No. 26992

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

THE GREELEY POLICE UNION, and DONALD O'LEARY, President of The Greeley Police Union, Plaintiffs-Appellants, v. THE CITY COUNCIL OF GREELEY, COLORADO, and GEORGE W. HALL, Councilman, GIL HOUSE, Councilman, WAYNE A. SODMAN, Councilman, JAMES R. SMITH, Councilman, GID W. GATES, Councilman, MARTHA BENAVIDEZ, Councilwoman, RICHARD PERCHLIK, Mayor, and JACK HUFFMAN, City Manager, Defendants-Appellees.	Appeal from the District Court of the County of Weld State of Colorado Honorable Hugh H. Arnold Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS

AMICUS CURIAE

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE

The Colorado Municipal League is a non-profit association of two hundred twenty-eight cities and towns located throughout the State of Colorado. During 1975, the League's member municipalities adopted a series of resolutions setting forth League policies and objectives. The following policy was adopted in the area of public employee labor relations:

> "The Colorado Municipal League shall support reasonable state legislation which encompasses the following concepts:
>
> * Facilitative procedures by which public employees may collectively bargain with political entities; and
>
> * Recognition and retention of the rights of employers and the public as well as employees.
>
> The League supports as impasse resolution techniques, in order of preference: (1) legislative show cause hearing; (2) referendum; and (3) limited right to strike. The League opposes binding arbitration."

The League's opposition to binding arbitration as a technique for resolving public sector bargaining impasses, and its willingness to accept other techniques for resolving impasses including a limited right to strike, if necessary, stem philosophically and legally from a commitment to a representative form of government. A basic tenet of representative government is that officials exercising governmental authority are accountable to the citizens they represent for essential governmental decisions -- decisions on 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 limited financial resources among competing demands for services. If those governmental decisions are considered by the citizens to be wrong, the local official may lose the next election or be recalled before his term is completed, or a law he adopts may be repealed by the citizens through a referendum process, or a law he refuses to adopt may be adopted by the citizens through the initiative process.

Binding interest arbitration, however, takes many of the essential governmental decisions out of the hands of the officials elected to represent the citizens and places those decisions in the hands -- as in the Greeley charter amendment -- of an outside "arbitrator" who is not elected by the citizens, not appointed by any elected official, and not responsible or accountable to any elected official or any citizen of the municipality. Binding interest arbitration in the public sector thus raises fundamental legal and policy concerns:

> "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.... 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 imparital 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.)

A principal concern with binding interest arbitration, however, has perhaps been best described by Mr. Justice Levin in Dearborn Fire Fighters Union v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975):

> "There are innumerable 'disputes' difficult of resolution which may become hot political issues -- e.g., zoning, the location of public buildings, school hours and school programs. These can all be viewed as 'disputes' or 'differences' between the property owners, parents or school teachers immediately affected and the government. It would be an enormous departure from present concepts of responsible exercise of governmental power if the practice were to develop of resolving difficult political issues in an arbitrator's conference room as an alternative to facing up to vexing problems in the halls of state and local legislatures.
>
> Reposing power to resolve political issues in a person called an arbitrator and characterizing the issue a 'dispute' or 'difference' and his decision an 'adjudication' does not obviate the need for political accountability of the manner in which political issues are resolved." 231 N.W. 2d at 240.

Public employee organizations in several home rule municipalities have sought to initiate charter amendments providing for compulsory binding arbitration of employment disputes. Thus, a decision by this Court with respect to the validity of the compulsory arbitration clause in the Greeley charter amendment can be expected to have a direct effect on home rule municipalities statewide and may affect statutory cities and towns through the possible future adoption of statewide legislation.

