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## APPROPRIATE SUBJECTS FOR BARGAINING IN LOCAL GOVERNMENT LABOR RELATIONS

By WILLIAM J. KILBERG\*

*Unionism has come to the municipal service. Of 1,358 cities surveyed by the Advisory Commission on Intergovernmental Affairs, seventy-five percent reported that their labor force was organized.<sup>1</sup> "No cities over 500,000 and only four percent of those from 100,000 to 500,000 lacked public employee organizations."<sup>2</sup>*

The introduction of unionism into the public sector has meant an end to unilateral decision-making. The era of "management-by-itself" is over, and the age of bilateralism — "consultation, negotiation and bargaining" — is here.<sup>3</sup> This public sector unionization provides a challenge to the fundamental nature of a democracy — responsibility to popular control — because with true collective bargaining there is some degree of compulsion upon the employer to reach agreement, whether it be through a threat of illegal strike or through some less drastic coercive action by the union.<sup>4</sup>

This paper attempts to develop a balance between unilateral and bilateral decision-making in order to safeguard, where needed, the responsiveness of local government to the popular will. The first section discusses certain trends in the law of local government labor relations, setting forth the legal bases for the right to bargain in public employment at the local level and analyzing the duty and the scope of the duty to bargain. The second part of this study attempts to define the proper limits which ought to be placed upon the scope of collective bargaining in the municipal and county public service. As two scholars in the field of public employee labor relations have phrased the question, "What are the minimum policy and administra-

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1. ADVISORY COMMISSION ON INTERGOVERNMENTAL AFFAIRS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 29 (1969).

2. *Id.* Of 209 counties responding to a questionnaire, 117, or fifty-six percent, reported at least one employee organization. *Id.* at 40.

3. Stanley, *What are Unions Doing to Merit Systems?*, 31 PUB. PERSONNEL REV. 108 (1970).

4. See notes 39-43 *infra* and accompanying text.

tive decisions which must remain subject to the public will, either directly or indirectly, if we are not to transform our government from a political democracy to an economic autocracy?"<sup>5</sup>

## I. TRENDS IN THE LAW

### A. *The Right to Bargain*

Most national labor legislation has carefully excluded public sector employment from its coverage.<sup>6</sup> Each state, then, has been free to develop its own conception of the proper route for local government labor relations to take.<sup>7</sup> This has resulted in confusion and contradiction, with the acceptability of collective bargaining varying with the jurisdiction.<sup>8</sup> Judicial disagreement has most often centered over the propriety of collective bargaining in the absence of enabling legislation. For example, a recent Florida decision<sup>9</sup> declared that a municipality, absent enabling state legislation, is not legally authorized to enter into a collective agreement with a union.<sup>10</sup> In a land-

5. K. WARNER & M. HENNESSY, PUBLIC MANAGEMENT AT THE BARGAINING TABLE 262 (1967).

6. See Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 152(2)-(3) (1964); Norris-LaGuardia Act, 29 U.S.C. § 101 (1964), construed in *United States v. United Mine Workers*, 330 U.S. 258 (1947) to be inapplicable to employees of the federal government. But see *Railway Labor Act*, 45 U.S.C. § 151 (1964), construed in *California v. Taylor*, 353 U.S. 553 (1957) to be applicable to employees of a state-owned railroad.

7. See, e.g., CONNECTICUT, REPORT OF THE INTERIM COMMISSION TO STUDY COLLECTIVE BARGAINING BY MUNICIPALITIES (1965); MICHIGAN, REPORT OF THE GOVERNOR'S ADVISORY COMMITTEE ON PUBLIC EMPLOYEE RELATIONS (1967); MINNESOTA, REPORT BY THE GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS (1966); NEW YORK CITY, REPORT OF THE TRIPARTITE PANEL TO IMPROVE MUNICIPAL COLLECTIVE BARGAINING PROCEDURES (1966); RHODE ISLAND, COMMISSION TO STUDY MEDIATION AND ARBITRATION (1966). An overall analysis is contained in EXECUTIVE COMMITTEE, NATIONAL GOVERNOR'S CONFERENCE, REPORT OF THE TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS (1967). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1969); MARITIME TRADES DEPARTMENT, EXECUTIVE BOARD, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: AN INTERIM REPORT (1969).

8. Compare N.Y. CIV. SERV. §§ 200-12 (McKinney Supp. 1969) and ORE. REV. STAT. §§ 243.720-760 (1953) with MINN. STAT. ANN. §§ 179.50-572 (1966) and N.M. STAT. ANN. §§ 14-53-14 to -16 (1953). The statutes differ in that Oregon and New York mandate collective bargaining for all municipal employees. The New Mexico statute authorizes municipalities to enter into collective bargaining with unions representing municipal transit workers; there is no comprehensive labor relations act for public employees. The Minnesota statute is couched in terms of a good faith obligation on the part of the municipality to resolve grievances. In Wisconsin there is a qualified area of collective bargaining. No right to bargain is set forth in the statute nor is a refusal to bargain prohibited, but certain subjects are delineated for bargaining. WIS. STAT. ANN. § 111.91 (Supp. 1969). Only three states statutorily prohibit collective bargaining in their public service. See N.C. GEN. STAT. §§ 95-97 to -100 (1965), upheld in *Adkins v. City of Charlotte*, 296 F. Supp. 1068 (D.N.C. 1969); TEX. CIV. STAT. ANN. art. 5154c, §§ 1-6 (1962); S.J. RES. 12, [1946] Va. Acts 1006.

9. *Dade County v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees*, 157 So. 2d 176 (Fla. 1963), cert. denied, 379 U.S. 971 (1965).

10. See also *International Union of Operating Eng'rs, Local 321 v. Water Works Bd.*, 276 Ala. 462, 163 So. 2d 619 (1964); *IBEW Local 283 v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967); *IBEW v. City of Hastings*, 179 Neb. 455, 138 N.W.2d 822 (1965); *New Jersey Turnpike Authority v. AFSCME*, 83 N.J. Super. 389, 200 A.2d 134 (1964).

mark decision holding to the contrary,<sup>11</sup> the Supreme Court of Connecticut held that, without need of a permissive statute and absent a prohibitory one, a board of education may bargain collectively with its teachers with regard to salary, grievances, procedures and working conditions within the board's power to contract, provided that the agreement is limited to members of the teachers' association and no strike threat is present.<sup>12</sup>

The Hobbesian notion of sovereignty has most often provided the basis for the proscription of public sector collective bargaining.<sup>13</sup> Sovereignty suggests a condition of supremacy — the state as final legal authority and political power. It evolved from the notion of English common law that "the King can do no wrong"; as it later developed in the United States, it was rephrased to read "the states are sovereign."<sup>14</sup> The sovereignty doctrine is clear in its placement of ultimate authority and, since the government cannot be coerced into doing anything it chooses not to do, the doctrine is an "effective bar to any action on the part of government employees to compel the government to enter involuntarily into any type of collective bargaining relationship."<sup>15</sup> There is no reason, however, why state governments cannot enter *voluntarily* into collective bargaining agreements<sup>16</sup> or cannot permit local governmental units to enter into such agreements. Notions of unions as illegal conspiracies belong to an era long past. If a state can contract with one employee, there is no good reason to deny it the power to contract with two or more employees as a group. Furthermore, an analogy may be drawn to the situation in which the sovereign authority has consented to suit — an act which in reality is a partial abdication of its sovereignty through the exercise of its sovereign power. To deny state governments this right would be to deny their sovereignty. That this concept has been accepted by a growing number of state legislatures is testified to by the increasing number of states which have enacted legislation specifically authorizing collective bargaining in the public sector.<sup>17</sup> However, the question remains whether subdivisions of the state — cities and counties which have generally followed the sovereignty doctrine and banned public sector collective bargaining on the ground that local government cannot delegate to

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11. *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951).

