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Charles C. Mulcahy

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THE CRISIS OF THE 70's—WHO WILL MANAGE MUNICIPAL GOVERNMENT?

CHARLES C. MULCAHY*

Ten years ago a mere handful of states had laws permitting or requiring municipal governments to "meet and confer" or bargain collectively with their employees. Few states had legislation authorizing municipal employees to organize or join unions. In fact, many states had laws forbidding such activity. Today only eight states have no legislation regarding union activity in the public sector,¹ and only two states still have legislation expressly prohibiting it.² The phenomenon of collective bargaining in municipal employment has spread throughout the United States in a nearly unprecedented legislation explosion. As of May, 1970, forty states had legislation authorizing some form of union activity by public employees, although in the majority of states, it is still limited in scope. The concepts and interpretations of employee rights are nearly as numerous as the states which have enacted legislation recognizing such rights. It is the confusion bred by this variety of state laws coupled with the lack of preparedness and experience on the part of municipal government administrators in dealing with the united front of organized labor unions that is precipitating the municipal labor crisis of the 70's. This crisis is best expressed by asking the question, "Who will manage municipal government?"

Some order and understanding may be gained by grouping public employment relations legislation into three categories: (1) Mandatory legislation which requires public employers to negotiate with their employees;³ (2) Permissive legislation which authorizes

* J.D. 1962, Marquette University Law School; member of firm, Mulcahy & Gefke, S.C., Milwaukee, Wisconsin; member of Milwaukee County Board of Supervisors and currently Vice-Chairman of its Personnel Committee, 1964 to present; Labor Negotiator, City of Cudahy, 1969 to present, and City of Wausau, 1970. Mr. Mulcahy previously published an article entitled "A Municipality's Rights and Responsibilities Under the Wisconsin Municipal Labor Law" in 49 MARQ. L. REV. 512 (1966).

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¹ Georgia, Mississippi, Ohio, South Carolina, Tennessee, Virginia and West Virginia.

² N.C. GEN. STATS. §§ 95-85 to 95-88 (1965); TEX. ANN. CIV. STAT. art. 5154c. (Vernon 1971).

³ In early 1971, twenty-six states had mandatory statutes requiring either meet and confer or collective bargaining relationships. The states are Alaska (teachers); California (state and local; teachers); Connecticut (teachers; local); Delaware (local; state and county; transit); Florida (teachers; county firemen); Hawaii (state, county and local); Idaho (firemen); Louisiana (public transit); Maine (local and county); Maryland (teachers); Massachusetts (state and local); Michigan (local); Minnesota (state and local; teachers); Missouri (all except police and teachers); Montana (nurses);

public employers to negotiate with their employees;⁴ and (3) minimal legislation which affords public employees only minimal rights.⁵ Mandatory and permissive statutes often incorporate the term "meet and confer" which is a legislative euphemism for something short of collective bargaining.⁶ The overwhelming trend of the legislation is to grant employees in the public sector organizational and collective bargaining rights that approach or equal those enjoyed by employees in the private sector, including the right to strike. The most recent public employment legislation limits the right to strike only to employees providing critically essential services or only after mandatory settlement procedures have failed to resolve the dispute.⁷

Wisconsin has traditionally been one of the leaders in the crucial area of public employee relations, having enacted the first compre-

Nevada (local and teachers); New Hampshire (state); New Jersey (state and local); New York (state and local); North Dakota (teachers); Oregon (state and local; teachers; nurses); Pennsylvania (state and local); Rhode Island (local; fire; police; teachers; and state); Vermont (state; teachers); Washington (state and local; teachers); Wisconsin (local except police; state); and Wyoming (firemen).

⁴ In early 1971, eleven states had permissive statutes, making meet and confer or collective bargaining relationships permissible. They are: Alaska (state, local); Delaware (local); Florida (teachers); Illinois (state, transit; universities); Kentucky (state); Nebraska (teachers); New Hampshire (city); New Mexico (transit); South Dakota (state and local); Vermont (city); and Washington (public utilities).

⁵ In early 1971, fourteen states had the minimal type of statute, under which a limited number of employees have only basic rights, such as the right to join a union or present proposals to the employer. Eight of these states have *only* minimal statutes: Alabama (firemen); Arizona (state and local); Arkansas (state and local); Indiana (teachers); Iowa (state and local); Kansas (teachers); and Utah (state and local). Six of the states which have minimal statutes for certain employees, have comprehensive statutes for others. These states and their minimal statutes are Florida (state and local); Illinois (firemen); Missouri (state and local); Nebraska (firemen); North Dakota (state and local); and California (firemen).

