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CONSTRAINTS ON LOCAL GOVERNMENTS IN PUBLIC EMPLOYEE BARGAINING

*Charles M. Rehmus**

I. INTRODUCTION

SEVERAL years ago, three adjoining school districts in Michigan agreed to cooperate in establishing a high school vocational education program. Vocational education is expensive, requiring substantially more funds for facilities and staff than most other educational programs. The contemplated three-district plan would have allowed each district to provide its students with a vocational curriculum far superior to that which any single district could have offered alone.

While these plans were under consideration, the Michigan legislature in 1965 amended its Public Employment Relations Act of 1947.¹ The 1965 amendments imposed a duty upon school districts, cities, and counties to bargain collectively with public employees on "wages, hours and other terms and conditions of employment."² The new legislation gave public employees the right to select exclusive bargaining agents by means of a majority vote in an appropriate bargaining unit, and it obligated public employers to bargain in good faith with the bargaining representatives thus certified. If the employing agency violated any of its statutory duties, the bargaining agent could file an unfair labor practice charge with the Michigan Labor Mediation Board. The new legislation did not, however, eliminate that part of the original 1947 legislation which prohibited strikes by public employees.

Pursuant to this new legislation, teacher organizations in each of the three Michigan school districts referred to above qualified for recognition and began collective bargaining with their respective school boards. In two of the districts, bargaining over salaries proved difficult. Without a master contract, the teachers threatened not to report to the classrooms for the opening of the fall semester. However, in both of these districts the crisis was averted; the school boards simply took from their reserve operating funds the amounts that had

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1. MICH. COMP. LAWS ANN. §§ 423.201-216 (1967).

2. *Id.*

been allocated for the new vocational education program and applied them toward improvements in faculty salary schedules. As a result, plans for the cooperative venture had to be dropped.

The point of this story is not to decry public employee bargaining. The teachers in the districts involved undoubtedly had legitimate complaints over their salaries. Readjustments in teacher salary schedules have long been overdue. The critical national shortage of qualified and certified teachers is too well known to require exposition. But vocational education is also of great importance to our society. Should it have been shunted aside because of what happened at the bargaining table? Unfortunately, the boards of education involved really had *no choice* but to divert funds from this promising cooperative program. Despite the continued prohibition of strikes by public employees in the 1965 legislation, Michigan has thus far been unable effectively to prohibit teacher strikes.³ The school boards either had to find the money to settle their teacher disputes or suffer a prolonged extension of summer vacation.

Some of the most experienced and distinguished students and practitioners of industrial relations in the country take the position that all strikes against the government must be prohibited.⁴ Their basic view is that such strikes undermine our political democracy and are, therefore, intolerable. This position, although argued with logic and brilliance, is from the point of view of local government administrators merely an exercise in coruscating on thin ice.

Public employees who are dissatisfied with the offers made to them at the bargaining table have shown themselves to be extraordinarily resourceful in devising effective means for bringing pressure upon their employers. While it is one thing to say that strikes and other lesser forms of disruptive "work action" are or should be illegal, it is quite another to formulate enforceable sanctions to deal effectively with these pressures.

If fifty per cent of a police force refuses to work overtime or to write traffic tickets, is discharge an appropriate punishment? Alternatively, what should administrators do if police officers enforce the

3. By virtue of *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206 (1968), the injunctive remedy is available against strikes by public employees. The granting of such an injunction is subject to traditional equity considerations, however, and will not automatically be granted against teacher strikes.

4. See, e.g., A. Anderson, *The Developing State of Collective Bargaining for Public Employees* (address before the University of Chicago Conference on Public Employees and Collective Bargaining), Feb. 5, 1965 (mimeograph); Hildebrand, *The Public Sector*, in *FRONTIERS OF COLLECTIVE BARGAINING* 125 (1967).

traffic laws so rigidly that they increase the rate of ticketed violations fivefold? If most of a city's bus drivers come down with "blue flu," is a two-week disciplinary suspension a valuable remedy? What sanction can be used against firemen who are available to fight fires but who refuse to do inspection, clean-up, or paper work in connection with their jobs? If three quarters of a district's school teachers are willing to resign rather than submit to an injunction, where can replacements be found? Absent effective means for eliminating these pressures (and none has yet been found), local administrators who are responsible for collective bargaining with public employees must have the freedom and flexibility to meet at least the minimum of employee demands. In most states the administrators of local government have not yet been given such latitude. If public employee bargaining is to operate effectively, state legislatures must grant greater freedom to local governmental units to raise funds and to determine the elements of the employment relationship. Failing this, the unwavering demands of employees for a major voice in setting their wages and working conditions will mean more bargaining impasses, strikes, and disruptive work pressure with disastrous results for the public.