12. *Id.* at 277-78, 83 A.2d at 486. See also *City of Fort Smith v. Arkansas State Council No. 38, AFSCME AFL-CIO*, 245 Ark. 409, 433 S.W.2d 153 (1968); *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *Civil Serv. Forum v. New York City Transit Authority*, 151 N.Y.S.2d 402 (Sup. Ct. Kings County 1956); *Christie v. Port of Olympia*, 27 Wash. 2d 534, 179 P.2d 294 (1947). See generally Seitz, *School Board Authority and the Right of Public School Teachers to Negotiate — A Legal Analysis*, 22 VAND. L. REV. 239 (1969).

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

14. Cf. THE FEDERALIST No. 81 (A. Hamilton).

15. W. HART, COLLECTIVE BARGAINING IN THE FEDERAL SERVICE 44 (1961) (emphasis added).

16. W. VOSLOO, COLLECTIVE BARGAINING IN THE U.S. FEDERAL CIVIL SERVICE 18 (1966); cf. A. HACKER, THE STUDY OF POLITICS 40 (1963): "The process of sovereignty . . . is more concerned with *how* laws are passed than with *what* they say."

17. See note 8 *supra*. For a summary of existing law permitting collective bargaining in the public sector, see Comment, 55 CORNELL L. REV. 547, 555-57 (1970).

others powers that have not been delegated to it by charter or statute<sup>18</sup> — may enter into collective negotiations with their employees absent enabling legislation.

In the absence of home rule,<sup>19</sup> the power of local governments has been narrowly construed.<sup>20</sup> Local governments are the creation of the sovereign; their powers are defined by charter or by statute. But it is often possible to infer from these powers the authority to bargain collectively. Where a local public employer has been granted a general power to contract in the course of its operations and, particularly, to enter into employment contracts, a power to execute collective bargaining contracts may be fairly implied.<sup>21</sup> It may be argued, moreover, that a public employer's general power to conduct its day-to-day operations is sufficiently inclusive to permit consultation with all persons affected by such activities.<sup>22</sup> Unions are groups of such persons.

A recent law review note<sup>23</sup> envisions a "common law of labor relations" based upon judicial interpretations of federal labor legislation and argues that this common law "demands the recognition of a right to collectively bargain" in the public sector.<sup>24</sup> Analogizing from dictum in *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*,<sup>25</sup> wherein Justice Harlan made reference to this concept, the note concludes that:

Based upon the law as it has been applied in extending to public employees full rights of freedom of expression and association to organize and join labor unions, it is conceivable, based upon the above view of the common law of labor relations, that a court will decide that a refusal to bargain is an unfair labor practice not permitted to any employer, including the states and their political subdivisions.<sup>26</sup>

Although the cases and theory may not yet dictate a duty to bargain in the public sector, there appears to be ample support for the right to bargain collectively in local government labor relations *without* enabling legislation, at least in the absence of statutory prohibition.

18. *E.g.*, *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

19. Generally, home rule is defined as local power to manage local affairs subject to general laws. See 2 E. McQUILLIN, *MUNICIPAL CORPORATIONS* § 9.08 (2d ed. 1966).

20. See, *e.g.*, *Wichita Pub. Schools Employees, Local 513 v. Smith*, 194 Kan. 2, 397 P.2d 357 (1964); *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 524, 309 S.W.2d 792 (1957), citing *Burnett v. Maloney*, 97 Tenn. 697, 712-13, 37 S.W. 689, 693 (1896).

21. *Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); accord, *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *Civil Serv. Forum v. New York City Transit Authority*, 4 App. Div. 2d 117, 163 N.Y.S.2d 476 (1957), *aff'd mem.*, 4 N.Y.2d 866, 174 N.Y.S.2d 234, 150 N.E.2d 705 (1958).

22. *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482, 486 (1951); *Local 59, Minn. Fed'n of Teachers v. Obermeyer*, 255 Minn. 347, 147 N.W.2d 358, 367 (1966); M. LIEBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 328 (1966).

23. 19 CATHOLIC U.L. REV. 361 (1970).

24. *Id.* at 364.

25. 374 U.S. 367 (1969).

26. 19 CATHOLIC U.L. REV. 361, 365 (1970).

However, the courts have long recognized the uniqueness of governmental responsibility — a responsibility not merely to a group of stockholders but rather an affirmative duty to further the good of the polity. A city administration, no less than the federal or state government, is the guardian of all of the public's rights and has the duty to retain the legal authority to repudiate any of its commitments for the benefit and safety of the commonweal. It is this duty and responsibility of government which has caused so much confusion. "The issue is not . . . [the critics] say whether government's power is 'supreme' but how government as an employer ought to exercise that power."<sup>27</sup> The doctrine of illegal delegation of power speaks to this issue.<sup>28</sup>

This doctrine, to an even greater extent than sovereignty, is known primarily for its vagueness. While the courts have been particularly nebulous in their description of "delegation,"<sup>29</sup> the concept is founded upon, and one step removed from, the sovereignty doctrine, *i.e.*, local government may not legally delegate any of its authority as to matters properly within its legislative discretion as defined by charter or by statute nor abdicate any of its responsibility to private parties. Because its origin is similar to that of the sovereignty doctrine, it has been misleadingly used as a prohibition against collective bargaining.<sup>30</sup>

The most meaningful definition of illegal delegation of power, however, and one that recognizes the need for public policy limitations on the collective bargaining process in the public sector, is the one given by Professors Wellington and Winter: "The doctrine of illegal delegation commands that certain discretionary decisions be made solely on the basis of the judgment of a designated official."<sup>31</sup> The need for these limitations stems from the fact that it is implicit in any scheme of collective bargaining that control be shared by management and the union; there is a possibility that a particular issue of critical importance to the public interest might be sacrificed to the give and take of the bargaining process. This concept, then, goes not to the existence of collective bargaining but rather to the scope of bargaining; it forseees a limitation to the extent of bilateral decision-making but does not prohibit the negotiation process in its entirety.

As this doctrine recognizes and seeks to protect the affirmative duty of government to serve the good of the community, it favors — rather than bars — the process of collective bargaining. This is most

27. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109 (1969).

