statewide by nature, the concept of charter cities in California will become a mere fiction with the state effectively in control of the bulk of the municipal function.

