SUPREME COURT, STATE OF COLORADO

Case No. 99SC85

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AN *AMICUS CURIAE*

FRATERNAL ORDER OF POLICE, LODGE # 19

Defendants-Petitioners,

v.

CITY OF COMMERCE CITY

Plaintiffs-Respondents

On Rule 50 Certiorari to the Colorado Court of Appeals, Case No. 99CA0077, and upon appeal from order of the District Court, County of Adams, 98CV3511, Hon. C. Vincent Phelps, District Court Judge.

COLORADO MUNICIPAL LEAGUE
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July 30, 1999

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Comes now the Colorado Municipal League (the "League") by its undersigned attorney, and, pursuant to Rule 29, C.A.R., submits this brief as an *amicus curiae* in support of the position of the Respondent, the City of Commerce City.

I. Interests of the League

The League is a voluntary non-profit association consisting of 263 of the 269 municipalities in the state of Colorado. The League's membership includes all 78 of the home rule municipalities in the state and 185 of the 191 other municipalities in Colorado, which collectively represent 99.9% of the municipal population in the state. The League has for many years appeared before the courts as an *amicus curiae* to present the perspective of Colorado municipalities.

The pending dispute between the F.O.P. and Commerce City raises important and fundamental questions that potentially affect municipalities throughout Colorado. In general, the court will inevitably revisit in this case the essential question of whether or to what degree municipal legislative authority can be lawfully delegated to persons or entities other than the governing body of the municipality. The doctrine of non-delegation of legislative authority is a legal principle that implicates innumerable municipal functions and activities.

The League anticipates that the court will also incidentally address the scope of municipal home rule authority under Colo. Const. Art. XX in this case, and the degree to which home rule authority over employment matters may be superseded by other constitutional considerations. The state's 78 home rule municipalities will have a particular interest in the outcome of this case to the extent it touches upon home rule powers. The League has consistently appeared before this court as an *amicus curiae* when home rule authority is at issue.

To the extent the court will revisit the question of whether municipalities can be compelled to submit to binding interest arbitration of labor disputes through home rule charter amendments, this case has generated keen interest in several of the larger home rule cities in the state. According to League records, at least nine municipalities (other than Commerce City) engage in some sort of collective bargaining with labor unions, either voluntarily or pursuant to the requirements of their respective home rule charters. (See Appendix A) These cities are subject to a wide variety of provisions for impasse resolution when they are unable to consummate a labor agreement. Since this court's decision in *Regional Transportation District v. State,* 830 P.2d 942 (1992), there has been a strong trend toward police unions seeking the inclusion of compulsory binding interest arbitration requirements in home rule charters throughout the state through initiated and referred charter amendments. In addition to Commerce City, voters in Englewood, Denver,[1] and Pueblo have approved binding interest arbitration in recent years. Moreover, petitions to compel binding interest arbitration are currently pending in Colorado Springs and Grand Junction, and the question will apparently be on the November ballot in those two cities. All of the new charter requirements (including the pending petitions)

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[1]Although Denver and Englewood are members of the Colorado Municipal League, the League does not purport to represent their political or legal position on binding interest arbitration in this case. Unique to these two municipalities, the city councils in both Denver and Englewood have affirmatively embraced binding interest arbitration and have publically taken the position that binding interest arbitration in their municipalities is now legal in light of *RTD v. State*. In both cities, charter amendments calling for compulsory binding interest arbitration were willingly *referred* to the people for a vote by the governing body itself, i.e. this requirement was not forced upon the governing bodies via a citizens *initiative* as has occurred and is occurring in other municipalities. Since the charter amendments in Denver and Englewood are substantially the same as Commerce City's, a "win" for Commerce City this case will be perceived as a "loss" by these two cities. Thus, CML's position in this case in support of Commerce City should be understood as representing the majority, but by no means the unanimous, sentiment of Colorado municipalities.

contain virtually the same approach to binding interest arbitration. Therefore, the outcome of the instant case will have repercussions throughout the state.

The League participated as an *amicus curiae* in the seminal case addressing binding interest arbitration in the municipal setting, *Greeley Police Union v. City Council of Greeley*, 553 P.2d 790 (Colo. 1976). Some of the arguments successfully made by the League and by Greeley in support of the legislative authority of municipal elected officials will be interposed again in this brief, in light of the fact that the F.O.P. and its *amici* are calling for a reinterpretation, a narrowing, or an outright repudiation of the Greeley case.

The decision by this court on the legitimacy of compulsory binding interest arbitration in this case in the context of labor disputes may have ramifications beyond the sphere of municipal employment, and beyond the sphere of initiated home rule charter amendments. In particular, depending upon how the case is decided, it could subject all elected municipal officials to the possibility of usurpation of their traditional powers through acts of the General Assembly if the court adopts a more liberal standard for delegation of municipal legislative authority.