28. *Id.*

29. *E.g.*, "To the extent that [questions of wages, hours, and working conditions] . . . are left to the discretion of any city department or agency, the city authorities cannot delegate or abdicate their discretion. Any exercise of such discretion . . . is at all times subject to changes or revocation in the exercise of the same discretion." *Mugford v. Mayor & City Council*, 185 Md. 266, 270, 44 A.2d 745, 747 (1945).

30. *E.g.*, *Local 59, Minn. Fed'n of Teachers v. Obermeyer*, 255 Minn. 347, 147 N.W.2d 358 (1966). See generally cases cited *State Bd. of Regents v. United Packing House Food and Allied Workers, Local 1258*, 175 N.W.2d 110, 116 (Iowa 1970).

31. Wellington & Winter, *supra* note 27, at 1109.

clearly so because collective bargaining is a means of achieving labor peace<sup>32</sup> and employee efficiency. As stated in a report by the Twentieth Century Fund:

Through a union representative system public officials can develop more effective communications with employees. A sense of participation can increase employee morale. With representation accorded it, a union enters a limited partnership with management and assumes responsibility for employee compliance with rules and practices it has agreed to. It brings to management's attention grievances which, left undisclosed, could become nuclei of dissatisfaction and deteriorating performance.<sup>33</sup>

To summarize, collective bargaining has a place in the public sector. The legal arguments against it are weak and public policy favors it.<sup>34</sup> There are, however, limitations recognized by the doctrine of illegal delegation of power which are aimed at safeguarding the public interest. The second half of this paper is devoted to an analysis of what those limitations ought properly to be.

### *B. The Duty and the Scope of the Duty to Bargain in Good Faith*

The argument has been made that collective bargaining ought to be permitted in public employment; now we must determine what we mean by collective bargaining. What is it that the parties are required to do, how are they expected to behave and what are they expected to discuss at the bargaining table for there to be "true" collective bargaining?

This, of course, is not a problem unique to the public sector. In the private sector this duty has been defined as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment but such obligation does not compel either party to agree to a proposal or require the making of a concession."<sup>35</sup> This concept of "good faith" bargaining has been applied to both procedural and substantive matters. Bad faith may be inferred from the nature of proposals made<sup>36</sup>

32. "The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining between employers and employees is that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other." FINAL REPORT OF THE INDUSTRIAL COMMISSION 844 (1902). For an analysis related to peace in government employment, see FINAL REPORT, GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS 9 (N.Y. 1966).

33. TWENTIETH CENTURY FUND, PICKETS AT CITY HALL 7 (1970).

34. Cf. ABA, SECOND REPORT OF THE COMMITTEE ON LABOR RELATIONS OF GOVERNMENT EMPLOYEES 125 (1955).

35. National Labor Relations Act, 29 U.S.C. § 158(d) (1964). See generally Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958). See also *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), where the Court held that although the NLRB has the power to order the parties to negotiate, it has no power to compel either party to agree to a substantive matter.

36. *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958) (dictum).

and from tactics or procedures employed.<sup>37</sup> Bad faith has also been inferred in a situation where a party's tactics were not, per se, evidence of bad faith but where the failure to supply information to the other party made collective bargaining impossible.<sup>38</sup> The courts have been particularly insistent that the good faith concept imposes absolutely no requirement that the parties reach agreement. However, at the same time they have announced that it does "impose a duty to negotiate with an open and fair mind and a sincere purpose to find basis for agreement"<sup>39</sup> and that it "demands more than sterile and repetitive discussion of formalities precluding negotiations, and requires a sincere effort to reach agreement although not agreement itself."<sup>40</sup> Specifically, it requires more than the proposal of a particular provision and absolute refusal to even *consider* modification;<sup>41</sup> and it demands a certain amount of exchange of relevant information to ensure intelligent negotiation.<sup>42</sup> It requires enough "give and take" to say that some degree of shared control is implicit in the good-faith bargaining concept.<sup>43</sup> There exists another element outside the statutory scheme which supports this idea of shared control in true collective bargaining, *i.e.*, the practical impact of the negotiation process. Notwithstanding the employer's right ultimately to refuse to make concessions, the union — even if a no-strike clause exists — may exert enough pressure in the form of publicity, protest techniques or a general discontent among the union members which adversely affects the workers' performance to create some compulsion upon the employer to reach agreement and thereby transform the entire procedure into one of shared control.

There is evidence that the private sector model is being adapted to the public sector, the courts providing to the public sector the same expansive interpretation of the good faith concept that has been applied in the private sector. Michigan has been a forerunner among the states in requiring its local governments to bargain in good faith.<sup>44</sup> In one instance, the Michigan Labor Mediation Board invalidated the action of the Detroit Board of Fire Commissioners raising the requirements for promotion to certain positions. The Labor Board did not deal with the question of the validity of the new standards themselves, but objected strenuously to the Commissioner's unilateral action and failure to make a good faith effort to resolve differences through negotiations.<sup>45</sup> In *School District v. Holland Education Association*,<sup>46</sup> the Board of Education of Holland, Michigan, after five months of bargaining without reaching agree-

37. NLRB v. Katz, 369 U.S. 736 (1962).

38. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

39. NLRB v. McLane Co., 405 F.2d 483, 484 (5th Cir. 1968).

40. NLRB v. W.R. Hali Distributor, 341 F.2d 359, 362 (10th Cir. 1965).

41. General Elec. Co. & Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, 150 N.L.R.B. 192 (1964); see Forkosch, *Boulwarism: Will Labor-Management Relations Take It or Leave It?*, 19 CATHOLIC U.L. REV. 311 (1970).

42. NLRB v. Frontier Homes Corp., 371 F.2d 974, 978 (8th Cir. 1967).

43. Wellington & Winter, *supra* note 27, at 1109.

44. Werne, *Collective Bargaining in the Public Sector*, 22 VAND. L. REV. 833, 840-44 (1969).

45. Detroit Bd. of Fire Comm'rs, No. C67, F-58 (Mich. Lab. Med. Bd. 1968).

46. 380 Mich. 314, 157 N.W.2d 206 (1968).



ment, informed the Holland Education Association that the schools would be open that fall. The teachers filed an unfair labor practice charge alleging that the Board had refused to bargain in good faith;<sup>47</sup> the teachers refused to report to work on the opening day of classes. The Board of Education petitioned for and received a preliminary injunction ordering the teachers to refrain from the strike action.<sup>48</sup> The Michigan Court of Appeals affirmed the issuance of the injunction,<sup>49</sup> and the teachers' association appealed to the Supreme Court of Michigan.<sup>50</sup>

The supreme court reversed the court of appeals and dissolved the injunction, upholding the argument of the appellants that an injunction is a proper remedy only when a court has found that a particular strike would cause irreparable harm to the public, violence or breach of peace.<sup>51</sup> Although basing its holding on the absence of public harm, the court remanded for a determination of the employer's good faith bargaining, thus allowing the inference that an injunction against striking public employees in Michigan will be granted only where there is irreparable harm to the public or *where the employer has first bargained in good faith*. Thus it would seem that the public employer must enter court with clean hands.<sup>52</sup>

A recent California decision<sup>53</sup> indicates that the trend toward adopting private sector standards of good faith bargaining is not isolated. The Hospital Employee's Association was granted injunctive relief to keep the Board of Supervisors of San Mateo County from opening and declaring any bids received pursuant to the Board's attempt to contract out food management services at San Mateo General Hospital. The court held that the proposed plan would jeopardize the jobs of Association members and that the Board was required to first negotiate in good faith with the Association.<sup>54</sup>

47. For the standards of good faith collective bargaining in Michigan, see MICH. COMP. LAWS ANN. § 423.215 (1967). The provision is very similar to the federal standard, imposing the obligation upon both parties to "confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party. . . ."

