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Patricia N. Blair

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State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Mnnicipal Employees

*Patricia N. Blair**

I. INTRODUCTION: THE ESTABLISHMENT OF THE RIGHT TO BARGAIN COLLECTIVELY

In 1816, the federal service under President James Madison consisted of 4,000 employees.[1] By 1950, the federal government had 2,120,000 persons on its payroll, while state and municipal governments employed another 4,290,000.[2] Today there are 2,720,000 federal employees[3] and 10,150,000 employees of state and municipal governments.[4] The emergence of a new labor movement aimed at attaining for public employees the right to bargain collectively, a right guaranteed to workers in the private sector by the 1935 National Labor Relations Act (NLRA),[5] recently has accompanied this expansion of government employment.[6] National legislation, however, has never extended the right to bargain collectively to public employees; indeed, all governments—federal, state, and local—traditionally have prohibited, either by statute or judicial decision, collective bargaining in their public serv-

* Associate Professor of Law, Wayne State University Law School. B.S., 1965, J.D., 1968, Indiana University School of Law; LL.M., 1969, University of Michigan School of Law. This article was submitted by the author in partial fulfillment of the requirements for the S.J.D. degree, University of Michigan School of Law.

1. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 710 (1965).

2. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 429 (89th ed. 1968).

3. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 421 (92d ed. 1971).

4. *Id.*

5. National Labor Relations Act, 49 Stat. 449, *as amended*, 29 U.S.C. §§ 151-68 (1970).

6. *See, e.g.*, Jones, *Union Militancy of Nation's 10.5 Million Public Employees Is Found Increasing*, N.Y. Times, April 2, 1967, at 79, col. 1.

ices.[7] In 1937, President Franklin D. Roosevelt stated the view that prevailed throughout the United States prior to the 1960's:[8]

> 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 the government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administratives and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.[9]

In spite of this early resistance, public employer collective bargaining is now an established fact at the federal level and in the majority of state and local governments. The transition from uniform disapproval to majority acceptance of public employer collective bargaining began in 1955, when New Hampshire adopted legislation authorizing town governments to engage in collective bargaining with public employee unions.[10] Two years later the Minnesota legislature enacted a law requiring all public employers to meet at regular intervals with representatives selected by their workers in order to negotiate over working conditions in the public service.[11] By 1959, Wisconsin[12] and Massachusetts[13] similarly had enacted legislation authorizing municipalities to bargain collectively with representatives chosen by municipal employees, and Alaska had adopted a law empowering all its "political subdivisions" to conclude collective bargaining agreements.[14]

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7. For an excellent review of the legal theories utilized by courts to invalidate public employer collective bargaining in the absence of enabling or prohibiting legislation see Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539 (1969).

8. There were, of course, exceptions to this almost universal disapproval of public employee collective bargaining. At the federal level, both the Tennessee Valley Authority and Department of the Interior had extensive union relations including the signing of written agreements during the 1950's. *See* Avery, *The TVA and Labor Relations: A Review*, 16 J. POL. 413 (1954); Terry, *Collective Bargaining in the U.S. Department of the Interior*, 22 PUB. AD. REV. 19 (1962). At the local level, Philadelphia, Pennsylvania, New Haven, Connecticut, and Cincinnati, Ohio, began negotiations with unions representing their public employees in the mid-50's. *See* Klaus, *Labor Relations in the Public Service: Exploration and Experiment*, 10 SYRACUSE L. REV. 183 (1959).

9. Letter from Franklin D. Roosevelt to Luther C. Steward, President of the National Federation of Federal Employees, Aug. 16, 1937, in C. RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 436-37 (1946).

10. N.H. REV. STAT. ANN. § 31:3 (1970) (originally enacted as Law of July 14, 1955).

11. MINN. STAT. ANN. § 179.52 (1966), *as amended*, (Supp. 1972).

12. Wis. Laws ch. 501, § 1 (1959), *as amended*, WIS. STAT. ANN. § 111.70 (Supp. 1972).

13. MASS. ANN. LAWS ch. 40, § 4C (1961), *as amended*, ch. 149, §§ 178G-N (Supp. 1971).

14. ALAS. STAT. § 23.40.010 (1962).

On January 17, 1962, President John F. Kennedy issued Executive Order 10988,[15] which extended the rights of unionization and collective bargaining to federal employees. Executive Order 10988 was, however, more comprehensive than its earlier state counterparts. While existing state laws merely authorized or required various public employers to engage in collective bargaining, Executive Order 10988 established a complete framework for management-employee relations similar to the one prevailing in the private sector under the NLRA.[16] The Order not only recognized the right of federal employees to engage in collective bargaining, but also set forth methods for defining the appropriate collective bargaining unit and ascertaining the employees' preference on which union, if any, should represent them in negotiations with management. Executive Order 10988 also adopted the NLRA concept of exclusive recognition for the bargaining agent selected by a majority of the workers in the appropriate unit, defined the scope of bargainable subjects, and prohibited specified activities by management and labor organizations.

Since the promulgation of Executive Order 10988, 34 states have adopted legislation either permitting or requiring designated public employers[17] to bargain collectively with their employees and, in many instances, to enter binding contracts covering those matters on which the parties agree.[18] Some of the recent state laws, following the pattern

15. 3 C.F.R. 521 (Comp. 1959-63), 5 U.S.C. § 631 (1964), *revoked by* Exec. Order No. 11,491, 3 C.F.R. 191 (Comp. 1969), 5 U.S.C. § 7301 (1970), *as amended*, 3 C.F.R. 505 (1972). On October 29, 1969, President Richard M. Nixon issued Executive Order 11491, which superseded Executive Order 10988. Executive Order 11491 aligns labor-management relations in the federal sector closely with labor-management relations in the NLRA-regulated private sector, but retains unique concepts introduced by Executive Order 10988. *See* note 16 *infra*. Executive Order 11491, however, does not apply to United States Postal Service employees. The Postal Reorganization Act of 1970, 39 U.S.C. §§ 1201-09 (1970), instead grants them virtually all rights—except the right to strike—enjoyed by private industrial workers under the NLRA.

16. Executive Order 10988, however, contained some unique features that have no counterpart in the NLRA-regulated private sector. For example, it provides for advisory grievance arbitration and for several varieties of nonexclusive as well as exclusive recognition of unions as bargaining agents.

17. Some states have a single statute that either authorizes or requires all state public employers to engage in collective bargaining. Other states divide their public employers into categories, such as school boards or fire departments, and by separate legislation authorize or require each different group to engage in collective bargaining. Still other states have enacted single public employer collective bargaining acts that authorize or require only a limited group of public employers to engage in collective bargaining.