Moreover, according to figures prepared by the United States Bureau of Census for fiscal year 1971-72, direct general municipal expenditures in Colorado totalled approximately $464.6 million. Of that total, almost 37% of the expenditures (approximately $171.4 million) were for personnel costs. U. S. Bureau of Census, Census of Governments 1972, Vol. 4, Government Finances No. 5: Compendium of Government Finances (1974) at p. 142, table 48. Thus, any court decision upholding public sector binding arbitration could have a potentially severe impact on the ability of a municipality to maintain control over the allocation of its financial resources among competing demands for local services.

Because of the potential impact of this Court's decision on Colorado's municipalities statewide, the League appears as amicus curiae on behalf of its member cities and towns, and in support of Defendant-Appellee, the City of Greeley. The major portion of the League's brief is directed to the validity of compulsory binding interest arbitration in public employee labor disputes. A portion of the League's brief is also directed to the question of standing, raised for the first time on appeal by the Greeley Police Union.

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

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

SUMMARY OF THE ARGUMENT

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

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II. THE ISSUE OF STANDING IS NOT PROPERLY BEFORE THIS COURT; BUT, IN ANY EVENT, THE CITY COUNCIL OF GREELEY, ITS INDIVIDUAL COUNCILMEMBERS, AND THE CITY MANAGER DO HAVE STANDING TO QUESTION THE CONSTITUTIONALITY OF THE GREELEY CHARTER AMENDMENT.

ARGUMENT

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

A. Introduction.

Under the Greeley charter amendment, members of the Greeley police 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. 11-3 (c). If the parties are unable to reach agreement on a contract, any and all unresolved issues must be submitted to arbitration* (11-3 (f)) in the following manner:

The American Arbitration Association is to be notified and is to submit to the parties a list containing five names. Each party may cross two names off the list and then number the remaining names

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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 which is quasi-judicial in nature). The type of arbitration to be imposed by the Greeley charter amendment is compulsory binding interest arbitration.

The distinction between "grievance" and "interest" arbitration is particularly important since case law relating to grievance arbitration is rarely applicable to questions involving interest arbitration:

> "Grievance arbitration concerns disputes arising under written agreements negotiated and agreed upon by the parties. In grievance arbitration, the labor arbitrator acts in a judicial or quasi-judicial capacity. He determines the facts and seeks an interpretation of the agreement in accord with the understanding of the parties as gleaned from the writing and the relationship.
>
> In interest arbitration, the functions and prerogatives of the arbitrator are significantly different. He is not bound by the agreement or understanding of the parties. He does not interpret the contract, he makes one. He then imposes his concept of what the 'agreement' ought to be on the parties." Dearborn Fire Fighters Union v. City of Dearborn, supra, 231 N.W. 2d at 234 (emphasis by the Court).

in order of preference. The Arbitration Association then selects a single person from the names not crossed off, and that single person is granted authority to decide all unresolved issues. Sec. 11-3 (g)(1) and 11-3 (f). The decision of that arbitrator is binding on the parties. Sec. 11-3 (h).

The validity of compulsory binding interest arbitration, such as that set forth in the Greeley charter amendment, is a question of first impression in Colorado. The question has been raised, however, with respect to legislative enactments in other states, with varying results.* Two state courts have ruled such legislation to be unconsti-

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* In its opening brief (pp. 3-4), the Greeley Police Union states:

> "Although this court has not as yet had an occasion to comment upon the question of compulsory binding arbitration for public employees, there has been a great many decisions in sister jurisdictions on this point. Enough in fact, to allow one to say without fear of contradiction that such measures are, unequivocally accepted as being within the confines of the Federal and various State Constitutions. As was pointed out in the Trial Court, a number of states through statutes, ordinances, or municipal charter amendments, provide public employees, most noteably police, firefighters and teachers, with the right to organize collectively and give them the right to have disputes with their public employers resolved through binding arbitration. These legislative enactments have been uniformly upheld when attacked upon the ground of unconstitutionality. Most also recognize the fact that decisions by arbitrators are reviewable by the judiciary."