48. *School Dist. v. Holland Educ. Ass'n*, No. 1238 (Cir. Ct. Ottawa County, Mich., decided Sept. 6, 1967).

49. 7 Mich. App. 569, 152 N.W.2d 572 (1967).

50. 380 Mich. 314, 157 N.W.2d 206 (1968).

51. *Id.* at 326, 157 N.W.2d at 210.

52. *But see* Board of Educ. v. New Jersey Educ. Ass'n, 53 N.J. 29, 247 A.2d 867 (1968). Under N.Y. CIV. SERV. LAW § 211 (McKinney Supp. 1968), a public employer is unconditionally obligated to seek an injunction against an illegal strike, and the court is required to grant it. N.Y. JUDICIARY LAW § 751(2) (McKinney 1968). *But see In re* Local 69, AFSCME, No. D-0014 (N.Y.P.E.R.B., May 8, 1970), where the penalty for a strike action was limited to forfeiture of dues deduction at the hospital locations involved in the strike because "the public employer and its representatives engaged in such acts of extreme provocation as to detract from or mitigate the responsibility of the employee organization for the strike." *Id.* at 28.

53. *Employees Ass'n v. County of San Mateo*, No. 142834 (Super. Ct., Cal., Feb. 27, 1969) (mem.), cited in Poyer, *Good Faith In Collective Bargaining*, 2 CAL. PUB. EMPLOYEE LABOR RELATIONS 1, 3 (1969).

54. *Id.* The California statute imposes an obligation to "meet and confer in good faith, regarding wages, hours, and other terms and conditions of employment." The obligation is defined as "the mutual obligation personally to meet and confer in order to exchange freely information, opinions, and proposals, and to endeavor to reach

In the private sector the duty to bargain in good faith and the scope of the duty to bargain are inextricably intertwined. A party's refusal to bargain over particular subject matter may invite an unfair labor practice charge from the other party.<sup>55</sup> This most often occurs because of the employer's<sup>56</sup> assertion of a "management prerogative" over which, he argues, he is not compelled to bargain.<sup>57</sup> The public sector analogue to management prerogative is the concept of illegal delegation of power. The public employer may refuse to bargain on the grounds that the subject matter raised in negotiation is one on which he cannot yield his discretion to act unilaterally.<sup>58</sup> Thus only in the public sector can a subject be considered truly "nonbargainable" in the sense that the parties cannot bargain over it, even if both desire to do so, because the public employer is prohibited from doing so by the illegal delegation doctrine. The question, then, is where the line separating bargainable and nonbargainable subject matter in the public sector ought to be drawn. Statutory language — regulating both private and public bargaining — is of little help since it defines the scope of bargainable matter as "wages, hours of employment and other terms and conditions of employment."<sup>59</sup>

The only private sector resolution to this difficulty has been the creation of two classes of bargainable matter: mandatory and voluntary (or permissive).<sup>60</sup> Mandatory subjects are those about which the parties are required to bargain to impasse; voluntary subjects may be discussed at the bargaining table only if both agree.<sup>61</sup> This has not proved to be a very clear means of classification and has been subject to criticism.<sup>62</sup> Judicial attempts at defining the duty to bargain in this manner are doomed to failure because no two bargain-

agreement on matters within the scope of representation." CAL. GOV'T CODE § 3505 (1968).

55. National Labor Relations Act, 29 U.S.C. §§ 158(a), (b)(3) (1964).

56. It is not only employers' refusal to bargain which may bring about an unfair labor practice. See 71 HARV. L. REV. 502 (1958).

57. See, e.g., *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

58. Cf. *In re Farmingdale Classroom Teachers*, 68 L.R.R.M. 2761 (Sup. Ct. N.Y. 1968); Recommendations of Fact Finding Panel, In the Matter of the Dispute Between the State of New York and Council 82, AFSCME (April 1, 1970), quoting the select Joint Legislative Committee on Public Employees Relations:

PERB has also been given the power to require the parties to negotiate in good faith. The most significant aspect of this authority is in the determination of the proper scope of bargaining.

If an employee organization feels that a certain topic is a proper subject of mandatory bargaining and the public employer disagrees, the organization may seek a bargaining order from PERB. The administrative agency then would determine whether the issue involves a subject about which the public employer can be required to bargain.

*Id.* at 19-20.

59. National Labor Relations Act § 9(2), 29 U.S.C. § 159(a) (1964). Cf. N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1967); ORE. REV. STAT. § 243.730 (1967); MINN. STAT. ANN. § 179.52(2) (Supp. 1965); WIS. STAT. ANN. § 11.70(2) (1967).

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

61. See, e.g., *Seitz*, *supra* note 12, at 250-51.

62. See, e.g., H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 63-90 (1968). For an early warning of the difficulties to be faced in governmental regulation of the scope of collective bargaining, see Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

ing situations are precisely the same and precedent applicable to one set of facts is likely to be inapplicable to another. It is no surprise, then, that it has proved extremely difficult for the NLRB and the courts to give defined life, in the private sector, to the phrase "other terms and conditions of employment";<sup>63</sup> therefore, it is likewise difficult to envision the viability of this judicially-interpreted test of mandatory bargaining matter for the public sector. The Supreme Court's latest attempt to speak to the issue resulted in the "industry practices" test of *Fibreboard Paper Products v. NLRB*<sup>64</sup> — a test of little immediate use in the public sphere where cases would necessarily be of the first impression. Nor has the mandatory/voluntary distinction served the goal of industrial peace: "forcing [the parties] to remove the disputed subject from the agenda will leave matters of serious controversy unsettled; unrest, rather than stability, will result."<sup>65</sup> A better approach in the private sphere would be for the law to stay out. "[T]he parties would decide for themselves on the basis of interest, practicality, and economic power what to bargain about. These factors would not be influenced by law. The scope of bargaining would be tailored by the situation for the situation."<sup>66</sup> The duty to bargain in good faith, then, would refer only to questions of style and intent, not subjects of bargaining. Finally, in the absence of a strike option,<sup>67</sup> the need for the mandatory/voluntary classification is lessened. In the private sector, when a subject is declared "mandatory," negotiation over that subject may be pushed to impasse; and the use of economic weapons — strike or lockout — are permissible.<sup>68</sup> The same result follows impasse in negotiation over "voluntary" subjects which the parties have agreed to discuss; but, if the parties have *not* agreed to discuss certain voluntary subjects, the use of these economic weapons — or any others — to compel agreement to discuss is forbidden as an unfair labor practice. Thus, in the private sphere the mandatory/voluntary distinction is a useful tool for eliminating the possibility of strikes or lockouts over subjects which the parties consider not important enough to justify such strong action; the voluntary classification allows either party to remove these subjects, in advance, from the bargaining table and thus to minimize the number of issues over which the parties could reach an impasse. In the public sphere, where there is no right to

63. See generally Fleming, *The Obligation to Bargain in Good Faith*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 60 (Shister, et al., eds. 1962); Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968).