II. Issue Presented for Review

Whether the binding arbitration provisions of the collective bargaining charter amendment adopted by the voters of Commerce City are unconstitutional.

III. Statement of the Case

For the sake of brevity, the League hereby adopts and incorporates by reference the statement of the case contained in Commerce City's Response Brief.

IV. Summary of Argument

The trial court correctly determined that the binding interest arbitration provision in the Commerce City charter amendment is unconstitutional, relying upon the principles enunciated in *Greeley Police Union* as forcefully reaffirmed by this court on two occasions in *City of Aurora v.*

Aurora Firefighters Assn, 566 P.2d 1356 (Colo. 1977) and especially in *City and County of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032 (Colo. 1983). The F.O.P.'s reliance on *Denver v. RTD* is misplaced because that case did not deal with the delegation of *municipal legislative* authority, the mode of arbitration employed in that case is thoroughly distinguishable from the framework proposed in Commerce City, and the court did not overturn the three cases cited above, which still provide the guiding rule for Colorado municipalities.

While both parties in this case may simply argue that this case can and should be decided upon a construction of Colo. Const. Art. XXI, § 4, the League will show in this brief that the binding interest arbitration requirement should also be deemed unconstitutional because it violates the overriding common law rule disfavoring delegation of legislative authority, it violates fundamental principles of representative government, it is irreconcilable with the right of initiative and referendum in Colorado, it creates a potential conflict with the qualified right to strike in the public sector identified in *Martin v. Montezuma-Cortez School District*, 841 P.2d 237 (Colo. 1992), and it is at odds with the "prior appropriation doctrine," separation of powers, and related legal principles.

V. Argument

A. The binding interest arbitration provision proposed in Commerce City violates Colo. Const. Art. XXI, § 4.

The parties in this case are apparently united in urging this court to base its decision on an interpretation of Colo. Const. Art. XXI, § 4, even as they are obviously seeking different outcomes. In other words, they are agreed that Colo. Const. Art. V, § 35 is not exactly on point (since this case does not deal with the usurpation of a municipal function by the "general assembly"). The League concurs with the arguments made by Commerce City on this point and

will not repeat them here. However, as more fully explained later in this brief, the League would urge the court to consider how Article V generally, and the vesting of legislative authority provided therein, is not totally irrelevant to the determination of this case.

The League also agrees in spirit with the observation by the F.O.P. and its *amici* that employment in a home rule municipalities is generally considered to be a matter of local concern under Colo. Const. Art. XX, § 6(a) and that the citizens of home rule municipalities can generally structure terms and conditions of municipal employment through their own charters in any way they may please. The League has previously appeared by the court to argue these self same principles, most recently in *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990) (residency requirements) and *Fraternal Order of Police v. City and County of Denver*, 926 P.2d 582 (Colo. 1996) (qualifications for deputy sheriffs). As the court explained in those two cases, however, home rule authority in general and home rule authority over employment in particular is not without bounds. For example, some aspects municipal employment are superseded by state laws of general applicability.[2] Pertinent to the issues in the instant case, the court determined in *Greeley Police Union* that the subject of labor contracts generally was a matter of "mixed" statewide and local concern and, in the absence of any statewide law on the subject was a proper matter to be addressed in a home rule charter.[3]

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[2]See, e.g.: *City of Colorado Springs v. Industrial Commission*, 749 P.2d 412, 416 (1988)(unemployment compensation); *City of Colorado Springs v. State of Colorado*, 626 P.2d 1122 (Colo. 1981) (police and fire pensions); *Conrad v. City of Thornton*, 191 Colo. 444, 553 P.2d 822 (1976) (police and fire pensions); *Huff v. Mayor of Colorado Springs*, 182 Colo. 108, 512 P.2d 632 (1973) (police and fire pensions); *Police Pension and Review Board v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959) (police and fire pensions); *City and County of Denver v. Thomas,* 176 Colo. 483, 491 P.2d 573 (1973) (workers compensation).

[3]To this day, the Colorado Labor Peace Act has never been amended to expressly include municipalities (see § 8-3-104 (12), C.R.S.) and unlike some other states, Colorado has never

Having its basis in the constitution itself, home rule authority to regulate the terms and conditions of employment should generally only be trumped by another overriding constitutional principle. This is precisely what happened in *Greeley Police Union* and *Denver Firefighters.* The court's reliance on Colo. Const. art. XXI, § 4 in these two cases was particularly appropriate because this constitutional provision was adopted after Article XX (the home rule amendment was adopted in 1902 and the recall amendment was adopted in 1912) and expressly supersedes any contrary provision in a home rule charter:

> "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.*" (Emphasis supplied.)