It is to the basic financial and administrative constraints upon the powers of local governing units that this Article is primarily directed. The examples used are taken largely from Michigan experience and Michigan law. The same limitations upon the financial and administrative powers of local government, however, exist in almost all other states. The Michigan experience with public administration and public employee bargaining should provide both a warning and a guide to other states as they cope with the so-called public employee revolution.

II. FINANCIAL LIMITATIONS ON LOCAL GOVERNMENTAL UNITS

Three major sources of revenue are available for financing government: taxes on sales, on income, and on property. Of these, the property tax is the workhorse of local government; it accounts for ninety per cent of local tax revenues in the United States.⁵ Local governments in Michigan—municipalities, counties, and school districts—have no authority to levy sales taxes,⁶ and the development

5. COMMITTEE FOR ECONOMIC DEVELOPMENT, *A FISCAL PROGRAM FOR A BALANCED FEDERALISM* 21 (1967).

6. MICH. COMP. LAWS ANN. § 205.51 (1967).

of city income taxes is just beginning.⁷ Thus, Michiganders have traditionally relied heavily on the property tax not only to finance city and village governments, but also to support townships, counties, and school districts. In many areas, three or four local governing units, not to mention special district authorities, all depend upon the same overburdened property tax base. Nevertheless, the state legislature, jealous of its own tax sources and protective of its citizens, has not permitted much change in local taxing structure. The new Michigan Constitution adopted in 1963 theoretically delegated broad taxing powers to home rule charter cities.⁸ Despite this, the state legislature has reserved most nonproperty taxes to itself and has prohibited municipalities from levying such taxes without specific legislative authorization.⁹ Moreover, Michigan, like most states, limits the total amount of millage that can be levied upon property without specific authorization from the voters.¹⁰ The specific constitutional limit in Michigan upon a city council's unrestricted taxing power is eighteen mills, and another fifteen mills must be divided among township boards, county supervisors, and school boards.¹¹

Even those cities that desire to tax themselves more heavily often find that the legislature forces them to beg for the privilege. States that permit cities to levy income taxes frequently place limitations upon the amounts that can be obtained through this resource. It is common to find statutes which restrict municipalities to a flat rate rather than a progressive income tax, limit the percentage of residents' income which they can tax, and place even more severe limitations upon the percentage of commuters' incomes which they can reach. Michigan, for example, limits city income taxes to a flat rate of one per cent and the tax on commuters' incomes to half that amount.¹² Moreover, state legislatures commonly allow voters a veto over new city income taxes, a privilege seldom if ever accorded for similar state levies. Under the uniform Michigan city income tax law, the imposition of city income taxes is subject to a protest refer-

7. At the present time, fewer than 200 cities in the United States levy an income tax, but growth of this form of taxation will undoubtedly expand rapidly.

8. See MICH. CONST. art. 7, § 22.

9. MICH. COMP. LAWS ANN. § 141.91 (1967).

10. MICH. CONST. art. 9, § 6. Pennsylvania is an important exception. It is alone among the states whose public employees are strongly organized and which permit local governing bodies to levy unlimited property taxes without specific voter authorization.

11. MICH. CONST. art. 9, § 6.

12. MICH. COMP. LAWS ANN. § 141.611 (1967).

endum.¹³ In order for city councils to obtain an affirmative vote in these referendum elections, they must often promise the voters major property tax reductions. Thus, the amount of new money generated is limited, and much of the purpose of the new taxes is defeated. Related to this, the Michigan Constitution prohibits cities from issuing general obligation bonds without an affirmative vote of property owners.¹⁴ Consequently, many cities, rather than attempting to get the voters to approve capital bonds, squeeze capital improvements out of their operating millage and further limit the resources available for short-run operational flexibility.

These constitutional and legislative constraints upon the taxing powers of home rule charter cities are sometimes aggravated by the cities themselves. Some cities have in their original charters limited the total operating millage which they can levy administratively to an amount lower than the state-imposed twenty-mill maximum.¹⁵ This handicaps them further in generating the funds necessary to meet employee demands.