18. ALA. CODE ANN. tit. 37, § 450(3) (Supp. 1971) (firemen); ALAS. STAT. § 14.20.550 (1971) (teachers); ALAS. STAT. § 23.40.010 (1962) (public employees generally); CAL. EDUC. CODE § 13082 (West 1969) (teachers); CAL. GOV'T CODE § 3505 (West Supp. 1972) (municipal employees); CAL. GOV'T CODE § 3525 (West Supp. 1972) (state employees); CAL. LABOR CODE § 1962 (West 1971) (firemen); CAL. PUB. UTIL. CODE § 70120 (West 1965) (transit work-

set by Executive Order 10988 and the NLRA, establish criteria for defining the appropriate collective bargaining unit, provide for the exclusive recognition of bargaining agents, define the scope of negotiable subjects, and designate particular activities as unfair labor practices.[19]

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ers); CONN. GEN. STAT. REV. § 7-468 (Supp. 1969) (municipal employees); CONN. GEN. STAT. REV. § 10-153(d) (Supp. 1969) (teachers); DEL. CODE ANN. tit. 2, § 1613, tit. 19, § 801 (Supp. 1970) (transportation workers); DEL. CODE ANN. tit. 14, § 4001 (Supp. 1970) (public school employees); DEL. CODE ANN. tit. 19, § 1301 (Supp. 1970) (public employees generally, except teachers and elected or appointed public officials); Florida Firefighters Act, 4 LAB. REL. REP. 19:214a (Jan. 1, 1973); FLA. STAT. ANN. § 839.221 (1965) (public employees); HAWAII REV. LAWS § 89-3 (Supp. 1971) (public employees generally); IDAHO CODE, § 44-1802 (Supp. 1971) (firemen); ILL. ANN. STAT. ch. 111 2/3, § 328 (Smith-Hurd 1966) (transit workers); KAN. STAT. ANN. § 72-5414 (Supp. 1971) (teachers); KAN. STAT. ANN. § 75-4328 (Supp. 1971) (public employees except supervisors, teachers, elected and management officials); Ky. Firefighters Act, 4 LAB. REL. REP. 27:217 (April 17, 1972); Ky. Police Act, 4 LAB. REL. REP. 27:225 (June 16, 1972); LA. REV. STAT. ANN. § 23:890 (Supp. 1972) (transit workers); ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1972) (municipal employees); MD. ANN. CODE art. 64B, § 37(b) (1972) (transit workers); MD. ANN. CODE art. 77, § 160 (1969) (teachers); MASS. ANN. LAWS ch. 149, § 178(F) (Supp. 1971) (state employees); MASS. ANN. LAWS ch. 149, § 178(H) (Supp. 1971) (municipal employees); MASS. ANN. LAWS ch. 161A, § 19 (1970) (transit workers); MICH. STAT. ANN. § 17.455(9) (1968) (public employees); MINN. STAT. ANN. § 179.65 (Supp. 1972) (public employees generally); MO. ANN. STAT. § 105.510 (1966) (all public employees except police, deputy sheriffs, and teachers); MONT. REV. CODE ANN. § 25-6119 (1971) (teachers); NEB. REV. STAT. § 79-1287 (1968) (teachers); NEV. REV. STAT. § 288.150 (1971) (local government employees); N.H. REV. STAT. ANN. § 31:3 (1970) (municipal employees); N.H. REV. STAT. ANN. § 98-C:2 (Supp. 1971) (state employees); N.H. Policemen's Collective Bargaining Act, 4A LAB. REL. REP. 39:205 (May 1, 1972); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1972) (all public employees); N.Y. CIV. SERV. LAWS § 203 (McKinney Supp. 1972) (all public employees); N.D. CENT. CODE § 15-38.1-08 (1971) (teachers); OKLA. STAT. ANN. tit. 11, § 548.4 (Supp. 1972) (firemen, policemen, and municipal employees); OKLA. STAT. ANN. tit. 70, § 509.2 (1972) (teachers); ORE. REV. STAT. § 243.730 (1971) (all public employees except teachers); ORE. REV. STAT. § 342.450 (1971) (teachers); PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1972) (police and firemen); PA. STAT. ANN. tit. 43, § 1101.401 (Supp. 1972) (all public employees except police, firemen, and transit employees); PA. STAT. ANN. tit. 53, § 39951 (Supp. 1972) (transit workers); R.I. GEN. LAWS ANN. § 28-9.1-6 (Supp. 1971) (firemen); R.I. GEN. LAWS ANN. § 28-9.2-6 (Supp. 1971) (policemen); R.I. GEN. LAWS ANN. § 28-9.3-4 (1968) (teachers); R.I. GEN. LAWS ANN. § 28-9.4-3 (1968) (municipal employees); R.I. GEN. LAWS ANN. § 36-11-1 (Supp. 1971) (state employees); S.D. COMP. LAWS ANN. § 3-18-2 (Supp. 1972) (all public employees); VT. STAT. ANN. tit. 3, § 903 (Supp. 1972) (state employees); VT. STAT. ANN. tit. 16, § 1982 (Supp. 1972) (teachers); VT. STAT. ANN. tit. 21, § 1703 (Supp. 1972) (municipal employees); WASH. REV. CODE ANN. § 28A.72.030 (1970) (teachers); WASH. REV. CODE ANN. § 41.56.010 (Supp. 1971) (municipal and state employees); WASH. REV. CODE ANN. § 53.18.020 (Supp. 1971) (port district employees); WIS. STAT. ANN. § 66.94(29) (1965) (transit workers); WIS. STAT. ANN. § 111.70(2) (Supp. 1972) (municipal employees); WIS. STAT. ANN. § 111.82 (Supp. 1972) (state employees); WYO. STAT. ANN. § 27-266 (1967) (firemen).

19. *See* CONN. GEN. STAT. REV. § 7-467 to -478 (Supp. 1969); DEL. CODE ANN. tit. 19, § 1301-12 (Supp. 1970); HAWAII REV. LAWS § 89-3 (Supp. 1971); ME. REV. STAT. ANN. tit. 26, § 961-72 (Supp. 1972); MASS. ANN. LAWS ch. 149, §§ 178D, 178F-178N (Supp. 1971); MINN. STAT. ANN. §§ 179.61-.77 (Supp. 1972); MO. REV. STAT. § 105.500.530 (1966); N.J. REV. STAT. ANN. § 34:13A-1 to -11 (Supp. 1972); N.Y. CIV. SERV. LAW §§ 200-14 (McKinney Supp. 1972); R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (Supp. 1972); S.D. COMP. LAWS ANN. §§ 3-18-1 to -17

A few state laws even create a board or commission that is similar to the National Labor Relations Board and is charged with administering the provisions of the act.