The paragraph preceding this language in Art. XXI is, of course, the one that is at issue in the instant case, requiring that government decisions, powers and duties be exercised by politically accountable persons. The citizens of home rule municipalities cannot structure their local government in such a way as to avoid this overriding constitutional obligation.[4]

Assuming that the court may dispense with Art V, § 35 as a basis for its decision in this case and rely entirely on Art. XXI as it did in *Denver Firefighters*, the court should nevertheless

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adopted a comprehensive statutory scheme addressing collective bargaining in the public sector. However, see the discussion of the *Martin* case and the qualified right for public sector strikes discussed below.

[4]The concept that constitutional home rule authority may be trumped by other constitutional provisions comes up in many different contexts, whether it be the obligation to honor initiative and referendum rights, Colo. Const. Art. V, § 1(9); the obligation to abide by TABOR, Colo. Const. Art. X, § 20 (1); mandatory uniform term limitations on elected officers, Colo. Const. Art. XVIII, § 11; the inability of a home rule municipality to impose an income tax, *Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958); or the obligation of home rule municipalities to afford substantive rights to criminal defendants in their municipal courts, *Hardamon v. Municipal Court*, 178 Colo. 271, 497 P.2d 1000 (1972).

bear the following in mind: If the court now determines that municipalities can be required to submit to binding interest arbitration and that such requirements are constitutional under Art. XXI if properly structured, then municipalities may be subject to such requirements not only by initiated charter amendments, but also by actions of the general assembly. What if the state legislature would then want to pass a statewide law requiring all municipalities to submit to a form of binding interest arbitration (whether it be for labor disputes, land use disputes, competitive bidding disputes, or whatever)? For years, *Greeley Police Union,* with its strong construction of Art. V, § 35, has stood as a bulwark against any attempts by the legislature to usurp municipal legislative authority.[5] The worst possible scenario in the instant case for municipalities statewide would be for Commerce City to lose, and for the court to simultaneously adopt a much more liberal interpretation of what is a permissible delegation of legislative authority, an interpretation that may be based upon Art. XXI, § 4 but would also have implications of Art. V, § 35 as well. This might open the floodgates to the state legislature mandating that municipal functions be delegated to third parties.

The League would therefore urge the court to carefully consider how its construction of Art. XXI, § 4 will affect future litigation arising under Art. V, § 35, although the latter may not provide the basis for the decision in this case.

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[5]Good illustrations of how Art. V, § 35 helps to preserve "local control" in the face of potential state usurpation are provided in *City of Durango v. Durango Transportation, Inc.*, 807 P.2d 1152 (Colo. 1991) (control over local transit system); *City of Colorado Springs v. Mountain View Electric Association*, 925 P.2d 1378 (Colo. App., 1995) (control of municipal electric utility service). However, compare *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061 (Colo. 1992) (regulation of oil and gas development at the state level does not usurp a municiality's zoning authority).

B. The charter amendment violates longstanding legal principles disfavoring the delegation of legislative authority.

Notably, neither Art. XXI, § 4 nor Art. V, § 35 refer expressly to the delegation of "legislative authority" *per se*. Instead both refer to the usurpation of municipal "functions" generally. The League would respectfully submit that disfavor for the delegation of municipal legislative authority is a concept that transcends and predates these two constitutional subsections to the extent the concept is embedded in Colorado common law.

For example, two years *prior* to the adoption of Art. XXI in 1912, this court declared a municipal ordinance in a home rule municipality 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 despotic power. . . ." *Curran Bill Posting and Distribution Co. v. Denver*, 47 Colo. 221, 107 P. 261, 267 (1910).

Article XXI, § 4 is not and never has been the original source of the rule that legislative powers should be exercised by legislative officials. As this court observed in the more recent case of *People v. Lowrie*, 761 P.2d 778 (Colo., 1988), the constitutional basis for this principle resides in Article V and the fundamental way legislative power is vested by the constitution generally. "The non-delegation doctrine, which has its source in the constitutional separation of powers, prohibits the General Assembly from delegating its legislative power to some other agency or person." 761 P.2d at 781. Moreover, there are important policy considerations underlying the rule: "The non-delegation doctrine is not merely concerned with the proper distribution of powers among the departments of government, but also looks to *the protection of*

the public from the imposition of irrational rules created by non-elected officials." 761 P.2d at 781 (emphasis supplied).

