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# Note

## Collective Bargaining Agreements and the Minnesota Public Employer

*Although the terms and conditions of private employment are normally governed by collective bargaining agreements, much uncertainty surrounds the legal status of such agreements in public employment. Despite this uncertainty many public employers in Minnesota have found it necessary to enter into these bilateral agreements to secure harmonious labor relations. The author of this Note analyzes present Minnesota law and concludes that public employers in this state may enter binding collective bargaining agreements that include many of the provisions found in equivalent agreements in private industry.*

### INTRODUCTION

All Government employes should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.<sup>1</sup>

The point of view expressed in this quotation has, with the exception of a few recent decisions,<sup>2</sup> controlled judicial rulings

1. Letter From Franklin D. Roosevelt to Luther C. Steward, President of the National Federation of Federal Employees, Aug. 16, 1937, in RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 436-37 (1946). The portion of that letter quoted in text has often been quoted in judicial opinions. *E.g.*, *State v. Brotherhood of R.R. Trainmen*, 37 Cal. 2d 412, 417, 232 P.2d 857, 860-61 (1951); *City of Springfield v. Clouse*, 356 Mo. 1239, 1247, 206 S.W.2d 539, 542-43 (1947).

2. See *Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Erie County Water Authority v. Kramer*, 4 App. Div. 2d 545, 167 N.Y.S.2d 557 (1957); *New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956); *Civil Serv. Forum v. New York City Transit Authority*, 3 Misc. 2d 346, 151 N.Y.S.2d 402 (Sup. Ct. 1956), *rev'd on other grounds*; 4 App. Div. 2d 117, 163 N.Y.S.2d 476 (1957); *Christie v. Port of Olympia*, 27 Wash. 2d 534, 179 P.2d 294 (1947).

on questions of collective bargaining with public employees.<sup>3</sup> The Minnesota Supreme Court, however, has not had the opportunity to define the extent to which collective bargaining is permissible in the field of public employment. But, lack of adjudication should not obscure the fact that the legal and practical problems in this area are pressing ones that require solution. This proposition is exemplified by the number of opinions promulgated by the state attorney general in response to requests by various public employers for a clarification of the issue.<sup>4</sup> The purpose of this Note is to ascertain the limitations, if any, on collective bargaining with public employees in Minnesota, with specific emphasis on municipalities and school districts as public employers. The Note will first consider the question of whether the public employer has the general power to enter into a collective bargaining agreement with employee representatives and then consider the validity of specific provisions normally included in such agreements.

### I. THE GENERAL POWER OF THE PUBLIC EMPLOYER TO ENTER INTO COLLECTIVE BARGAINING AGREEMENTS

The Minnesota legislature has taken a major step toward instituting collective bargaining in the field of public employment by enacting sections 179.51 to 179.58 of the Minnesota statutes—the so-called “no-strike” provisions.<sup>5</sup> Under section 179.52 of the Minnesota statutes (the conference procedure section), public employees are given the right to join or to refrain from joining labor organizations and the power to designate representatives to meet with the public employer.<sup>6</sup> In turn, the public employer is *requir-*

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3. See Annot. 31 A.L.R. 2d 1142, 1170-72 (1953).

4. E.g., Minn. Att’y Gen. Op. 270-D (Jan. 22, 1959); Minn. Att’y Gen. Op. 270-D (May 10, 1957); Minn. Att’y Gen. Op. 270-D (Feb. 2, 1954); Minn. Att’y Gen. Op. 270-D (July 18, 1952); Minn. Att’y Gen. Op. 270-D (June 19, 1950); 1944 MINN. ATT’Y GEN. BIENNIAL REP. 205 (Op. No. 115, March 29, 1943); 1940 MINN. ATT’Y GEN. BIENNIAL REP. 122 (Op. No. 92, Feb. 28, 1940); Minn. Att’y Gen. Op. 270-D (March 23, 1939).

5. Although §§ 179.51-.58 are popularly referred to in a collective sense as the “no-strike statute,” § 179.51 is the section that prohibits public employees from striking. The other sections of the “no-strike statute” are at least equally as important for they provide various means of assuring effective negotiation or mediation of disputes.

It should here be noted that neither the Minnesota Labor Relations Act nor the National Labor Relations Act apply to public employment. MINN. STAT. § 179.01(3) (1957); 61 Stat. 137-38 (1947), 29 U.S.C. §§ 152(2), (3) (1958).

6.

Nothing contained in sections 179.51 to 179.58 shall be construed to limit, impair or affect the right of any public employee or his or her

ed to meet with the employee representatives to discuss "grievances and conditions of employment."<sup>7</sup> In the event of a dispute concerning the representation of the employees, the statute provides for certification of the proper representative or representatives by the state labor conciliator.<sup>8</sup> "[I]n order to avoid or minimize any possible controversies," the legislature has also enacted section 179.57 (the adjustment panel section) which provides procedures for establishing an adjustment panel to hear grievances of public employees.<sup>9</sup>

In spite of these measures which look toward the development of a form of collective bargaining in public employment, it is possible that restrictive judicial interpretations of the statutes could limit the effectiveness of this attempt. However, because the "no-strike statute" has never been interpreted by the Minnesota Supreme Court, all questions must be answered by reference to the

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representative to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment; nor shall it be construed to require any public employee to perform labor or services against his will.

Public employees shall have the right to form and join labor organizations, and shall have the right not to form and join labor organizations, public employees shall have the right to designate representatives for the purpose of meeting with the governmental agency with respect to grievances and conditions of employment. It shall be unlawful to discharge or otherwise discriminate against an employee for the exercise of such rights, and the governmental agency shall be required to meet with the representatives of the employees at reasonable times in connection with such grievances and conditions of employment. It shall be unlawful for any person or group of persons, either directly or indirectly, to intimidate or coerce any public employee to join, or to refrain from joining, a labor organization.

When a question concerning the representative of employees is raised by the governmental agency, labor organization, or employees, the labor conciliator or any person designated by him shall, at the request of any of the parties, investigate such controversy and certify to the parties in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the labor conciliator may provide for an appropriate hearing, and shall take a secret ballot of employees to ascertain such representatives.

MINN. STAT. § 179.52 (1957).

7. *Ibid.*

8. *Ibid.*

9. MINN. STAT. § 179.57 (1957). Briefly described, the section provides that public employees may request their employer to set up an "adjustment panel" made up of a representative of the employees, a representative of the public employer, and a mutually satisfactory third member. The function of the adjustment panel is to attempt to adjust grievances through informal negotiations between the parties or, failing settlement, to afford the parties a full hearing after which the panel makes findings to be sent to the governor, the legislature, the public employer and the employees. The statute does not require mandatory acceptance of the findings or mandatory compliance with recommendations of the panel.

statute itself, the opinions of the state attorney general, and the judicial opinions of other jurisdictions.

Although the conference procedure section requires the public employer to meet with the employee representatives in connection with "grievances and conditions of employment,"<sup>10</sup> it is unclear whether that section applies to the critical area of employee compensation. It may be contended that the phrase "conditions of employment" encompasses compensation; but this argument is weakened by the fact that the legislature, in the preceding paragraph of the same statutory section, used the language "any matter related to the conditions *or compensation* of public employment."<sup>11</sup> If the legislature had intended the phrase "conditions of employment" to include compensation in all instances, it seems somewhat strange that it was found necessary to use the explicit term "compensation" in the earlier portion of the paragraph.<sup>12</sup>

However, other considerations support a conclusion that the public employer *is required* to meet with employee representatives to consider the matter of compensation. The conference procedure section is, by its terms, not to be construed so as to "limit, impair, or affect" the right of public employees "to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment."<sup>13</sup>

If the statute were construed to mean that the public employer is under no obligation to meet with employee representatives regarding compensation, the employees' right meaningfully to communicate their views on compensation would be adversely affected—in violation of the legislative mandate.<sup>14</sup>

On the other hand, even if "conditions of employment" were restrictively construed as not including compensation, the argument that the public employer is required to confer with employee representatives on such matters is not foreclosed. It seems likely that the term "grievances," as used in the conference procedure section ("grievances and conditions of employment"), would be judicially construed to include "grievances concerning matters of

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10. MINN. STAT. § 179.52 (1957).