Many of the new state public employment labor laws, however, are not so comprehensive. These less extensive statutes merely authorize public employers to engage in collective bargaining with their employees, thereby licensing the courts and the parties involved to resolve—without legislative guidance—problems concerning the appropriate bargaining unit, union recognition, the scope of bargaining, and the tactics of labor and management.[20]

The extent to which a public employment labor act regulates the collective bargaining process will, of course, affect the character as well as the resolution of problems that arise during subsequent bargaining efforts. Nevertheless, differences in the laws approving public employer collective bargaining should not obscure the realization that all of these laws were enacted for substantially similar reasons. One explanation for the rapid enactment of public employment labor laws stems from the growing strength of labor organizations in the public service. Although total union membership in the United States increased by only six percent between 1964 and 1966,[21] the memberships of the American Federation of State, County, and Municipal Employees, the American Federation of Government Employees, and the American Federation of Teachers increased by twenty, forty-two, and fourteen percent respectively during that same period.[22] Strengthened by their expanded memberships, public employee unions consequently have become potent political forces directing substantial resources toward lobbying for the right to bargain collectively. Indeed, their members, seeing the relatively favorable wages and fringe benefits that private employees have gained through collective bargaining, consider the right of collective bargaining to be essential and believe that the conditions of public employment can never be similarly improved as long as government officials can set those conditions unilaterally.[23] In fact, the utilization of the collective bargaining process by some public employees, most notably teachers,

(Supp. 1972); VT. STAT. ANN. tit. 3, §§ 901-29 (Supp. 1972); VT. STAT. ANN. tit. 21, §§ 1701-07 (Supp. 1972); WASH. REV. CODE ANN. §§ 41.56.010-.900 (Supp. 1971); WIS. STAT. ANN. §§ 111.80-.94 (Supp. 1972).

20. *E.g.*, ALA. CODE tit. 37, § 450(3) (Supp. 1971); ALAS. STAT. § 23.40.010 (1962).

21. U.S. Dep't of Labor, News Release, USDL-8413, Sept. 4, 1967, *cited in* Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 LAB. L.J. 138, 139 n.2 (1969).

22. *Id.*

23. *See, e.g.*, Stieber, *Collective Bargaining in the Public Sector*, in CHALLENGES TO COLLECTIVE BARGAINING 69 (L. Ulman ed. 1967).

already has resulted in significant improvements in their basic working conditions.

A second reason for the enactment of public employment labor laws is the desire of governments to quell criticism directed at their willingness to require private employers to engage in collective bargaining while at the same time refusing to implement a similar procedure for the benefit of their own employees. As the American Bar Association noted in 1955: "A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar . . . basis . . . ."[24]

Serious disruptions in the flow of necessary public services, caused by an increasing number of public employee strikes,[25] provide a third explanation for the burgeoning number of laws authorizing or requiring public employers to engage in collective bargaining.[26] These disruptions, and the public outcry that accompanies them, have forced governments into searching for orderly procedures to replace the strike as a conflict resolution device in public employment. Many legislative bodies have selected a system of collective bargaining based upon informed persuasion rather than economic force as the most appropriate replacement.[27]

The extent to which utilization of the collective bargaining process will be successful in averting strikes in the public sector, however, depends upon many different factors. For example, success may in large measure depend upon whether the scope of bargainable subjects is defined in a sufficiently expansive manner to include items that traditionally have resulted in grave employee dissatisfaction. Spokesmen for

24. 2 ABA LABOR RELATIONS SECTION 90 (1955).

25. Strikes by public employees are illegal at the federal level and in all states except Vermont, Hawaii, and Pennsylvania, which recognize a limited right to strike by public employees when the strike will not endanger the public health or safety. *See* HAWAII REV. LAWS § 89-12 (Supp. 1971); PA. STAT. tit. 43, § 1101.1003 (Supp. 1972); VT. STAT. ANN. tit. 21, § 1704 (Supp. 1972).

26. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF COMMERCE, REP. NO. 348, WORK STOPPAGES IN GOVERNMENT, 1958-1968 (1970), *cited in* Clark, *Public Employee Strikes: Some Proposed Solutions*, 23 LAB. L.J. 111, 112 n.5 (1972).

27. *See, e.g.*, HAWAII REV. STAT. § 89-1 (Supp. 1971): "The legislature . . . finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages. . . ."

"The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to *protect the public by assuring effective and orderly operations of government*. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining . . . ." (emphasis added).

public employee unions maintain that unless the scope of collective bargaining in the public sector is made at least as broad as the scope prevailing in private industry, subjects over which public employees presently have grievances will necessarily be excluded from the bargaining process, and collective bargaining will, therefore, be unsuccessful as a dispute settlement device.[28] Thus 23 states presently have legislation defining the scope of collective bargaining for various groups of state and municipal employees in language similar or identical to that used in the NLRA, which governs the private sector.[29] This adoption of the private sector NLRA criteria to define the scope of bargainable subjects means that public employers will be required to bargain in good faith concerning "wages, hours, and other terms and conditions of employment"[30] upon the demand of their employees. The practical impact of describing the scope of collective bargaining in such general language will be to permit the courts, as final arbiters on matters of statutory construction, to resolve disputes between public employers and employee representatives over whether specific items come within the broad statutory definition of bargainable subjects.

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28. *See, e.g.*, Address by W. Wildman, Industrial Relations Research Association Spring Meeting, May 7, 1966, in COLLECTIVE BARGAINING IN THE PUBLIC SERVICE: THEORY AND PRACTICE (K. Warner ed. 1967).

29. ALA. CODE tit. 37, § 450(2) (Supp. 1969) (firemen); CAL. GOV'T CODE § 3530 (West Supp. 1972) (state employees); CAL. LABOR CODE § 1962 (1971) (firemen); CONN. GEN. STAT. ANN. § 10-153(d) (Supp. 1972) (teachers); IDAHO CODE § 44-1802 (Supp. 1971) (firemen); KAN. STAT. ANN. § 75-4328 (Supp. 1971) (teachers); Ky. Firefighters Act, § 6(3), 4 LAB. REL. REP. 27:217 (April 17, 1972); LA. REV. STAT. § 23:890 (Supp. 1972); MD. ANN. CODE art. 64B, § 37(b) (1972) (transit workers); MASS. ANN. LAWS ch. 149, § 178(D) (Supp. 1971) (state employees); MICH. COMP. LAWS ANN. § 423.215 (1967); MO. REV. STAT. § 105.510 (1966); NEB. REV. STAT. § 79-1287 (1968); N.H. Policemen's Collective Bargaining Act, 4A LAB. REL. REP. 39:205 (May 1, 1972); N.D. CENT. CODE § 15-38.1-08 (Supp. 1969); OKLA. STAT. ANN. tit. 11, § 548.4 (Supp. 1972) (firemen, policemen, and municipal employees); ORE. REV. STAT. § 243.710(2) (1969) (all public employees except teachers); ORE. REV. STAT. § 342.450 (1969) (teachers); PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1972) (police and firemen); R.I. GEN. LAWS ANN. § 29-9.4-3 (1968) (municipal employees); R.I. GEN. LAWS ANN. § 28-9.1-6 (Supp. 1971) (firemen); R.I. GEN. LAWS ANN. § 28-9.2-6 (Supp. 1971) (policemen); R.I. GEN. LAWS ANN. § 28-9.3-4 (1968) (teachers); S.D. COMP. LAWS ANN. tit. 3-18-2 (Supp. 1972); VT. STAT. ANN. tit. 3, § 901 (Supp. 1971) (municipal employees); WASH. REV. CODE § 53.18.020 (1969) (port district employees); WIS. STAT. ANN. § 111.70(1)(d) (West Supp. 1972) (municipal employees, excluding police); WYO. STAT. ANN. § 27-266 (1967) (firemen). Some acts impose a duty on public employers to bargain in good faith over items within the statutory definition of bargainable subjects upon the request of their employees' representative; others merely authorize public employers to bargain over such subjects if they so choose.