In the substantial body of case law interpreting and applying the non-delegation doctrine, as often as not Art. XXI is not even mentioned. Instead, most cases on this subject focus on the adequacy (or lack thereof) of the standards under which government decision making authority has been delegated, and whether a particular delegation crosses the line. (Indeed, *RTD v. State* falls into this line of cases, with the court summarily rejecting the RTD's argument that the form of binding interest arbitration condoned therein did not include specific standards to guide the arbitrator.) Perhaps the most important modern decision in this genre is *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981), wherein the court observed that when government decision making authority is delegated to non-elected officials, "The proper focus should be upon the totality of protection provided by standards at both the statutory and administrative levels." 636 P.2d at 709. The court in *Cottrell* also emphasized the need for "procedural safeguards" at the administrative level where a decision is actually being made pursuant to a delegation of authority, citing *Elizondo v. Department of Revenue*, 194 Colo. 113, 570 P.2d 518 (1977). *Cottrell* thus virtually invites a careful case-by-case analysis of whether legislative authority has been unlawfully delegate with a two-part analysis, first to see whether the legislature has handed down specific enough standards, and second to determine whether certain "protections" exist on the receiving end of the delegation.

As the court observed in *Cottrell,* "violation of the non-delegation doctrine has been an argument frequently invoked but rarely sustained." 636 P.2d at 708. Indeed, in the years since this decision was rendered, many unlawful delegation claims have been carefully considered by

the court but ultimately rejected, notwithstanding the more rigorous standard of review handed down in *Cottrell*.[6]

However, *Cottrell* ushered in a new framework for assessing delegation of government powers wherein, beyond the legitimacy of the initial delegation, the court assesses "subsequent procedural steps" which "provide substantial protection to persons adversely affected. . ." by actions of the decision maker to whom authority has been delegated. *State Farm v. City of Lakewood*, 788 P.2d 808, 816 (Colo. 1990). Twice, the courts have found an initial delegation of authority by a legislative body to be legitimate, but ultimately determined the delegation to be flawed because the recipient of the decision-making authority failed to take additional steps to ensure the rendering of fair and consistent decisions. "(T)here must be sufficient standards and procedural safeguards *and subsequent implementation* to ensure that any action taken . . . will be rational and consistent and that judicial review of that action will be available and effective." *Beaver Meadows v. Board of County Commissioners of Larimer County*, 709 P.2d 928, 936 (Colo. 1985) (emphasis supplied); see also *Squire Restaurant and Lounge v. City and County of Denver*, 890 P.2d 164 (Colo. App. 1994), *cert.* denied (1995).

In *Cottrell* and *State Farm,* the court indicated that one of the "protections" that should be taken into account when government decision-making is delegated to a non-elected official is the availability of some sort of public process whereby the decision-maker can be influenced by anyone who will be affected by the decision-maker's actions. Accord: *Bennett Bear Creek Farm Water and Sanitation District v. City and County of Denver,* 928 P.2d 1254, 1269 (Colo. 1996).

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[6]Good examples include: *Loup-Miller Construction Company v. Denver*, 676 P.2d 1170 (Colo. 1984); *People v. Holmes*, 959 P.2d 406 (Colo. 1998).

Returning to the case at bar, although the charter amendment proposed by the F.O.P. contains some "FACTORS TO BE CONSIDERED BY THE ARBITRATOR" at § 21.14 (including the catch-all "other similar standards recognized in the resolution of interest disputes"), it is bereft of any requirement that the decision-maker adopt any procedure or mechanism for ensuring that arbitration decisions are fair and consistent over time. Moreover, it is bereft of any provision for how citizens at large (i.e. the individual taxpayers who will foot the bill for the arbitration award) may influence the process.[7] While the F.O.P.'s proposal for binding interest arbitration promises one informal hearing between the union and "the city" before the arbitrator makes a decision, there is no indication whatsoever of whether the public may be a part of the hearing or monitor the activities of the arbitrator in any way.

Thus, consistent with *Cottrell* and other non-delegation cases, the court should ask: Where are the "substantial protections" built into the Commerce City charter amendment to safeguard the larger public interest? Or, conversely, given the fundamental nature of binding interest arbitration as suggested in this case, are such protections even possible? Under the F.O.P.'s proposal, neither the appointment nor the removal of the arbitrator for a particular dispute is left to the absolute discretion of the elected legislative officials in Commerce City. Given the selection process imposed, the particular arbitrator who will bind the city to a particular contract on a year-to-year basis could change, thus calling into question whether the arbitrators' decisions will be consistent and predictable in practice. Given the highly prescriptive

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[7]Contrast this to the open and public way in which the Commerce City city council must consider and adopt its overall budget, Commerce City Charter §§ 12.1, *et seq.*, including the submission of a budget proposal and message well in advance of adoption, a formal public hearing following adequate public notices, and a requirement that the budget be made a public record. These requirements are typical in both statutory and home rule municipalities throughout Colorado. See, e.g., the Local Government Budget Law, §§ 29-1-105, *et seq*, C.R.S.

