No. 26494

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF AURORA, COLORADO, a municipal corporation, Petitioner - Appellant, v. SAMUEL J. DILLEY, MELVIN W. MORELY, and J. RICHARD McGOVERN, as representatives of the individuals signing petitions requesting an election to add a new Article XIV of the Charter of the City of Aurora, Respondents - Appellees.	Appeal from the District Court of the County of Adams State of Colorado Honorable Clifford J. Gobble, Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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INTRODUCTION

The Colorado Municipal League (hereinafter referred to as "the League") is a non-profit association of two hundred twenty cities and towns located throughout the State of Colorado. The League appears as Amicus Curiae in support of Petitioner-Appellant, the City of Aurora.

The League's brief is directed to the principal issue of the case, namely, whether the proposed initiated amendment to the charter of the City of Aurora constitutes an invalid delegation of the legislative power of the City of Aurora and of its citizens. The brief assumes arguendo that an amendment to a home rule charter could lawfully authorize a home rule municipality to enter into binding collective bargaining agreements with its public employees. It is the position of the League, however, that the proposed amendment to Aurora's home rule charter constitutes an invalid delegation of municipal legislative power insofar as it provides for compulsory binding arbitration of disputes over all terms and conditions of municipal employment.

Law-making at the local level is the result of a complex decision-making process requiring expert knowledge in every phase of municipal government. One of the basic tenets of local government is that local officials are responsible for making those decisions and that such officials are--through the election and recall processes--accountable to the citizens for their decisions. It is therefore of vital concern to the League and its member municipalities that the basic municipal legislative authority to determine such matters as the terms and conditions of municipal employment, the nature and extent of municipal services, the extent to which local citizens can and should be taxed to support such services, and the allocation of municipal finances not be delegated to a body of non-publicly appointed, non-publicly elected arbitrators who may have a limited understanding of the citizens, the community and the government, and who can not be

held accountable to the citizens for their decisions. In his concurring opinion in Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962), now Chief Justice Pringle properly recognized that:

> (C)ollective bargaining contracts with municipalities, when authorized, are surrounded by many limitations because they deal with public employment, public budgets and public funds. The legislative body can not surrender policy making powers which are delegated to it by constitution, charter or statute. (151 Colo. at 307-308.)

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the City of Aurora.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the City of Aurora.

SUMMARY OF THE ARGUMENT

The proposed amendment to the charter of the City of Aurora provides that any and all unresolved disputes over the terms and conditions of employment between the City and its firefighters--after a certain period of time--must be submitted to binding arbitration. Article XX, §6 of the Colorado Constitution vests in home rule municipalities and their citizens the legislative power to define, regulate and alter the duties, qualifications, and terms or tenure of all municipal agents and employees. Under established principles of law, vested legislative power cannot be delegated. Thus, the provision for compulsory binding arbitration contained in the proposed Aurora charter amendment is invalid in that it attempts to delegate to a board of arbitrators the legislative power to determine terms and conditions of municipal employment.

The proposed amendment to the Aurora charter contains no standards to guide and limit the authority of the board of arbitrators. If the Court

determines that legislative power to establish terms and conditions of municipal employment can be delegated to a board of arbitrators, the proposed delegation is invalid under the principle that any attempted delegation of legislative power must contain sufficient standards to guide and limit the body exercising such power.

The attempted delegation of legislative power to arbitrators, a panel of non-publicly elected, non-publicly appointed persons, is invalid as a delegation of legislative power to private persons.

ARGUMENT

THE PROPOSED INITIATED CHARTER AMENDMENT, INSOFAR AS IT PROVIDES FOR COMPULSORY BINDING ARBITRATION OF THE TERMS AND CONDITIONS OF MUNICIPAL EMPLOYMENT, CONSTITUTES AN INVALID DELEGATION OF THE MUNICIPAL LEGISLATIVE POWER.