Apparently in support of all or parts of these various propositions, the brief, on page 4, cites seven cases--four from New Jersey, two from Michigan, and one from Rhode Island. The cited cases, however, lend little support to the Union's assertions that compulsory binding arbitration for public employees is "unequivocally accepted as being within the confines of the Federal and various State Constitutions" or that legislative enactments affording public employees the right to have disputes resolved through binding arbitration "have been uniformly upheld when attacked upon the ground of unconstituionality".

tutional: Washington [State v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955)]; and, in the most recent opinion on the subject, South Dakota [City of Sioux Falls v. Sioux Falls Firefighters, ____ S.D. ____, 234 N.W. 2d 35 (1975)]. In two states, courts have divided evenly on at least one constitutional issue relating to compulsory binding arbitration: Michigan [Dearborn Fire Fighters Union v. City of Dearborn, 394 Mich. 229, 231 N.W. 2d 226 (1975)]; and Maine [City of Biddeford v. Biddeford Teachers Association, Me., 304 A.2d 387 (1973)]. And four state courts have upheld such arbitration: Rhode Island [City of Warwick v. Warwick Regular Firemen's Association, 106 R.I. 109, 256 A.2d 206 (1969)]; Pennsylvania, but only after adoption of a specific constitutional amendment permitting interest arbitration in the public sector [Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969)]; Wyoming [State v. Laramie, Wyo., 437 P.2d 295 (1968)]; and New York [City of Amsterdam v. Helsby, 37 N.Y. 2d 19, 332 N.E. 2d 290 (1975)].

The legislation considered in the above cases, and often the constitutional concerns involved, differed from state to state. This variety of judicial opinion reflects the difficulty of the issue facing the courts. It is submitted, however, that an analysis of the Greeley charter amendment in terms of the Colorado constitution and related Colorado and other state cases, necessarily leads to the conclusion that the Greeley arbitration amendment is invalid.

B. 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 to An Arbitrator.

The determination of essential governmental decisions regarding the wages, rates of pay, hours, working conditions and other terms and conditions of employment is clearly a legislative function, an exercise of the legislative power. Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962); and State v. Johnson, supra. See Big Sandy School District No. 100-J v. Carroll, 164 Colo. 173, 433 P.2d 325 (1967). Through the adoption of Article XX, Sec. 6 of the Colorado Constitution, the people of the State of Colorado vested that legislative power in home rule municipalities and their citizens by granting to them:

> "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...."

This ultimate legislative power to finally determine the terms and conditions of municipal employment, vested in home rule municipalities and their citizens by Article XX, Sec. 6, may not be delegated away, either by the legislative body or the citizens, to outside arbitrators. See Fellows v. LaTronica, supra; State v. Johnson, supra; Erie Firefighters Local No. 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962); and Big Sandy School District No. 100-J v. Carroll, supra. See also Smyser, "Public Employers and Public Employee Unions: Their Rights and Limitations in South Dakota", 17 South Dakota L. Rev. 65 (1972).

Such attempted delegations of governmental authority to outside arbitrators have been characterized as in "clear conflict with a democratic form of government" [Sullivan, Public Employee Labor Law, §13.4, p. 93], and as:

> "not consonant with a core concept of a representative democarcy: the political power which the people possess and confer on their elected representatives is to be exercised by persons responsible (not independent) and accountable to the people through the normal processes of the representative democracy." Dearborn Fire Fighters Union v. City of Dearborn, supra, 231 N.W. 2d at 235, opinion of Mr. Justice Levin. (Emphasis by the Court.)