qualifications for arbitrators imposed by the amendment, it virtually guarantees that the arbitrator will be a nonresident, with no necessary stake, interest, or prior knowledge about the history, culture and needs of the community. Indeed, the arbitrator is charged not with safeguarding the larger public interest, but instead is required to be "impartial and disinterested," which presumably means he must be prepared to serve two masters. The arbitrator is positively prohibited from having specialized in public sector arbitration and thus is more likely to come as a neophyte to municipal government. The arbitrator swears an oath, but only to support this one portion of the charter, and not to faithfully serve the people of Commerce City.[8]

Whether the arbitration framework proposed by the F.O.P. satisfies *Cottrell* is at least debatable. But the League would suggest that the proposal is flawed at an even more fundamental level. In *Ossinger Outdoor Advertising v. Department of Highways*, 752 P.2d 55 (Colo. 1988), the court observed, "we start from the basic proposition that the legislature may not delegate the power to make or define a law, but may delegate the power to make rules and regulations" consistent with adequate standards and procedural safeguards. 752 P.2d at 62. This pronouncement was consistent with the dichotomy recognized in *People v. Lepik*, 629 P.2d 1080 (Colo. 1981) in which the court previously held that the power to make a law may not be delegated, but the power to determine the state of facts upon which the law operates may be delegated if not left to the uncontrolled discretion of the administrative officer.

The League would submit that the approach taken in these two cases is consistent with and provides additional support for the distinction made in the *Denver Firefighters* case between

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[8]Compare this to *elected* officials in Commerce City, who swear an oath to support and defend the entirety of the state and federal constitutions, § 31-4-401 (1), C.R.S., as well as the charter and ordinances of the city itself, Charter § 4.7.

a decision on a grievance arising under an existing collective bargaining agreement (which is delegable to an arbitrator) and the decision to enter into a collective bargaining agreement in the first place (which is not). The approval of a contract that will bind a municipality and the appropriation of public funds to support the contract are core legislative functions, not unlike the power to make a law, and are therefore unalterably vested in the elected officials who make up the governing body. "(T)he terms and conditions of public employment contained in a collective bargaining agreement are legislative matters, and the ultimate responsibility for the establishment of such terms must rest with elected officials." *Denver Firefighters*, 663 P.2d at 1038.[9]

The League urges the court to reaffirm the principle that, while a municipal legislators may delegate authority to interpret, enforce, and administer their legislative actions, the ultimate authority to take those actions in the first instance must remain with the city council.

C. Binding interest arbitration in the municipal setting is antithetical to the guarantee of a republican form of government.

The non-delegation doctrine is closely related to the fundamental principle that our entire system of government is based upon representative democracy. In *Greeley Police Union,* this

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[9]Colorado statutes governing municipalities are replete with numerous examples of how these core legislative functions are presumptively performed by the elected officials who make up the governing body. The *governing body* exercises control over the "finances and property" of the municipal corporation. § 31-15-302 (1)(a). The *governing body* controls "the appointment, term of office, removal, powers, duties, and compensation . . . of all employees. § 31-15-201 (1)(b). The *governing body* is vested with the authority "to regulate the police of the municipality." § 31-15-401 (1)(a). Any action authorizing the "expenditure of money or the entering into of a contract" in a statutory city or town requires a roll call vote and majority approval of the *governing body*. § 31-16-108. A municipal contract must not only be approved by the governing body in the first instance, it also must not operate to deprive *future* governing bodies of their authority to contract or otherwise exercise legislative authority. *City of Grand Junction v. Johnson,* 689 P.2d 679 (Colo. App., 1984), *cert.* denied (1984) (confirming the authority of a city council to terminate an educational pay program and adopt a new pay plan for police and fire personnel). See, also *McQullin Mun. Corp.* § 29.15 (3rd Ed.).

court's seminal analysis of the legitimacy of binding arbitration in the municipal setting relied in part upon *Dearborn Fire Fighters Local 412 v. City of Dearborn*, 231 N.W. 2d 226 (1975). Portions of that case bear repeating here, as the court determined that compulsory binding interest arbitration in a municipality is:

> "not consistent with a core concept of a representative democracy: 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 representative democracy." 231 N.W. 2d at 235 (emphasis original).
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> "While delegation of authority to resolve the dispute to an independent outsider may resolve the immediate crisis and relieves the public employer and union officials of the need to justify the result, this approach to legislative decision-making, precisely because it is designed to insulate and, in fact, does insulate the decision-making process and the results from accountability within the political process, it is not consonant with proper governance and is not an appropriate method for resolving legislative-political issues in a representative democracy." 231 N.W.2d 226.