30. 29 U.S.C. § 158(d) (1970). Once raised at the bargaining table, subjects within this definition are mandatorily bargainable, which means that the parties must negotiate over them until an impasse is reached. *See* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). In the private sector, subjects not within this definition are negotiable on the mutual consent of labor and management.

Of course, the problem of determining whether specific items come within the meaning of the general phrase, "wages, hours, and other terms and conditions of employment," is one the courts regularly encounter in the private sector under the NLRA. Yet, when the NLRA language is transposed from the private to the public sector, the courts may have to confront a peculiar problem of statutory construction that cannot occur in the private sector. The difficulty arises because, unlike the situation in private industry, control over the working conditions in most state and local governments normally is divided among several different bodies and officials. In order to understand the precise nature of this problem, one must first appreciate the diffusion of authority over public employment working conditions which presently exists in most state and local governments and into which the state legislatures have thrust public employment bargaining laws.

II. DIFFUSION OF AUTHORITY OVER THE CONDITIONS OF PUBLIC EMPLOYMENT

In the absence of an explicit provision to the contrary,[31] state courts have interpreted their constitutions as delegating the power to establish employment conditions for state employees to the state's legislative body.[32] The legislatures generally have redelegated some power over employment conditions to various state executive officials and possibly to a state civil service commission; those officials and commissions establish without further approval all employment conditions within the ambit of their delegated powers. Should the state legislature wish to regulate a condition of employment that is within the power it has delegated to an executive official or commission, however, it can do so simply by enacting a law that establishes the desired condition and, until repealed, also has the effect of suspending the prior delegation.

State legislatures commonly do not redelegate all their powers over state employment conditions to executive officials and commissions. Typically they directly exercise their undelegated powers to establish those conditions of state employment whose implementation requires appropriations from state tax moneys. In some states, the number of subjects regulated by undelegated legislative power is more expansive, and only the less significant conditions of employment are set by persons or entities other than the legislature. Consequently, it is common to find diffusions of authority that permit the director of each state agency to

31. A few state constitutions contain provisions vesting power to establish the conditions of state employment in a civil service commission. *See, e.g.*, MICH. CONST. art. XI, § 5.

32. *See, e.g.*, City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947).

establish many of the basic employment conditions for the agency's employees, while at the same time the state's chief executive officer, the state legislature, or perhaps a state civil service commission, establishes the remaining conditions for the same workers.[33]

Authority over employment conditions at the municipal level may be even more diffused. In states that do not have constitutional provisions authorizing home rule for municipal governments, the state constitutions vest power over municipal employment conditions in the state legislature.[34] The state legislatures, however, ordinarily redelegate the power to fix most municipal employment conditions to the municipal governments, which in turn divide their delegated powers among the municipal legislative body, local executive officials, and, frequently, a local civil service commission. As in the case of powers that relate to state-level conditions of employment, state legislatures rarely delegate their powers to deal with municipal employment conditions when implementation of those conditions would necessitate appropriations from state tax moneys. Similarly, the state legislature can also suspend the municipality's power to regulate a particular working condition by passing a law that establishes the condition and makes the law applicable to municipal governments in spite of their delegated powers. Thus, in jurisdictions without constitutional home-rule provisions, both the state and local legislative bodies may regulate some municipal employment conditions, while local mayors, their various department heads, and local civil service commissions are likely to have power over other conditions.[35]

State constitutional home-rule provisions[36] either delegate the power to regulate all "municipal affairs" directly to the municipal governments themselves[37] or direct the state legislature to enact a statute

33. *See* N.Y. GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 13 (1966).

34. 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 1.23, 2.00 (1968).

35. *See* N.Y. GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS, *supra* note 33, at 13.

36. The following constitutional provisions authorize home rule for local governments: ALAS. CONST. art. X, § 10; ARIZ. CONST. art. 13, § 2; CAL. CONST. art. 11, § 8; COLO. CONST. art. XX, §§ 1, 6; CONN. CONST. art. X, § 1; FLA. CONST. art. VIII, §§ 1, 2; GA. CONST. art. XV, ch. 2-83; HAWAII CONST. art. VII, § 2; KAN. CONST. art. 12, § 5; LA. CONST. art. 14, § 40; MASS. CONST. art. II, § 6; MD. CONST. art. XI-E, § 3; MICH. CONST. art. VII, § 22; MINN. CONST. art. 11, § 3; MO. CONST. art. 6, §§ 18(a), 19, 31; NEB. CONST. art. XI, § 2; NEV. CONST. art. 8, § 8; N.M. CONST. art. X, § 4; N.Y. CONST. art. 9, §§ 1, 2; OHIO CONST. art. XVIII, § 7; OKLA. CONST. art. 18, § 3(a); ORE. CONST. art. XI, § 2; PA. CONST. art. 9, §§ 2, 3; R.I. CONST. amend. 28, § 2; S.D. CONST. art. X, §§ 4, 5; TENN. CONST. art. 11, § 9; TEX. CONST. art. 11, § 5; UTAH CONST. art. XI, § 5; WASH. CONST. art. 11, § 10; W. VA. CONST. art. 6, § 39(a); WIS. CONST. art. 11, § 3.