An argument often made in support of binding interest arbitration is that such arbitration is a necessary substitution for the so-called "right" to strike* (as provided in the Greeley charter amendment) and thus should receive a more liberal treatment at the hands of the courts. One author has stated, however:

> "Some persons would 'simplify' matters by 'forthrightly' adopting some form of compulsory arbitration in all the political jurisdictions. This course, until now, has been almost universally rejected in the private sector, because it would undermine private agreement-making, which is the cornerstone of the enterprise system. Compulsory arbitration is not more, and perhaps less, appropriate in the government sector...[A] strike of government employees interferes with the orderly performance of the functions of representative government. Compulsory arbitration is a greater threat -- it entails a delegation to 'outsiders' of the authority assigned by the electorate to elected officials, who are subject to the checks and balances of our governmental institutions. How can the mayor of a municipality or the members of a city council perform their constitutional functions of taxing and budget making if they are bound by what a panel of 'outside experts' decides is necessary to resolve a particular government-

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* Even assuming that a "right" to strike exists, it certainly isn't proven that binding arbitration eliminates strikes. In fact, some experiences have been to the contrary. See Laffer "Compulsory Arbitration: The Australian Experience", 95 Monthly Labor Rev. 45 (May, 1972); and McAvoy, "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector", 72 Colum. L. Rev. 1192, 1212 (1972).

> labor issue dealt with as an isolated incident? There is no doubt that compulsory arbitration is as incompatible with the kind of representative government to which we are dedicated as it is with the private enterprise system to which we have committed ourselves." Taylor, "Public Employment: Strikes or Procedures?", 20 Industrial and Labor Relations Rev. 617, 632 (1967). (Emphasis added.) [See also, Bernstein, "Alternatives to the Strike in Public Sector Labor Relations", 85 Harvard L. Rev. 459, 466-469 (1971), where the author discribes compulsory arbitration as a "dubious alternative" to the strike.]

The attempted delegation of authority in the Greeley charter amendment epitomizes the conflict between binding arbitration in the public sector and representative government. The single arbitrator lacks any political accountability. He is selected by a body outside the municipality, the American Arbitration Association, and the only voice granted the municipality in his selection is to eliminate two names from a list of five persons provided and prepared by the Association. The arbitrator need not be a resident of the municipality or even of the state. He sits for one arbitration only, unless the parties mutually agree to his use for another arbitration (which is unlikely if one or the other is dissatisfied with a prior award).* [Greeley Charter Amendment Sec. 11-3(g)] Yet his decisions affect the allocation of public resources, the level of municipal services to be provided, and the general cost of municipal government. The arbitrator is in fact a one-time "hit and run" legislator.

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* This lack of permanence means that no consistent rules of procedure will be promulgated, consistent precedent cannot be developed, a body of consistent decisional law will not evolve, and an accumulation of experience and development of standards by the arbitrator becomes unlikely.

267 ORD. declared invalid because, "It commits, in some instances, the exercise of the municipality's legislative discretion to property owners and residents, and in others intrusts such power to the caprice of certain of its officers, and vests in them an absolute or despotic power . . . ."

It is apparent under Colorado law, that such an exercise of legislative discretion may not be delegated to private persons. Curran Bill Posting and Distributing Co. v. Denver, 47 Colo. 221, 107 P. 261 (1910). See Fellows v. LaTronica, supra. That rule is not a mere technicality which can be summarily dismissed, as done by the Rhode Island Supreme Court in City of Warwick v. Warwick Regular Firemen's Association, supra.* It is, instead, a rule reflecting the essence of representative government -- that legislative power can and must be exercised only by those persons who are in some manner accountable to the citizens.

Most importantly, the rule prohibiting delegation of legislative power to politically unaccountable persons is mandated in Colorado by a 1912 initiated amendment adding Article XXI to the Colorado Constitution:

> "Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of this constitution...." Colorado Constitution, Article XXI, Sec. 4

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* In that case, it was argued that the compulsory binding arbitration statute was an unconstitutional delegation of power to private persons. The Court upheld the delegation indicating that the person chosen as an arbitrator receives a portion of the sovereign power of the state and thereby becomes a public officer. The Court's reasoning has been described as "tautological" [City of Biddeford v. Biddeford Teachers Association, supra, 304 A.2d at 397] and as countenancing "the syllogism that all enactments of the legislature are constitutional because the legislature cannot pass on unconstitutional law" [Dearborn Fire Fighters Union v. City of Dearborn, supra, 231 N.W.2d at 232, opinion of Mr. Justice Levin].