Once again, the F.O.P. and their *amici* in the case at bar, relying primarily on *RTD v. State* and Colo. Const. Art. XXI § 4, are asserting the position that binding interest arbitration should be deemed to be legitimate when the arbitrator is in some sense appointed by politically accountable persons and when criteria are established to guide the arbitrator's decisions. The League simply responds that when the arbitrator is by definition an interloper, with no fiduciary duty to the municipality as a whole and with a requirement to be "impartial and disinterested," and then is permitted to make legislative decisions that would normally be made by the governing body, such an arbitration scheme is repugnant to notions of representative democracy.

Again, this is an example of where rights of local sovereignty and self determination secured by Article XX of the state constitution give way to higher constitutional principles. As this court observed long ago, "The Home Rule Amendment was intended to reiterate

unmistakably 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).

Just last year, the court engaged in its most pointed discussion to date on the meaning and applicability of the Guarantee Clause of the U.S. Constitution. *Morrissey v. State*, 951 P.2d 911 (Colo. 1998). Coincidentally, in that case as in the instant case, the court was called upon to consider the validity of an initiated, popularly approved amendment designed to usurp the discretion of elected legislative officials. In holding that state elected officials could not be compelled to support a federal constitutional amendment on the subject of term limits, the court observed, "This coersion of legislators is itself inconsistent with Article IV, Section 4 (the Guarantee Clause) which guarantees to every state a republican form of government." The court concluded, "In our system, the people set policy by choice, not control, of their elected representatives."

D. Mandatory binding interest arbitration thwarts the people's right to initiative and referendum.

After *Greeley Police Union* and its progeny, the most common provision for impasse resolution in municipalities throughout Colorado has been a requirement for voter approval. (See Appendix A.) This makes perfect sense in response to the earlier cases, in light of the court's concern with unlawful delegation of legislative authority. Since, under Colo. Const. Art. V, all legislative authority is derived from the people, it is only logical that the people would be the only legitimate alternative to elected officials when deciding whether to enter into a contract that will bind a municipality. Submitting it to a vote doesn't involve a delegation of legislative authority, *it involves putting it to the very source of legislative authority.* Since the decision in

RTD v. State, however, Englewood, Denver[10] and Pueblo have switched from voter approval to binding interest arbitration to establish collective bargaining agreements with their police unions.

Now, ironically, it appears from the charter amendments approved in Commerce City and elsewhere around the state, not only will an impasse not be automatically submitted to the people, it apparently *cannot* be forced to a vote even if the people choose to exercise their right of referendum on labor contracts on a case by case basis. The charter amendment at § 21.16 ensures the "finality" of the arbitrator's decision, provides in no uncertain terms that it is binding upon the municipality, and merely provides a limited form of judicial review for anyone dissatisfied with the terms and conditions of the award.

Home rule municipalities are positively required to include provisions for initiative and referendum in their charters by Colo. Const. Art. V, § 1(9),[11] Art. XX, § 5, and § 31-2-212, C.R.S. In numerous cases, this court has held that the rights of initiative and referendum on municipal legislative matters is sacrosanct. See, e.g., *McKee v. Louisville*, 200 Colo. 525, 616 P.2d 969 (1980). The decision to enter into a labor contract is undeniably a legislative matter according to *Greeley Police Union* and *Denver Firefighters*. Query, then, how compulsory binding interest arbitration can be reconciled with the constitutional right of initiative and referendum enjoyed by the citizens of Colorado municipalities?

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[10]See: *Denver v. Denver Firefighters,* 663 P.2d at n. 9. Denver still utilizes voter approval to resolve impasses with its firefighters, even though the city went to a system of binding arbitration with police unions in 1995.

[11]"The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities." Colo. Const. Art. V, § 1(9).

E. Binding interest arbitration may conflict with the qualified right to strike identified in *Martin v. Montezuma Cortez School District.*

The system of binding interest arbitration approved by the court in *RTD v. State* compels arbitration solely and specifically to avoid a strike by public transit employees. § 8-3-113 (3), C.R.S. In addition to requiring binding interest arbitration, the Commerce City charter amendment at § 21.19 (a) purports to ban strikes. These provisions echo the observation made by the court in *Denver Firefighters* that arbitration provisions "may serve to compensate public employees in some measure for denial of the right to strike." 663 P.2d at 1039. The concept that arbitration is set up as an alternative to strikes has been acknowledged elsewhere.[12]

The paradox in Colorado is that the court has now construed the Labor Peace Act to afford a limited right to strike in the public sector. *Martin v. Montezuma-Cortez School District*, 841 P.2d 237 (Colo. 1992). Although the applicability of this right to employees in home rule municipalities has never been tested, at least one commentator has opined that it will apply to home rule cities and will act to trump contrary provisions on collective bargaining in home rule charters. Hogler, Raymond L., "Public Employee Strikes in Colorado: The Supreme Court Adopts a New Rule," 22 Colo. Law. No. 1, p. 1.[13]

By no means does the League concede that the right to strike established in *Martin* supersedes home rule authority. However, we believe it appropriate to bring to the court's

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[12]See, *McQuillin Mun. Corp.* § 12.140.10 (3rd ed.), "where the right of employees to strike is by law prohibited, it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, expeditious, effective and binding procedure for the resolution of disputes. . . ," quoting from Michigan Statutes Annotated, § 17.455 (31).

