

LABOR ORGANIZATION:
NEGOTIATION:
PUBLIC BODY:
POLITICAL SUBDIVISION:
CITIES:
SCHOOLS AND SCHOOL DISTRICTS:
COLLECTIVE BARGAINING:
STATE:
STATE OFFICERS:
STATE BOARDS AND COMMISSIONS:

1. A city shall (used in a mandatory sense) meet with appropriate representatives of city employees when proposals relative to salaries and other conditions of employment are presented to the city. 2. When the discussions between the representatives of the city and the labor unions have been completed and the results reduced to writing, the agreement must be submitted to the governing body of the city

in the form of an ordinance, resolution, bill or other form for "adoption, modification or rejection." This procedure does not constitute "collective bargaining" in the usual understanding of such phrase because the results of the completed discussions, when reduced to writing, do not constitute a legally enforceable contract.

OPINION NO. 373

October 17, 1967



Honorable Corley Thompson, Jr.
State Representative, 41st District
35 Rosemont
Webster Groves, Missouri 63119

Dear Representative Thompson:

This opinion is prepared to respond to your question wherein you requested an opinion whether House Bill 166 (as truly agreed to and finally passed by the 74th General Assembly and later signed by the Governor) requires a meeting with and entering into a "collective bargaining agreement" by a city; and, if so, whether such requirement of that law is constitutional.

The question submitted makes reference to the City of Webster Groves and has its genesis in the demands of a local labor union for negotiations and a "collective bargaining agreement" with that city.

We note that House Bill 166 does not become effective until October 13, 1967, pursuant to the terms of Section 29, Article III of the Missouri Constitution.

The four sections on labor organizations enacted in 1965 by Senate Bill 112 (Sections 105.500 through 105.530, RSMo Supp. 1965), were totally repealed and five new sections have been enacted. They are found in House Bill 166 of the 74th General Assembly and are denominated Sections 105.500, 105.510, 105.520, 105.530 and 105.540.

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Section 105.500, supra, defines certain terms in these new sections and subsection (1) thereof reads as follows:

"'Public body' means the State of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state."

Subsection (2) reads as follows:

"'Exclusive bargaining representative' means an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining."

Quite obviously, the new act applies to Webster Groves because it is included with the meaning of "any other political subdivision of or within the state," as was held in an official opinion of this office rendered under date of May 6, 1966 to Representatives Garrett, Davis and Schapeler (#68-1966); a copy of which opinion is enclosed.

Section 105.510, provides generally that employees of a public body (with certain exceptions not applicable here) shall have the right to form or belong to labor unions; to present proposals on salaries or other conditions of employment; and, further, that no discrimination shall be applied to any employee because he is a member of the union or because he refuses to join such union.

Section 105.520, with which we are principally concerned in dealing with this problem, reads as follows:

"Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection." (Emphasis supplied)

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For easy reference the pertinent constitutional provisions of the Missouri Constitution are set forth hereafter. Section 29 of Article I, Missouri Constitution, reads as follows:

"Organized labor and collective bargaining.-- That employees shall have the right to organize and to bargain collectively through representatives of their own choosing." (Emphasis supplied.)

The pertinent part of Section 40, Article III, reads as follows:

"The general assembly shall not pass any local or special law:

"(27) regulating labor, trade, mining or manufacturing;"

Section 105.520 of House Bill 166, supra, provides generally that a public body or its representative "shall meet, confer and discuss" any labor proposals. This section provides further that: "Upon the completion of discussions, the results shall be reduced to writing and be presented to the . . . governing body in the form of a . . . resolution . . . required for adoption, modification or rejection." The word "shall" as used in Section 105.520 of House Bill 166 requires definition.

The Missouri Supreme Court in State v. Wymore, 119 S.W.2d 941, 944, distinguished between the terms "may" in a permissive sense, and "shall" in a mandatory sense, using the following words:

" * * * On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes, the word 'may' is permissive only, and the word 'shall' is mandatory. * * * "

Accordingly, the representative or representatives of a city shall (used in a mandatory sense) meet with a labor organization when it is the "exclusive bargaining representative" as defined by Section 105.500(2), supra. As Section 105.520 states, the purpose of the meeting is to confer and discuss such proposals relative to salaries and other conditions of employment of the city employees.