37. *See, e.g.*, N.Y. CONST. art. 9, §§ 1 & 2. Some constitutional home-rule provisions

delegating such powers to the local governments.[38] Although in either case the courts nevertheless generally consider the conditions of municipal employment to be municipal affairs within the meaning of home-rule provisions,[39] the power to establish municipal employment conditions still ordinarily remains divided between the state and municipal governments. Such divisions of power result from the fact that most home-rule provisions require home-rule municipalities to exercise their delegated powers in accordance with general state laws and declare that state laws will supersede municipal ordinances whenever the two conflict.[40] Consequently, state legislatures can regain the power to regulate employment conditions in home-rule municipalities simply by enacting a general law that sets out the conditions desired.

III. INTERACTION OF AUTHORITY TO CONTROL THE CONDITIONS OF PUBLIC EMPLOYMENT AND PUBLIC EMPLOYER LABOR LAWS: THE DANGER OF REALLOCATING LEGISLATIVE POWER

State legislatures have interjected laws authorizing or requiring public employer collective bargaining into the structure of diffused power over public employee working conditions. The extent to which this power structure will create interpretative problems when the courts and administrative bodies attempt to construe NLRA-like definitions of bargainable subjects within the new laws depends upon who is statutorily defined as the "public employer" for collective bargaining purposes. If the public employer is defined to include every governmental body and official having authority to regulate a subject that the courts might include within the concept of "wages, hours, and other terms and conditions of employment," then the interpretative problems involved are similar to those raised under the NLRA because all items possibly

require local governments to frame and adopt a charter for their government before they can take advantage of the constitutional grant of power to regulate their own affairs. Until a municipal government adopts such a charter, it cannot regulate its own affairs unless the state legislature first delegates the necessary powers. In other states, however, the municipal governments need not adopt a charter in order to exercise home-rule powers. 1 C. ANTIEAU, *supra* note 34, at § 3.05.

38. *See, e.g.*, MICH. CONST. art. 7, §§ 21 & 22. As in the case of constitutional home-rule provisions, a municipality may have to adopt a charter before it can take advantage of legislative home-rule provisions. *See* 1 C. ANTIEAU, *supra* note 34, at § 3.08.

39. *See, e.g.*, Scheafer v. Herman, 172 Cal. 338, 155 P. 1084 (1916); City of Mansfield v. Endly, 38 Ohio App. 528, 176 N.E. 462 (1931); State v. City of Milwaukie, 231 Ore. 473, 373 P.2d 680 (1962).

40. 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.19 (3d ed. rev. 1966); Sandalow, *The Limits of Municipal Power Under Home Rule*, 48 MINN. L. REV. 643 (1964). In some states, however, constitutional home-rule provisions free home-rule municipalities from all legislative interference in matters solely of local concern.

encompassed by an NLRA-like definition of bargainable subjects are regulated by a party who must engage in collective bargaining as a component of the "public employer."[41]

The states, however, have not generally incorporated an expansive definition of the words, "public employer," into their collective bargaining laws.[42] Instead, they frequently have combined an NLRA-like definition of bargainable subjects with a definition of the public employer that excludes the state's legislative body.[43] State statutory provisions of this type will inevitably require the state's judiciary, when it construes an NLRA-like definition of bargainable subjects, to make decisions that could reallocate the distribution of power between state legislatures and executive officials, and between state and local governments.

A. Typographical, Pressmen's and Bindery Unions v. Personnel Division

One situation that can result in a reallocation of power within the

41. *See* note 30 *supra*. Although a collective bargaining statute may include every governmental body and official having control over employee working conditions within its definition of the "public employer" who must engage in collective bargaining, a person not included within the statutory definition nevertheless may establish a few working conditions. For example, some local government charter provisions that are adopted pursuant to a broad delegation of state legislative power require the electorate to establish certain municipal working conditions by referendum. In such a situation, when the state legislature imposes a duty to bargain over working conditions on municipal employers, the courts and administrative agencies must decide either that working conditions established by referendum are implied exceptions to the statutory scope of collective bargaining, or that the collective bargaining act requires even electorally established working conditions to be negotiated by a municipal official on the demand of employee representatives. In 2 recent decisions involving this issue, the Michigan Employment Relations Commission found that the state's Public Employment Relations Act (PERA), which imposes a duty on city officials to bargain over "wages, hours, and other terms and conditions of employment," and a city charter provision that requires a referendum to approve certain working conditions were in "irreconcilable conflict." The Commission then held that the PERA "should prevail over any city charter, to the extent they may conflict. . . . At the time of recognition of such bargaining representative, the city is obligated to bargain in respect to rates of pay, wages, hours of employment or other conditions of employment without regard to any provisions of the city charter relating to these mandatory subjects of collective bargaining." City of Detroit and Detroit Police Officers Ass'n, 3 CCH LAB. L. REP., STATE LAWS ¶ 49,997.72 (Mar. 18, 1971). According to the Commission, any agreement reached as a result of these negotiations would bind the city and its employees' representative despite the contrary charter provision. *Accord*, City of Flint and Council 29, AFSCME, 3 CCH LAB. L. REP., STATE LAWS ¶ 49,996.56 (Apr. 2, 1970). A better approach might have been to construe the PERA as requiring city officials to bargain over working conditions that require the approval of the electorate, and then to submit any agreement reached to the electorate for its consideration. The Michigan Commission rejected this alternative, reasoning that it was too cumbersome for efficient collective bargaining.

42. Many state collective bargaining statutes fail to define the words "public employer." *See, e.g.*, ALAS. STAT. § 23.40.010 (1962); MICH. STAT. ANN. § 17.455(9) (1968).

43. *See, e.g.*, CAL. GOV'T CODE § 3526 (West Supp. 1972); HAWAII REV. STAT. § 89-2(9) (Supp. 1971); MASS. ANN. LAWS ch. 149, § 178(I) (Supp. 1971); WIS. STAT. ANN. § 111.70(1)(a) (Supp. 1972).

present structure of state governments will arise when employees seek to bargain with state or local officials, whom the statute defines as their public employer for collective bargaining purposes, over subjects encompassed by the definition of "wages, hours, and other terms and conditions of employment," but traditionally regulated by the legislature through its exercise of undelegated powers. A court confronting this situation must cope with what appears to be a two-horned dilemma: it could decide that items within the broad statutory definition of bargainable subjects but traditionally established by the legislature through the exercise of undelegated powers are outside the scope of collective bargaining; or it could conclude that the statutory definition of bargainable subjects constitutes an implied delegation of the legislature's reserved power to a public official whom the statute defines as a public employer, thereby enabling this official to conclude collective contracts covering all items within the statutory definition. A court adopting the former alternative might thereby exclude important items from the collective bargaining process; yet adopting the latter alternative may result in an unintended reallocation of legislative power.