64. 379 U.S. 203 (1964). The employer had subcontracted out work previously done by its union employees in order to save money. The Court upheld the Board's finding that this violated the employer's obligation to bargain collectively. The Court said, "While not determinative, it is appropriate to look at industrial bargaining practices in appraising the propriety of including a particular subject with the scope of mandatory bargaining." *Id.* at 211.

65. 71 HARV. L. REV. 502, 512 (1958).

66. H. WELLINGTON, *supra* note 62, at 79.

67. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 13-18 (1969). *But see* new Hawaii statute, reproduced in 349 G.E.R.R. F-1 (May 18, 1970).

68. Cf. M. MOSKOW, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 250-51 (1970); Schmidt, *Collective Negotiations in Michigan: An Overview*, in D. KRUGER & C. SCHMIDT, COLLECTIVE BARGAINING IN THE PUBLIC SERVICE 170, 178 (1969).

strike or lockout, pushing a subject to impasse would, presumably, merely result in the implementation of impasse procedures such as mediation, fact finding or some form of arbitration, none of which constitute the ultimate economic conflict presented by a strike or a lockout. Because the consequences of impasse are not as disruptive in the public sphere, there is a corresponding decrease in the need to minimize the number of subjects over which the parties could reach such impasse. Thus the rationale for the mandatory/voluntary distinction in the private sector offers little support for the use of that distinction in the public sphere.

The private sector mandatory/voluntary distinction is, therefore, not appropriate for use in the public sector. The public sector distinction must be one that clearly defines what is and what is not bargainable — rather than what may or may not be required bargaining matter. For this purpose, the judiciary, which bases its decisions on precedent or interpretation of existing law, is without adequate foundation for setting the standards by which to determine those areas of unilateral decision-making in the public sector. The natural tendency to preserve governmental power makes the executive branch an unsatisfactory choice as arbiter of bargainability in the public sphere. The legislature, equipped as it is to hold hearings and to draft statutory guidelines, is the proper governmental branch to define these standards of bargainability.

There has been relatively little litigation over the scope of bargaining in public employment.<sup>69</sup> Much of what there has been has focused on two issues: union security and the arbitration of unresolved grievances. In *Tremblay v. Berlin Police Union*,<sup>70</sup> the Supreme Court of New Hampshire held that the union shop was a proper subject of bargaining, so long as ultimate power resided in the municipality and, in this case, the police commissioner, to hire and fire personnel and to manage the police department.<sup>71</sup> And in Wisconsin, the state supreme court has held that arbitration as the terminal point in a grievance procedure is a mandatory subject of bargaining.<sup>72</sup> Some courts and labor boards have borrowed the terminology of the private sector. A Michigan trial examiner, for example, developed a list of "mandatory" subjects for teachers and school boards in that state.<sup>73</sup>

As is true in other areas of municipal employee law, we look to New York City for the most far-reaching trends in this area. The Board of Collective Bargaining (a part of New York City's tripartite Office of Collective Bargaining) has ruled that any management de-

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69. See generally St. Antoine, *The Consent of the Governed — Public Employees' Unions and the Law*, Address Before The Second Annual Collective Bargaining Forum, The Institute of Collective Bargaining and Group Relations, New York City, May 18, 1970.

70. 108 N.H. 416, 237 A.2d 668 (1968).

71. *But cf.* *Benson v. School Dist. No. 1*, 344 P.2d 117 (Mont. 1959).

72. Local 1226, *AFSCME v. City of Rhinelander*, 35 Wis. 2d 209, 151 N.W.2d 30 (1967); see *School Bd. v. Werb*, 65 L.R.R.M. 2488 (Cir. Ct. Wis. 1965).

73. The subjects are the right to evaluate curriculum, class schedules, size of classes, selection of materials, planning of facilities, and procedures for rating teacher effectiveness. 186 G.E.R.R. E-2 (March 3, 1969).

cision having a "practical impact" on working conditions may become the subject of bargaining if the city does not act to correct the impact.<sup>74</sup> A unanimous Board explained that it was referring to any "unreasonably excessive or unduly burdensome workload, as a regular condition of employment."<sup>75</sup> The Board of Collective Bargaining has formally accepted the private sector's mandatory/voluntary distinction in a dispute over the bargainability of some 151 of 241 contract demands by the Social Service Employees Union (S.S.E.U.).<sup>76</sup> The Board held that voluntary subjects could be "discussed" by mutual consent and included in agreements without their being considered mandatory in future negotiations.<sup>77</sup>

The executive branch has been as ambiguous as the courts in dealing with the thorny problem of defining the scope of bargaining. New York City's executive order states the right of the city to make certain decisions and then declares: "but notwithstanding the above, questions concerning the *practical impact* that decisions on the above matters have upon employees, such as questions of workload or manning are within the scope of collective bargaining."<sup>78</sup> All the union has to do is show that those whom it represents are affected by the management decision in question in order for unilateral decision-making to be transformed into bilateral.<sup>79</sup>

Management's rights clauses<sup>80</sup> could provide the framework for delineating a proper scope of bargaining. Such clauses, however, although commonplace in private industry, are rare in the public sector<sup>81</sup> and are often so general as to be of little value.<sup>82</sup> Moreover, contract clauses often give a false indication of the scope of the issues jointly determined because the "real" scope of bargaining is frequently more extensive than the "formal" scope.<sup>83</sup>

Evidence indicates that public managers have, up to this point, opted for breadth rather than depth as regards issues to be negotiated.<sup>84</sup> "That is, management appears willing to place no limit on the number of negotiable issues so long as the actual power of the union over the issues is severely limited."<sup>85</sup> While one would hope

74. City of New York Fire Dep't & Uniformed Firefighters Ass'n, Bd. of Coll. Bar. Dec. No. B-9-68, cited in Anderson, *The Office of Collective Bargaining in New York City*, in J. LOEWENBERG & M. MOSKOW, *COLLECTIVE BARGAINING IN GOVERNMENT: READINGS AND CASES* (to be published 1971, Prentice-Hall, Inc.). This decision followed the lead of Mayor Lindsay's executive order in this regard. See note 78 *infra* and accompanying text.

