SUPREME COURT, STATE OF COLORADO

Case No. 95-SC-698

Certiorari to the Colorado Court of Appeals, No. 94-CA-0387
District Court, City and County of Denver, Colorado, No. 92-CV-6668

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

FRATERNAL ORDER OF POLICE, COLORADO LODGE #27, a Colorado non-profit corporation; FRATERNAL ORDER OF POLICE, COLORADO STATE LODGE, a Colorado non-profit corporation; and LARRY NEAD,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a municipal corporation, and ELIZABETH H. McCANN, in her official capacity as Manager of Safety for the City and County of Denver,

Respondents.

COLORADO MUNICIPAL LEAGUE
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June 12, 1996

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Comes now the Colorado Municipal League (the "League") as an amicus curiae and submits this brief in support of the position of the Respondent, City and County of Denver.

I. Interests of the League

The League is a voluntary, non-profit association of 258 municipalities located throughout the state of Colorado, including all Colorado municipalities above 2000 population and the vast majority of those having a population of 2,000 or less. The League's membership represents 99.9% of the municipal population of Colorado. The League has for many years appeared before the courts as an amicus curiae to present the perspective of Colorado municipalities.

The League's membership includes every home rule municipality in the Colorado, currently 76 in all. Over two-thirds of the state's entire population and more than 90% of the municipal population in Colorado currently resides within the boundaries of a home rule municipality. Thus, the preservation of home rule authority under Article XX of the Colorado Constitution is of particular concern to the League.

In this case, the Court will, for the first time since City and County of Denver v. State, 788 P.2d 764 (Colo. 1990), once again review the authority of home rule municipalities to control

the qualifications of their own officers and employees, and the degree to which the Colorado General Assembly can intrude into this area and impair or override home rule authority over employment qualifications by statute. The power of all home rule municipalities to control the qualifications of their own employees having been expressly conferred in Colo. Const. Art. XX, § 6(a),[1] this subject is of special interest and concern to Colorado municipalities.

Although this case deals specifically with deputy sheriffs in the City and County of Denver, i.e. a type of employee that is peculiar to that municipality, the issues framed in this case indicate that the court will address legal standards of significance to all forms of employment in home rule municipalities.

The League does not appear in this case to argue or discuss the particular applicability of the Peace Officer Standards and Training Act, C.R.S. 24-31-301, et seq., to home rule municipalities statewide, but rather to assist the court in

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[1] The parties in this case and the lower courts have relied principally upon the home rule employment provisions found in Colo. Const. Art. XX, § 2, provisions which apply expressly to the City and County of Denver. However, similar provisions, applicable to all 76 home rule municipalities in the state are found in Art. XX, § 6 which provides in pertinent part that all home rule cities and towns have "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."

reviewing general constitutional principles related to reconciling conflicts between statutes and home rule charters in the area of employment.[2]

II. Issues Presented for Review

As set forth in the Court's order granting the Petition for Certiorari in this case, the issues to be decided are:

"1. Where the district court found on undisputed facts that there is a substantial state concern to protect the public from inadequately trained police officers, do the statutory provisions of secs. 24-31-301 to -307, 10A C.R.S. (1994 Supp.), requiring uniform training and Peace Officer Standards and Training (P.O.S.T.) certification of peace officers supersede a city regulation which does not have P.O.S.T. certification as a

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[2] We would note however, that the applicability of the P.O.S.T. statutes to home rule municipalities is far from clear even on the face of these statutes. The P.O.S.T. Act itself contains no declaration of statewide concern and no express indication that it is supposed to apply to home rule cities. Cf., National Advertising Co. v. Department of Highways, 751 P.2d 632 (Colo. 1995). Instead, the Act merely cross references to the definition of "peace officer" found at C.R.S. 18-1-901 (3)(l)(I), which refers to certain types of law enforcement personnel ". . .employed by the state or any city, city and county, town, or county within the state. . ." Conspicuously absent from this litany is any express inclusion of home rule municipalities. See: definition of "municipality" as contrasted with definition of "city" or "town" at C.R.S. 31-1-101. Nevertheless, the parties, including Denver, appear to have conceded and the lower courts appear to have held that the P.O.S.T. statutes indeed purport to apply to home rule municipalities, thus creating the "conflict" that is at issue in this case.

requirement for its deputy sheriffs."