That precise problem recently confronted the Oregon Public Employee Relations Board, which administers Oregon's Public Employment Relations Act,[44] in *Typographical, Pressmen's and Bindery Unions v. Personnel Division.*[45] Under the Oregon Act, the "State" is directed to engage in collective bargaining with its employees over "employment relations," which are statutorily defined to include "direct or indirect monetary benefits."[46] The Oregon legislature had never delegated its authority to establish wage rates for state employees, and the Board did not regard the legislature as a necessary party to collective bargaining under the Act. Prior to the passage of the Public Employment Relations Act, those public officials that the Board deemed the public employer for purposes of collective bargaining therefore did not possess the requisite authority to set wage rates, an item clearly within the statutory scope of bargainable subjects. Consequently, the public officials refused to negotiate over wage rates with representatives of the state's employees. The case thus squarely presented the dilemma posed above. The Board could regard the Act's directive to the state to bargain over employment relations as an implied delegation of the legislature's reserved power over wage rates to the public officials whom the Board viewed as the public employer, thereby enabling those

44. ORE. REV. STAT. §§ 243.711-.795 (1971).
45. 400 GOV'T EMP. REL. REP. B-6 (March 31, 1971).
46. ORE. REV. STAT. § 243.711 (1971).

officials to establish wage rates through collective bargaining. Alternatively, the Board could conclude that wage rates, which traditionally had been regulated only by the state legislature, were implied exceptions to the statutory definition of bargainable subjects.

The Board rejected the implied delegation of power argument, yet found that the state employees and their public employers could negotiate over all items within the statutory definition of bargainable subjects. The Board reached this seemingly incongruous result by reasoning that, although the officials who comprised the "public employer" for the purpose of collective bargaining could not conclude binding agreements on matters wholly within the undelegated authority of the legislature, they nevertheless were obligated by the statutory definition of bargainable subjects to negotiate over wage rates and to recommend any agreement reached to the state legislature for its ultimate approval or rejection.

In view of the available alternatives, the Oregon Board's construction of the statute seems not only proper, but also extremely desirable. One alternative would have required the Board to interpret a generalized definition of bargainable subjects as impliedly effecting a broad delegation of legislative power. Under that interpretation, all working conditions previously requiring legislative approval prior to their final establishment would thereafter have been subject to final establishment through collective bargaining with a nonlegislative official. Such a drastic reallocation of governmental power, however, should follow only from a clear expression of legislative intent. To effect a severe redistribution of governmental power from no more than a very general definitional phrase unreasonably presupposes the existence of the requisite legislative intent.

The second alternative interpretation available to the Oregon Public Employee Relations Board would have forced it to exclude from the statutory definition of bargainable subjects all items traditionally established by the state legislature through the exercise of its undelegated powers. Since Oregon, like most other jurisdictions,[47] requires the state legislature to approve any expenditure of tax revenues, that interpretation would exclude from the collective bargaining process any working conditions whose implementation requires appropriations from state tax moneys.[48] It would entail even more drastic exclusions from the range

47. *See, e.g.*, ILLINOIS GOVERNOR'S ADVISORY COMM'N ON LABOR-MANAGEMENT POLICY FOR PUBLIC EMPLOYEES, REPORT AND RECOMMENDATIONS 15-16 (1967).

48. Normally, only the working conditions of state employees, as distinguished from the working conditions of municipal employees, will involve expenditures from state tax moneys. *See*

of bargainable subjects in those jurisdictions in which the state legislatures exercise their undelegated power to establish all the fundamental conditions of public employment and permit executive officials and personnel boards to fix only the less significant conditions, such as questions relating to lunch hours and work breaks.[49] One reason for statutorily granting public employees the right to bargain collectively is to provide an orderly procedure for peacefully resolving disputes over working conditions.[50] An interpretation that excludes wages and other basic working conditions from the collective bargaining process would place most of the items that private sector experience indicates give rise to labor disputes beyond any curative effects of this process. In view of the equally unsatisfactory alternatives that confronted it, the Oregon Board's interpretation of the State's Public Employment Relations Act was perhaps the best resolution possible. Its interpretation avoided implying a reallocation of governmental power from a generalized definition of bargainable subjects, and at the same time did not summarily exclude important items from the bargaining process.

The approach adopted by the Oregon Board, however, is not without difficulties of its own. Since most state legislatures delegate the power to control public working conditions among a number of executive officials and bodies, each of which is thereby empowered to regulate different working conditions for the same class of public employees,[51] a court adopting the approach of the Oregon Board must be prepared to determine which of those officials and commissions should be required to negotiate over working conditions still subject to the undelegated powers of the state legislature and to recommend any agreement reached to the legislature.[52] Although the Oregon Board did not encounter this precise problem, it is certain to occur in many jurisdictions should the Board's reasoning be used in interpreting a collective bargaining act that excludes the state legislature from the definition of the public employer.

Conclusions and Recommendations on Labor Relations by the Advisory Comm'n on Intergovernmental Relations, 342 GOV'T EMP. REL. REP. E-1, at E-3 (March 30, 1970).

49. *See, e.g.*, NEW YORK GOVERNOR'S COMM. ON PUBLIC EMPLOYEE RELATIONS, *supra* note 33, at 13-14 (1966).

50. *See* text accompanying note 25 *supra*.

51. *See* text accompanying note 33 *supra*.

52. If a court construes an NLRA-like definition of bargainable subjects as implying a delegation of legislative power over all matters coming within the definition to a nonlegislative "public employer" that is authorized or required to engage in collective bargaining, a similar problem of construction arises. If the "public employer" consists of more than one entity, each of which already regulates different conditions of public employment for the same class of public employees, the court must decide which of those entities was intended to receive the delegation of legislative power that it implied from the collective bargaining act.

A second difficulty inherent in the Oregon Board's approach stems from the allocation of power between the state and municipal governments. Since municipal officials are almost uniformly defined in collective bargaining statutes as the "public employer" for the purposes of bargaining with municipal employees,[53] any locally negotiated collective agreement that concerns municipal employment conditions traditionally established by the state legislature through the exercise of undelegated powers would have to be submitted to the legislature for its approval. In view of the thousands of municipal governments in every state, each of which has diverse groups of employees demanding the bargaining rights extended by state law, the Oregon approach would force any state legislature that regulates even a single condition of municipal employment through its undelegated powers to devote an inordinate amount of time to the process of approving or rejecting municipal labor agreements.