75. City of New York Fire Dep't & Uniformed Firefighters' Ass'n, Bd. of Coll. Bar. Dec. No. B-9-68, cited in Anderson, *supra* note 74.

76. City of New York and Social Services Employees' Union, Bd. of Coll. Bar. Dec. No. B-11-68, cited in Anderson, *supra* note 74.

77. *Id.*

78. Executive Order No. 52, § 5c (N.Y. City, Sept. 29, 1967) (emphasis added).

79. Cf. Los Angeles County, Employee Relations Ordinance, Oct., 1968.

80. Management's rights clauses, generally, outline a particular area as to where the employer will make the discretionary decisions. See N. CHAMBERLAIN & I. KUHN, *COLLECTIVE BARGAINING* 86 (2d ed. 1965).

81. BROOKINGS INSTITUTION, *STUDY ON COLLECTIVE BARGAINING AND PUBLIC EMPLOYMENT*, chapter on *The Employment Relationship* (forthcoming in 1971).

82. *Id.*

83. Gerhard, *The Scope of Bargaining in Local Government Labor Relations*, U. OF ILL. BULL., REPRINT SERIES No. 211 (1970).

84. *Id.* at 547.

85. *Id.*

for both breadth and depth in negotiation, the expansion of subject matter itself is a good sign. "A very narrow scope reduces the significance of collective bargaining. Effective collective bargaining requires 'a reasonably wide range of negotiable issues.'"<sup>86</sup> Collective bargaining, after all, is a process whereby each of the parties foregoes something it desires in order to obtain (or retain) something it desires more.<sup>87</sup> Increasing the subject matter appropriate for bargaining, therefore, increases the possibilities for exchange and agreement.<sup>88</sup> This process ought not to be hampered unnecessarily. The trend of decisions in the public sector — if the few decisions we have indicate a trend — would seem to bode well for expansion of the scope of the collective bargaining process. There is a danger, however, that the use of private sector terminology to define bargainable subject matter will lead, as it apparently has in the private sector, to haphazard and illogical restrictions on collective bargaining in the name of the duty to bargain in good faith, or, as some New York cases may indicate, to unwarranted expansions of the scope of bargaining.

A balance must be struck between illogical restrictions on bargaining and overexpansion into sensitive policy areas. The next section of this paper attempts to set out certain statutory guidelines for a proper scope of bargaining in local government employment.

## II. APPROPRIATE SUBJECTS FOR BARGAINING

The right to bargain collectively in the local government service has been set out. It has also been shown that the public sector is rapidly borrowing private sector concepts of the duty to bargain in good faith and the scope of the duty to bargain. It has been argued that, while the doctrine of illegal delegation of power places certain unclarified restrictions on the subject matter appropriate for bargaining in public employment, the public sector would be ill-advised to borrow private sector concepts to define a proper scope of bargaining. It is not clear that these judicially-determined principles are working well in the private sphere, and there is little reason to suppose that they would serve the public sector any better.

Now we must turn to a comparison of the contexts in which public and private sector bargaining takes place. It is only by understanding certain unique aspects of public sector labor relations that we can more clearly define the limits which the doctrine of illegal delegation of power places on the scope of bargaining in the public service.

While it is true that "in our system of private collective bargaining, economic power and the parties' desires are the only rational determinants of what matters should be subjects of bargaining,"<sup>89</sup> it is not axiomatic that these should be the sole determinants in public

86. J. LOEWENBERG & M. MOSKOW, *supra* note 74, at 239.

87. Cf. N. CHAMBERLAIN, *COLLECTIVE BARGAINING* 220-21 (1951).

88. See Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919, 928 (1969).

89. Wellington & Winter, *supra* note 27, at 1111.

collective bargaining. The economic context in which public employee collective bargaining takes place is dissimilar to that of the private sector.<sup>90</sup>

There is no recognizable rational price structure or profit motive in the public sector. Many municipal goods and services are not divisible into discrete units in production or distribution and are provided free or at nominal charges to consumers while the great bulk of their expense is borne by general revenues. Fire and police protection are classic examples of such "collective goods." On the other hand, rational pricing is quite feasible in government-operated public utilities such as transit and water; but these are often deliberately run on deficit bases for political and social reasons. The New York City subways, water supply, and the Staten Island Ferry are prime illustrations of this proposition.

Not only is there lacking a direct relationship between the cost of a city-supplied service and the price charged for it, but it may be extremely difficult for local government to expand its tax base. The exodus of the middle class from strife-torn cities has resulted in contraction of the local tax base, and all cities face an elasticity in their tax revenue curve with respect to population: increased taxes yield further impetus for the harried middle class to reject urban for suburban living.<sup>91</sup> Thus there is no potential for a redistribution of income from consumers or management to workers as was envisioned by Congress for the private sector when the National Labor Relations Act was enacted.<sup>92</sup> There can be only redistribution from one municipal service to another or an unacceptable tax increase. Arguably, such redistribution is properly a political question<sup>93</sup> which should not be delegated by a city to the bilateral bargaining process. But this would mean that bargaining is not proper on the subject of wage levels. If there is to be any bargaining, it is difficult to imagine it not including the question of wages. Perhaps the trend toward increased state and federal aid to cities will avoid any such impasse between a vital public interest in the levels of various services and the demand of workers for collective bargaining.

The relationship which local government bears to those who consume its services is such that the public stake is apt to be large in many areas of decision-making. Those who manage the city or county are legally responsible to the entire community. Those who manage in the private sector, on the other hand, more often than not see their immediate constituency as the shareholders of the firm, not the consumers of the firm's product. It is the balance sheet which is the main determinant of management decision in the private sphere,<sup>94</sup> whereas it is the polling booth which has the most sway in

90. See Kilberg, *Labor Relations in the Municipal Service*, 7 HARV. J. ON LEG. 1, 13-15 (1969).

91. Wellington & Winter, *supra* note 27, at 1122; see Rehmus, *supra* note 88, at 923.

92. See generally Friedman, *Some Comments on the Significance of Labor Unions for Economic Policy*, in D. WRIGHT, *THE IMPACT OF THE UNION* 204 (1951).

93. Derber, *Who Negotiates for the Public Employer?*, U. OF ILL. BULL., REPRINT SERIES No. 199, at 53-54 (1969).

94. See generally R. DORFMAN, *PRICES AND MARKETS* (1967).

the public sector.<sup>95</sup> Municipal and county officials are, at least theoretically, attuned to the demands of the public.<sup>96</sup> The public union, however, is attuned to the interests of its membership — which may or may not coincide with those of the public, or segments of the public. When management in the public sector gives up some of its “prerogatives,” therefore, it foregoes the right to make decisions in the name of all the people. When management in the private sector loses its unilateral power to act, however, the public loses little or nothing because the decision-making process is merely transferred from one private group to another, rather than from public to private. The loss of the power to manage unilaterally in the public service is, therefore, more serious than the same phenomenon in the private sector.