11. *Ibid.* (Emphasis added.)

12. See 82 C.J.S. *Statutes* § 316(b) (1953). The legislature has enacted statutes governing the construction of Minnesota statutes. Section 645.16 provides in part:

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

13. MINN. STAT. § 179.52 (1957).

14. "Nothing contained in sections 179.51 to 179.58 shall be construed to limit, impair or affect the right of any public employee or his . . . representative to the expression or communication of a view . . . ." MINN. STAT. § 179.52 (1957).

compensation." The probability of such a judicial construction is heightened by the fact that the Minnesota Attorney General has construed the term "grievance" as used in the adjustment panel section to include alleged inadequacy of compensation.<sup>15</sup> Since the conference procedure section and the adjustment panel section relate to the same matter they are *in pari materia*,<sup>16</sup> and the attorney general's construction of the term "grievance" in the one section would be equally applicable to the other.

Assuming that section 179.52 requires public employers to confer with their employees regarding compensation and other matters commonly subject to collective negotiation, the statute stops short of authorizing bilateral agreements that incorporate the results of such negotiations. Thus, a key question in Minnesota is whether a public employer may enter into a collective bargaining contract with public employee organizations if, in its discretion, it believes a bilateral agreement would best solve personnel problems and promote greater efficiency.

While it has been suggested that if a public official has discretionary power over matters of employment a collective bargain may properly be made,<sup>17</sup> a recent opinion of the Minnesota Attorney General casts some doubt on the validity of that suggestion under Minnesota law. The attorney general indicated that because an administrator's discretion cannot be legally restricted by a contract with an outside agency, public employers are precluded from

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15. *E.g.*, Minn. Att'y Gen. Op. 270-D (March 29, 1956); Minn. Att'y Gen. Op. 270-D (Sept. 9, 1955); 1952 MINN. ATT'Y GEN. BIENNIAL REP. 304, 305 (Op. No. 165, Nov. 15, 1951). While opinions of the attorney general are not binding on the state supreme court, they have persuasive weight in statutory construction. 17 DUN. DIG. *Statutes* § 8952 (3) (1955).

16. Compare MINN. STAT. § 179.52 (1957) with MINN. STAT. § 179.57 (1957).

For a discussion of the doctrine of *in pari materia* see 17 DUN. DIG. *Statutes* § 8984 (1955).

17.

A collective bargain has been defined as "a statement of the conditions upon which such work as is offered and accepted is to be done." . . . It is said that the Administrative official cannot "bind the employer." True, his agreement would not be proof against legislative action, for Congress could at any time change the terms of the agreement. However, private contracts of a similar nature are also not completely immune from legislative action, Federal or local. The head of each department has authority to prescribe regulations for the conduct of his department and the conduct of the employees. There is no reason why such regulations cannot be made with the advice and consent of the representatives of the employees. There is no lack of power if the administrator wishes to exercise it.

It may be argued that such a regulation by contract will not be binding upon a successor. But while the ordinary rule that the decision or contract of an administrator binds his successor is probably inapplicable to this type of situation, that hardly seems a valid reason for

entering into binding collective bargaining agreements.<sup>18</sup> On the other hand, the attorney general stated in the same opinion that a municipality or school board "might adopt by resolution what would otherwise be, in a private employer-employee relationship, a collective bargaining agreement."<sup>19</sup> The attorney general's conclusion that collective bargaining agreements are invalid because discretion is necessarily delegated or abdicated is a fallacious over-generalization. The initial inquiry should be concerned with the issue of whether the public employer possesses the general power to contract with employee organizations. Only after this question has been affirmatively decided should the secondary question of what provisions may legally be incorporated in the collective bargaining agreement become the subject for decision.

#### A. POWER OF THE MUNICIPALITY AS A PUBLIC EMPLOYER

##### 1. *Home rule municipalities*

The fact that a given municipality operates under a home rule charter is an important consideration in determining whether that municipality may enter into a collective bargaining agreement with its employees.<sup>20</sup> Under the Minnesota constitution all cities and villages are permitted to adopt home rule charters upon compliance with procedures prescribed by statute.<sup>21</sup> To implement this constitutional provision, section 410.07 of the Minnesota statutes allows such charters to "provide for any scheme of municipal government not inconsistent with the constitution, and [to provide] . . . for the regulation of all local municipal functions, *as fully as the legislature might have done* before home rule charters . . . were authorized. . . ."<sup>22</sup> Thus, adoption of a home rule charter frees the municipality from the absolute control of the Minnesota legislature so that affairs of local concern may be handled locally where both the problem and the interest in its solution will be found.

The important question is whether, within the framework of Minnesota law, home rule municipalities may by charter provision

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refusing to make a contract. A collective labor agreement in private industry will not necessarily bind a purchaser or successor of the employer. . . .

Agger, *The Government and its Employees*, 47 YALE L.J. 1109, 1134-35 (1938).

18. Minn. Att'y Gen. Op. 270-D (Jan. 22, 1959). The attorney general said that the board of education could not enter into a binding contract with a union representing the employees of the school district.

19. *Ibid.*

20. See Seasongood & Barrow, *Unionization of Public Employees*, 21 U. CINC. L. REV. 327, 359 (1952).

21. MINN. CONST. art. 11, § 3.

22. MINN. STAT. § 410.07 (1957). (Emphasis added.)

or by ordinance expressly authorize their officials to negotiate collective bargaining agreements with public employees. Since the state legislature unquestionably has the power expressly to authorize municipal officials to enter into such collective bargaining agreements,<sup>23</sup> it should follow that a Minnesota home rule municipality may do likewise absent other effective limitations upon the scope of its legislative power.

Important limitations on municipal legislative power arise where there is a conflict or inconsistency between the municipal legislation and a state general statute,<sup>24</sup> or where the legislature has expressly pre-empted the area which the municipal legislation seeks to regulate.<sup>25</sup> Formally speaking, however, traditional rules have established other apparent limitations.

One formal limitation upon the legislative power of home rule municipalities is derived from the terms of the home rule statute itself: the power to regulate is limited to "regulation of all *local municipal functions* . . . ." It is conceivable that an argument could be constructed to the effect that entry into collective bargaining agreements, though not in conflict with any state statute, is a matter of more than "purely local concern" and hence beyond the power of the municipality.<sup>26</sup> However, the limitation has never been applied in that manner by the Minnesota court. Rather, the argument that the municipal legislation "overreaches" matters of municipal concern has been applied only in support of a conclusion based upon a finding of "conflict" or inconsistency with a state statute,<sup>27</sup> or the scarcely distinguishable finding that the legislature has expressly pre-empted the subject of municipal regulation.<sup>28</sup> Furthermore, there is respected authority for the proposi-

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23. See 56 MICH. L. REV. 645, 646-47 n.6 (1958). Two state legislatures have authorized municipalities, through the proper officers, to enter into collective bargaining agreements with the representatives of public utility employees. OHIO REV. CODE ANN. § 717.03 (Page 1954); WASH. REV. CODE § 35.22.350 (Supp. 1959). Another state has specifically authorized the Metropolitan Transit Authority to enter into collective bargaining agreements with its employees "concerning wages, salaries, hours, working conditions and pension or retirement provisions" and to agree to settle disputes concerning the same by binding arbitration. ILL. REV. STAT. ch. 111 § 36, § 328a (1957).

24. *E.g.*, State *ex rel.* Dann v. Hutchinson, 206 Minn. 446, 288 N.W. 845 (1939); Note, *Offenses Against the City*, 36 MINN. L. REV. 143, 146 (1952).