B. Loose v. City of Dearborn Heights

Another interpretative problem that may result in the redistribution of governmental power will confront the judiciaries of the many jurisdictions which have collective bargaining acts containing generalized definitions of bargainable subjects combined with definitions of the public employer that exclude the state legislature. The problem arises whenever the state legislature—or in the case of a home-rule municipality, the constitution—has delegated broad power to establish working conditions to an entity or official whom the collective bargaining act views as the public employer, but the legislature also has, prior to the enactment of the bargaining statute, suspended part of its delegated power by establishing some working conditions that the newly designated public employer must obey in spite of its delegated powers. When the state legislature interjects a collective bargaining statute containing a generalized definition of bargainable subjects into this setting, a court construing the act again faces a dilemma: it can decide that working conditions previously established by state law may now be changed by bargaining with the nonlegislative public employer, who in spite of its broad power previously had no authority to modify working conditions established by state law; or it can instead conclude that working conditions previously established by law constitute implied exceptions to the statutory definition of bargainable subjects.[54]

53. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 962(7) (Supp. 1972); N.Y. CIV. SERV. LAW § 201(6) (McKinney Supp. 1972).

54. If the legislature is viewed as the public employer, then a prior law establishing a working

The Michigan Court of Appeals recently examined this type problem in *Loose v. City of Dearborn Heights*.[55] Dearborn Heights, a home-rule municipality,[56] had promoted a person to the position of Chief of Police without conducting a competitive examination. A Michigan civil service statute required competitive examinations for promotions in all municipal police departments.[57] On a petition for mandamus, the trial judge sustained the validity of the challenged promotion and held that the Michigan civil service statute setting forth requirements for the promotion of municipal policemen was impliedly repealed by the subsequent passage of Michigan's Public Employment Relations Act,[58] which directs public employers to bargain with their employees' representatives over "wages, hours, and other terms and conditions of employment."[59]

The court of appeals rejected the trial judge's rationale of implied repeal; nevertheless, it indicated that a collective bargaining agreement negotiated with the appropriate municipal employer—in this case, the City of Dearborn Heights—could change the terms of existing state law:[60] "In our opinion there is no conflict between these provisions of the civil service act and the public employees' labor relations act. The civil service act in the instant case provides day-to-day procedural rules to be followed by the employer. The public employees' act provides the mechanism for changing those procedural rules."[61]

The court of appeals' construction of the State's Public Employment Relations Act achieves the precise result that the Oregon Board

condition would not preclude it from entering into a collective bargaining agreement that changes the previously established working condition. A legislative body can always modify an earlier law, although it may not, except in emergency situations, destroy vested rights created by that law. Thus, only when the public employer is not a legislative body, but rather an agency or another branch of government, will a court be called upon to determine whether a statute approving collective bargaining over working conditions impliedly authorizes the public employer to negotiate collective agreements that change working conditions previously established by law.

55. 64 CCH Lab. Cas. 67,853 (Mich. Ct. App. 1970).

56. *See* text accompanying notes 36-40 *supra*.

57. *See* MICH. STAT. ANN. § 5.3362 (1969).

58. Michigan's Public Employment Relations Act, MICH. STAT. ANN. § 17.455 (1968), does not define the words "public employer." Nevertheless, in *Loose v. City of Dearborn Heights* the trial court and the court of appeals assumed that when municipal employment conditions are involved, the "public employer" for purposes of collective bargaining is the municipal government.

59. The reported facts do not suggest that the city's failure to promote according to the civil service statute was in any way related to the collective bargaining process.

60. As a consequence of this decision, when a conflict arises between the working conditions established under a collective agreement negotiated with a municipal employer and a state law, the collective agreement governs as to those employees covered by the agreement, but the provisions of the law remain applicable to all public employees not covered by the collective agreement.

61. 64 CCH Lab. Cas. at 67,854.

sought to avoid under a similar collective bargaining statute in *Typographical, Pressmen's and Bindery Unions v. Personnel Division.* By authorizing an extra-legislative public employer to negotiate collective agreements that supersede state law, the Michigan court used the general statutory definition of bargainable subjects as the basis for reallocating legislative power over public employee working conditions. In terms of their eventual impact upon the distribution of governmental power, any difference between construing a NLRA-like definition of bargainable subjects as an implied delegation of power, which the Oregon Board rejected, and construing the definition as an implied removal of limitations on delegated powers, which is the ultimate effect of the Michigan decision, is illusory.

The final solution adopted by the Oregon Board in a case involving state employees, however, was not realistically available to the court in *Loose*, which was concerned with municipal employees. When municipalities are statutorily required as public employers to bargain over working conditions, it would be unreasonable for a court to direct them to negotiate over changes in every state law that establishes municipal working conditions and then present any agreement reached to the state legislature for final action. There are too many such laws,[62] combined with too many municipal governments, for most state legislatures to assume the burden of actually giving meaningful consideration to every tentative agreement that local governments would submit for legislative approval.

IV. Suggested Solutions

The decisions of the Michigan Court of Appeals and the Oregon Board illustrate two interpretative problems involving the redistribution of legislative power that public employment labor laws can create when they combine NLRA-like definitions of bargainable subjects with definitions of the public employer that exclude the state legislature. In order to avoid such problems and simultaneously preserve their own powers over state and local working conditions, a few state legislatures have included in their collective bargaining laws sections providing that public employer collective bargaining agreements cannot supersede state laws and/or that public employers may conclude agreements only on matters within their existing delegations of power.[63] Although the in-

62. In many jurisdictions, state legislatures have enacted detailed laws regulating the hiring and firing of municipal employees, as well as laws concerning their promotion, transfer, and discipline. *See, e.g.*, N.Y. Civ. Serv. Law § 5 (McKinney Supp. 1972).

63. *See* Cal. Educ. Code § 13080 (West Supp. 1972) (teachers); Cal. Gov't Code § 3500

corporation of such provisions into collective bargaining laws will ensure against judicial interpretations that either expand existing delegations of power to state and local government officials or alter laws that regulate public working conditions, this type of statutory scheme will restrict the scope of bargaining to less than that which prevails in the private sector. Restricting the number of subjects open to the collective bargaining process decreases the likelihood that collective bargaining will be an effective dispute settlement device, which is, of course, a primary reason for introducing bargaining into the public service.[64]

There is, however, a method available for preserving existing legislative control over state and municipal working conditions without restricting the scope of collective bargaining. That method would require the state legislature to participate in the collective bargaining process whenever bargainable items are established by the exercise of undelegated powers or through laws effecting a suspension of prior delegations of power. The legislature, of course, could not negotiate as a whole, but instead would appoint a bargaining representative consisting of a committee of its own members, an executive official, or in the case of municipal employees, the local government for which the employees seeking to bargain work. The bargaining representative would be authorized to reach tentative agreements and required to submit such agreements to the legislature for its final approval or rejection. Two states recently have amended their statutes authorizing public employer collective bargaining to establish similar procedures when state employment conditions are involved.[65]

Suggestions of state legislative participation in the collective bargaining process, even to the limited extent described above, have not gone uncriticized. The most frequently voiced objection is that the views of civic groups, private organizations, and individual citizens on what

(West Supp. 1972) (municipal employees); CAL. GOV'T CODE § 3525 (West Supp. 1972) (state employees); DEL. CODE ANN. tit. 14, § 4013 (Supp. 1970) (public school employees); KAN. STAT. ANN. § 75-4330(a) (Supp. 1971) (public employees except supervisors, teachers, elected and management officials); MD. ANN. CODE art. 77, § 160(k) (1969) (teachers); MASS. ANN. LAWS ch. 149, § 178(I) (Supp. 1971) (municipal employees); MINN. STAT. ANN. § 179.66(5)-(6) (Supp. 1972); N.J. STAT. ANN. § 34:13A-8.1 (Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.904 (Supp. 1972) (all public employees except policemen, firemen, and transit workers); VT. STAT. ANN. tit. 3, § 904 (Supp. 1972) (state employees); VT. STAT. ANN. tit. 16, § 2004 (Supp. 1972) (teachers).