Moreover, the public employee union may be less apt to bow to management’s leadership in crucial policy matters. The private sector union must be sensitive to the plight of its employer in the marketplace because the jobs of its members depend upon the employer’s profit.<sup>97</sup> The public union, however, fears neither layoff nor abandonment and does not believe in the possible bankruptcy of its employer.<sup>98</sup>

In addition, the professional positions which many public employees hold make it more likely that their bargaining demands will center on crucial policy matters. Although it has been suggested that all workers seek intellectual status equal to management,<sup>99</sup> it is generally believed that it is the professional employee who feels his freedom most threatened by such management-oriented principles as “directive leadership,” “unit of command,” and “task specialization.”<sup>100</sup> Professional demands in response to such threats do not impinge on management’s policy-making role in the same way in the private sector as they do in the public. Such typical industry requests as time off to attend professional meetings, educational leaves, and the like are professional demands only in so far as they are unique to the professional’s immediate working environment. There is nothing to the same degree in the private experience to compare, for example, with the demands of the Social Service Employees’ Union in New York City for a twenty-five percent increase in twice yearly automatic clothing grants and telephone allowances.<sup>101</sup> The tendency of public professionals to impinge upon management’s political prerogatives

95. See generally R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

96. This includes the elected official’s perceptions of public desires and needs, as well as the impact upon him of various interest groups. See, e.g., R. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961).

97. See A. REES, THE ECONOMICS OF TRADE UNIONS 107-09 (1962); see also Reder, *The Theory of Union Wage Policy*, 44-1 REV. OF ECON. AND STAT. 34, 40 (1952).

98. Interview with Jerry Wurf, President of the American Federation of State, County & Municipal Employees, U.S. NEWS & WORLD REPORT, Sept. 26, 1966, at 98.

99. N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 98 (1967).

100. Johnson & Hill, *Managements’ Dilemma — The Professional Employee*, 503 CAL. MGT. REV. 37, 41 (1963).

101. BROOKINGS INSTITUTION, *supra* note 81, chapter on *The Effect on Work Management and Working Conditions*. Perhaps private sector workers will follow the lead of some shareholders in, for example, opposing the manufacture of napalm, but this has not yet happened.



are greater than the private professional's tendency to impinge upon his employer's economic ones. It has been said of the New York City school teachers that they are "convinced they are fully equipped to head either the [union] local or the school system."<sup>102</sup>

On the other side of the coin, it is fair to say that, at least as regards professional employees, nearly every policy decision of local government has an effect upon the professional's working conditions.<sup>103</sup> A recent National Education Association brief to the New Jersey Public Employment Relations Commission makes the argument well:

Among the most significant of working conditions to a teacher are a broad panoply of matters, such as the quantity and quality of textbooks, methods of instruction, curriculum, the number of students assigned to a classroom, which not only affect the relative hardship of a teacher's daily tasks but are prime determinants of the quality of education. Impact on the work of a teacher and impact on the excellence of product are inextricably intertwined.<sup>104</sup>

In addition, the contact which many local government employees regularly have with members of the community means that there are pressures upon one who works in the public sector which are not often present in the private sphere. Albert Shanker, president of the United Federation of Teachers in New York, put it this way, "No one dreams of going to Ford or General Motors and saying, 'Ralph Nader says my car is unsafe; I demand you fire the following workers.' In the schools it's very different. The parent marches in and says, 'This class is behind in reading; fire the teacher.'"<sup>105</sup> The desire which public unions have to expand the scope of bargaining into policy areas is therefore understandable. But this does not mean that it is acceptable.

The function of government as representative of all interests in the community, the strategic nature of governmental decision-making involving difficult choices between competing services, the generally proven unworkability of strike prohibitions,<sup>106</sup> the parochial nature of union representation,<sup>107</sup> and the high probability of union attempts to encroach on areas of unilateral management decision-making demand that life be given to the doctrine of illegal delegation of power in the form

102. Raskin, *He Leads His Teachers Up the Down Staircase*, N.Y. Times, Sept. 3, 1967, (Magazine) at 4.

103. Cf. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* (1967).

104. *In re Ramsey Bd. of Educ. & Ramsey Teachers Ass'n*, No. CE-11, at 8.

105. *Supra* note 102, at 29. Another point of view has been expressed by a high-ranking official of the Board of Education: "Shanker and his associates are masters in the use of threats until they get their way. . . . No legal, economic, or educational considerations are important to the U.F.T., just naked strength." *Id.* at 28.

106. Work disruptions in the municipal service increased 271 percent from 1967 to 1969. ADVISORY COMMISSION, *supra* note 1, at 39-40; cf. Kilberg, *supra* note 90, at 33.

107. Cf. M. LIEBERMAN & M. MOSKOW, *COLLECTIVE NEGOTIATIONS FOR TEACHERS* 231 (1966): "It is naive to believe that the employment conditions desired by teachers will always be consistent with the solution based purely on educational policy."

of proscribed subjects of bargaining. The desire for effective collective bargaining means that the proscription must be limited to those areas where unilateral decision-making is essential or bilateral determination is clearly inappropriate.

A first category of subjects not proper for collective negotiation concerns matters which would require noncompliance with superior statutory law or administrative regulation. Included within this category, for example, are matters that would arguably conflict with constitutional standards of equal protection or due process. A teachers' union, for example, ought not to be permitted to demand that a board of education give individual teachers the right to punish "unruly" pupils as they see fit.<sup>108</sup> The "professional demands" of the Social Service Employees' Union, referred to above, would have required New York City to violate state and federal welfare regulations had they been met.<sup>109</sup>

Civil service regulations are a distinct problem because they often set working conditions and standards which employees desire to bargain over. A civil service system, in the absence of an express statutory prohibition, will not preclude the negotiation of collective bargaining contracts which are consistent with it.<sup>110</sup> But, to the extent that a civil service system creates statutory rights, these cannot be varied by agreement.<sup>111</sup> The civil service system can, therefore, be a major stumbling block to free collective bargaining. To rectify this, "all non-merit functions should be transferred from the civil service commission to a personnel department under the chief executive officer of each local unit."<sup>112</sup> Arvid Anderson, Director of the Office of Collective Bargaining in New York City, has recommended such an approach, retaining "the essentials of the merit system with respect to the recruiting, examination, hiring and the establishment of standards for promotion and training."<sup>113</sup> Unfortunately, practice and theory do not always comport. In Massachusetts and Wisconsin, for example, the public employee collective bargaining statutes specifically set out the superiority of existing civil service commission regulations.<sup>114</sup> In Connecticut, on the other hand, the employment and promotion functions of the merit system are excluded from collective bargaining; but negotiated agreements supersede all other provisions of the Civil Service Act.<sup>115</sup> The Connecticut example would seem to be the better one to follow, accepting the general provision that collective agreements are not to supersede

108. *In re* Ramsey Bd. of Educ. & Ramsey Teachers Ass'n, No. CE-11, at 71-72.