(Footnotes 3, 4 and 5 contain material from 2 Lab. Rel. Law Sec., A.B.A. Rep. at 94-100 (1970) reprinted with permission.)

⁶ The Wisconsin Supreme Court interpreted "meet and negotiate in good faith" provisions of the Wisconsin Municipal Employment Relations Act (see note 8, *infra*) as not requiring a school board to "bargain collectively," saying that the statutory duty of a school board was different in regard to negotiation than that of a private sector employer. *Joint School District No. 8, City of Madison v. Wisconsin Employment Relations Board*, 37 Wis. 2d 483, 488, 155 N.W. 2d 78, 80 (1967).

⁷ See Public Employee Relations Act, Act. No. 195, PENN. LAWS 1970; 359 GERR B-9 and E-1 (1970).

This law extends bargaining rights to all state, county and municipal employees and grants them the right to strike, limited so that it can be employed only after good faith compliance with dispute settlement procedures and in absence of danger to public health and safety. A further limitation specifically denies the right to strike to prison and mental hospital guards and court employees.

Also, see Collective Bargaining in Public Employment, Act 171 LAWS OF HAWAII (1970); 349 GERR B-9 and E-1 (1970). This law is the first public employment law authorizing a strike. It requires a cooling off period, encourages use of settlement procedures and is limited when public health or safety is endangered.

hensive public employee bargaining law in 1959.⁸ In its original form, the Wisconsin Municipal Employment Relations Act was a simple pronouncement of the right of public employees to meet and confer with their employers on matters concerning wages, hours and conditions of employment. Subsequent amendments provided for exclusive recognition of certified bargaining representatives, authorized written agreements and established machinery for third party intervention by way of mediation or fact finding in impasse situations as a vehicle for the resolution of bargaining disputes. This mechanism was intended to supplant the right to strike—a right zealously protected in private employment,⁹ but denied to public employees.¹⁰ At the present time there is a bill pending before the Wisconsin State Assembly which would make sweeping changes in subchapter 4 of the Wisconsin Municipal Employees Relations Act.¹¹ Among these changes would be the elimination of the strike

⁸ "Right of Municipal Employees to Organize and Join Organizations; Bargaining in Municipal Employment," WIS. STAT. sub. ch. IV, ch. 111, § 111.70 (1959) as amended in 1961, 1963, 1965, 1967 and 1969.

⁹ "Injunctions; Conditions of Issuance; Restraining Orders (1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof;

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection".

WIS. STATS. § 103.56(1) (1969). Section 103.56 also imposes bonding requirements on parties seeking its relief.

¹⁰ "Strikes Prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited." WIS. STAT. § 111.70(4) (1) (1969).

This statutory provision was originally enforced in the Circuit Court of Milwaukee County in the case of County of Milwaukee v. Milwaukee County District Council #48, AFSCME, AFL-CIO, *et. al.*, Milwaukee County Circuit Court Case 342-526 (1966). Although this court hearing admitted extensive testimony concerning the substantial dangers to the public health, safety and welfare if the strike by Milwaukee County General Hospital workers continued, the decision explicitly stated that strikes by public employees for *any reason* were expressly prohibited citing WIS. STAT. § 111.70(4) (1) and extensive authority from numerous jurisdictions to that effect. (Also see *City of LaCrosse v. LaCrosse Education Association, et. al.*, LaCrosse County Circuit Court Case No. 28699 (1971).)

¹¹ Assembly Bill 198 (1971). This Bill and amendments were introduced by Committee on Labor by request of Wis. Council of County & Municipal Employees; Milwaukee District Council 48; Wis. Professional Policemen's

prohibition and the creation of an agency shop or fair share agreement concept.