The above-quoted constitutional provision embodies in clear and unambiguous language the commitment of the people of Colorado to the basic philosophy of representative government, that persons exercising governmental authority must be accountable to the public for their decisions through the recall process either directly, or indirectly through the appointing authority. Moreover, by adoption of the recall amendment, the citizens of Colorado made it clear that the above-quoted restriction applies within home rule municipalities:

> "Nothing herein contained shall be construed as affecting or limiting the present or future powers of cities and counties or cities having charters adopted under the authority given by the constitution, except as in the last three preceding paragraphs expressed." Colorado Constitution, Article XXI, Sec. 4. (Emphasis supplied.)

The language of Article XXI, Sec. 4 requiring persons who exercise governmental authority to be either elected, or ultimately responsible to an elected official, is contained in the paragraph immediately preceding the above-quoted language. Thus, the people of Colorado did intend to restrict the powers of home rule municipalities to the extent that the officials in those municipalities who exercise governmental authority must be accountable -- directly or indirectly -- to the citizens through the recall process. This Court has also recognized that the citizens of a home rule municipality do not have absolute freedom in the exercise of their powers:

> "The Home Rule Amendment was intended to reiterate unmistakeably the will of the people that the power of a municipal corporation should be as broad as possible within the scope of a Republican form of government...." Fort Collins v. Public Utilities Commission, 69 Colo. 554, 195 P. 1099 (1921). (Emphasis supplied.)

The Greeley charter amendment, insofar as it provides for the exercise of a legislative function by an arbitrator who is not elected by the people, and not appointed by an elected official or by any person who is responsible to an elected official, constitutes an invalid delegation of legislative power and directly violates Article XXI, Sec. 4.

C. The Delegation of Legislative Power to An Arbitrator, as Set Forth in the Greeley Charter Amendment, is Invalid in that it Contains No Standards to Guide the Decision of the Arbitrator or to Permit Effective Judicial Review of any Arbitrator's Award.

As pointed out previously in this brief, Article XX, Sec. 6 of the Colorado Constitution 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 to an outside arbitrator, the compulsory binding arbitration provision of the amendment must still be declared invalid on its face under the long-recognized 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, 179 Colo. 223, 499 P.2d 1176 (1972); People v. Giordano, 173 Colo. 567, 481 P.2d 415 (1971); State Board of Cosmetology v. Maddux, 162 Colo. 550, 428 P.2d 936 (1967); Swisher v.

Brown, 157 Colo. 378, 402 P.2d 621 (1965); Apple v. Denver, 154 Colo. 166, 390 P.2d 91 (1964); 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). While it may not be practical or possible to formulate absolutely precise standards, it is apparent that some standards must exist to ensure that the legislative power is not totally abdicated. See Lloyd A. Fry Roofing Company v. State Department of Health, supra.

A search through the Greeley charter amendment for any standards to guide the decisions of the arbitrator, however, proves to be utterly futile. The amendment furnishes no "crucial criteria" to guide the arbitrator as to what factors should be considered in examining the issues presented to him. See City of Biddeford v. Biddeford Teachers Association, supra, 304 A.2d at 401 (opinion of Mr. Justice Weatherbee). The arbitrator is simply charged with resolving all disputed issues involving the terms and conditions of employment of the Greeley police officers. The standards by which the arbitrator is to resolve those issues are left to the arbitrator's own unfettered and undirected -- but binding -- discretion. The arbitrator is completely free to determine the disputed issues by the application of his own social, political or economic theories. His theories are not even checked by potentially different philosophies held by one or two additional arbitrators -- the arbitrator to be appointed under the Greeley charter stands alone to decide the issues as he sees fit.