25. *E.g.*, State v. Mandehr, 168 Minn. 139, 209 N.W. 750 (1926). Compare Grant v. Berrisford, 94 Minn. 45, 101 N.W. 940 (1904), with Guaranteed Concrete Co. v. Garrick Bros., 185 Minn. 454, 241 N.W. 588 (1932).

26. See 2 MCQUILLIN, MUNICIPAL CORPORATIONS § 4.83-.84 (3d ed. 1949) [hereinafter cited as MCQUILLIN].

27. See, *e.g.*, Hjelm v. City of St. Cloud, 129 Minn. 240, 152 N.W. 408 (1915); State *ex rel.* Dann v. Hutchinson, 206 Minn. 446, 288 N.W. 845 (1939).

28. See, *e.g.*, Anderson v. City of Two Harbors, 244 Minn. 496, 70



tion that in the absence of a finding of conflict or inconsistency with the state's general statutes, the powers exercised by a municipality pursuant to a home rule charter may properly go beyond the bounds of purely municipal interest.<sup>29</sup>

There are other formal grounds upon which invalidation of a municipal ordinance may be placed. Thus, municipal legislation must not contravene state public policy.<sup>30</sup> Furthermore, the legislature may pass general statutes relating to municipal affairs which will be paramount to charter provisions or ordinances governing the same subject matter.<sup>31</sup> However, it is questionable whether these formally stated rules impose any limitations upon the scope of municipal legislative power that are not effectively imposed by the concept of "conflict" or by express pre-emption. Thus, it is clear that municipal legislation will be found to contravene state public policy only where the legislature has made that policy explicit in the statutes.<sup>32</sup> Similarly, it is unlikely that any state general statute which did not expressly pre-empt the area of regulation would be found to invalidate municipal legislation except by an analysis of the "conflict" between the municipal legislation and the "paramount" state legislation.

No state general statute has expressly pre-empted the area of collective bargaining agreements with public employees. Therefore, the question becomes whether municipal legislation authorizing collective bargaining agreements with municipal employees would conflict with Minnesota statutory law.

Conflict would be most likely to appear in evaluation of Minnesota statutes, sections 175.51 to 175.58—the so-called "no-strike" statute—which provides public employees with many of the advantages commonly associated with collective bargaining and provides governmental facilities for the settlement of disputes, avowedly for the purpose of minimizing any possible controversies.<sup>33</sup> However, apparent compatibility may not be sufficient to resolve the question of conflict.

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N.W.2d 414 (1955); *State v. Mandehr*, 168 Minn. 139, 209 N.W. 750 (1926).

29. See 2 McQUILLIN § 4.84, at 147.

30. *E.g.*, *State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 528–29, 91 N.W.2d 81, 83 (1958); 2 McQUILLIN § 4.83, at 131–41.

31. *E.g.*, *Monaghan v. Armatage*, 218 Minn. 108, 112, 15 N.W.2d 241, 243–44 (1944); *Guaranteed Concrete Co. v. Garrick Bros.*, 185 Minn. 454, 457, 241 N.W. 588, 589 (1932); *State ex rel. Smith v. City of International Falls*, 132 Minn. 298, 300–01, 156 N.W. 249, 249–50 (1916); 2 McQUILLIN § 4.84.

32. *E.g.*, *Power v. Nordstrom*, 150 Minn. 228, 184 N.W. 967 (1921); see generally Anderson, *Municipal Home Rule in Minnesota*, 7 MINN. L. REV. 306, 325–26 (1923).

33. MINN. STAT. §§ 179.51–.58 (1957).

In other states which have authorized home rule charters, several cases have invalidated municipal legislation that, on its face, did not conflict with the terms of general state legislation nor deal with subject matter expressly pre-empted by the legislature. Thus, in *City of Golden v. Ford*,<sup>34</sup> the Colorado court was confronted with municipal regulation of picketing more extensive than that imposed by the state Labor Peace Act, which placed some restrictions on picketing and dealt with other activities relating to labor disputes. The court held the state statute to be "sufficiently comprehensive to embrace the entire field of regulation of disputes between employers and their employees."<sup>35</sup> In another case, *Stephenson v. City of Palm Springs*,<sup>36</sup> a municipal ordinance was invalidated on the ground that the California statutes regulating labor unions were intended to occupy the field even though the state legislation did not expressly deal with closed shop and union shop agreements which were prohibited by the municipality. Essentially, these courts applied a two-step analysis to find conflict between the state and municipal legislation. The courts first reasoned that by enacting legislation dealing with a particular aspect of a given subject matter the state legislature intended to pre-empt the entire area and preclude concurrent municipal legislation. The courts then concluded that since the entire area is pre-empted, any municipal legislation dealing with the same area is necessarily in conflict with state legislation regardless of whether the municipal legislation is consistent with the terms of the general statutes. Thus, in cases such as *Ford* and *Stephenson* where the legislatures had merely enacted several statutes dealing with particular problems within a given field of law, the judicial references to legislative intent to pre-empt that whole field arguably represent a judicial conclusion that the municipal legislation in question in some manner interfered with a need for state-wide uniformity.<sup>37</sup>

However, it has been said that the Minnesota court has followed the "liberal" view in determining what constitutes a "conflict" between state and municipal legislation.<sup>38</sup> The decisions overwhelmingly support that statement. For example, in the leading

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34. 348 P.2d 951 (Colo. 1960).

35. *Id.* at 953.

36. 320 P.2d 238 (Cal. Dist. Ct. App. 1958), *aff'd*, 52 Cal. 2d 407, 340 P.2d 1009 (1959).

37. It has been suggested that legislative intent to pre-empt the area of regulation, in absence of contrary indication in the state statute, may be assumed to exist only to the extent necessary to invalidate any ordinance or home rule charter provision which substantially interferes with the effective functioning of that state statute. See Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 745 (1959).

38. Note, *Offenses Against the City*, 36 MINN. L. REV. 143, 146-47 (1952).

case of *Grant v. Berrisford*,<sup>39</sup> action was brought on a contractor's bond without the notice required by a general state statute. The action was brought under a provision of the municipality's home rule charter which covered the matter but did not require notice as did the general statute. In response to a plea that the charter provision was invalid as conflicting with the general state law, the supreme court stated:

This presents the question whether the charter provisions relating to contractors' bonds are in harmony with and subject to the constitution and laws of the state, as required by constitutional amendment.

If this limitation on the power of cities in framing their charters is to be construed as prohibiting the adoption of any charter provisions relating to proper subjects of municipal legislation and matters germane thereto, unless they are similar to and contain all the provisions of the general laws on the subject, then, as said by the learned trial judge: "All that the framers of a charter can do, where there is a law in existence at the time the charter is adopted, is to add such provisions as are not already contained in the law, and are not repugnant to it. If this is the extent of the power conferred upon cities to make their own charters, then the constitutional grant is a mere form of words, of no practical value." It is clear that such is not a proper construction of the limitation. This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws . . . . But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws.<sup>40</sup>

Subsequently, in *American Elec. Co. v. City of Waseca*<sup>41</sup> the court amplified its statement in *Grant*, saying:

We have held in recent cases that the provisions of home rule charters upon all subjects proper for municipal regulation prevail over the General Statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state . . . and in those instances where the Legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions.<sup>42</sup>

In the light of such decisions, it is inconceivable that the Minnesota Supreme Court would find that the "no-strike" statute had pre-empted the field so completely as to render conflicting, and thus invalid, home rule legislation authorizing collective bargaining agreements between public employers and employees.<sup>43</sup>

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39. 94 Minn. 45, 101 N.W. 940 (1904).

40. *Id.* at 47-48, 101 N.W. at 941-42.

41. 102 Minn. 329, 113 N.W. 899 (1907).

42. *Id.* at 333-34, 113 N.W. at 901.