"2. Are the criteria for resolving the question of supremacy of state law versus home rule law in matters of mixed state and local concern established by City and County of Denver v. State (1990) or does Passarelli v. Schoettler,742 P.2d 867 (1987) establish a different rule where an enabling Constitutional provision grants broad authority to a city to establish the qualifications of its officers, i.e. deputy sheriffs."

III. Statement of the Case

The League hereby adopts by reference the statement of the case and statement of facts as contained in the City's Answer Brief.

IV. Summary of Argument

The Petitioner ("F.O.P.") posits a false dichotomy in arguing that City and County of Denver v. State, *supra*, and Passarelli v. Schoettler, 742 P.2d 867 (1987) provide "different rules" for reconciling home rule powers and conflicting state statutes. The two cases can be harmonized and both can be properly applied, as the Court of Appeals did in this case, to analyze the operation of constitutional and statutory provisions in relation to home rule municipalities.

The relief sought by the F.O.P. in this case is unprecedented. This court has never upheld any statutory limitation on the authority of home rule municipalities to determine the *qualifications* of their own employees under the authority expressly set forth in Colo. Const. Art. XX, § 6(a). While certain collateral aspects of municipal employment may be deemed to be a matter of exclusive state concern or, more typically, mixed statewide and local concern, this court has consistently held that a home rule municipality's fundamental power to determine whom it wishes to hire and fire as well as the powers and duties of these employees derives from the constitution and their own charters and therefore supersedes conflicting statutes.

If the F.O.P. is arguing that the Court of Appeals erred in not systematically applying all of the criteria discussed in City and County of Denver v. State, then the F.O.P. must concede that the district court similarly erred, thus necessitating a remand of this case for further consideration of those criteria.

V. Argument

A. City and County of Denver v. State and Passarelli v. Schoettler are reconcilable and were both properly applied by the Court of Appeals.

The F.O.P. persists in characterizing the Court of Appeals' decision as having incorrectly relied on Passarelli and suggests

that the rules of constitutional construction applied in that case are somehow at odds with the mode of analysis employed by this court in City and County of Denver v. State. In fact, as is clearly evident on the face of the Court of Appeals decision and as is demonstrated by Denver in their Answer Brief, pp. 9-12, the Court of Appeals referred to Passarelli almost parenthetically (for the axiomatic proposition that when a statute and the constitution conflict, the constitution is paramount law), then goes on to expressly base its decision on a series of cases that are directly on point in terms of addressing home rule authority over employment matters, culminating in City and County of Denver.

Did the Court of Appeals err in making this passing reference to Passarelli in its decision? The League would submit that it did not, principally because the general rules of constitutional constructions discussed in that case are completely harmonious with the courts more specific analysis of constitutional home rule issues as discussed in Denver v. State. In particular, neither case purports to establish some sort of *per se* rule whereby apparent conflicts between the constitution and a statutes always results in the invalidation of the statute.

Passarelli merely reaffirms the general principle that the "Courts must, whenever possible construe statutes to conform to constitutional standards" but that it is necessary to give "*appropriate weight* to the strong mandatory statements" of the

constitution. (Emphasis supplied.) 742 P.2d at 870.

Similarly, this court noted in City and County of Denver v. State that the courts must deem "relevant" and "significant" the expressed enumeration of home rule powers in Colo. Const. Art. XX when reconciling apparent conflicts between statutes and these particular constitutional provisions. 788 P.2d 768 and 771. Nowhere in that case did the court indicate that the principles discussed therein were intended to supplant more general rules of constitutional construction as discussed in cases such as Passarelli. Both of these cases consistently stand for the proposition that a large measure of consideration must be afforded the express provisions of the constitution, although such provisions may not be absolutely dispositive of every alleged statutory conflict that comes before the court.[3]

Passarelli and City of County of Denver v. State do not provide "different rules" of constitutional construction, and