[13]This article was followed in short order by a scathing critique by the attorney who represented the union in the *Martin* case. While disagreeing with the author on many points, however, the attorney noted on the issue of home rule preemption, "If it preempts at all, it is only in the matter of dispute resolution." 22 Colo. Law. No. 2, p. 265, 266.

attention that, in a future case, the police union in Commerce City may argue that they enjoy a right to strike under *Martin* notwithstanding the specific disclaimer contained in the Commerce City Charter.[14] The union could enjoy *both* a qualified right to strike *and* the benefits of compulsory binding operation. Thus the notion that one is supposed to substitute for the other would be violated.

F. Binding interest arbitration is irreconcilable with the principle that elected legislative officers control the purse strings of a municipality.

Colorado statutes and case law have traditionally reflected respect for the principle that the appropriation of public funds is the province of elected legislative officials, and that contracts must be supported by a prior appropriation. These principles beg the question of whether an exercise of the appropriation power can be compelled due to the actions of an unelected arbitrator.

The public policy underlying the prior appropriation doctrine has been stated thus: "to protect the taxpayer against improvident use of tax revenue, . . . to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct the expenditure of public funds." *Normandy Estates Metropolitan Recreation District v. Normandy Estates Limited*, 553 P.2d 386, 390 (Colo. 1976), quoting *Shannon Water and Sanitation District v. Norris*, 29 Colo. App. 48, 477 P.2d 476 (1970). Other cases discussing the principle that a contractual commitment to pay money that is unsupported by a prior appropriation may be void

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[14]This argument is made possible by the fact that the court in *Greeley Police Union* has already determined that collective bargaining matters are a matter of "mixed" statewide and local concern. On matters of "mixed" concern, both the municipality and the state are free to regulate, but a local provision can be superseded by a contrary state statute. *Voss v. Lundvall*, 830 P.2d 1061 (Colo. 1992); *U.S. West Communications Inc. v. City of Longmont*, 948 P.2d 509 (Colo. 1997).

and unenforceable include *Englewood v. Ripple & Howe*, 374 P.2d 360 (Colo. 1962) and *F. J. Kent Corp. v. Town of Dillon*, 648 P.2d 669 (Colo. App. 1982). See also, *McQullin Mun. Corp.* § 29.20 (3rd ed.) In yet another case, in the face of a quasi-contract claim, the court of appeals held that a board of county commissioners could not be bound by compensation promises made by a county sheriff to his employees"without the knowledge and approval of the board." *Johnson v. Board of County Commissioners of Eagle County*, 676 P.2d 1263. The principle that a prior appropriation is necessary to establish a valid contract is also embodied in two state statutes, § 29-1-110 C.R.S. (the Local Government Budget Law, applicable to all statutory local governments in the state) and § 24-91-103.5 (concerning appropriations in support of public works contracts).

Concerns about the practicality and enforceability of a contract entered into via binding interest arbitration are heightened by separation of powers principles. Certainly the Commerce City charter amendment contemplates judicial review and enforcement of an arbitrator's decision, but query whether the court could compel a municipality to appropriate the funds necessary to support the contract ordered by the arbitrator? This supreme court has held that, although a court may enter a judgment against a state agency, it is "powerless" to order the state legislature to make an appropriation to support the judgment. *State v. Pena*, 855 P.2d 805 (Colo. 1993)[15]. Moreover, "ordering specific fiscal action by another branch of government is outside the judiciary's inherent authority." *Board of County Commissioners v. 19th Judicial District*, 895 P.2d 545 (Colo. 1995). Both of these cases involved the enforceability of an obligation imposed

[15]See also: *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438 (Colo. App. 1994).

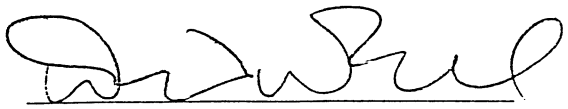
by a government agency pursuant to a state statute. Presumably, the same principles would hold true for a claim arising under the requirements of a home rule charter.

Obviously, these practical concerns of how, when or whether a city council must adjust its budget and make an appropriation to fund a contract ordered by a third party arbitrator will be obviated if the court reaffirms that the ultimate power to make contracts must remain with the elected legislative body, just as the power and responsibility to manage the fiscal affairs of the municipality resides in that body.