In summary, a state-imposed obligation upon local governments to negotiate wages and fringe benefits inevitably entails increased budget expenditures for employee compensation. If the state simultaneously maintains existing limitations upon the unilateral taxing power of local governments, the situation often becomes intolerable. Local government administrators are helplessly caught between employee compensation demands, public unwillingness to vote for increased operating millage levied on property, and the state legislature's reluctance to allow local governments the freedom to impose income, sales, or excise taxes.

An example which highlights the problem recently occurred in Detroit. Following both a "ticket-writing strike" and a "blue flu" epidemic among police officers, the disputants finally referred the issue of police salaries to a neutral three-member panel for recommendations. The panel found that police officers' salaries should be substantially increased. Money to pay the recommended increases could be found on an emergency basis within Detroit's current operating budget, but beyond the first year, the panel concluded:

the City of Detroit urgently needs new taxing authority which can be granted only by the State Legislature. . . . Detroit is in serious

13. MICH. COMP. LAWS ANN. § 141.503 (1967).

14. MICH. CONST. art. 2, § 6.

15. Only six of the sixteen largest cities in Michigan are presently levying the twenty-mill maximum.

financial trouble, and we join others who have suggested that the State Legislature raise the authorized level of the municipal income tax, to restore the authority to levy local excise taxes, and to revise the 2 percent restriction on property tax levies.¹⁶

The problem of financial straight-jacketing in the face of collective bargaining pressure is equally serious for school districts. Collective bargaining for Michigan public school teachers appears to have produced annual pay increases averaging ten to twenty per cent higher than those which the teachers would otherwise have received.¹⁷ Over all, the salaries of Michigan teachers have increased by about one third in the last three years. Most, if not all, of these increases were long overdue, but they resulted in severe pressure on school district budgets. In the 1966-1967 academic year, the first full year of teacher bargaining under the 1965 Act, these increases in teacher compensation were paid for largely from minor economies and from new revenues. Among the new revenue sources were increases in state aid, imposition of previously authorized millage, and growth in assessed valuation. In the second full year of collective bargaining, however, school districts began to use less desirable sources of funds to pay the wage increases demanded by organized teachers. Administrators generated new sources of funds through liquidation of operating reserves and contingency funds, transfer of millage from building and site reserves to operating accounts, and substantial program cutbacks. Most important—and despite the fact that Michigan law is generally construed to forbid school districts from deficit financing¹⁸—a quarter of the school districts studied in one survey showed a deficit by the end of fiscal 1968.

The financial constraints on local governments constitute the most serious problem they face in coping with public employee collective bargaining. However, public officials must contend with at least three other problems which, although related to financing, are not as severe as the shortage of funds per se. The first problem is that of coordinating the budget-making process with collective bargaining. An acute aspect of this problem is the difficulty which local governmental units face in meeting budget deadlines, particularly when the state legislature itself imposes the deadlines. The collective bar-

16. Detroit Police Dispute Panel, Findings and Recommendations on Unresolved "Economic" and Other Issues 32-33 (Feb. 27, 1968, unpublished mimeo).

17. The statements in this paragraph are based upon C. REHMUS & E. WILNER, *THE ECONOMIC RESULTS OF TEACHER BARGAINING* (1968).

18. 1 1959-1960 BIENNIAL REP. ATT'Y GEN. 147 (Mich. 1959).

gaining process often entails months of negotiations, mediation, and fact-finding or arbitration; it does not respect time limits. Yet budgets must be filed under the law, and this requires local officials to make preliminary estimates. As a result, municipalities may often feel constrained to take rigid positions based upon estimates which were submitted to the legislature before bargaining is completed. A second aspect of the coordination problem arises after budget submission deadlines have been passed: the issue then is whether negotiated pay increases should apply prospectively from the date of the agreement or retroactively from the beginning of the budget period. Finally, it may be difficult to synchronize legislative decisions concerning the amount of funds to be allocated to local governmental units with local governmental responsibilities in the bargaining process. For instance, teacher bargaining for the 1967-1968 school year in Michigan proved exceptionally difficult because the state legislature failed to act on the school aid formula until August 1967. Consequently, spring and summer bargaining in many school districts dragged on beyond budget submission deadlines because school administrators were unable to predict how much state funding would be available to help them meet teacher demands. The state legislature avoided this problem the following year by acting on the school aid formula in April, well before budget deadlines. Perhaps as a result, a smaller number of bargaining impasses occurred during teacher negotiations for the 1968-1969 school year. This problem of coordinating the budget-making process with collective bargaining is more an irritating than an insurmountable obstacle. The difficulties can be minimized by using open-ended budgets, resorting to short-term internal and external borrowing, allowing more time for bargaining before budget deadlines, and negotiating collective bargaining contracts for longer terms than are currently settled upon.