The Greeley Police Union does not and -- we believe -- cannot argue the impossibility of creating some standards to direct the arbitrator. Certainly other states have established standards for guiding arbitrators in resolving public employee disputes, and the existence of those standards has often been a key factor in decisions upholding the validity of the statutes. In Rhode Island, for example, the arbitration statute sets forth certain factors which must be considered by the arbitrators in arriving at a decision: comparison of wage rates and conditions of employment in the local operating areas and in other cities and towns of comparable size; the interest and welfare of the public; the hazards of the employment; and physical and educational qualifications. City of Warwick v. Warwick Regular Firemen's Association, supra, 256 A.2d at 211.

In New York, the state's compulsory binding arbitration law provides in part that the arbitration panel will consider: a comparison of the wages, hours and employment conditions of the particular employees with the wages, hours and employment conditions of other employees in a similar situation, and with other employees generally in public and private employment in comparable communities; the interest and welfare of the public; the financial ability of the public employer to pay; the hazards of employment; physical, education and mental qualifications; and job training skills. City of Amsterdam v. Helsby, supra, 332 N.E. 2d at 299-300. And in the Michigan statute, standards to guide the arbitrators' exercise of the delegated power include: lawful authority of the employer; stipulations of the parties;

welfare of the public; financial ability of the government to bear the cost; comparison of conditions with employment in comparable communities; cost of living; and overall existing compensation and benefits. Dearborn Fire Fighters Union v. City of Dearborn, supra, 231 N.W. 2d at 236, 237 (N. 40).

While the Greeley Police Union admits (page 5 of its opening brief) that no guidelines exist within the framework of the Greeley arbitration amendment, it asserts that C.R.C.P. 109 and the "Uniform Arbitration Act of 1975" [C.R.S. 1973, 13-22-201 et seq., (1975 Supp.)] can be used to "fill in" the missing standards. Assuming, arguendo, that either one or both of the provisions would be applicable to an arbitration under the Greeley charter amendment, a review of both the rule and the act makes it absolutely clear that neither sets forth any substantive standards or "crucial criteria" to guide the arbitrator's decision.

In a further effort to extricate itself from the problem, the Police Union cites six cases (pages 4-5 of its opening brief) in support of its proposition that a "lack of standards in public employee arbitration enactments....[is] not fatal": Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); Brotherhood of Locomotive and Enginemen v. Chicago, 225 F. Supp. 11 (D.C. 1964), affirmed per curiam, 331 F.2d 1020, cert. den. 377 U.S. 918 (1964); Venneri v. County of Allegheny, 12 Pa. C. 517, 316 A.2d 120 (1974); Dearborn Fire Fighters Union v. City of Dearborn, supra; City of Amsterdam v. Helsby, supra; and Dayton Classroom Association v. Dayton Board of Education, 41 Ohio

St. 2d 127, 323 N.E.2d 714 (1975). However, the decision of the Pennsylvania court in Harvey v. Russo, supra, is largely based upon a unique constitutional provision*, and the remaining five cases cited by the Union, simply do not support the proposition or its application to this case. As noted previously in this brief, both the Michigan statute considered in the Dearborn case and the New York statute considered in City of Amsterdam v. Helsby articulate a number of standards to guide the decision of the arbitrators. (See pages 16 and 17 of this brief.) Even in Brotherhood of Locomotive and Enginemen v. Chicago, supra, some substantive standards existed to guide the arbitrators. (See 225 F. Supp. at 23.) The Dayton case cited by the Police Union involved grievance arbitration, not interest arbitration (the type of arbitration involved in the Greeley charter amendment) and the court specifically pointed out the difference between the two types of arbitration in rejecting the unconstitutional delegation of power argument. Finally, the Venneri case simply does not deal with the standards issue.

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* In Harney v. Russo, supra, the Pennsylvania Supreme Court did uphold the constitutionality of a compulsory arbitration statute against a challenge that the statute lacked any standards or guidelines. The court's decision in the case, however, rested in part on the passage of a constitutional amendment authorizing the legislature to enact compulsory binding arbitration laws for policemen and firemen. That constitutional amendment was adopted after an earlier judicial decision struck down a compulsory arbitration statute. Because of the unique constitutional history of the Pennsylvania statute, the opinion of the court in Harney v. Russo, supra, should have limited application in this case.

