PREEMPTION AND LOCAL ANTI-STRIKE LEGISLATION*

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I. INTRODUCTION

On June 14, 1983, a coalition of Los Angeles County public employee unions ("Unions") entered Los Angeles Superior Court to oppose the County's charter amendment, Section 47.5.[1] The amendment made, *inter alia*, any strike-related activity or "concerted action to withhold services" grounds for dismissal.[2] This harsh anti-union mandate raised concerns regarding management and labor relations at the local level. The placement of the amendment on the November 1982 ballot may have been motivated by the fact that negotiations between the County and Unions were set to begin in 1983. Additionally, newspaper reports revealed that the County would ask County employees to take a three percent pay cut;[3] a reasonable employer would anticipate labor's reaction to such news. The circumstances created an atmosphere ripe for a strike and the County acted accordingly albeit harshly.

A. *Reaction to Proposition 13*

Local government funding from the state treasury has been greatly reduced in recent years due to the delayed impact of Proposition 13 which was passed by California voters in 1978.[4] As a result of the Proposition's limitations on the revenue generating process which state and local governments heavily relied upon, the County looked to Section 47.5 as a mechanism to shift the newly created economic burden onto organized labor's shoulders. But forcing public employees to bear the entire burden (via pay

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1. Los Angeles County Federation of Labor, AFL-CIO, v. County of Los Angeles, No. C 435 415 (Los Angeles Supp. Ct. July 11, 1983) (unpublished opinion). *See* Appendix I for the *Statement of Decision*. *See* Appendix II for text of section 47.5.

2. Los Angeles County voters passed Proposition A (the anti-strike charter amendment) by a margin of 53% to 43%. Los Angeles Times, Nov. 3, 1982, § 1, at A, col. 1 (late final). See Appendix II.

3. Los Angeles Times, May 21, 1983, § 1, at 1, col. 6.

4. CAL. CONST. art. 13.

and benefit cuts) does not promote stable relations between management and labor. Moreover, such a move by the County set the stage for hostile labor negotiations which could lead to actions that would be deemed strikes.[5]

Section 47.5 was struck down.[6] Nevertheless, its importance as a timely issue is underscored by the provisions in the charter amendment that called for dismissal of any employee suspected of being a strike participant, and prohibiting the County from invoking amnesty as consideration for settling a strike, or similar job action. With an ordinance or charter amendment such as Section 47.5, the County would have been free unilaterally to "trim some fat" from the workforce without having to deal in good faith with employee representatives. Therefore, under Section 47.5, if the County conducted its negotiations in an unfair manner, public employees would not be able to strike even though they could do so with impunity *sans* the amendment.[7]

This article will focus on how Section 47.5 was, in fact, preempted by existing state law.[8] Moreover, the amendment was contrary to public policy as expressed from legislative enactments such as the Meyers-Milias-Brown Act (MMBA)[9] and the Higher Employment Relations Act (HEERA).[10]

II. STRIKES

The first efforts to provide a statutory framework for stabilizing labor and management relations and public bargaining strikes in California began more than twenty years ago.[11] Explicit language in a series of collective bargaining legislation[12] shows the

5. According to news reports, "county employees have staged 46 job actions since 1966, with half of them involving fewer than 200 employees." *Supra* note 3, at 26.

6. In a summary judgment, the court granted a permanent injunction restraining the County from implementing or spending public funds pursuant to § 47.5, and a writ of mandate ordering the County to vacate § 47.5. *See* Appendix I.

7. *See* San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

8. *See supra* note 6.

9. CAL. GOV'T CODE § 3500 et seq. (West 1980).

10. CAL. GOV'T CODE § 3540 et seq. (West 1980).

11. "In 1961 the evolution of public employee rights in [California] began with the enactment of the George Brown Act [stats. 1961, ch. 1964, § 1, pp. 4141-4142, now codified in CAL. GOV'T CODE §§ 3525-3536]. As originally enacted, the Act applied to employees of the state, cities, counties, school districts and institutions of higher education, granting such employees the right to join employee organizations of their choosing and requiring public employers to 'meet and confer' with employee organizations prior to undertaking action on 'all matters relating to employment conditions and employer-employee relations.'" Pacific Legal Foundation v. Brown, 29 Cal.3d 168, 176, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981). *See* Almond v. Sacramento County, 276 Cal. App.2d 32, 80 Cal. Rptr. 518, *hg. den.* (1969).