Originally legislation of this type created a tremendous furor in public employment due to its apparent confrontation with the sovereignty of government. Based upon the number of states enacting this legislation, a definite trend has developed where public employees in most states now have collective bargaining rights (with limitations in specific sectors of employment). In certain areas the relationship between public management and its employees has stabilized. In others, the relationship has completely deteriorated. This deterioration has been caused by both management and the unions. For example, in 1970, then Governor Claude Kirk of Florida issued an executive order providing that all forms of collective bargaining with public employee units be expressly forbidden and that he would veto any legislation attempting to grant such bargaining rights.¹² This order incurred the wrath of most municipal labor leaders and further shocked many government officials engaged in this area. The impact might have been different if collective bargaining had not been in process in some areas of that state. However, once the bargaining relationship had been established, it was almost impossible to effectively issue an order of this type. As an example of union contribution to the deterioration in the bargaining relationship, attention may be directed to the state of New York where public employment strikes are almost a daily occurrence. Many municipalities are complacently accepting their adjustment to the new re-

Assn.; Professional Firefighters of Wis.; Wis. Education Assn.; Wis. County Police, Deputy Sheriffs & Radio Operators Assn. Repeals and recreates subch. IV of ch. 111, the municipal labor relations law. Eliminates all exceptions in law for policemen and law enforcement officers. Provides for "fair share agreements" between municipal employers and unions if approved by 2/3 of employees in unit by referendum whereby employer deducts union dues from union members, and from nonunion members that part of union dues attributable to union collective bargaining expense and "contract administration" and makes failure to abide by agreement a prohibited practice. Defines supervisor and provides that only officers immediately below fire chief or police chief in rank can be considered supervisors in those departments. Supervisors may belong to the same union as subordinates but cannot represent union in bargaining or grievances. Municipal employers authorized to submit to binding arbitration, and 3-year agreements are permitted. Imposes duty to bargain on municipal employees and employers and makes refusal to bargain a prohibited practice. Makes agreements to arbitrate subject to ch. 298 (court enforces arbitration award [private labor arbitration agreements are specifically excepted from ch. 298]). Requires parties to notify each other and WERC of action on fact finder's recommendations and provides for WERC order to show cause proceeding if dispute continues unresolved 30 days after fact finder's report. Authorized mediation of disputes on action of WERC or by request of either party. Eliminates authority of municipalities to hire labor negotiators. Eliminates authority of municipality to adopt local fact finding ordinance. Authorizes WERC to adopt rules for dispute settlement procedures in local agreements. Makes action by municipal employer issuing or seeking to issue contracts, including statutory (teachers') contracts, during collective bargaining, mediation, fact finding or arbitration, a prohibited practice.

¹² Fla. Exec. Order of May 13, 1970; 350 GERR B-10 and F-1 (1970).

lationship, basing this acceptance upon their ability to settle negotiations within reasonable cost prospectives and at the same time avoiding municipal strikes. However essential these objectives are, they do not protect the future management and operation of government.

PERIOD OF DEVELOPMENT

The critical issue is whether government will retain the right to govern itself. Stated more simply, will the people who elect the representatives in government continue to control that same government? The purpose of this article is not to recommend or urge that municipal labor matters be returned to the era when municipal employers unilaterally decided all matters involving wages, hours and conditions of employment. Rather, the author recognizes that public employee bargaining has eliminated many personnel abuses prevalent before public management was forced to justify its personnel relations. It is also recognized that bargaining in public employment became an accepted process due to the large and cumbersome nature of many government units. Public employees needed a spokesman to fight through the maze of commissions, committees and elected governmental units.

The crisis has been caused by past and present employment practices and the negotiation of past and present municipal labor agreements. Many communities have steadfastly compromised the management rights of municipal employers. It can easily be deepened by future employment practices and negotiations of labor agreements. This erosion has laid the foundation for the municipal labor crisis of the 1970's—public employee organizations' attempt to co-manage government with their municipal employers. This crisis stems from the basic union philosophy to negotiate every conceivable area which directly or indirectly affects the work force in the bargaining unit (and sometimes out of the bargaining unit), causing a direct confrontation with the rights of management to manage.

UNIONS DENY THIS OBJECTIVE

Many public employee unions state that they are not interested in co-managing any government unit. They are not interested in determining whether government should create a new program, construct a new building or build a new park. Rather, as they state, they are only interested in wages, hours and conditions of employment. Based upon a practical experience prospective, however, under the term "conditions of employment" a consistent demand has been made in many government units to meet, confer and, in effect, negotiate reorganizations, new positions and related changes.

By the time all of these matters have been resolved, the union is intimately involved in the management prerogatives of determining the nature and level of services to be provided to the community.