VI. Conclusion

Upon due consideration of the constitutional infirmities of binding interest arbitration as applied to municipalities in Colorado, the League respectfully urges the court to affirm the judgement of the district court.

Respectfully Submitted this 30th day of July, 1999.



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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League as an *Amicus Curiae* was placed in the U.S. Postal System by first class mail, postage prepaid, on the 30th day of July, 1999 addressed to the following:

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Appendix A

Methods of Impasse Resolution in Municipalities that Use Collective Bargaining to Negotiate Labor Contracts
(Includes Pending Charter Amendments)

CITY	PROVISION CREATING IMPASSE RESOLUTION MANDATE	METHOD OF IMPASSE RESOLUTION	HOW ARBITRATOR / FACILITATOR IS CHOSEN
Aurora	Charter §§ 14-9 and 15-9 (§ 14-9: firefighters) (§ 15-9: police officers) *(§ 14-9 added 1977, amended 1989 by Ord. No. 89-85; § 15-9 added 1978, amended 1989 by Ord. No. 89-85)*	Advisory Fact Finding If impasse is unresolved after fact finding period, the City will hold a **special election**	AAA submits list of 7 names; parties strike 1 name from list until 1 name is selected
Boulder	Boulder Municipal Employee's Association 1999-2000 Agreement	Economic Fact Finding City Council reserves legislative power by reviewing Fact Finder's report and acting upon the finding. (Council may, but is not required to, submit impasse to a **special election**)	AAA submits list of 5 names; City and Bargaining Unit strike 1 name from list until 1 name is selected
Colorado Springs	Proposed Amendment to Charter	Binding Arbitration	City to establish permanent panel of atleast three arbitrators (arbitrators appointed for six-year term); parties will receive list of panel members; parties alternately strike names from list until 1 name remains

Denver (Firefighters)	Charter § C5.80-5 (*added 1971; amended 1979*)	Advisory Fact Finding If impasse is unresolved after fact finding period, the City will hold a special election	AAA submits list of 5 names; parties strike 2 names from list and number remaining names in order of preference; AAA chooses 1 person from remaining names
Denver (Police)	Charter § C5.82-7 (*added 1995*)	Binding Arbitration	City to establish permanent panel of atleast three arbitrators (arbitrators appointed for six-year term); parties will receive list of panel members; parties alternately strike names from list until 1 name remains
Englewood	Charter § 137:6 (*added 1991; amended 1995*)	Binding Arbitration	City Manager and employee organization jointly submit names of 3 arbitrators to City Council; City Council chooses 1 arbitrator
Grand Junction	Proposed Amendment to Charter	Binding Arbitration	City to establish permanent panel of atleast 3 arbitrators; parties will receive list of panel members; parties alternately strike names from list until 1 name remains
Greeley (Firefighters)	Charter § 13-4(e) (*§ 11-8(a)-(k) repealed and re-enacted as § 13-4(a)-(k) by Ord. No. 40 1993*)	Advisory Fact Finding If impasse is unresolved after fact finding period, the City will hold a special election	AAA submits list of 7 names; parties strike 1 name from list until 1 name remains
Greeley (Police)	Charter § 14-4(f) (*§ 11-3(a)-(m) repealed and re-enacted as § 14-4(a)-(m) by Ord. No. 40 1993*)	Advisory Fact Finding If impasse is unresolved after fact finding period, the City will hold a special election	AAA submits list of 5 names; parties strike 2 names from list and number the remaining names by preference; AAA chooses one person from remaining names
Littleton	Agreement between City of Littleton and Local #2086 of the International Association of Fire Fighters	Non-binding Facilitation If the facilitator is unable to resolve impasse, the facilitator will be released	Mutually acceptable facilitator is chosen from list of three names compiled by parties

Pueblo	Charter § 8-14(r) (*§§ 8-14(q)-(w) added by amendment 1998*)	Binding Arbitration Prior to 1998 amendment, impasses were submitted to special election	City to establish permanent panel of atleast 3 arbitrators; parties will receive list of panel members; parties alternately strike names from list until 1 name remains
Thornton	Charter § 18.6 (Added by initiative, 1979) *Thornton no longer has its own fire authority, so the collective bargaining agreement is moot: Thornton's fire protection provided by North Metro Fire Rescue	Advisory Fact Finding If impasse is unresolved after fact finding period, the City will hold a special election	AAA submits list of 7 names; parties strike 2 names from list and number the remaining names by preference; AAA chooses three persons from remaining names and appoints a chairperson for the three person panel
Trinidad	Charter § 12.6 provides for collective bargaining, but does not have a measure that refers to impasse resolution (*charter adopted 1993*)	N/A	N/A

Prepared by CML, July 21, 1999