12. Winton Act (Stats. 1965, ch. 2041, § 1, p.4660) (expanding the "meet and confer" rights of public school employees); Meyers-Milias-Brown Act (MMBA)

state's legislative intent to promote stable labor relations. In keeping with this explicit intent,[13] with the exception of the MMBA,[14] the Public Employment Relations Board (PERB)[15] has been given the authority to oversee public employment labor relations. Its scope is analogous to that of the National Labor Relations Board (NLRB). PERB is charged with the responsibility "to protect both employees and the state employer from violations of organizational and collective bargaining rights."[16] Although California's lawmakers have provided public employees with comprehensive legislation delineating rights and privileges,[17] there is still a question as to whether local public employees have the right to strike under the MMBA. This question is not settled because the courts have indicator that strikes may be acceptable, notwithstanding express exclusion of California Labor Code § 923.[18] Even though public employee strikes have not been termed per se illegal activity in recent years by the courts,[19] public

(Stats. 1968, ch. 1390, § 1, p.2725, codified in CAL. GOV'T CODE § 3500 et seq.) (providing a structured collective bargaining process for local government employees); Educational Employment Relations Act (EERA) (Stats. 1975, ch. 961, § 2, p.2247, codified in CAL. GOV'T CODE § 3540 et seq.) (repealing Winton Act while creating formal negotiating rights for public school employees and the Educational Employment Relations Board to enforce it, CAL. ADMIN. CODE tit. 8, ch. 5, § 32612 et seq.); State Employer-Employee Relations Act (SEERA) (Stats. 1977, ch. 1159, § 4, p.3751, codified in CAL. GOV'T CODE, § 3512 et seq.) (creating collective bargaining structure for state employees); Higher Education Employer-Employee Relations Act (HEERA) (Stats. 1978, ch. 744, § 3, p.2312, codified in CAL. GOV'T CODE § 3560 et seq.) (granting rights similar to those of the foregoing employees). *See Pacific Legal Foundation*, *supra* at 174-177.

13. *See, e.g.*, statements of purposes or intent in CAL. GOV'T CODE §§ 3500, 3512, 3540, and 3561 (West 1980). Generally, they all provide for full communication, improved relations between employer and employees, and to provide for organizing of employee groups, among other things.

14. For a historical perspective on MMBA, *see* Grodin, *Public Employee Bargaining in California: Meyers-Milias-Brown Act*, 23 HASTINGS L.J. 719 (1972); Glendale City Employees' Assn. v. City of Glendale, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513 (1975).

15. For a historical background on PERB, *see* Rodda, *Collective Bargaining in the California Schools*, 18 SANTA CLARA L. REV. 845 (1978); Alleyne, *The Special Value of Settlements in Educational Employment Relations Act Proceedings*, *id.* at 853; *Pacific Legal Foundation*, *supra* at 175-179.

16. 29 Cal. 3d at 198.

17. *See supra* note 12.

18. CAL. LAB. CODE § 923 provides in pertinent part that: it is necessary that the individual workman have full freedom of association, self organization, and designation of representation of his own choosing, to negotiate the terms and conditions of his employment and that he shall be free from the interference restraint, or coercion of employers of labor, or their agents, in designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection. *Compare* NATIONAL LABOR RELATIONS ACT, § 7 29 U.S.C., as amended.

19. *See* United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.C.), *aff'd*, 404 U.S. 802 (1971) (public employees have no right to strike), *accord* Los Angeles Unified School District v. United Teachers of Los Angeles, 24 Cal. App.3d 142, 145, 100 Cal. Rptr. 806 (1972). *But see San Diego Teachers Ass'n v. Superior Court*,

employee strikes are subject to being held "illegal." Thus, until the courts or the legislature decide to redefine work stoppages as merely unfair labor practices, subject to remediation through court issued injunctions, the issue will continue to arise.[20]

In *San Diego Teachers Ass'n v. Superior Court*,[21] the Court construed the Education Employment Relations Act (EERA) as providing PERB with initial jurisdiction to determine whether an injunction should be issued when a strike has been undertaken by public employees. In the *San Diego Teachers* case, approximately 3000 teachers went on strike. They were dissatisfied with the pace of negotiations then underway. A temporary restraining order against the strike was issued at the district's request. The district was also granted a preliminary injunction prohibiting the teachers from engaging in an "illegal" work stoppage.[22] Pursuant to Cal. Gov't Code Section 3541.5, which gives PERB exclusive jurisdiction to determine whether charges of unfair practices are justified, both parties field charges against the other.