We must next consider whether this is "collective bargaining" as the word is generally accepted. "Collective bargaining" results

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in an accord between the employer and employee and defines a contractual relationship which will govern the many interrelated problems between the employer and the employees. See our opinion dated March 15, 1957, to the Honorable W.H.S. O'Brien. Labor relations in the public employment field are distinct and are quite different from those procedures generally found to exist in private industry. By way of illustration, we find in private industry both the employer and employees engage in a process of "collective bargaining" which results in a contractual relationship enforceable at law. The bargaining goes on between the unions representing the employees and the representatives of the employer. In public employment, the purposes of any negotiation is to bargain collectively or as a group to decide if joint recommendations arising out of the conference and discussion of the proposals can be arrived at by the representatives of the employees, and in this case, the city. See Section 29, Article I, Missouri Constitution. If so, under the very words of Section 105.520, House Bill 166, the results shall be "reduced to writing and be presented to the appropriate . . . governing body (in this case probably the council) in the form of an ordinance or resolution, bill or other form required for adoption, modification or rejection." Quite obviously, we distinguish in this opinion between the constitutional right to "bargain collectively" as a group, which we equate to the right to petition, and the process of "collective bargaining" as it is understood in private industry. This procedure as we have construed the phrase "bargain collectively" affords due process and recognition of the "separation of powers" doctrine. In public employment, the relation of employer and employee may only be altered because of changes in legislation or rules. On the contrary, in private industrial relationships, it is the contract that defines employer-employee relations and this definition of relationship of employer viz-a-viz the employees exists for the term of the contract.

We predicate our position that a municipality may not enter into a "collective bargaining agreement" upon the case of City of Springfield v. Clouse, which is reported in 206 S.W.2d 539. As we held in the enclosed opinion, No. 68, dated May 6, 1966, to the Honorable Howard M. Garrett et al., we believe this en banc opinion to be declaratory of the law under our Missouri Constitution. For this reason we quote rather extensively from this opinion underscoring pertinent portions of it for emphasis:

" * * * All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for

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any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article I, 1945 Constitution was adopted. * * * Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. See United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. ; Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. ; King v. Priest, Mo.Sup., 206 S.W.2d 547, and cases therein cited. This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization. (l.c. 542)

"Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them. However, collective bargaining by public employees is an entirely different matter. * * * (l.c. 542) [Emphasis supplied].

"Indeed defendants' counsel recognize (as did the sponsors of Section 29 in the Constitutional Convention) that wages and hours must be fixed by statute or ordinance and cannot be the subject of bargaining. In the argument in this case, en banc, it was conceded that a city council cannot be bound in any such bargaining; that it must provide the terms of working conditions, tenure and compensation by ordinance; and that it likewise by ordinance may change any of them the next day after they have been established. (l.c. 543)

* * * * *

"This is confusing collective bargaining with the rights of petition, peaceable assembly and

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free speech. Certainly public employees have these rights for which Mr. Wood was contending; and can properly exercise them individually, collectively or through chosen representatives, subject, of course, to reasonable legislative regulation as to time, place and manner in the interest of efficient public service for the general welfare of all the people. However, persons are not engaging in collective bargaining when they tell their senator, representative or councilman what laws they believe they should make. Neither are they engaging in collective bargaining with executive or administrative officers when they urge them to exercise discretionary authority within standards and limits which they have received or must receive from the legislative branch, or ask them to make recommendations to the legislative branch for further legislation. (l.c. 543) [Emphasis supplied].

" * * * But legislative discretion cannot be lawfully bargained away and no citizen or group of citizens have any right to a contract for any legislation or to prevent legislation. The only field in which employees have ever had established collective bargaining rights, to fix the terms of their compensation, hours and working conditions, by such collective contracts, was in private industry. (l.c. 543) [Emphasis supplied].

* * * * *

" * * * Thus the Convention did not settle the matter of public employees in labor organizations and their functions in governmental relations but left the matter to the legislature and the courts. While these debates are instructive as to the background and development of this proposal, nevertheless what was submitted to the people for adoption was Section 29 and not any delegate's speech about it. See *Adamson v. People of State of California*, 67 S.Ct. 1672, 91 L.Ed. ___, and concurring opinion of Justice Frankfurter, 67 S.Ct. loc.cit. 1682; see also *Household Finance Corporation v. Shaffner*, Mo. Sup., 203 S.W.2d 734, loc.cit. 737. Furthermore,

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the people voted on the adoption of an entire Constitution so that Section 29 must be construed in connection with all the provisions of the Constitution of which it is a part, many of which have long been essential parts of our basic law. (l.c. 544)