JUDICIAL DECISIONS HAVE FURTHER LIMITED MANAGEMENT

In addition to attempting to be involved in and to help direct changes and/or new programs in municipal government, other encroachments have been exercised by public employees. A recent example involved the Professional Policemen's Protective Association of Milwaukee and the City of Milwaukee.¹³ The policemen petitioned for a declaratory ruling on whether the rules and regulations of the Police Department of the City of Milwaukee should be considered as having a bearing upon the wages, hours and conditions of employment of certain law enforcement individuals in the bargaining unit represented by the Association. The decision of the Wisconsin Employment Relations Commission stated that rules established by the Chief of Police for the regulation of his department and for the governing of the police officers therein which affect the wages, hours and conditions of employment of such officers are proper subjects of negotiation between the representative of such officers and the City of Milwaukee, regardless of whether said rules and regulations were promulgated by the City of Milwaukee or the Chief of Police, since the latter is an agent of the City of Milwaukee. Police departments in the past had been considered para-military in nature and the decisions of the Chief not subject to challenge by anyone. Thus this case involved a major inroad in an area which had customarily been considered absolute with respect to management authority. On January 24, 1971, following several months of negotiations, the City of Milwaukee sustained its first strike by policemen. The refusal to report for work was referred to by all parties concerned as "the blue flu." One of the prime issues in this "job action" involved the attempt on the part of the Milwaukee Professional Policemen's Protective Association to negotiate the operating rules of the Chief of Police. Whether the items requested for negotiation were reasonable is not the issue. Rather, it is the fact that a police union would contract blue flu over a non-economic item.

In another interesting case involving Local 594, Milwaukee District Council 48, AFSCME, AFL-CIO, a similar position was taken by the Wisconsin Employment Relations Commission.¹⁴ During the year 1969, the Milwaukee County Welfare Department commenced

¹³ Professional Policemen's Protective Association of Milwaukee, WERC Dec. 9429; *aff'd.* Dane County Circuit Court Case No. 129-468 (1970).

¹⁴ Local 594, Milwaukee District Council 48, AFSCME, AFL-CIO, WERC Dec. 9754.

a review of its operations to consider the possibility of reorganizing the department to relieve the professional welfare worker from the tedious routine clerical work associated with the determination of eligibility for aid under its various programs. The ultimate recommendation of the personnel and fiscal experts of the County was to create a new job classification of "case aide" to handle the routine clerical work and thereby allow the professional social workers to engage in purely professional activities. In addition to this functional readjustment, there was the further incentive of complying with the 1967 amendment to the Social Security Act regarding the treatment of welfare cases to enable the County to continue to share in federal funding to the maximum degree possible under the Act. The Union objected to Milwaukee County's unilateral establishment of the "case aide" position and insisted that it had the right to engage in bargaining with respect to all aspects of the position. Although the areas in which the union felt negotiations were mandatory varied from time to time, the thrust of its argument was that in addition to normal wage and hour patterns, the County was required to bargain the number of positions to be created, the duties of the position, qualifications of applicants for the positions and the relationship that the case aide positions would bear to professional positions in the department and in determining the need, classification, title and recruiting techniques. The County and the Union met for nearly one year in a voluntary attempt to work out a mutually agreeable plan for the creation of the "case aide" positions. When it became apparent to the union that the County was not going to follow the union's blueprint for the welfare department "case aides," Local 594 filed a petition with the Wisconsin Employment Relations Commission to initiate a fact finding proceeding with respect to the features of the "case aide" positions previously mentioned. The County resisted the union's petition on the ground that the creation of new positions was not negotiable and that items the union sought to subject to bargaining were not conditions *of* employment but rather conditions *for* employment. On June 24, 1970, the Commission issued its decision in which it held that the wages, hours and conditions of employment of the "case aide" positions were negotiable.¹⁵ The WERC further held that the County had refused to negotiate these items and therefore appointed Professor Gerald Somers of the University of Wisconsin faculty as a fact finder to make preliminary recommendations. The County immediately petitioned the Circuit Court of Dane County to review the determination of the Commission. However, the petition for review in Wisconsin does not automatically stay the pro-

¹⁵ District Council 48, Local No. 594, AFSCME, WERC Dec. 9904.

ceedings sought to be reviewed,¹⁶ so the fact finding hearings proceeded without delay, pending appeal. On August 28, 1970, Professor Somers issued his opinion recommending that the intake functions should not be assigned to "case aides" but rather to professional case workers. This recommendation effectively creates a precedent that assignment of work to employees in a bargaining unit may be subject to negotiation and fact finding. The impact of such a trend in municipal labor relations is significant as well as alarming.¹⁷