A trial court issued contempt orders resulting in substantial monetary sanctions against the teachers association and its president. On appeal, the California Supreme Court was asked to determine whether the lower court's restraining order was proper in light of PERB's statutory jurisdiction. After finding that PERB was invested with initial jurisdiction in the dispute, the Court stated:

> A court enjoining a strike on the basis of (1) a rule that public employee strikes are illegal, and (2) harm resulting from the withholding of . . . services cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.[23]

The Court recognized the need for consistency in dealing with "job actions," at least in terms of labor relations. Further evidence of this may be derived from the Court's observation that "section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities. Moreover, EERA specifies no 'unfair practices' but only acts that are 'unlawful' (§§ 3543.5, 3543.6) and thus does not seg-

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supra (public employee strikes are not per se illegal), *accord* Public Employment Relations Board v. Modesto City Schools District, 136 Cal. App.3d 881, 186 Cal. Rtr. 634 (1982). *Cf.* In Re Berry 68 Cal.2d 137, 151, 65 Cal. Rptr. 273 (1968).

20. *See, e.g.*, Fresno Unified School Dist. v. National Ed. Assn., 125 Cal. App.3d 259, 265, 270, 177 Cal. Rptr. 888 (1981), *Public Employment Relations Board v. Modesto City Schools District*, *supra*.

21. 24 Cal. 3d 1. *See also* Los Angeles County Civil Service Commission v. Superior Court, 23 Cal. 3d 55, 151 Cal. Rptr. 547 (1978).

22. Staff, *Recent Developments in California Public Jurisdictions*, 34 CPER 37 (1977).

23. 24 Cal. 3d at 13.

regate unfair practices from other violations."[24] Finally, the Court in *San Diego Teachers* states that strikes may be deemed "an unfair practice," but cautioned that the applicability of its holding was limited "to injunctions against strikes by public school employee organizations recognized as exclusive representatives. . . ."[25]

A. *Reluctance to Rule on Strikes*

It is interesting to note that as in previous occasions,[26] whenever the facts permit, the Court will refrain from dealing directly with the strike issue. This is exemplified by its conclusion in *San Diego Teachers* that it was "unnecessary . . . to resolve the question of the legality of public employee strikes if the injunctive remedies were improper. . . ."[27] Such propensity for avoiding the strike issue fails to give clear guidance to public sector labor law practitioners advising their respective clients as to what job related actions can safely be taken. One may conclude that if a case similar to the instant case is ever presented to the California Supreme Court, it will most likely look for alternative grounds for reaching its decision, rather than making a ruling that would allow management or labor to prepare for negotiations with the real possibility of a strike as an issue.[28]

III. PREEMPTION

The issue of preemption was argued by the Los Angeles Federation of Labor. It was asserted that the labor relations field is already occupied by state legislation, therefore, the anti-strike charter amendment (Section 47.5) passed by the County was preempted. Preemption has been characterized as "a procedural safeguard against conflicting applications of labor law principles . . . 'to provide an informed and coherent basis for stabilizing labor relations, for equality and delicately structuring the balance of power among competing forces so as to further the common

24. *Id.*
25. *Id.* at 14.
26. *Cf. supra* note 19.
27. 24 Cal. 3d at 7.
28. *See* Aaron, *Collective Bargaining Where Strikes Are Not Tolerated*, Reprint No. 225 INST. IND. RELS. 149 (1972). "Absent some mutually acceptable procedure that provides an alternative for the strike . . . it seems best to avoid a policy stating categorically that any group of public employees may or may not strike, and at the same time make any strike subject to injunction by the regular courts if, but only if, the public authorities can demonstrate by credible evidence in open court that the strike would cause more harm to the public if allowed to continue than would be caused to the striking employees if it were halted." *Id.*

good.' "[29]

In *Employment Relations Board v. Modesto City Schools District* the Court of Appeals held that the trial court properly applied the abstention doctrine of *San Diego Teachers* when it dropped petitions for a temporary restraining order from its calendar in deference to PERB because it recognized its limitation when dealing with labor issues.[30]

It may be argued that PERB related cases do not control under the MMBA.[31] Although that may be true, the crucial issue was the extent of the California's labor relations legislation, rather than merely applying PERB decisional law. For as the *Modesto* court noted: "We do not believe it would serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results. One of the basic purposes for the doctrine of preemption is to bring expertise and uniformity to the task of stabilizing labor relations."[32] This "stabilizing" effect cannot exist if each county is allowed to create and implement labor related acts that run contrary to statutes and case law.