" * * * The principle of separation of powers is stated in Article II, Art. III, 1875 Const., which provides that 'the powers of government shall be divided into three distinct departments * * * each of which shall be confided to a separate magistracy'; and that 'no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others.' This establishes a government of laws instead of a government of men; a government in which laws authorized to be made by the legislative branch are equally binding upon all citizens including public officers and employees. The legislative power of the state is vested in the General Assembly by Section 1 of Article III. Sec. 1, Art. IV, 1875 Const. The members of the legislative branch represent all the people, and speak with the voice of all of the people, including those who are public officers and employees. In the exercise of their legislative powers, they must speak through laws which must be equally binding upon all and not through contracts. Even the making of public contracts must be authorized by law. See Sec. 39(4), Article III, 1945 Const., Sec. 48, Art. IV, 1875 Const. Laws must be made by deliberation of the lawmakers and not by bargaining with anyone outside the lawmaking body. These same governmental principles and constitutional provisions apply also to municipalities because their legislative bodies exercise part of the legislative power of the state. See *City of Springfield v. Smith*, 322 Mo. 1129, 19 S.W.2d 1; *Ex parte Lerner*, 281 Mo. 18, 218 S.W. 331 and cases cited; see also Sections 6613-6617 as to legislative powers of the city council of second class cities. The City's organization and powers come from the General Assembly which is authorized by Section 15, Article VI, Sec. 7, Art. IX, 1875 Const. to provide for the organization and classification of cities and towns with the limitation that 'the number of such classes shall

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not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.' It is inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority, concerning the operation of municipalities in fixing and regulating compensation, tenure, working conditions and other matters concerning public officers and employees. (l.c. 544-545)

"Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W.2d 532; see also Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d741, loc.cit. 745; Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194, loc.cit. 197, 165 A.L.R. 967; Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, loc.cit. 747, 162 A.L.R. 1101. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. 11 Am.Jur. 921, Sec. 214; 16 C.J.S. Constitutional Law, §133; A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of

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public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. * * * (l.c. 545) [Emphasis supplied.]

" * * * The question involved herein is a question of power rather than one of what function is involved. 'Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city.' Taylor v. Dimmit, 336 Mo. 330, 78 S.W.2d 841, 843, 98 A.L.R. 995. Fixing compensation, hours and tenure require the exercise of legislative powers in exactly the same way for all employees of the City, whether governmental or corporate, at least under the organization of second class cities in this state. * * * " (l.c. 546) [Emphasis supplied.]

In view of the interpretation by the Missouri Supreme Court in the Clouse case, the General Assembly is presumed to be aware of that declaration of law by the Supreme Court when it adopts laws on the same subject (Mack Motor Truck Corporation v. Wolfe, 303 S.W.2d 697, 700; Jacoby v. Missouri Valley Drainage District, 163 S.W.2d 930, 939). We must therefore conclude that the General Assembly had in mind an intent to enact legislation in accord with the constitutional principles enunciated in the Clouse case.

The Clouse case defines and sets forth the constitutional framework within which area the legislature may construct legislation authorizing public bodies to deal with labor problems. Outside of that framework as defined in the Clouse case, the legislature may not properly act.

Accordingly, we again hold that a city may not engage in collective bargaining as the term is generally understood and accepted.

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An additional comment is appropriate in that Section 105.520, House Bill 166, holds that discussions between the city and the bargaining representative when completed, are reduced to writing and presented to the appropriate governing body in the form required for adoption, modification or rejection. An interpretation of this phrase might be appropriate for your guidance. In commenting upon this, we recognize that the basic rule for the interpretation of any statute is to seek the lawmakers intention for the whole act. Words should be given their plain ordinary meaning to promote the object and purpose of the statute (Julian v. Mayor, 319 S.W.2d 864; State v. Weinstein, 395 S.W.2d 525). These words, "adoption, modification or rejection," as used in the statute, impose upon the governing body discretion whether to accept, modify, reject in part or reject en toto the proposals submitted which were agreed to and reduced to written proposals by the representatives of both the city and the union.

CONCLUSION

It is the opinion of this office that:

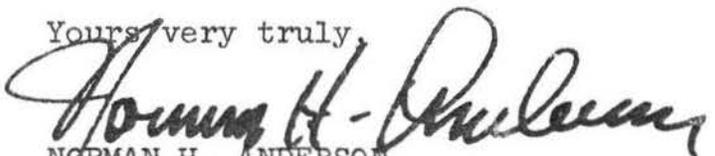
1. A city shall (used in a mandatory sense) meet with appropriate representatives of city employees when proposals relative to salaries and other conditions of employment are presented to the city.

2. When the discussions between the representatives of the city and the labor unions have been completed and the results reduced to writing, the agreement must be submitted to the governing body of the city in the form of an ordinance, resolution, bill or other form for "adoption, modification or rejection."

This procedure does not constitute "collective bargaining" in the usual understanding of such phrase because the results of the completed discussions, when reduced to writing, do not constitute a legally enforceable contract.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosures: Opinion No. 68,
to Garrett, Davis
and Schapeler,
5-6-66; and
Opinion to W.H.S. O'Brien,
3-15-57.