DILEMMA OF THE MUNICIPALITY

One of the dilemmas faced by any municipality involved in complicated reorganizations or other changes in its governmental structures, such as modernization of existing facilities, is that any meetings conducted with employee organizations in an attempt to explain the proposed changes have frequently been interpreted as admissions on the part of the individual municipality that the items discussed were subject to bargaining. The character of such meetings, therefore, should be clearly identified in writing to the employee organization in order to rebut any such presumption. Another frustration of the municipal employer is that apparently any employee organization seeking fact finding over an issue which it feels is negotiable cannot be restrained by pending judicial review.¹⁸ In other words, the Wisconsin Employment Relations Commission has taken the position that following its determination that certain items are subject to bargaining, a fact finder can be appointed to proceed with the hearings to determine what should have resulted from the bargaining while an appeal may be pending to determine whether or not the particular area is a proper subject of bargaining.

¹⁶ WIS. STAT. § 227.17 (1969).

¹⁷ Certain recent trial court proceedings have injected the courts into the bargaining process. In these cases where public employee strikes occurred, the court, when presented with a temporary restraining order or petition for temporary injunction, attempted to mediate a settlement between the parties. Although mediation by the courts in the past has resulted in distinct advantages in resolving disputes between parties in all types of cases, such mediation attempts when forced upon municipalities may be contrary to their express rights under Wisconsin state law. (See *City of West Allis v. West Allis - West Milwaukee Teachers Association*, Milwaukee County Circuit Court Cases No. 386-591 and 387-044 (1970).)

This situation is further complicated by the reluctance of trial courts in the State of Wisconsin (in the absence of a Supreme Court decision to clarify the question although it would appear that the state law is specific) to issue either temporary restraining orders or temporary injunctions without proof of substantial danger to public health, safety or welfare. This appears to be only the test in the private sector, however, certain trial courts have discussed this test in public employment cases. (See *City of Milwaukee v. Professional Policemen's Protective Association of Milwaukee, et. al.*, Milwaukee County Circuit Court Case No. 386-372 (1970) and *Regents of the University of Wisconsin on behalf of University of Wisconsin v. Teaching Assistants Association, et. al.*, Dane County Court Case No. 130-095 (1970).)

¹⁸ Note 16, *supra*.

This position further compounds the problems of the municipality.

Another problem is the role of supervisors in employee units. Some do not consider this a disadvantage. Two students of labor relations, I. B. Helburn and Stephen R. Zimmer of the University of Texas published an article in January, 1971 issue of *Public Personnel Review*.¹⁹ In that publication they suggest that active participation of supervisors in unions representing their subordinates might foster sound labor relations by providing a forum for the interchange of ideas between supervisors and employees, thereby making it possible for the supervisors to know what was on their employee's mind, in order to take corrective action before minor complaints blossom into full grown formal grievances.²⁰ Although arguments can be made for the value of maintaining good communications, including an interchange of ideas between supervisors and employees in the bargaining unit, it is not necessary for supervisors to hold leadership positions in the union to accomplish this objective.

The right of supervisory employees in public employment to continue their union membership has been alleged to be a basic constitutional right. The Wisconsin Employment Relations Commission has refused to take any position concerning mere union membership by supervisory employees in the absence of court action to determine the constitutionality of this position.²¹ While distinguishing mere union membership from inclusion in the bargaining unit, the WERC does take position that supervisory employees must be excluded from the bargaining unit itself. Although Wisconsin Statutes, Section 111.70(1)(b) does not expressly exclude supervisors from the definition of employees, the WERC has administratively determined that they are not entitled to the protections or privileges of the act. A municipal employer may voluntarily recognize and bargain with a supervisors organization. In no case may supervisory personnel be included in a bargaining unit representing employees whom they supervise.

The Wisconsin Employment Relations Commission set forth the following rationale:

Should supervisors be included in the same bargaining unit with employees they supervise, said individuals would be in a position to either prefer the interest of the employees over that of the municipal employer or to prefer the interest of the municipal employer as the agents thereof over the employees. Supervisors are generally responsible for the direction of the work force, the maintenance of discipline and processing of routine grievances. We do not believe that supervisors can

¹⁹ 384 GERR A-1 (1971).

²⁰ City of Cudahy and International Association of Fire Fighters, Local 1801, WERC Dec. 9381; 2 Lab. Rel. Law Sec., A.B.A. Rep. 102 (1970).