A second complication of collective bargaining in the public sector results from the tradition that public budgets and accounts are not secret documents. In the private sector the employer may under most circumstances refuse to disclose his profit and loss figures, but the public employer is forced to open his books to all interested persons. As a result, any operating reserves or contingency funds that may be available simply become targets for the employees to shoot at. Prudent management—whether in business or in public administration—ordinarily requires the retention of some operating reserves. It is not reprehensible for a public administrator to maintain a re-

serve account to pay operating costs in periods before tax money becomes available or to provide for unforeseen contingencies. In practice, however, even if cities and school districts have not had to resort to deficit financing in order to meet collective bargaining demands, the retention of operating reserves has proved almost impossible. Many cities and most school districts in Michigan, their reserves depleted to satisfy the bargaining demands of employees, are now operating on little better than a year-to-year cash basis. In jurisdictions where reserves remain, this result has often been accomplished by padding various budget items—a recurrent practice but hardly one to be encouraged.

A third anomaly of collective bargaining in the public sector is that the union can often invade the management decision-making structure. Particularly in public school and junior college districts, organized teacher groups have succeeded in electing their members, relatives, or sympathizers to school and governing boards. Under these circumstances it is often impossible for the management decision-making group to hide its bargaining strategy and tactics from employees. Democratic government does allow almost anyone to run for office, but this tactic may make collective bargaining a farce.

III. OTHER STATE-IMPOSED CONSTRAINTS ON COLLECTIVE BARGAINING

State legislatures have imposed many limitations upon the authority of local governmental units to manage their own personnel systems. One of the most common limitations is the statutory or de facto requirement that home rule cities establish a civil service and merit system for recruitment and promotion of personnel.¹⁹ This requirement, although beneficial in its thrust and general impact upon city government, operates to reduce substantially the flexibility of local governmental units at the collective bargaining table. State legislatures have seldom given enough thought to the problems that may be encountered when they impose a collective bargaining requirement covering "terms and conditions of employment"²⁰ upon an existing merit structure.

The civil service concept ordinarily contemplates the establishment of a nonpartisan board or commission at the local or state level

19. 1967 Executive Committee of the National Governors' Conference, Preliminary Report of Task Force on State and Local Government Labor Relations 36-37.

20. See, e.g., MICH. COMP. LAWS ANN. § 423.215 (1967).

with rulemaking authority to assure adherence to the merit principle. In practice, merit systems have over the years grown to encompass many aspects of employee relations and personnel management other than recruitment, classification, and promotion. These new areas of concern include the handling of grievances, employee training, salary administration, safety, morale, and attendance control programs—the very subjects that most employee organizations regard as appropriate for bargaining. If an independent civil service commission has authority over bargainable matters, then perhaps bargaining responsibilities should lie with the commission. But as it is, authority to bargain is usually vested in the chief executive officer of the local government unit. If he has the duty to bargain over the terms and conditions of employment while authority over many personnel matters remains with an independent commission, the scope of negotiations will be unduly restricted.

This problem is not insoluble. If the principle of collective bargaining by local governments is to be effectuated, all nonmerit functions should be transferred from the civil service commission to a personnel department under the chief executive officer of each local unit. In practice, however, such a transfer of authority has seldom been made. In Massachusetts, for example, the state collective bargaining law for public employees specifically states that it shall not “diminish the authority and power of the civil service commission, or any retirement or personnel board established by law”²¹ The Wisconsin public employment relations statute²² excludes from the mandatory scope of bargaining a large range of matters established by law or governed by civil service. In practice, in localities where public employee collective bargaining is fully developed, informal bargaining arrangements to deal with these problems are already appearing.²³ At the very least, any state considering collective bargaining legislation for public employees should carefully analyze its personnel system in order to minimize the potential conflict between bargaining relationships, existing merit systems, and the rules promulgated by civil service boards and commissions.

21. MASS. ANN. LAWS ch. 149, § 178N (Supp. 1967).

22. WIS. STAT. § 111.91 (Supp. 1967).

23. For example, Michigan's Wayne County has created special labor boards with the power to negotiate collective agreements with employees. The labor board for a negotiation is composed of a representative of the county Civil Service Board, a representative of the county Board of Supervisors, and a representative from the particular administrative unit involved (such as the county Highway Department).