The lack of standards in a compulsory arbitration law has in fact been held to be fatal. In State v. Traffic Telephone Workers' Federation of New Jersey, 2 N.J. 335, 66 A.2d 616 (1949), the court invalidated the compulsory arbitration provisions of a statute relating to labor disputes in the area of public utilities stating that the statute contained no guide for the board of arbitration other than that it shall arbitrate "any and all disputes". State v. Traffic Telephone Workers' Federation of New Jersey, supra, 66 A.2d at 625. The court made one additional point applicable to the instant case, namely, that an even greater need of specific standards exists where there is -- as in the Greeley charter amendment -- no permanence or continuity in the arbitrators which may decide successive cases. In State v. Johnson, 46 Wash. 2d 114, 278 P.2d 662 (1955) (a case closely parallel to the instant case), the Supreme Court of Washington invalidated an initiated compulsory binding arbitration amendment to a city charter noting, in part, that no standards were prescribed for the arbitration board. See also, the opinion of Mr. Justice Weatherbee in City of Biddeford v. Biddeford Teachers Association, supra, 304 A.2d at 398-403.

The principle requiring that any delegation of legislature authority be accompanied by adequate standards and safeguards is intended to serve a dual purpose:

> "They (standards) not only operate to direct or limit the action of the recipients of such delegated power, but they are standards pursuant to which on judicial review a court may determine whether the action taken by the recipients of such powers was capricious, arbitrary, or in excess of the delegated authority." City or Warwick v. Warwick Regular Firemen's Association, supra, 256 A.2d at 211.

In essence, the existence of standards is necessary to permit effective judicial review of the exercise of the delegated power -- to prevent judicial review from becoming merely an exercise at large. See Blumenthal v. Board of Medical Examiners, 18 Cal. Rptr. 501, 368 P.2d 101 (1962); and Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed 2d 542 (1963), opinion of Mr. Justice Harlan, dissenting in part.

There is, of course, no language in the Greeley charter which expressly permits judicial review of the arbitrator's award. Assuming, arguendo, that such review is permissible in the absence of express language, there remains a lack of any standards against which a court could effectively review the arbitrator's award. It is submitted that if a delegation of the legislative authority to establish wages, hours and other terms and conditions of municipal employment is permissible at all, any delegating legislation, including a charter amendment, must set forth sufficient standards to guide the exercise of that power, and to protect against its misuse by permitting effective judicial review. Because of the absence of such standards, the Greeley charter amendment must be declared invalid.

II. THE ISSUE OF STANDING IS NOT PROPERLY BEFORE THIS COURT; BUT, IN ANY EVENT, THE CITY COUNCIL OF GREELEY, ITS INDIVIDUAL COUNCILMEMBERS, AND THE CITY MANAGER DO HAVE STANDING TO QUESTION THE CONSTITUTIONALITY OF THE GREELEY CHARTER AMENDMENT.

In its opening brief, the Greeley Police Union challenges the standing of the defendant city council, councilmembers, and city manager

to question the constitutionality of the Greeley Charter amendment, citing Denver Association for Retarded Children, Inc. v. School District No. 1, ____, Colo. ____, 535 P.2d 200 (1975). The League submits that the issue of standing is not properly before this Court; but, in any event, the opinion of the Court in Denver Association for Retarded Children, Inc. v. School District No. 1, supra, is inapplicable to this case for the reasons stated hereafter.

On page 14 of its opening brief, the Greeley Police Union admits that the question of the standing of the Greeley City Council, its individual members and the city manager "was not expressly considered by the Trial Court". The League agrees with the City of Greeley's brief that the issue of standing may not be raised for the first time on appeal. Denver Association for Retarded Children, Inc. v. School District No. 1, supra; and People v. Leddy, 53 Colo. 109, 123 P. 824 (1912). See Ames v. People, 26 Colo. 83, 56 P. 656 (1899).