43. The Minnesota legislature may have intended to afford uniform treatment as to the general rights and privileges of public employees, but it

## 2. *Municipalities Which Have Not Adopted Home Rule Charters*

Suppose a Minnesota municipality operates under a statutory charter rather than a home rule charter and that the municipality has no charter provision that expressly authorizes collective bargaining with municipal employees. In such a case, if any authority to bargain collectively exists, it must be found by construing the municipality's general statutory powers.<sup>44</sup> Of course, if the charter says that matters of public employment may only be governed by rule or regulation, a collective bargaining agreement covering terms and conditions of employment is prohibited. However, where the municipality's charter is silent as to how terms and conditions of employment are to be settled, it is probable that the power to enter into collective bargaining agreements covering such terms may be implied from the express powers.

Courts apply a rule of strict construction when the extent of municipal power under a statutory charter is at issue; that is, any doubt will be resolved against the existence or expansion of the power.<sup>45</sup> Thus, in Minnesota it is well-settled that a municipality

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is difficult to argue that the legislature also intended that the means of formalizing the results of collective negotiation be uniform. As a matter of fact, it appears doubtful that the legislature intended that even the general rights and privileges of the public employee should be subject to uniform regulation. The Minnesota legislature has placed the adoption of civil service on a voluntary rather than a mandatory basis for municipalities of the second, third, and fourth class. MINN. STAT. § 44.02 (1957). Since there is no express or implied legislative mandate for pre-emption, municipal legislation authorizing collective bargaining agreements with public employees should be sustained on the ground that no Minnesota statute has forbidden such action.

44. See Minn. Att'y Gen. Op. 270-D (July 18, 1952) ("The authority of a city to contract must be found either in its charter or the laws of the State of Minnesota.").

45. E.g., *Long v. City of Duluth*, 49 Minn. 280, 51 N.W. 913 (1892); RHYNE, MUNICIPAL LAW § 4-12 (1957); RHYNE, MUNICIPAL CONTRACTS 28 (1952).

The rule of strict construction is equally applicable in a determination of the powers of a home rule municipality. See 2 McQUILLIN § 10.25. Thus, absence of an explicit provision covering collective bargaining agreements from the home rule charter would seemingly be fatal to an assertion of the power to bargain collectively. However, the home rule charter may provide a basis for application of a liberal construction by including an "all powers" provision. Briefly, these provisions are designed to grant to the municipality all powers possible under the state constitution, statutes, or otherwise by use of a general provision rather than elaborate enumeration of specific powers. For an example of such a provision see *State ex rel. Zien v. City of Duluth*, 134 Minn. 355, 359-60, 159 N.W. 792, 794 (1916). Such a provision has been construed as tantamount to a general welfare clause. *Northern Pac. Ry. v. Weinberg*, 53 F. Supp. 133 (D. Minn. 1943); *City of Duluth v. Cervený*, 218 Minn. 511, 16 N.W.2d 779 (1944); *State ex rel. Zien v. City of Duluth*, *supra*; 2 McQUILLIN § 10.25; see *Park v. City of Duluth*, 134 Minn. 296, 159 N.W. 627 (1916); see generally RHYNE, MUNICIPAL LAW § 4-8 (1957). And, general welfare clauses have been

has no inherent power.<sup>46</sup> Rather, a municipality possesses only those powers that have been expressly granted and those that may be necessarily implied from the express powers.<sup>47</sup> In the law of municipal powers generally, courts have followed one of two

liberally construed to allow a city to exercise broad powers of regulation inasmuch as they include all powers which may be given to and exercised by municipal corporations. *City of Duluth v. Cerveney*, *supra*; *Tousley v. Leach*, 180 Minn. 293, 230 N.W. 788 (1930); *State ex rel. Zien v. City of Duluth*, *supra*; see *Northern Pac. Ry. v. Weinberg*, *supra*. Therefore, the general welfare clause of municipal charters would appear to be a likely source of the power to execute collective bargaining agreements.

Moreover, when a municipal corporation acts in its "proprietary" capacity the rule of strict construction is not applied. 2 McQUILLIN § 10.22; Comment, *Union Labor and the Municipal Employer*, 45 ILL. L. REV. 364, 368-69 (1951); see *Wilke v. City of Duluth*, 172 Minn. 374, 215 N.W. 511 (1927). Minnesota case law seems to accord with this view for there is language in several decisions to the effect that when a municipality is acting in its proprietary capacity the rules of contract law applicable to transactions between individuals control. See *e.g.*, *City of Crookston v. Crookston Water Works, Power & Light Co.*, 150 Minn. 347, 353, 185 N.W. 380, 382 (1921); *Reed v. City of Anoka*, 85 Minn. 294, 298, 88 N.W. 981, 982 (1902). It has been suggested that the power to bargain collectively with public employees could be implied as easily as those powers which courts have been willing to imply in the past even if the judicial language in reference to proprietary capacity is taken with a grain of salt. Comment, *Union Labor and the Municipal Employer*, *supra* at 369. However, the courts have thus far refused to expressly apply the governmental-proprietary distinction to allow collective bargaining with public employees. In fact, some courts have expressly rejected the concept as wholly inapplicable to collective bargaining with public employees. *City of Springfield v. Clouse*, 356 Mo. 1239, 1252, 206 S.W.2d 539, 546 (1947); *City of Alcoa v. IBEW*, 203 Tenn. (7 McCanless) 12, 23-25, 308 S.W.2d 476, 481-82 (1957); *Weakley County Municipal Elec. Sys. v. Vick*, 309 S.W.2d 792, 801-05 (Tenn. App. 1957), *cert. denied* (Tenn. 1958); 56 MICH. L. REV. 645, 646 n.5 (1958); see Annot., 31 A.L.R.2d 1142, 1165 (1953). However, in upholding a collective bargaining agreement entered into by a municipal authority, although the decision was not expressly based on the point, the Washington court noted that the authority engaged in "purely proprietary undertakings." *Christie v. Port of Olympia*, 27 Wash. 2d 534, 547-48, 179 P.2d 294, 301 (1947). And, the Arizona court noted the fact that a proprietary function was involved as one factor in its finding that there was authority to enter into a collective bargaining agreement with public employees. *Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 39, 275 P.2d 393, 399 (1954).

The purpose of making the legalistic distinction between governmental and proprietary functions is to determine what powers can be implied. See Comment, *Union Labor and the Municipal Employer*, *supra* at 369. Still, the distinction seems to have no relevance to the policy factors upon which the ultimate decision should rest. And, there is no established rule by which the distinction may consistently be made. See RHYNE, *MUNICIPAL LAW* § 4-6 (1957); see generally Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

46. *State ex rel. Village of Fridley v. City of Columbia Heights*, 237 Minn. 124, 130, 53 N.W.2d 831, 835 (1952).

47. *Ibid.*

prevailing views.<sup>48</sup> Under the conservative view, a power may not be implied unless it is so essential or indispensable to the exercise of an expressly conferred power as to clearly indicate a legislative intent that the power be implied.<sup>49</sup> Other courts, following the more liberal view, hold that a power may be implied even though it is not absolutely indispensable if it is an aid to the more complete exercise of an express power.<sup>50</sup>

The Minnesota Supreme Court's approach to the implied powers question is ambiguous and cannot be assigned with certainty to either the liberal or conservative category. In a recent decision, *State ex rel. Village of Fridley v. City of Columbia Heights*,<sup>51</sup> the Minnesota Supreme Court stated that a municipality has powers which "may be necessarily implied from those expressly conferred."<sup>52</sup> The court did not, however, adhere to a strict necessity test. Instead, the decision was based primarily on the ground that it would be both unjust and unreasonable to find implied power in one municipality to annex land entirely within the boundaries of another municipality. Moreover, in its earlier decisions, the Minnesota court reached results inconsistent with the conservative approach to implied powers. In *Williams v. Village of Kenyon*,<sup>53</sup> the supreme court held that the power to enter into

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48. See RHYNE, MUNICIPAL LAW § 4-7 (1957). Apparently both of these supposedly conflicting views were derived from "Dillon's Rule" which has been stated as follows:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: *first*, those granted in express words; *second*, those necessarily or fairly implied in or incident to the powers expressly granted; *third*, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the exercise of power is resolved by the courts against the corporation and the power is denied.