64. *See* NATIONAL GOVERNORS CONFERENCE, TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS, PRELIMINARY REPORT 36 (1967): "Care should be exercised not to restrict collective bargaining so unreasonably as to nullify the values of the process. Experience has shown that employee organizations denied reasonable scope in bargaining—particularly over the matter of wages—resort to lobbying and political pressure. They attempt a quasi-negotiation of sorts with the group that sets salaries. . . . " *Id.*

65. KAN. STAT. ANN. § 75-4330 (Supp. 1971); Wisconsin State Employment Labor Relations Act, §§ 111.81(16), .92, 4A LAB. REL. REP. 60:242a (May 1, 1972).

conditions should prevail in public employment will somehow be entitled to less weight with the legislature once it has entered a collective bargaining relationship with public employees. The objection, however, actually concerns the question whether any government official or entity that controls public employment working conditions should be permitted to bargain collectively, and not the question whether a state legislature, once it has decided that collective bargaining is desirable, should itself participate in the collective bargaining process. If legislative bodies cannot attune themselves to the opinions of civic groups, private organizations, and individuals when they engage in collective bargaining, then, a fortiori, nonlegislative public officials would be no more responsive.[66]

A second objection to state legislative participation in the collective bargaining process stems from the inherent practical difficulties of a legislature's obligating itself by statute to negotiate through selected representatives over municipal employment conditions that are established by state law. If statutes of this type were enacted, it is unlikely that most state legislatures could meet their self-imposed commitment to bargain with the many diverse groups of municipal employees who perform different jobs for different municipal governments and who desire to negotiate over matters controlled by the legislature. Quite simply, there are too many working conditions and too many groups of municipal employees,[67] as well as too little time available in legislative sessions, for state legislatures to engage in collective bargaining at the municipal level, even in the restricted sense of approving or rejecting tentative agreements negotiated by their own representatives.[68] Indeed, even if a legislature's collective bargaining obligation included only state employees, some legislatures, particularly those in large urban states, would still find themselves unable to act during their legislative session

66. Of course, if the public is dissatisfied with the representation that it receives from a legislature's bargaining representatives, it can always oust the representatives or their principals at the next election.

67. Even if the appropriate unit for bargaining with the state legislature were defined to include all municipal employees performing similar jobs throughout the state, the legislature would still have to deal with an extensive number of bargaining units. Moreover, the mechanics of defining those units to include employees scattered throughout the state in different municipalities and conducting elections for bargaining representatives would be unwieldy.

68. The only collective bargaining law that seemingly requires state legislative consideration of municipal agreements that conflict with state law or that involve terms necessitating the exercise of undelegated legislative powers is New York's Taylor Act, N.Y. CIV. SERV. LAW §§ 200-200.11 (McKinney Supp. 1972). Section 204(a) of that Act requires every collective agreement negotiated by state executive officials or local governments to include the following provision: "It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore, shall not become effective until the appropriate legislative body has given approval."

on all matters that state employees wish to incorporate into collective bargaining agreements and that require the exercise of undelegated legislative powers or changes in state law for implementation.[69]

Thus, in order to produce a meaningful scope of collective bargaining, state legislatures apparently will be forced to relinquish much of their control over municipal employment conditions to the municipal governments and to vest state executive officials with increased power over the conditions of state employment. Of course, it is unlikely that any state legislature would be willing to authorize either state executive officials or local governments to conclude final collective agreements with employee representatives over working conditions that require appropriations from state tax moneys, nor has that alternative ever been seriously suggested. But other bargainable working conditions, established either through the exercise of undelegated powers or by laws suspending earlier delegations of power, could probably be dealt with more efficiently and without sacrificing any important public interests through collective bargaining agreements negotiated with state or local officials. The legislature, however, would not have to forswear any control over the terms of the agreements negotiated by state and local government officials. If designated officials prove unresponsive to the interests of the general public when negotiating collective bargaining agreements, they can be removed by the legislature; moreover, the legislature can always withdraw any powers that it previously has delegated.[70] Once nonmonetary working conditions are removed from state legislative regulation, a second advantage would accrue from the redistribution of legislative power: the legislature, through its designated representatives, would have time available to bargain over those matters that do require financial expenditures from state tax moneys.[71] Hopefully, bargaining over these matters could be accomplished without perpetual delays.

In an effort to produce a meaningful scope of collective bargaining, four recently adopted public employee labor acts do expand the authority of state and local officials over the conditions of public employ-

69. Again, even if the unit for bargaining with the state legislature were defined to include all those state employees who might have some community of interest in the subject to be established, the legislature would still have to negotiate with the representatives of a significant number of distinct groups of employees.

70. State legislatures would, of course, always be free subsequently to enact laws specifically providing that their terms cannot be changed by later collective bargaining agreements.

71. In the very rare case when a municipal working condition requires state appropriations for its implementation, municipal officials could be directed to bargain over these matters at the request of employee representatives and then to submit any agreement reached to the state legislature for its approval or rejection.

ment.[72] Those acts permit state and local officials who already have been delegated broad powers over public employee working conditions to conclude collective agreements that supersede state laws which have established conditions within the statutory definition of bargainable subjects. No state collective bargaining law, however, actually transfers legislative power that was previously undelegated and exercisable only by the legislature.

72. The following acts provide that collective bargaining agreements negotiated with specifically designated nonlegislative public employers will prevail over state laws regulating matters within the statutory definition of bargainable subjects: CAL. PUB. UTIL. CODE § 70124 (West 1965) (transit workers); CONN. GEN. STAT. ANN. § 7-468(b) (Supp. 1969) (municipal employees); DEL. CODE ANN. tit. 19, §§ 1301-12 (Supp. 1970) (public employees, except teachers and elected or appointed public officials); MASS. ANN. LAWS ch. 161A, § 19 (transit workers). *See also* Postal Reorganization Act of 1970, 39 U.S.C. § 1005(a)(1)(A) (1970).