Moreover, this court has recognized that a question of standing is not necessarily dispositive where, as here, the substantive question to be decided is one of significant public interest. People v. Pitcher, 56 Colo. 343, 138 P. 509 (1914); and Ames v. People, supra. See, also, Associated Hospital Service of Maine v. Mahoney, Me., 213 A.2d 712 (1965); State v. Rothwell, 25 Wisc. 2d 228, 130 N.W. 2d 806 (1964); and Elwell v. County of Hennepin, Minn., 221 N.W. 2d 538 (1974). The League pointed out previously in this brief (see "Interest of the Colorado Municipal League") the statewide importance of the instant case and the substantial policy and legal concerns involved in the application of compulsory binding arbitration to public sector employee relations.

Should this court determine that standing is an issue which may properly be raised for the first time on appeal and that the substantive issues involved in this case are not of public interest, the city, its councilmembers, and the city manager do have standing to challenge the constitutional validity of the charter amendment. Where, for example, a legislative act imposes duties on a public officer which he believes will cause him to violate his oath of office, he is permitted to challenge the constitutionality of that act. In Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed. 2d 1060 (1968), the board of education sought declaratory relief against enforcement of a New York statute requiring the loan of textbooks to parochial school students. Mr. Justice White stated:

> "Appellees do not challenge the standing of appellants to press their claim in this court. Appellants have taken an oath to support the United States Constitution. Believing §701 (the New York statute) to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step -- refusal to comply with §701 -- that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation. Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962)." 392 U.S. at 241, footnote 5.

The conflict faced by public officials between their sworn duty to uphold a constitution and their responsibility for administering an allegedly unconstitutional law has been recognized by other courts as providing standing to the affected official: City of New York v. Richardson, 473 F. 2d 923 (2nd Cir. 1973); States Attorney of Baltimore City v. City of Baltimore, 274 Md. 597, 337 A.2d 92 (1975); City of Montpelier v.

Gates, 106 Vt. 116, 170 A. 473 (1934); State v. Wheatley, 113 Miss. 555, 74 So. 427 (1917); Harrell v. Cone, 130 Fla. 158, 177 So. 854 (1938).

Colorado law requires that:

> "All officers elected or appointed in any municipality* shall take an oath or affirmation...to support the constitution of the United States and the state constitution." C.R.S. 1973, 31-4-401 (1) (1975 Supp.)."

Thus, the councilmembers and the Greeley city manager are faced with the conflict of complying with a charter amendment which appears to violate their sworn duties to support the Colorado Constitution. In such a situation, pursuant to previously cited authority, the councilmembers and the city manager do have standing to seek a resolution of that conflict.

The City, through its council, also has standing to raise the issues involved in this case. Article XX, Sec. 1 of the Colorado Constitution (through Article XX, Sec. 6) grants to home rule municipalities the power to "sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings...." This constitutional grant of authority goes beyond the statutory authority granted counties to "sue and be sued" [see County Commissioners v. Love, 172 Colo. 121, 470 P.2d 861 (1970)]. By the express terms of the constitutional language, the people of the state of Colorado have granted home rule municipalities the broadest possible power to defend themselves in all matters

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* "Municipality" is defined in C.R.S. 1973, 31-1-101 (6) (1975 Supp.) to specifically include a home rule municipality.

and proceedings. The language contains no exceptions regarding the types of defenses which may be raised -- whether constitutionally based or otherwise. Any judicially-created exception would be, at the least, inappropriate.

Finally, in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962), the United States Supreme Court described the purpose of standing:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? That is the gist of standing." 396 U.S. at 204.

An application of the above test should remove any doubt regarding the standing of the city council, its councilmembers, and the city manager to question the constitutional validity of the Greeley charter amendment.

CONCLUSION

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

Respectfully submitted,

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