Quoted in Serbine, *Municipal Powers*, 24 MINN. STAT. ANN. 73, 78-79 (1958). Judge John F. Dillon was the author of a text on municipal corporations and the formulator of "Dillon's Rule." This rule was first enunciated in 1872 and, according to the commentator, may be considered to be an accurate statement of present-day law. The second of the classes of powers mentioned in the rule has been freely used recently to enable municipalities to cope with rapidly changing conditions of population and scientific advance. *Ibid*.

49. See, e.g., *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 1322, 78 N.W.2d 843, 849 (1956); *People ex rel. City of Olean v. Western N. Y. & Pa. Traction Co.*, 214 N.Y. 526, 529, 108 N.E. 847, 848 (1915); RHYNE, MUNICIPAL LAW § 4-7 (1957).

50. See, e.g., *Colwell v. City of Waterbury*, 74 Conn. 568, 51 Atl. 530 (1902); *People ex rel. Sweitzer v. City of Chicago*, 363 Ill. 409, 2 N.E.2d 330 (1936); *Potson v. City of Chicago*, 304 Ill. 222, 136 N.E. 594 (1922); *Schneider v. City of Menasha*, 118 Wis. 298, 95 N.W. 94 (1903).

51. 237 Minn. 124, 53 N.W.2d 831 (1952).

52. *Id.* at 130, 53 N.W.2d at 835.

53. 187 Minn. 161, 244 N.W. 558 (1932).

a conditional sales contract for the purchase of generating equipment could be implied as "reasonably necessary" to the express power to erect a lighting and heating plant. And, although the court said in *State ex rel. Johnson v. Brown*<sup>54</sup> that it was applying a rule of "reasonably strict construction," the result demonstrates that the court in fact employed the liberal approach. In the *Brown* case, the charter provision giving the Minneapolis board of park commissioners the power to "*hold, improve, govern and administer*" parks and parkways was construed impliedly to authorize the board to erect a dwelling house on park property to be used as a residence for the park superintendent and his family.

In light of such decisions it is reasonable to conclude that in Minnesota a power will be implied in aid of an express power when policy considerations do not militate against the existence of such power and it may be implied without an extremely tortuous construction. Specifically, it should be possible for the Minnesota Supreme Court to imply the power to enter into collective bargaining agreements with public employees from the municipality's expressly granted general power to contract.<sup>55</sup> One court has reasoned that if the municipality is authorized to enter into many individual contracts of employment, it would be incongruous to deny it the power to enter into a single agreement concerning the terms and conditions of employment of a number of the employees.<sup>56</sup> It has also been argued that the power to achieve harmonious labor relations by means of collective bargaining agreements with municipal employees must necessarily be implied in or incident to a municipality's powers to employ and to administer its affairs. Harmonious labor relations are of great importance if the municipality is to serve its inhabitants in the most efficient manner.<sup>57</sup>

However, where the municipal charter contains an express provision authorizing the municipality to contract in regard to employment it may be unnecessary to *imply* the power to enter into a collective bargaining agreement. The Minnesota Supreme Court has ruled that:

Where municipal authorities are authorized to contract in relation to a particular matter, *they have a discretion, as to methods and terms,* with the honest and reasonable exercise of which a court cannot in-

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54. 111 Minn. 80, 126 N.W. 408 (1910).

55. "[T]he inhabitants shall . . . be a body politic . . . [and] shall . . . be capable of contracting and being contracted with . . . ." MINN. STAT. § 411.02 (1957). See *e.g.*, *Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 38-39, 275 P.2d 393, 398-99 (1954).

56. *Id.* at 39, 275 P.2d at 399.

57. PRESSMAN, LEGAL MEMORANDUM IN SUPPORT OF POWER OF MUNICIPALITIES TO ENTER INTO COLLECTIVE AGREEMENTS 12-13 (1942).

terfere, although they may not have chosen the best method, or made the most advantageous contract.<sup>58</sup>

Thus, if responsible municipal officials believe that a collective bargaining agreement is the most effective means of achieving good labor relations with municipal employees, the Minnesota court could not invalidate such a bargaining agreement without overruling or disregarding prior law.

#### B. POWER OF THE SCHOOL DISTRICT AS A PUBLIC EMPLOYER

The school boards of common and independent school districts in Minnesota are by statute expressly granted the power to "employ and contract with necessary qualified teachers and discharge the same for cause."<sup>59</sup> However, the Minnesota Attorney General has declined to issue an opinion stating flatly that a school board possesses the general power to enter into collective bargaining agreements with the representatives of teachers' organizations.<sup>60</sup> The attorney general has gone no further than to say that proper proposals of a teacher, union, or other organization with regard to subjects which, in private employment, would be proper subjects for collective bargaining may be incorporated in a school board's rules, regulations or resolutions.<sup>61</sup>

Nevertheless, there is general authority to the effect that school boards may enter collective bargaining agreements. In *Norwalk Teachers' Ass'n v. Board of Educ.*<sup>62</sup> the Connecticut court found that implied authority to negotiate such an agreement with a teachers' organization was incident to the school board's broad powers over educational matters and school management. Since the Minnesota legislature has not prescribed any particular method of formalizing employment contracts and no statute or court decision has indicated that the school board's discretion cannot be exercised by means of a collective bargaining agreement, the *Norwalk* result seems equally possible in Minnesota.

Furthermore, the Minnesota Supreme Court has stated that public school administrative officers have broad powers to deter-

58. *Flynn v. Little Falls Elect. & Water Co.*, 74 Minn. 180, 186, 77 N.W. 38, 39 (1898), *aff'd on reargument*, 74 Minn. 191, 78 N.W. 106 (1899) (Mitchell, J.). (Emphasis added.) Also see *Davies v. Village of Madelia*, 205 Minn. 526, 287 N.W. 1 (1939); *Ambrozich v. City of Eveleth*, 200 Minn. 473, 274 N.W. 635 (1937); *Reed v. City of Anoka*, 85 Minn. 294, 88 N.W. 981 (1902).

59. MINN. STAT. ANN. §§ 123.14(4), .35(5) (1960). The school board is also given general charge of the business of the school district. MINN. STAT. ANN. §§ 123.14(1), .35(1) (1960). Thus, the school board exercises all powers granted to the school district.

60. See, e.g., Minn. Att'y Gen. Op. 270-D (Jan. 22, 1959); Minn. Att'y Gen. Op. 270-D (Jan. 31, 1947).

61. See, e.g., authorities cited at note 60 *supra*.

62. 138 Conn. 269, 83 A.2d 482 (1951).



mine matters of policy pursuant to the boards' administrative, legislative, and executive functions and that the courts can exercise little control in this area.<sup>63</sup> For instance, terms of employment contracts, including the fixing of salaries, have been held to be within the discretion of the school board.<sup>64</sup> Thus, if a school board should determine that the solution to its problems of personnel management could more feasibly be accomplished by executing a collective bargaining agreement with its employees, prior authority indicates that such action should be upheld. Such a determination seems clearly to be a policy matter relating to the administration of school affairs. Because school boards have the expressly granted power to contract for employment with teachers, their exercise of discretion should not be subject to general review by the courts unless a board acts in an arbitrary or capricious manner.<sup>65</sup>

## II. THE VALIDITY OF SPECIFIC TERMS OF THE COLLECTIVE BARGAINING AGREEMENT

Although the public employer in Minnesota has the power to enter into collective bargaining agreements, such power may be illusory without the correlative power to incorporate into the contract provisions normally included in corresponding agreements in private industry. The objections traditionally raised against the collective bargaining agreement and specific provisions thereof are that an unlawful delegation or abdication of discretion occurs or that agreement to certain specific terms constitutes an illegal discrimination by the public employer.