A. <u>The Legislative Power to Determine the Wages, Rates of Pay, Hours, Working Conditions and All Other Terms and Conditions of Municipal Employment May Not Be Delegated.</u>

Under the proposed charter amendment, members of the Aurora fire department are granted the right to bargain collectively with the City and to be represented by an employee organization in the bargaining with respect to "wages, rates of pay, hours, grievance procedure, working conditions and all other terms and conditions of employment." Sec. 14-3. The City is obligated to meet and confer with the representative of the employee organization within ten days after receipt of a written notice from the bargaining agent. Sec. 14-5. If the parties are unable to reach an agreement on a contract in not more than 35 days, any and all unresolved issues must be submitted to arbitration (Sec. 14-6) in the following manner:

The American Arbitration Association is to be notified and is to submit to the parties a list containing seven names. Each party may cross

two names off the list and then number the remaining names in order of preference. The Arbitration Association then selects the three person arbitration panel from the names not crossed off by either party, in accordance with the order of preference. Sec. 14-7.

Once selected, the arbitrators resolve the disputed issues within certain time limitations. Sec. 14-8. A majority decision of the arbitrators is binding upon both the City and the bargaining agent of the firefighters.* Sec. 14-8.

Thus, the arbitration panel will normally be a "one-shot" body. None of its members will be elected or appointed by the municipality or by its citizens. The arbitrators will not be accountable to the citizens through the election or recall process, nor may they be removed by any elected official who is accountable to the citizens. Yet the decision of the arbitration panel with respect to all disputed terms and conditions of municipal employment is binding on the municipality.

Article XX, §6 of the Colorado Constitution grants to home rule municipalities and their citizens:

> the power to legislate upon, provide, regulate, conduct and control:
> a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees....

Thus, Article XX, §6 vests in home rule cities and towns and in their citizens legislative power over all local and municipal matters including--

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* Arbitration may take many forms. It may be voluntary or compulsory, binding or advisory. It may be "interest" arbitration (arbitration of disputes involving the creation of a labor contract) or "grievance" arbitration (arbitration of disputes arising from employment under an existing labor contract). The type of arbitration to be imposed by the proposed charter amendment is compulsory binding interest arbitration.

specifically--matters relating to the powers, duties, qualifications, terms and tenure of all municipal employees. The determination of the wages, rates of pay, hours, working conditions and all other terms and conditions of municipal employment is a purely legislative function, an exercise of the legislative power. Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962); and State v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955). See Big Sandy School District No. 100-J v. Carroll, 164 Colo. 173, 433 P.2d 325 (1967).

Assuming that the proposed charter amendment, if adopted, would empower the City to enter into a binding collective bargaining agreement with the firefighters' organization, the ultimate legislative power to finally determine the terms and conditions of municipal employment, as vested by Article XX, §6 in home rule municipalities and their citizens, may not be delegated. Fellows v. LaTronica, supra; State v. Johnson, supra; and Erie Firefighters Local No. 293 v. Gardner, 406 Pa. 395, 178 A. 2d 691 (1962). See Big Sandy School District No. 100-J v. Carroll, supra. Cf. Gidley v. Colorado Springs, 160 Colo. 482, 418 P.2d 291 (1966); and City of Leadville v. McDonald, 67 Colo. 131, 186 P. 715 (1920). In his specially concurring opinion in Fellows v. LaTronica, supra, now Chief Justice Pringle pointed out that the terms and conditions of employment must remain with the legislative body of the municipality:

> The fact that the municipality engages in collective bargaining does not necessarily mean that it has surrendered its decision making authority with respect to public employment. The final decision as to what terms and conditions of employment the municipality will agree to, or whether it will agree at all, still rests solely with its legislative body. The public employer can, and frequently does, place its own terms and conditions in effect rather than those requested by the bargaining agents.
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> * * *
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> Of course, collective bargaining contracts with municipalities, when authorized, are surrounded by many limitations because they

> deal with public employment, public budgets and public funds. The legislative body can not surrender policy making powers which are delegated to it by constitution, charter, or statute. (151 Colo. at 307, 308.) (Emphasis added.)

A collective bargaining arrangement which includes a requirement of compulsory binding arbitration on substantive terms and conditions of employment, such as that proposed in the instant case, goes far beyond Chief Justice Pringle's concurring opinion, much less the majority opinion, in LaTronica.