²¹ City of Wausau Public Works, WERC Dec. 6276.

properly carry out such responsibilities if they were included in the bargaining unit.²²

PUBLIC VS. PRIVATE MANAGEMENT RIGHTS

Many labor experts claim that the erosion of management rights in the public employment area should not be cause for alarm as this is a natural preliminary step to the establishment of a sound bargaining relationship. They point to the private sector where battles over management rights have been waged for over twenty-five years in an effort to establish good working relationships, yet these private firms have continued to flourish. In the 1930's, however, critical tactical errors were made in the area of management rights, and today these errors continue to hamstring many American industries. Settlements were reached during those years based primarily upon economic factors (profit vs. wages) and little regard was placed upon preservation of management rights. Had sufficient care been taken at that time, many of the current frustrations of management in private industry would have been avoided. Comparisons with private industry in the area of management rights are pertinent. Certain inherent differences are present between the public and private sector:

1. Government operates without a profit motive.
2. Government units are required by law to continue to operate (unless consolidated, or to the extent that certain of their services are discontinued).
3. Government normally does not run the risk of going bankrupt. It merely raises the tax levy.
4. Government provides many unique services which constitute critical and essential monopolies in the community.

Government therefore by its unique nature must exercise extreme caution in avoiding personnel entanglements which would curtail essential government services.

SOLVING THE MANAGEMENT RIGHTS PROBLEM

The apparent trend of invading government rights must be met by municipalities to preserve their operational effectiveness. The first step is the development of effective personnel programs and procedures; the second is the negotiation of a definitive management rights clause. Unfortunately, many municipalities engage in "management by crisis." They fail to recognize that the greatest opportunity for structuring a sound personnel program occurs *before* any trouble commences.

²² Krause, Robert E. "Administration Labor Agreements in the Public Service: A Report on Hartford, Connecticut"; Peterson, B.H."; Cohen, Leonard "Living with the Contract", Making the Collective Bargaining Agreement Work Kenneth O. Warner, ed. PERL No. 14, Chicago, Public Personnel Association, 1970.
Mulcahy, *A Municipality's Rights and Responsibilities Under the Wisconsin Municipal Labor Law*, 49 MARQ. L. REV. 512 (1966).

The development of a sound personnel program is the most effective means of retaining strong but fair management rights. The initial planning of the personnel program should include the establishment of set procedures, administered by responsible individuals, to handle personnel problems. Several treatises have been written summarizing recommended procedures concerning the establishment of such a plan.²³ Basically the development of this personnel program involves the following key areas:

1. Negotiation of a comprehensive and protective written collective bargaining agreement setting forth the precise authority of management to conduct the business of that particular government unit.
2. Development of a specific plan for administration of these contracts once they are negotiated and executed. This would include the development of specific grievance procedures to effectively and fairly decide grievances and to establish a forum to discuss personnel problems. In large government units the personnel officers of the various departments can meet to discuss uniform handling of grievances, application of work rules and bargaining objectives in the next contract session. In small government units, the employees vested with the personnel function can meet with other personnel officers in surrounding communities to interchange data. It would be a mistake to assume that the unions are not already exchanging this type of information.
3. Development of a comprehensive strike plan. Whenever a union recognizes that a municipality cannot "take a strike" that municipality's bargaining position is weakened.²⁴
4. Careful, precise exercise of the provisions to avoid modification by usage. The finest labor agreements ever negotiated are only as effective as the line supervisory and management people who administer them. The application of a particular contract provision in the work setting will become the rule of the case even though its application is contrary to the intent of the draftsman.
5. Insistence upon a strong management rights clause. Obviously a management rights clause must be negotiated in the contract. When municipal employees are negotiating for their first contract, an outstanding opportunity is presented to incorporate a strong management rights clause, since the employees are happy to get any contract at all. If the clause is not included in the initial contract, the situation is more complex. The union takes the position that management rights are negotiable.

Several government units in the past have taken the position that management rights clause are unnecessary, relying upon the "resi-

²³ C.D. Saso, *Coping with Public Employee Strikes* (1970).