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[3] The League must note, however, that the degree of consideration that the court afforded to expressed constitutional home rule powers in Denver v. State paled in comparison to earlier pronouncements on this issue by this court. For example, in City of Thornton v. Farmers Reservoir, 575 P.2d 382 (Colo. 1978), the court said that when "there is involved a specific constitutional power granted to home rule municipalities and, *even though the matter may be of statewide concern*, the General Assembly has no power to enact any law that denies a right specifically granted by the Colorado Constitution." (Emphasis supplied.) 575 P.2d at 389. This case dealt with home rule eminent domain powers reserved at Colo. Const. Art. XX, § 1, powers that are set forth no more or less definitively that home rule authority over employment matters as set forth in Art. XX Secs. 2 and 6.

therefore the Court of Appeals did not err in referring to both of these cases in its decision.

B. There is no precedent wherein the courts have allowed the State to regulate the qualifications of employees or officers of home rule municipalities.

The F.O.P has not and can not cite any prior case where the courts have deemed a state interest to supersede the authority of home rule municipalities to regulate the qualifications, tenure and powers and duties of their own employees. On the contrary, every reported case addressing these particular areas of local concern have come down on the side of home rule authority. If the court grants the relief sought by the F.O.P., this case will mark the first time this court has expressly allowed the Colorado General Assembly to dictate employment qualifications to home rule municipalities.

Admittedly, not every aspect of employment in home rule municipalities is immune from state regulation. However, it is instructive to compare those subjects upon which this court has found there to be an overriding state interest when reviewing conflicts between state law and local regulation:

1. Fire and police pensions. City of Colorado Springs v. State of Colorado, 626 P.2d 1122 (Colo. 1981); Conrad v. City of Thornton, 191 Colo. 444, 553 P.2d 822 (1976);

Huff v. Mayor of Colorado Springs, 182 Colo. 108, 512 P.2d 632 (1973); Police Pension and Review Board v. McPhail, 139 Colo. 330, 338 P.2d 694 (1959); Board of Trustees v. People, 119 Colo. 301, 203 P.2d 490 (1949).

2. Unemployment compensation. City of Colorado Springs v. Industrial Commission, 749 P.2d 412 (Colo. 1988).

3. Workers compensation. City and County of Denver v. Thomas, 176 Colo. 483, 491 P.2d 573 (1973).

The foregoing cases are remarkably consistent in that they dealt with a particular aspect of employment--i.e. certain forms of compensation that are purely incidental to the employment relationship--that is not specifically enumerated as a matter of local and municipal concern in Colo. Const. Art. XX, § 6. Therefore, it was significantly easier for the court in these cases to determine that these matters were of statewide or mixed state and local concern.

Standing in stark contrast to this line of cases, however, are those where the court has addressed more fundamental employment issues related to qualifications, tenure, and powers and duties of home rule municipal employees and officers. A brief review of these cases is in order because they are precisely on point with the issues in the instant case.

Before proceeding, however, it is important to underscore what the holding in City and County of Denver v. State did or did not accomplish in the way of redefining home rule principles in Colorado. As is evident on the face of that opinion, the court did not intend to establish some rigid new paradigm or test for analyzing conflicts between state and home rule laws and regulation. As is discussed in Denver's answer brief in the instant case, pp. 12-13, this court has not ritualistically referred to the many principles and considerations discussed in that case every time it has analyzed a home rule issue since 1990. City and County of Denver v. State did not purport to overrule any prior precedents in the great body of common law on home rule in this state, and in fact, this court cited and implicitly reaffirmed several of the key cases cited below. Therefore, we must assume that the following cases are still good law.

In the seminal case of City and County of Denver v. Rinker, 148 Colo. 441, 366 P.2d 548 (1961), this court declared in no uncertain terms that, "the method of selection and tenure of the officer designated to carry out the duties of the position became the concern of the people of Denver by authority expressly granted to them by all of the people of the state under Article XX *and this is true even though those officers might be required to perform duties which were of statewide concern*. (Emphasis supplied.) 366 P.2d at 551.

In assessing a mandatory retirement provision in a home rule charter, this court held, "No state statute, however, sets any standard which this charter amendment interferes with or attempts to override in regard to involuntary retirement, *nor could it*, because this subject relates solely to tenure, power over which is expressly delegated to home rule cities by Article XX, Section 6 of the Colorado Constitution." (Emphasis supplied.) Coopersmith v. City and County of Denver, 156 Colo. 469, 477; 399 P.2d 943 (1965).