Compulsory binding arbitration of the terms and conditions of a firefighter's employment raises additional complex questions perhaps not immediately apparent:

> There is considerable wishful thinking that the involvement of the legislative and executive branches of government can be minimized--or even avoided altogether--by having a board of impartial labor relations experts make a final and binding decision to resolve an impasse. While recognizing the apparent simplicity of compulsory arbitration, one should not be unaware of the consequences of the broad delegation of governmental authority which is entailed. An arbitration board would become a powerful arm of government acting without the checks and balances upon which we depend in the fashioning of our laws. Some additional difficult questions have to be faced. Is it sound and wise to consider the claims of one particular group of employees for their share of limited public funds in isolation from the claims of other employees? Or, to do so without regard to the leap-frogging effect upon the total wage bill of a decision made in narrow context? What effect would all this have upon the allocations of limited resources for other sorely needed services to the public? And, if a legislative body cannot or will not do what it takes to carry out an award by the impartial arbitrators, is it intended that a court will compel them to do so? Bringing such questions into the appraisal of compulsory arbitration transforms an apparently easy answer into a very doubtful one. (Taylor, "Impasse Procedures-The Finality Question", Governor's Conference on Public Employment Relations 5-6 (New York City, October 15, 1968), reprinted in Smith, Labor Relations in the Public Sector, Cases and Materials (1974) at 818.)

It is submitted that under well-reasoned and established law, compulsory binding arbitration of the terms and conditions of municipal employment is--under Article XX, §6 of the Colorado Constitution--an invalid delegation of the legislative power of home rule municipalities.

B. The Delegation of Legislative Power to a Board of Arbitrators, as Set Forth in the Proposed Charter Amendment, is Invalid in that it Contains No Standards to Guide the Decisions of the Arbitrators.

As pointed out previously in this brief, Article XX, §6 vests in home rule municipalities and their citizens, the legislative power to regulate and control the "definition, regulation and alteration of the powers, duties, qualifications, and terms or tenure of all municipal officers, agents and employees...." If the Court determines that this legislative power can be delegated as set forth in the proposed Aurora charter amendment, the compulsory binding arbitration provision of the amendment must still be declared invalid on its face under the well-established principle of law that any delegation of legislative power must include sufficient standards to guide and limit the body exercising the conferred power. Lloyd A. Fry Roofing Co. v. State Department of Health, ___ Colo. ___, 499 P.2d 1176 (1972); People v. Giordano, 173 Colo. 567, 481 P.2d 415 (1971); Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965); State Board of Cosmetology v. Maddux, 162 Colo. 550, 428 P.2d 936 (1967); Bettcher v. State, 140 Colo. 428, 344 P.2d 969 (1959); Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953); Hazlet v. Gaunt, 126 Colo. 385, 250 P.2d 188 (1952); and Sapero v. State Board of Medical Examiners, 90 Colo. 568, 11 P.2d 555 (1932). The rule prohibiting the delegation of legislative power in the absence of sufficient standards to guide and limit the authority of the body delegated such power applies also to the delegation of

municipal legislative power. Apple v. Denver, 154 Colo. 166, 390 P.2d 91 (1964).

A search through the proposed charter amendment for any standards to guide the decisions of the arbitrators proves to be utterly futile. The arbitrators are simply charged with resolving all disputed issues involving the terms and conditions of employment of the Aurora firefighters. The standards by which the arbitrators are to resolve those issues are left to the arbitrators' own unfettered but binding discretion. Must the arbitrators compare the wages, hours or working conditions of the City's firefighters with comparable city employees? With firefighters in other Colorado cities of comparable size? No. Must the arbitrators give weight to the interest and welfare of the public? No. To the ability of the City and its citizens to pay any award? To the existing tax structure? Budget? Financial resources? Desires and needs of the citizens for the existence or quality of any particular City service? No. To the hazards involved in the particular employment? No.