A. *"Home Rule" and Local Governments*

The basic question to be determined in cases where preemption is asserted, is whether the enacted code sections are "exclusively municipal affairs."[33] In *Professional Firefighters v. City of Los Angeles*, the Court held that state enacted labor codes superseded ordinances promulgated by charter cities, notwithstanding the fact that the California Constitution[34] provides for the "home rule." In essence, the "home rule" provides for local governing bodies to invoke and implement ordinances for the benefit of their respective communities.[35] In *Professional Fire Fighters*, the Court noted "that general law prevails over local enactments of a

29. *Public Employment Relations Board v. Modesto City Schools District*, *supra* note 19 (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971)).

30. *Id.* at 894.

31. Legislation (S.B. 858) to replace the MMBA and bring local employees under PERB's jurisdiction, *inter alia*, was defeated in 1979 when the Assembly Public Employment and Retirement Committee deadlocked 4-4 with one abstention after sailing through the Senate 21-9. A bill introduced by California state Senator McCorquodale (SB 637) to give PERB and superior courts concurrent initial jurisdiction over unfair labor practices was defeated in the first half of the 1983 legislative session.

32. 136 Cal. App. 3d at 895.

33. Professional Firefighters, Inc. v. City of Los Angeles, 60 C.2d 276, 291, 32 Cal. Rptr. 830 (1963).

34. CAL. CONST. art. 11, § 3 (West Supp. 1983).

35. *See generally*, Hiscocks, *Charter City Financing in California*, 16 U.S.F. L. REV. 603 (Summer 1982); Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055, 1115 (1972).

chartered city even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern."[36] Moreover, the Court concluded that by enactment of the labor code at issue (§ 923), the legislature had "adopted general policies and provided general rights and obligations of labor management throughout the state . . . The total effect of all this legislation was not to deprive local government [charter city or otherwise] of the right to manage and control [fire fighting service] but to create uniform fair labor practices throughout the state."[37] The thrust of this holding has been asserted repeatedly without contradiction.[38] Accordingly, the trial court in *Federation* clearly stated:

> In the opinion of the Court the controlling authority on the issue of preemption is Professional Firefighters Inc. vs. County of Los Angeles [cite omitted] which holds that the home rule doctrine of Article XI is inapplicable in the field of labor relations, which remained a manner to state concern and a field in which legislation is preemptive. (*See* Appendix at 35.)

The issue then becomes whether the appellate court in *Federation* will find a reason to deviate from such a well-worn legal path. That is not likely.

Therefore, it appears that appellate courts are sensitive to arguments involving labor issues wherein a supportable argument can be made that the legislature has preempted the field. Moreover, the crazy quilt of decisions that *Modesto* decries by implication[39] is a strong argument for deferring to PERB decisions regarding labor disputes, especially strikes. Thus, *San Diego Teachers* might prove to be of some value for superior courts confronted with the argument that the California Supreme Court has indicated that strike issues are best avoided if possible. If not, some collateral issues should be used to dispose of the case, such

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36. Id. at 292.

37. *Id.* at 294-295.

38. In Bagget v. Gates, 32 Cal.3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982), the Court held that the Public Safety Officers' Procedural Bill of Rights Act (CAL. GOV'T CODE § 3300 et seq. (West 1980)) supersedes the home rule provisions of the California Constitution (see supra note 17). Since the legislature specifically stated its rationale for providing the Bill of Rights was in part to effect " 'stable employer:employee relations . . . in order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers . . . wherever situated within the State of California.' " *Id.* at 136-137. *But see* Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, 317, 591 P.2d 1, 152 Cal. Rptr. 903 (1979), where the court cautioned against over reliance on *Professional Firefighters*, *supra* at 291, as authority for the proposition that legislative intent, without any judicial determination, is sufficient to determine what is of "statewide concern."