### A. DISCRETIONARY POWERS: THE EFFECT OF DELEGATION OR ABDICATION

The rule is well-established that a public official's discretionary powers are held by him in public trust and thus may not be dele-

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63. *Frisk v. Board of Educ.*, 246 Minn. 366, 381, 75 N.W.2d 504, 514 (1956); see *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 589, 7 N.W.2d 544, 564 (1942).

64. *Frisk v. Board of Educ.*, *supra* note 63, at 382, 75 N.W.2d at 514. Provided the school board has been given the power to contract with reference to a particular matter, it is free to exercise honest and reasonable discretion as to "methods and terms" and the courts may not interfere with the exercise of that discretion even though the board may not have chosen the best method or made the most advantageous contract. *Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 224, 79 N.W.2d 428, 437 (1956).

65. See *Frisk v. Board of Educ.*, 246 Minn. 366, 382, 75 N.W.2d 504, 514 (1956). The power to contract with teachers is granted in the following terms: "The board shall employ and contract with necessary qualified teachers and discharge the same for cause . . . ." MINN. STAT. § 123.14 (4) (1957).

gated.<sup>66</sup> However, the critical question is whether the inclusion within the collective bargaining agreement of a provision governing an area with respect to which the public official has discretionary power constitutes a delegation. Whenever a public official determines what specific terms will be included within an individual employment contract, the official has *exercised* rather than *delegated* his discretion over the terms included in the contract. Similarly, when the public official agrees to the inclusion of specific terms within a collective bargaining agreement governing the terms of employment of many individuals, discretion is exercised rather than delegated.<sup>67</sup> A delegation of discretion will only occur where the terms of the agreement leave certain matters to be determined by an outside agency.<sup>68</sup>

In the case of the collective bargaining agreement, a more important question than delegation of discretion is whether the public official has *abdicated* his continuing discretion as to those terms bargained upon; and if so, whether such an abdication is objectionable.<sup>69</sup> The argument that discretion has not been abdicated because the public official has the choice of whether or not to enter into the agreement<sup>70</sup> is misconceived, for the real objection is that *continuing* discretion has been abdicated.<sup>71</sup>

66. 34 MINN. L. REV. 260, 264-65 (1950); see Note, *Union Activity in Public Employment*, 55 COLUM. L. REV. 343, 350 (1955); Note, *Right of Municipality to Enter Into Collective Bargaining Agreement on Behalf of Civil Service Employees*, 18 N.Y.U.L.Q. REV. 247, 259-60 (1941). But see *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 278-80, 83 A.2d 482, 486-87 (1951).

67. See Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist., 78 Ariz. 30, 39, 275 P.2d 393, 399 (1954).

68. See, e.g., *Jewell Belting Co. v. Village of Bertha*, 91 Minn. 9, 97 N.W. 424 (1903); 1944 MINN. ATT'Y GEN. BIENNIAL REP. 265 (Op. No. 156, Oct. 23, 1943).

69. The assertion has been made that "the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of that same discretion." *Mugford v. Mayor & City Council*, 185 Md. 266, 270, 44 A.2d 745, 747 (1945).

70. This argument was used by the court to sustain a collective bargaining agreement with public employees in *Local 266, IBEW v. Salt River Project Agricultural Improvement & Power Dist.*, 78 Ariz. 30, 39, 275 P.2d 393, 399 (1954). It may be noted that in Minnesota the public employer is under no obligation to *bargain* collectively. Although he is under an obligation to *meet* with employee representatives to discuss terms and conditions of employment, see MINN. STAT. § 179.52 (1957), there is no sanction equivalent to that under federal law which proscribes as an unfair labor practice a private employer's refusal to bargain in good faith with his employees' representatives. See, e.g., Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Comment, *Requirement Under the Taft-Hartley Act to Bargain in Good Faith*, 44 MARQ. L. REV. 220 (Fall 1960).

71. See *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades*

Strictly speaking, the public official abdicates his continuing discretion over matters governed by provisions of the collective bargaining agreement for the period of time that the agreement is in force. However, the same is true as to any terms that are incorporated into an individual contract of employment. Furthermore, the idea that public officials at any time exercise "continuing discretion" has more basis in theory than in fact. For example, assume that the public official has discretion to fix compensation schedules. The accepted method of exercising discretionary power is through the promulgation of rules, regulations, and resolutions which may be rescinded at any time.<sup>72</sup> Thus, continuing discretion is theoretically never surrendered. As a practical matter, however, the right of rescission would not be exercised for a substantial period of time, for an intelligent public official would normally try to plan changes in the compensation schedules in a manner that would have the least detrimental effect on the working force. Therefore, even though the public official exercises his discretion without formally surrendering his discretion, he must, as a matter of administrative necessity, surrender his continuing discretion for a reasonable period of time. If a collective bargaining agreement similarly extends for a reasonable period,<sup>73</sup> it does not dif-

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Council, 94 Cal. App. 2d 36, 47, 210 P.2d 305, 311-12 (1949); *Mugford v. Mayor & City Council*, 185 Md. 266, 270, 44 A.2d 745, 747 (1945); *City of Springfield v. Clouse*, 356 Mo. 1239, 1247-51, 206 S.W.2d 539, 543-45 (1947).

Since usual legislative grants of power have been found impliedly to authorize administrators to enter into binding contracts outside the area of collective bargaining, it would seem that the power to enter into binding collective bargaining agreements could be implied with equal facility. If discretion may validly be surrendered in the first instance, implied authorization to surrender a limited amount of continuing discretion under the collective bargaining agreement should be found by analogy. See 10 McQUILLIN § 29.05; Note, *Union Activity in Public Employment*, 55 COLUM. L. REV. 343, 351 (1955); 56 MICH. L. REV. 645, 648 (1958). However, the analogy may be misleading. In certain areas the existent legislative intent that discretion should be surrendered by contract must necessarily be implied by the nature of the legislation. See *Reed v. City of Anoka*, 85 Minn. 294, 298, 88 N.W. 981, 982 (1902). On the other hand, such a legislative intention does not necessarily follow as to the power of an administrator to make decisions of a legislative nature relating to the terms and conditions of employment. Thus, it has been suggested that each question must depend primarily upon statutory intent and not on mere analogy. See Shestack, *The Public Employee and His Government: Conditions and Disabilities of Public Employment*, 8 VAND. L. REV. 816, 835 (1955).

72. See, e.g., 1944 MINN. ATT'Y GEN. BIENNIAL REP. 265 (Op. No. 156, Oct. 23, 1943).

73. All municipal contracts must be limited in duration to the time that is reasonable in light of the necessities presented by the subject matter. See *Flynn v. Little Falls Elect. & Water Co.*, 74 Minn. 180, 77 N.W. 38 (1898), *aff'd on reargument*, 74 Minn. 191, 78 N.W. 106 (1899). A collective bargaining agreement is likely to be of short duration due to unions' desire to bargain periodically to receive further favorable changes in terms

fer significantly from a rule, regulation, or resolution except that continuing discretion is legally surrendered rather than surrendered as a pragmatic necessity. However, it is difficult to see how the surrender of discretion involved in a collective bargaining agreement differs in substance from the surrender of discretion involved in every individual contract of employment. Thus, it would seem that the proper judicial approach would be to determine whether, considering the subject matter governed by the collective bargaining agreement, the length of time that discretion is surrendered is reasonable.<sup>74</sup>

## B. ARBITRATION OF DISPUTES

Courts have generally reacted unfavorably to provisions in collective bargaining agreements which require that disputes between public employees and their employer be settled by arbitration.<sup>75</sup> The grounds on which the Courts have invalidated such provisions are: (1) that the agreement to submit disputed matters to a third-party arbitrator who shall make a binding decision is an illegal delegation of discretion; and (2) that the handling of all disputes by arbitration is contrary to the civil service or merit system law.<sup>76</sup>

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and conditions of employment. There are other considerations that tend to restrict the duration of collective bargaining agreements. Any agreement concerning compensation may be valid only for the length of the budgetary period of the public employer who cannot be bound beyond the amount of the funds appropriated. Also, it may be undesirable to bind successors in the case of collective bargaining agreements where there is no necessity comparable to that present in the case of contracts which by their very nature cannot be performed during the term of office of the contracting employer.