State legislatures contemplating collective bargaining in the public sector should also ensure that they have not imposed undue restrictions upon the permissible scope of bargaining. Some years ago the Michigan legislature imposed upon its municipalities a fifty-six-hour maximum duty week for firemen.²⁴ This law not only raised municipal fire protection costs substantially, but also eliminated from the scope of bargaining one of the major subjects which should have been left there. In Pennsylvania, the state legislature prohibited combined police-fire departments,²⁵ another potentially bargainable subject. Laws of this kind place many local governments, particularly smaller communities, in a Procrustean bed. These municipalities are obligated to bargain over wages and hours, yet uniform state laws fundamentally weaken their negotiating position by creating mandatory high-cost requirements without the freedom to trade cost reductions in one area for new expenditures in another.

State legislatures have also limited the negotiating flexibility of school boards. For example, the Attorney General of Michigan has recently ruled that under existing law boards of education lack statutory authority to award severance pay, to pay for any unused portion of sick leave at the end of a school year or upon termination of employment, or to reimburse teachers' tuition for college credit courses beyond the baccalaureate degree.²⁶ Under the Michigan collective bargaining statute, school boards had assumed prior to the Attorney General's ruling that they were obligated to bargain on all of these subjects, and concessions had in fact been made on many. Probably a majority of existing teacher collective bargaining agreements in Michigan call for one or more of these payments that have now been declared to be unlawful. The attempt of school boards to negotiate such benefits back out of existing contracts is likely to engender bitter conflict. A new grant of authority to make the disputed payments would seem to be a preferable alternative.

Another important source of conflict is the discrepancy between union security arrangements in collective bargaining agreements and the provisions of state teacher tenure laws. The Michigan Labor Mediation Board has ruled that union security—specifically, an employee demand for an agency shop—is a mandatory subject of bar-

24. MICH. COMP. LAWS ANN. § 123.841 (1967).

25. PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1969) (by implication).

26. Mich. Att'y Gen. Op. No. 4583 (Oct. 11, 1968), No. 4667 (Feb. 24, 1969) (clarifying no. 4583).

gaining, at least so far as home rule counties are concerned.²⁷ A number of Michigan school boards, assuming that this ruling applied to them as well, have agreed to agency shop clauses in their master contracts. These provisions ordinarily call for terminating the employment of bargaining unit members who refuse to pay either union dues or an equivalent agency fee. Yet a basic condition of the Michigan Teacher Tenure Act is that a school board must show a "reasonable and just cause" relating to job performance for terminating a tenured teacher's employment.²⁸ This conflict between Michigan's Public Employment Relations Act and its Teacher Tenure Act must ultimately be resolved by the state supreme court. In the meantime, the conflict illustrates graphically the kinds of problems that can arise when a legislature mandates collective bargaining and simultaneously continues to legislate terms or conditions of employment for the employees of local governmental units.

IV. CONCLUSION

A classic dilemma faces the management negotiator who has been instructed, "Don't give them anything, but don't let them strike." Increasingly, administrators of local units of government find themselves trying to carry out such impossible orders. The constraints that state constitutions and state legislatures place on local governing units have existed for many years. Most of them find their origins in jealousy over taxing power and the fear that locally elected and appointed officials might prove unresponsive to the state legislature's standards of "good government." Many limitations have been retained in an attempt to remove certain subjects from local collective bargaining altogether. In an environment where local administrators must negotiate their employees' wages and working conditions with employee representatives, these limitations on local authority are real obstacles to effective collective bargaining.

Freedom to trade one proposal for another and to balance cost reductions in one area against new expenditures in another is essential to bargaining flexibility. Freedom to raise new money to meet employee demands, or to withstand the consequences of refusal, is an equally essential part of the collective bargaining process. Much of this freedom and flexibility is presently denied local administra-

27. Oakland County Sheriff's Dept. & Metro. Council No. 23, Case No. C66 F-63 (Michigan Labor Mediation Bd. Jan. 10, 1968).

28. MICH. COMP. LAWS ANN. § 38.101 (1967).

tors. As a result, local public employee bargaining has resulted in impasses and employee pressure tactics more often than should have been necessary. Many of these problems would not be so serious if public employee bargaining were merely a transitory phenomenon. But Pandora's box has been opened. Employees who have gained a real voice in setting their compensation levels and their working conditions will not readily give up the collective bargaining process which has so often brought them real benefits. It is essential, therefore, that the administrators of local governmental units be given greater freedom than they now have to negotiate and to raise funds. Continued failure to grant them authority commensurate with their bargaining responsibilities is hardly likely to be in the public interest.