109. N.Y. Times, June 18, 1967, at 38, col. 5.

110. See *Civil Serv. Forum v. New York City Transit Authority*, 3 Misc. 2d 346, 351-52, 151 N.Y.S.2d 402, 406-07 (Sup. Ct. Kings County, 1956), *rev'd on other grounds*, 4 App. Div. 2d 117, 163 N.Y.S.2d 476 (1957), *aff'd mem.*, 4 N.Y.2d 866, 150 N.E.2d 705, 174 N.Y.S.2d 234 (1958).

111. *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 299-302, 168 P.2d 741, 745-46 (1946).

112. Rehmus, *supra* note 88, at 927.

113. Personnel Opinions, 27 PUB. PERSONNEL REV. 52 (1966).

114. MASS. ANN. LAWS ch. 149, § 178(H) (Supp. 1969); WIS. STAT. § 111.91 (Supp. 1969).

115. CONN. GEN. STAT. ANN. § 7-474(f) (1958).

constitutional or legislative guarantees other than the non-merit provisions of civil service acts.

A second category of subject matter in which the public stake is so great as to warrant a prohibition on bargaining are those matters that vitally affect the adequate protection of the public from physical harm. An example of this type of prohibition is an arbitration decision in New York City which held that the city is not required to bargain with policemen and firemen over how many policemen are put into a patrol car, the number of firemen on an engine or where these men are assigned.<sup>116</sup>

In such areas as police, fire, sanitation and medical services, workload, work assignment and job content are particularly sensitive subjects. But it does not seem appropriate to place a total bargaining ban on these subjects. In the New York City situation, for example, the Patrolmen's Benevolent Association (PBA) insisted that police patrol cars should be manned by two men at all times in order to insure the safety of the police officers. The city maintained that one man is enough in low crime neighborhoods in the safer times of day. The city wanted to assign the additional policemen to high crime areas of the community; the police union was concerned with the safety of its members. While the city's aims were laudable, so were those of the PBA; the public stake is evident in police assignments but it is also evident in police safety. A more recent New York decision held that the city is required to bargain with the firemen's union over the assignment of fire fighting units to high-risk hours and areas. The Board of Collective Bargaining held that any management decision with "practical impact" on employees' working conditions is bargainable unless the city moves "expeditiously" to relieve the impact.<sup>117</sup> Here, the question of public safety — and particularly the safety of high fire-risk ghetto areas — was ignored. This question, dealing with work assignment and manning, should have been determined unilaterally with the full public interest in mind.

A statutory ban on bargaining is called for where issues of public safety are involved, particularly in the fire, police, sanitation and medical services. An arbitration panel or court should determine whether any particular union demand would be adverse to public safety if accepted by the city. If so, the local government would not be permitted to negotiate over the matter in question. No public official ought to be permitted to bargain with a limited interest group over issues which vitally affect the health and safety of the community. And the community should be able to hold its elected officials directly accountable for successes and failures in this regard without allowance for the give and take of the bargaining table.

A third area of nonbargainability concerns the social welfare services, which generally include teachers, welfare workers, hospital employees and other professional and non-professional employees. In this area, the legislature must provide a comprehensive listing of bargainable and nonbargainable matters, in each case balancing the

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116. N.Y. Times, Oct. 11, 1966, at 49, col. 2.

117. See notes 74 & 78 *supra*.

public interest with the right of public employees to be heard on matters which directly affect their working conditions. In making this determination, the legislature ought to weigh heavily the unique concerns which teachers, social workers and other public professionals have for the well-being of the population they serve; every effort should be made to keep the subject matter within the bargaining structure.

Of the entire category of social welfare services, education especially is of prime concern to all citizens and is a likely battleground for a duel between "labor union concepts and civil rights concepts."<sup>118</sup> The schools are a sensitive area of contact between city employees and ghetto residents: parents are certain to blame the schools for the failure of their children while school personnel, confident that they are doing the best that they can within the confines of the system, are apt to be antagonistic toward the parents of their students.<sup>119</sup>

Strategic level decisions dealing with *what* is to be taught, *who* is to be educated and *where* schools are to be located should be made solely by individuals whose job it is to serve the long-run public good and who are responsible to all the people of the local community. Course curriculum and textbook choice ought to be unilaterally set by those who, it is hoped, will be more sensitive to the impact which the social make-up of a community has on its educational needs. There must be a degree of flexibility and leeway for teacher experimentation; teaching methodology, therefore, should not be a matter for unilateral school board determination. Subjects such as teacher facilities and free periods for class preparation, because of their impact on the teachers' working conditions, should remain open for collective negotiation. There are certain subjects of a hybrid nature, such as class size, which may be viewed as matters of educational policy, but whose impact on working conditions for teachers is so great that they ought to remain bargainable.

It is not intended that these guidelines prohibit individual teacher-supervisor discussions on matters determined nonbargainable; but that is quite different from formal collective bargaining where unpleasant trade-offs might occur on matters of fundamental public importance with a representative of a limited private interest.

### III. CONCLUSION

I suggest these three guidelines as proper limitations on the scope of the duty to bargain in local government labor relations. They do not exhaust the list of arguable possibilities; an agency's level of public assistance, as in the case of the New York welfare dispute, might very properly be classified as nonbargainable. There is no doubt that more study is needed before such guidelines are established. Care must be taken when restricting the scope of bar-

118. Raskin, *Why New York is Strike City*, N.Y. Times, Oct. 22, 1968, (Magazine) at 9, quoting John Doar, President of the New York Board of Education.

119. Cf. Mayer, *The Full and Sometimes Very Surprising Story of Ocean Hill, The Teachers' Union and the Teachers' Strikes of 1968*, N.Y. Times, Feb. 2, 1969, (Magazine) at 18.

gaining — the possibility of throwing the infant collective bargaining process out with the bath water is very great.<sup>120</sup> Too many restrictions on the scope of bargaining would be an inducement for public employee unions to resort to strike tactics in order to obtain their goals. The proper balance between employee rights and citizen rights must be struck.

A caveat is in order. Were it possible to develop adequate dispute settlement mechanisms for public employment so as to effectively eliminate the strike threat, there would be less need to place restrictions on the subject matter of bargaining. The fear of local government capitulation to unreasonable union encroachments on the policy-making process would be lessened by this corresponding decrease in union power.<sup>121</sup> I do not, however, believe it is possible to effectively eliminate the strike or other work disruptions in the public sector. Until such a system has been devised, these restrictions on the bargaining system are a necessity.<sup>122</sup>

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120. Cf. Rehmus, *supra* note 88, at 928; Schmidt, *supra* note 68, at 179; Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 908 (1969).

121. In the usual private sector situation, compulsory arbitration is neutral as to effect on management and union power. However, where the public service is deemed essential, the union strike is an unequal power which is reduced by compulsory settlement procedures.

122. Cf. McLennan & Moskow, *Multilateral Bargaining in the Public Sector*, in TWENTY-FIRST ANNUAL PROCEEDINGS OF THE INDUSTRIAL RELATIONS RESEARCH ASS'N 31 (1969).