74. See Seasongood & Barrow, *Unionization of Public Employees*, 21 U. CINC. L. REV. 327, 367-68 (1952).

75. See Annot., 31 A.L.R.2d 1142, 1172-74 (1953); Vogel, *What About the Rights of the Public Employee?*, 1 LAB. L.J. 604, 610-12 (1950).

76. Mann v. Richardson, 66 Ill. 481 (1873) (delegation of discretion); Mugford v. Mayor & City Council, 185 Md. 266, 44 A.2d 745 (1945) (conflicts with civil service or merit system law); City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America, 30 Ohio Op. 395 (C.P. 1945) (delegation of discretion and conflicts with civil service or merit system law). In the *Cleveland* case the court said:

Under the civil service laws of the state and city, it would seem a vain and futile thing for the transit board to refer the issues to arbitrators who, with the best of intentions, but in ignorance of the civil service laws, might make an award which it would be legally impossible for the transit board to accept.

In view of the overwhelming weight of authority the court holds that, assuming the board has power to enter into a contract with a union or association of employees, a provision for compulsory arbitration would be illegal.

*Id.* at 410.

While no case has been decided by the Minnesota Supreme Court regarding arbitration agreements with public employees, the Minnesota Attorney General has issued opinions concerning the problem. The attorney general has said that an *unqualified* arbitration provision in an agreement between the University of Minnesota and the Public Building Service Employees Union was invalid because it would have resulted in the relinquishment of powers and duties conferred by law upon the Board of Regents.<sup>77</sup> In his opinion, the attorney general did not discuss the question of whether arbitration was a method which might properly have limited application to public employment in the settlement of particular disputes. Subsequent to the issuing of that opinion, the Minnesota legislature enacted the adjustment panel section<sup>78</sup> which authorized non-binding, mediation-type procedures.<sup>79</sup> It may be argued that by enacting this section the legislature provided the *sole* remedy for the settlement of disputes with public employees and divested the public employer of any power he possessed to agree to arbitrate even specific, arbitrable disputes.<sup>80</sup> However, the argument is equally persuasive that enactment of the adjustment panel section did not, by implication or otherwise, divest the public employer of the power to agree to arbitrate particular disputes if such power in fact existed prior to the enactment. It would seem that in the absence of explicit denial of the power to agree to arbitrate a specific, arbitrable dispute, the better view would favor the power of the public employer to adopt whatever appears to be the most practical form of settling specific disputes—including arbitration.

The proposition that public employers have at least limited, inherent power to enter into arbitration agreements with their em-

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77. 1944 MINN. ATT'Y GEN. BIENNIAL REP. 265 (Op. No. 156, Oct. 23, 1943); see also *id.* at 263 (Op. No. 155, March 29, 1943).

78. MINN. STAT. § 179.57 (1957); see note 9 *supra*.

79. Minn. Att'y Gen. Op. 270-D (Aug. 12, 1958). Inasmuch as the adjustment panel section does not actually state the legal effect of the panel's findings, there was some question whether the findings were legally binding on the governmental agency and employees involved. According to the attorney general's construction of the statute, the panel findings are not binding on either side.

80. See *Gaidamavice v. Newaygo Board of County Road Comm'rs*, 341 Mich. 280, 288-89, 67 N.W.2d 178, 182 (1954), where the court said that the public employee's remedy of processing his grievance before the labor mediation board was exclusive under the Michigan "anti-strike statute." The Minnesota Attorney General has filed an opinion stating that the Minnesota "no-strike statute" was patterned upon and identical to the Michigan statute in question in *Gaidamavice*, with the exception that the Minnesota statute provides for mediation by an adjustment panel rather than by the labor mediation board. Minn. Att'y Gen. Op. 270-D (Jan. 22, 1959).

ployees<sup>81</sup> has recently been judicially recognized. In *Norwalk Teachers' Ass'n v. Board of Educ.*<sup>82</sup> the Connecticut court held that there was no reason to deny the board of education the power to enter voluntarily into a contract to arbitrate a specific dispute. However, the court also stated that an unlimited agreement to submit all disputes to arbitration would be invalid. The *Norwalk* distinction is sound. At least where the subject matter of a dispute is governed by statute or ordinance, such as civil service or merit system provisions, the dispute cannot be settled by arbitration.<sup>83</sup> Similarly, where substantial questions of policy are at the heart of the dispute, an agreement to arbitrate would clearly result in delegation of legislative discretion to an outside agency.<sup>84</sup> Even if the arbitration provision incorporated into the collective bargaining agreement were limited to proper subjects for arbitration, the objection that continuing discretion has been surrendered seems valid.<sup>85</sup> On the other hand, if the public employer makes an *ad hoc* decision that an arbitrable dispute should be submitted to binding arbitration by an outside agency, discretion has been properly exercised.<sup>86</sup> Consistent with the preceding analysis, it is reasonable to conclude that although the public employer in Minnesota does not have the power to agree to a clause in the collective bargaining agreement submitting all disputes to arbitration, he may enter into an individual agreement to submit a specific, arbitrable dispute to arbitration.

### C. DISCRIMINATION

In some cases, collective bargaining agreements with public employers have been invalidated on the ground that a particular provision in the agreement discriminates against public employees who do not belong to the contracting organization.<sup>87</sup> However, in-

81. A noted authority on municipal law has said that municipalities have the inherent power to arbitrate disputes arising out of subject matter with regard to which they have the general power to contract. RHYNE, *MUNICIPAL LAW* § 31-8, at 803-04 (1957).

82. 138 Conn. 269, 279, 83 A.2d 482, 487 (1951).

83. *Cf. Mugford v. Mayor & City Council*, 185 Md. 266, 270, 44 A.2d 745, 747 (1945).

84. *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 279, 83 A.2d 482, 487 (1951).

85. See text accompanying note 71 *supra*.

86. *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 279, 83 A.2d 482, 487 (1951).

87. *E.g., City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America*, 30 Ohio Op. 395, 407 (C.P. 1945) (exclusive bargaining agent). In *Mugford v. Mayor & City Council*, 185 Md. 266, 44 A.2d 745 (1945) (dues check off), the court stated:

It has been frequently held that a municipality, in performing work or other duties it is required by law to do, cannot discriminate in favor

validation has not been based on the theory that discrimination affects the general power to enter into the collective bargaining agreement,<sup>88</sup> but rather on the ground that the illegal provision could not be severed from the rest of the agreement.<sup>89</sup> Since several specific provisions have been frequently invalidated as discriminatory it is necessary to determine the status of such provisions under Minnesota law.

### 1. Closed Shop or Union Shop Provisions

In *Norwalk* the Connecticut court stated that an agreement by the public employer "to hire only union members would clearly be an illegal discrimination."<sup>90</sup> To support this proposition the court relied solely upon common law authority from other jurisdictions.<sup>91</sup> The Minnesota legislature, however, has declared that in the area of public employment closed shop or union shop provisions are illegally discriminatory. The conference procedure section of the Minnesota statutes provides in part that:

Public employees shall have the right to form and join labor organizations, and shall have the right not to form and join labor organizations . . . . It shall be *unlawful* to discharge or otherwise *discriminate* against an employee for the exercise of such rights . . . .

of members of a labor union. Such action would not only be unlawful but would also tend to constitute a monopoly of public service by members of a labor union, which the law does not countenance. By the same force of reasoning a citizen who is a member of a union cannot, by that fact alone, be barred from a position in the public service.