²⁴ 48 Wis. 2d 272, 179 N.W. 2d 805 (1970).

dual rights" doctrine. This theory assumes that all rights to manage are inherent in government and that any rights not specifically bargained away in a municipal labor contract are retained. Unfortunately, a steady stream of arbitration cases has watered down the residual rights doctrine so that in the absence of a strong management rights clause the municipality is vulnerable to attack.²⁵ There have been certain exceptions to this view. The recent case of *Libby, McNeill and Libby vs. Wisconsin Employment Relations Commission*²⁶ contains a clarification of the proper subject matter for collective bargaining and the exercise of management rights. The case involved a dispute over a decision made by the management of a chain of farms that employed migrant workers for manual harvesting operations. The decision to convert to mechanical harvesting methods was made for reasons of operational economy and efficiency and resulted in the elimination of numerous harvesting jobs. The union representing the migrant workers alleged that Libby had committed an unfair labor practice in refusing to bargain collectively concerning the change in methods. The Wisconsin Supreme Court upheld Libby's right to manage itself, saying that business affairs of a corporation shall be managed by a board of directors and that managerial decisions which lie at the core of entrepreneurial control are not subject to collective bargaining, nor are management decisions changing the direction of a corporate enterprise which involve a change in capital investment.²⁷

SAMPLE MANAGEMENT RIGHTS CLAUSE

The content of a management rights clause depends upon the particular activities and operation of the particular government unit involved. A management rights clause is negotiated, not written in an ivory tower. Accordingly, any management rights clause extracted from existing labor agreements should be reviewed from that perspective. An example of a recently negotiated "and highly controversial" management rights clause is that negotiated between Milwaukee County and its largest employee organization, District Council 48, American Federation of State, County and Municipal Employees, in a two year contract covering the years 1971-72. This management rights clause provides as follows:

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and

²⁵ *Ibid.* at 283.

²⁶ Milwaukee County, Wis. General Ordinances 81.01 (1971); Milwaukee County Board of Supervisors Journal of Proceedings 43-61 (Jan. 19, 1971).

²⁷ Cudahy, Wis., Ordinance No. 908 (1971).

divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such services; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices and the terms of this agreement; the right, subject to civil services procedures and the terms of this agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.²⁸

Another example of a management rights clause negotiated with public employees is that negotiated as part of a two (2) year contract between the City of Cudahy and Local 1801, International Association of Fire Fighters. This clause reads as follows:

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of contract. These rights which are normally exercised by the Fire Chief include, but are not limited to, the following:

- A. To direct all operations of City Government.
- B. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge, and take other disciplinary action against employees pursuant to the reasonable rules and regulations of the Cudahy Fire and Police Commission.
- C. To relieve employees from their duties because of lack of work or for other legitimate reasons.
- D. To maintain efficiency of City Government operation entrusted to it.
- E. To introduce new or improved methods or facilities.

²⁸ Note 23, *supra*.

- F. To change existing methods or facilities.
- G. To contract out for goods or services.
- H. To determine the methods, means and personnel by which such operations are to be conducted.
- I. To take whatever action which must be necessary to carry out the functions of the City in situations of emergency.
- J. To take whatever action is necessary to comply with State or Federal Law.

The Association and the employees agree that they will not attempt to abridge these management rights and the City agrees it will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.²⁹

DEVELOPMENT OF PROCEDURES TO RESOLVE DISPUTES

Each municipality should consider and evaluate specific steps it is willing to undertake to avoid disastrous municipal labor consequences. After all reasonable collective bargaining techniques have been explored, consideration should be given to mediation, fact finding and/or advisory arbitration. If all these procedures are unsuccessful, any municipality may be faced with a walk-out or strike. Such situations require a comprehensive strike plan. Although municipalities are reluctant to talk about this subject, most responsible municipal employers who provide critical municipal services have established procedures of this type to insure the continuation of services in the event of an emergency³⁰

CONCLUSION

One of the ironic features of public employee bargaining at the local level is the fact that it endangers the claim of municipalities that they administer government programs more efficiently than the federal or state government. The municipality which cannot efficiently manage itself is in no position to assume greater program responsibilities. The task ahead for local government units therefore is difficult and challenging. The already rampant erosion of management rights of municipal government must be halted. Creative and progressive strategy that can be employed to reverse the effects of improvident planning, inept negotiation and administration, aggressive union attempts to manage and largely unfavorable judicial and quasi-judicial decisions must be encouraged. If the desired creativity and necessary experience cannot be rapidly developed within government, professional vision and implementation must be acquired to insure that the answer to the question "Who will manage municipal government?" remains "the elected government."