39. *See supra* note 13.

as overbreadth, vagueness or an unfair labor practice charge.[40] The *Modesto* court illustrated the need to defer to the labor expertise of PERB, or a similar agency, when it quoted the lower court: "I have no background in labor relations. There isn't a person at counsel table that isn't far better informed that I am in this case."[41] Such candor underscores the need for labor expertise when dealing with complex labor issues. It follows, then, that in lieu of such expertise, trial courts should defer to PERB decisions, since PERB is the "expert" on labor issues.

Thus, as the Court in *San Diego Teachers* wisely observed, deferring to an agency with labor law expertise is proper, especially when it is charged with such responsibility. Therefore, lower courts faced with problems similar to those found in *San Diego Teachers* should look to see if the employee strike is an unfair labor practice. This was not possible under the invalidated Section 47.5 because that amendment made *all* strikes illegal. Thus, Section 47.5 was antithetical to statewide legislation regarding labor relations, and therefore, it was *prima facie* contrary to statewide legislation regarding labor relations in the eyes of the Court, and accordingly, preempted.

IV. CONCLUSION

When California Supreme Court Justice Joseph Grodin was a professor, he opined: "I tend to the view that a ban on strikes by public employees is both unwise and inequitable, unless it is limited to strikes which imperil public health or safety. . . ."[42] As Justice Grodin is a noted labor law scholar, the Court will probably rely upon his expertise in future decisions regarding strikes by public employees. Justice Grodin's sentiments represent a moderate, common sense approach to a problem that deserves a clear message from the Court.

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40. *E.g., In Re Berry, supra*, and *San Diego Teachers Ass'n v. Superior Court, supra*.

41. 136 Cal. App.3d at 894.

42. Grodin, *Public Employee Bargaining*, 23 HASTINGS L.J. 719, 759 (1972). *See also supra* note 28 (Aaron).

APPENDIX I

Los Angeles County Federation of Labor, AFL-CIO, v. County of Los Angeles

Statement of Decision

Section 47.5 of Article X of the Los Angeles Charger ("Section 47.5") was enacted pursuant to charter amendment in November 1982.

Plaintiffs and Intervenors are labor organizations representing Los Angeles County employees ("Unions") and County employees represented by unions.

Section 47.5 partly provides that any County employee who instigates, participates in, affords leadership to a strike against the County, or who shall engage in any form of concerted activity to withhold service from the County shall be discharged. It is clear that plaintiffs do not call upon the Court to consider whether or not public employees have the right to strike, and this Court is not considering or ruling upon that issue. Thus, the fact that various courts have upheld the validity of anti-strike regulations or statutes has no relevance to the issues presented in this motion for summary judgment. However, the Court notes that counsel have not cited any decision nor has the Court discovered any decision which upholds anti-strike provisions substantially similar to Section 47.5 against the type of challenges raised by plaintiffs.

It is not enough to chart a course towards prohibiting strikes by public employees. The course must be charted by constitutional means and must not run afoul of state statutes which preempt these amendments to the County Charter. Hence, the Court is called upon to determine whether the County of Los Angeles can enact such provisions in the context of a panoply of laws governing the subject of employees' rights, including in many instances the right to strike, and whether or not section 47.5 is consistent with statutory and constitutional provisions.

In essence, plaintiffs contend: that the State of California has completely occupied the field of employee collective bargaining rights; Section 47.5 conflicts with and is therefore preempted by relevant state laws; and the section is overbroad, vague and violates First Amendment guarantees and constitutional requirements of due process.

The Court finds:

1. Section 47.5 is preempted by an in conflict with compre-

hensive state laws governing labor relations between public employees and representatives of the employees.

The Court notes that in opposing plaintiffs' argument on this issue, defendants do not address the comprehensive set of state laws which now govern the bargaining rights of employees in the state.

Instead, defendants focus on plaintiffs' argument that Section 47.5 conflicts with the Meyers-Milias-Brown Act ("MMBA"), a comprehensive state statute governing labor relations between local public agencies and public employees. Defendants contend that the MMBA has no application to and is not intended to preempt "disciplinary proceedings" such as in Section 47.5. However, the answer to that contention is that there is a whole body of state laws which occupy one significant aspect of the field of labor relations—the right of employees to organize for purposes of representation on issues concerning their employment and to negotiate and bargain collectively with their employers concerning matters such as terms and conditions of employment. Defendants' argument that if Section 47.5 is preempted by state law, the County would have no authority to punish strikes is not persuasive, since there exists a wide range of penalties, including discharge, under various civil service and departmental disciplinary rules.