In the broadest possible language in International Brotherhood of Police Officers v. City and County of Denver, 521 P.2d 916 (1974), this court declared in reference to Colo. Const. Art. XX, § 2, "This specific provision vests in Denver the *exclusive control* over public officers, their powers and duties. Other sections of Article XX make it clear that Denver's power to determine the limits of their public officer's authority, by charter or amendment to their charter is all exclusive." (Emphasis supplied.) 521 P.2d at 917. The court then went on to characterize Article XX, Section 6 as granting home rule municipalities "exclusive control over creation and terms of municipal offices." This court apparently cited and reaffirmed its holding in this case, along with the Coopersmith case, *supra*, in City and County of Denver v. State, 788 P.2d at 768 and 770, and most certainly has never overruled it.

In reviewing charter provisions for the termination of employees in a home rule municipality, the Colorado Court of

Appeals held in Ratcliff v. Kite, 541 P.2d 89 (Colo. App. 1975), "Since Commerce City is a home rule city, this provision takes precedence over any statutory or common law rule to the contrary. This was solely a matter of local concern." 541 P.2d at 90.

And more recently, this court seems to have explicitly acknowledged the distinction between statewide concern over certain aspects of compensation incidental to employment, and basic home rule authority to determine whom to employ and under what circumstances, when the court said in City of Colorado v. Industrial Commission, "*while the determination of whether a city employee should be reinstated in a city job may be a matter of local concern governed by city policies*, the determination of whether an employee is subject to unemployment compensation is a matter of statewide concern." 749 P.2d at 416.

In summary, these cases demonstrate a strong and longstanding judicial tradition of respecting the authority of home rule municipalities to establish the qualifications, tenure, and powers and duties of their own employees free from interference by the state. Although the court indicated in Denver v. State that the enumerated home rule powers as set forth in Colo. Const. Art. XX, § 6 were not dispositive of controversies over matters of statewide or local concern, 788 P.2d at 771, the court should determine that this case was properly decided by the court of appeals in accord with applicable precedents.

C. If the Court of Appeals erred in not fully applying the standards set forth in Denver v. State, then so did the trial court.

If the F.O.P is suggesting in this case that the Court of Appeals did not make sufficient findings under the principles discussed in Denver v. State, then the same criticism should be applied to the somewhat conclusory declaratory judgement by the trial court. Thus the League joins Denver by arguing, in the alternative, that if this court disapproves of the thoroughness with which the lower courts analyzed the issues and made their findings, this case should be remanded to the trial court for further proceedings consistent with Denver v. State.

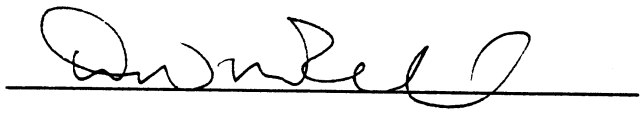
In particular, the lower court should be instructed to more thoroughly consider Denver's avowed local interest in establishing job qualifications for its own deputy sheriffs versus the alleged state interest in imposing uniform standards in this area (as this court took pains to do in Denver v. State). Furthermore, the trial court should be directed to consider that, while the F.O.P. may continue to assert a general state interest in ensuring the hiring of duly qualified peace officers and law enforcement personnel, this interest may yet be fulfilled if a home rule city merely has its own alternative qualification procedures. As this court said in Conrad v. City of Thornton, where a statewide concern has been asserted, "a state statute on the matter does not necessarily preempt the home rule city from adopting a charter provision or

ordinance" especially where "a review of the applicable statutes. . .reveals that the legislature has neither expressly authorized nor forbidden what the city has done." 553 P.2d at 825.

VI. Conclusion

The League respectfully urges this court to affirm the decision of the Court of Appeals or, in the alternative, remand the case for additional findings of fact as suggested in the Answer Brief of the City and County of Denver.

Respectfully submitted this 12th day of June, 1996.



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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Appear as Amicus Curiae was placed in the U.S. Postal System by first class mail, postage prepaid, on the 12th day of June, 1996, addressed to the following:

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