State v. Traffic Telephone Workers' Federation of New Jersey, 2 N.J. 335, 66 A. 2d 616 (1949) points out the necessity of setting forth standards in any attempted delegation of legislative authority to a board of arbitrators. In that case, the court invalidated the compulsory arbitration provisions of a state statute relating to labor disputes in the area of public utilities:

> If no standards are set up to guide the administrative agency in the exercise of functions conferred on it by the legislature, the legislation is void as passing beyond the legitimate bounds of delegation of legislative power....Nowhere in this act is there any guide furnished to the board of arbitration other than that it shall arbitrate "any and all disputes" then existing between the public utility and the employees. (66 A.2d at 625.)

The court noted an even greater need of specific standards where there is--as in the instant case--no permanence or continuity in the various boards of arbitration which may be constituted in successive cases:

> There is, thus, an even greater need of specific standards than there would be in the case of a continuous administrative body which might gather experience as it went along. * * * Any increase in operating costs which may result from arbitration will inevitable be charged to the public in increased rates. But the board of arbitration is nowhere directed to consider the rights of the public, which will ultimately be called upon to foot the bill. In these circumstances the need of legislative standards is peculiarly apparent. (66 A.2d at 625.)

Subsequent to the court's opinion in the above case, the New Jersey legislature amended its statute by inserting a series of standards to guide the decision of the arbitrators, including such standards as the interests and welfare of the public, and a comparison of wages, hours and conditions of employment among employees doing the same or comparable work in the industry.

In State v. Johnson, supra, the Supreme Court of Washington held invalid an initiated amendment to a city charter which provided for compulsory binding arbitration between firemen and the city. In its opinion, the Court noted that no standards were prescribed to direct the arbitration board in its determinations. Against an argument that a compulsory binding arbitration statute for firefighters constituted an invalid delegation of legislative power, the Rhode Island Supreme Court pointed out that the particular state statute set forth a number of comprehensive limitations on the arbitrators by requiring that certain factors be given weight in reaching a decision including:

> ...a comparison of wage rates or hourly conditions of employment of the fire

> department in question with prevailing wage rates or hourly conditions of employment of skilled employees of the building trade and industry in the local operating area. They require also that consideration and weight be given to the wage rates or hourly conditions of employment of the fire department in question in comparison to similar wage rates or hourly conditions of employment of other cities or towns of comparable size. They require that weight be given to the interest and welfare of the public and specifically spell out that weight be given to the hazards of employment and physical and educational qualifications of the employees and the job training and skills. (City of Warwick v. Warwick Regular Firemen's Ass'n, ____ R.I. ____, 256 A.2d 206, 211 (1969).)

The Michigan Court of Appeals also upheld compulsory binding arbitration provisions of the Michigan statute against an argument that the statute lacked sufficient standards to adequately circumscribe the arbitrator's exercise of authority. Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn, 42 Mich App. 51, 201 N.W. 2d 650 (1972). However, the Court specifically noted that the standards contained in the Michigan statute were almost identical to the standards contained in the approved Rhode Island statute.

It is submitted that if a delegation of the legislative authority to establish hours, wages and other terms and conditions of municipal employment is permissible at all, any delegating legislation must--at a minimum and consistent with existing law--set forth sufficient standards to guide and limit the authority exercised by the arbitrators. Since the proposed initiated charter amendment contains no standards but, instead, grants the arbitrators total and unfettered discretion in the establishment of the terms and conditions of municipal employment, the proposed amendment must be considered invalid in its face.

C. The Delegation of Legislative Power to a Board of Arbitrators, as Set Forth in the Proposed Charter Amendment, is Invalid as a Delegation of Legislative Power to Private Persons.

As this brief earlier noted, the arbitrators who--under the proposed charter amendment--are to be delegated the legislative authority to establish binding terms and conditions of employment for firefighters, are private persons. They are not elected by the citizens or appointed by elected officials. They are not accountable to the citizens through the election or recall processes. In Curran Bill Posting and Distributing Co. v. City of Denver, 47 Colo. 221, 107 P. 261 (1910), the Court indicated that the exercise of municipal legislative discretion may not be delegated to private persons. See Fellows v. LaTronica, supra. Cf. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

CONCLUSION

Based upon the foregoing points and authorities, the Colorado Municipal League prays that the Court declare the proposed Aurora charter amendment to be invalid and unenforceable insofar as it provides for compulsory binding arbitration of the terms and conditions of municipal employment.

Respectfully submitted,

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