*Id.* at 270, 44 A.2d at 747. Along this same line, in *Chapin v. Board of Educ.*, No. 21255, Cir. Ct. Ill., Dec. 9, 1939 (closed shop), in RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 157 (1946), the court stated that:

It would not be contended that the legislature of our State could pass a law providing that certain work required by the State or by a board of education should be done only by members of a particular organization. Such a law would be unconstitutional and void on the ground of discrimination. So, a school board, an agency and creature of the State, which could have no more authority in this regard than the State itself, cannot enter into a contract of the nature of the one involved in this case except under the penalty of it being illegal and void for the same reason. It may be true that without any contract the board can employ members of the local in question to the exclusion of non-members. It may be within its discretion to do so. The board cannot, however, by contract, foreclose the possibility of a non-member securing employment.

*Id.* at 158.

88. See Comment, *Union Labor and the Municipal Employer*, 45 ILL. L. REV. 364, 372 (1950).

89. See RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 35 (1946).

90. 138 Conn. 269, 278, 83 A.2d 482, 486 (1951).

91. *Mugford v. Mayor & City Council*, 185 Md. 266, 270, 44 A.2d 745, 747 (1945); cases cited and reprinted in RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 34, 137, 157 (1946).

It shall be unlawful for any person or group of persons, either directly or indirectly, to intimidate or coerce any public employee to join or to refrain from joining, a labor organization.<sup>92</sup>

This statute leaves no doubt that closed shop and union shop provisions are invalid and may not be used in any form in Minnesota where public employees are involved.

## 2. Dues Check Off Provisions

An agreement whereby the employer deducts union dues from his employees' wages and remits the amount deducted to the union is commonly referred to as a check off provision.<sup>93</sup> In *Mugford v. Mayor & City Council*<sup>94</sup> the Maryland Court of Appeals held that the city of Baltimore had the power to check off union dues provided: (1) that the request for check off came from an individual employee rather than as a blanket demand from the union; (2) that the privilege of check off was open to all employees alike; and (3) that the employees requesting check off had the right to discontinue such payments at any time. On the other hand, *compulsory* check off provisions have been condemned as discriminatory on the ground that such provisions tend to establish a closed shop.<sup>95</sup>

Although Minnesota law provides that public employees have the same rights to assign their wages as private employees,<sup>96</sup> a compulsory check off provision would probably be invalid under the wage assignment statute.<sup>97</sup> That statute voids all assignments of wages to be earned more than sixty days from the date of assignment except payroll deductions for union dues, which are excepted in the following terms: "A written contract may be entered into between an employer and an employee wherein the employee authorizes the employer to make payroll deductions for the purpose of paying union dues . . . for periods longer than 60 days."<sup>98</sup> The statutory language is ambiguous in that the "written

92. MINN. STAT. § 179.52 (1957). (Emphasis added.)

93. See RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 38 (1946).

94. 185 Md. 266, 272, 44 A.2d 745, 747-48 (1945).

95. *Mugford v. Mayor & City Council*, Baltimore City Cir. Ct. No. 2, April 12, 1944, in RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW 161, 163 (1946). Check off provisions raise additional problems. For example, a municipal corporation cannot, in absence of statutory authorization, become an agency for the collection of private debts. See *Merwin v. City of Chicago*, 45 Ill. 133, 136 (1867). Also, state statutes often govern and restrict wage assignments. See, e.g., OHIO REV. CODE ANN. § 1321.32 (Page Supp. 1960); *Hagerman v. City of Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947); compare *State ex rel. Leach v. Price*, 168 Ohio St. 499, 156 N.E.2d 316 (1959).

96. MINN. STAT. § 181.063 (1957).

97. MINN. STAT. § 181.06 (1957).

98. *Ibid.*



contract" referred to could be interpreted as including a collective bargaining agreement providing for compulsory check off of dues.<sup>99</sup> However, since compulsory check off provisions are generally condemned,<sup>100</sup> it is unlikely that the Minnesota legislature contemplated that the statute would be so construed.

If the public employer agreed with the union to check off dues for those employees furnishing the requisite authorization, such action would clearly be consistent with the wage assignment statute. Therefore, the public employer in Minnesota may agree to the inclusion of voluntary check off provisions in the collective bargaining agreement.

### 3. *Exclusive Bargaining Agent*

Several decisions in jurisdictions other than Minnesota have indicated that it would be an unlawful discrimination for a public employer to agree that one union shall be the exclusive bargaining agent for its employees.<sup>101</sup> However, it does not appear likely that such a problem would exist in Minnesota. Under section 179.52 of the Minnesota statutes, "public employees shall have the right to designate representatives for the purpose of meeting with the governmental agency with respect to grievances and conditions of employment." Moreover, the same statutory section further provides that:

When a question concerning the representative of employees is raised by the governmental agency, labor organization, or employees, the labor conciliator or any person designated by him shall, at the request of any of the parties, investigate such controversy and certify to the

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99. The argument being, of course, that the public employees have authorized their agent, the union, to enter into the agreement with the employer on each individual employee's behalf by means of the single collective bargaining agreement.

100. See note 94 *supra* and accompanying text; Labor Management Relations Act (Taft-Hartley Act) § 302(c)(4), 73 Stat. 538 (1959), 29 U.S.C. § 186(c)(4) (Supp. I, 1960).

101. See *City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America*, 30 Ohio Op. 395, 407 (C.P. 1945); *Mugford v. Mayor & City Council, Baltimore City Cir. Ct. No. 2*, Nov. 15, 1944, in RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* 166, 168-69 (1946). For example, in the *Cleveland* case the court said:

Assuming that the transit board has the power to enter into a contract with a union, it seems to this court that the transit board is entirely without authority to include therein an agreement designating Division 268 as sole and exclusive bargaining agent for all employees including those who are members of other unions. The fact that Division 268 has as members a majority of the employees is immaterial. Such a law or enabling act passed by the state legislature or city council would be unconstitutional. It would be tantamount to forcing all employees to become members of the favored union, and would be unlawful.

30 Ohio Op. at 407.

parties in writing, the name or names of the representatives that have been selected. In any such investigation, the labor conciliator may provide for an appropriate hearing, and shall take a secret ballot of employees to ascertain such representatives.<sup>102</sup>

Thus, it would seem that the public employer could agree to recognize one union as the exclusive bargaining agent if that union had in fact been so designated by the employees. The public employer would only be agreeing to that which is required by statute.

### CONCLUSION

This Note has taken the position that under present Minnesota law the public employer may legally enter into a collective bargaining agreement. While it is believed that this position is sound as a matter of strict legal analysis, it must be recognized that the legal status of the bilateral agreement in public employment will be subject to conjecture until legislation or definitive judicial decision puts the matter to rest. The major problem is that the law in this area has not kept pace with the exigencies of modern concepts of the employment relationship. Traditional legal theories must either be discarded or at least reappraised to meet the needs of modern society. Thus, the increasing role of government in modern society has caused an increasing share of the working force to be employed by public employers. Correspondingly this increased role of modern government requires that for the public interest the best working force obtainable be available to the public employer. To attain this objective the public employer must be able to compete with private industry in the labor market. Because private industry is governed almost entirely by collective bargaining agreements, it is little wonder that public employees are not satisfied by unilateral promulgation of rescindible resolutions which incorporate the results of their collective negotiations. This proposition may well be countered by the assertion that there is no practical difference between the resolution which will not in fact be rescinded and the binding bilateral agreement. But the simple answer to this assertion is that psychology has a lot to do with the problem. The public employee may feel, with a good deal of justification, that he is treated as a second-class citizen. Although the public interest is generally asserted to be the reason for applying different standards to public employment than those applied to private industry, the public interest should also demand the form of labor relationships that will best assure harmonious and efficient personnel relations. The large number of attorney general opinions which involve questions submitted by Minnesota

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102. MINN. STAT. § 179.52 (1957).

public employers with reference to proposed or existing collective bargaining agreements stand as mute evidence of the recognized necessity for such agreements. Legal theory should be cognizant of this practical necessity so that collective bargaining agreements may play a proper role in the future of Minnesota public employment.