Defendants also argue that the MMBA has no application to charter amendments. Defendants acknowledge that their reliance on the case of *San Francisco Firefighters vs. Board of Supervisors* [cite] ("the first San Francisco firefighters case"), is not appropriate since the Supreme Court granted a hearing and remanded that case back to the Court of Appeal.

Although defendants cite a recent San Diego Superior Court case as support for their claim that the MMBA has no application to charger amendments, defendants rely primarily on the case of *San Francisco Firefighters vs. Board of Supervisors* [cite] ("the second San Francisco firefighters case").

In analyzing the second San Francisco firefighters case, it is significant that after granting the hearing in the first San Francisco firefighters case, the Supreme Court decided the case of *Los Angeles County Civil Service Commission vs. Superior Court* [cite] in which it held that a chartered county (Los Angeles) could constitutionally be required, and was required, to comply with the meet-and-confer provisions of the MMBA and was not exempted from the provisions of the MMBA by virtue of the home rule provisions of the California Constitution.

The holding of the second San Francisco firefighters case is narrow and confined to a determination that a city is not required

to meet and confer with employee representatives before preparing a charter amendment. It is not authority to enable the governing bodies of cities and counties to amend their charters to restrict or eliminate bargaining rights granted to public employees by the MMBA. Charter amendments are not entitled to any greater protection against challenge than any existing charter provision.

In the opinion of the Court the controlling authority on the issue of preemption is *Professional Firefighters Inc. vs. County of Los Angeles* [cite] which holds that the home rule doctrine of Article XI is inapplicable in the field of labor relations, which remain a matter of state concern and a field in which legislation is preemptive. In that case, the Supreme Court stated:

> [T]he home rule doctrine of Article XI of the Constitution [is] inapplicable in regard to matters of statewide concern.
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> . . . .
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> "Because the various sections of Article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern. This question must be determined from the legislative purpose in each individual instance. In the instant case it would appear that the Legislature was attempting to deal with labor relations on a statewide basis. By enactment of Labor Code Section 923 it adopted general policies and provided general rights and obligations of labor and management throughout the state. Because those provisions are not applicable in their entirety to all public employees, it enacted Government Code Sections 3500-3509. Realizing that even that legislation could not apply in its entirety to certain types of public employees, it provided therein for methods of exempting law enforcement officers from the provisions, and set forth slightly different legislation as applicable to firemen (Lab. Code §§1960-1963). The total effect of all this legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state. As such, the legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern. Labor relations are of the same statewide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing of claims, and the requirement to subscribe to loyalty oaths [citation omitted], all of which have been held to be governed by general law in contravention of local regulations by chartered cities.

2. Section 47.5 unconstitutionally restricts speech and speech-related activities of County employees.

On its face, subsections (a), (b) and (c) restrict informational picketing, public airing of complaints and urging that the law be

changed to provide employees with the right to strike, *even if no strike occurs*. The Court may not read into the section that those rights of free speech exist except when a strike occurs. Judges should not rewrite or enlarge statutes, and Section 47.5 must be taken as the Court finds it. Thus it is possible that under these provisions a County employee who complaints about that employee's treatment by the County employer and decides to leave County service temporarily and is joined by a fellow sympathizing employee can be discharged under the literal terms of these sections. That County employees should be compelled to forego constitutionally protected speech and speech-related conduct out of a fear of punishment would indeed chill free-speech rights.

It has constantly been held that a state or local government may not control its employees' rights of free speech unless it can be shown that it has a compelling interest in limiting those rights, and the more substantial the infringement of First Amendment rights, the more compelling the governmental interest and the more ominous the threat to that interest must be. Thus, while some courts have held that government may prohibit its employees from striking, they have not upheld provisions which prohibit speech, union membership, fund raising, organization and distribution of literature and informational picketing in the absence of a showing which meets the compelling state purpose test. Here, Section 47.5 does not require any showing of actual impairment of employee or departmental efficiency before an employee may be discharged for speech or conduct which is found to constitute "instigating," "participating in" or "offering leadership" to a strike.

Moreover, because Section 47.5 can be read to prohibit conduct such as peaceful and informational picketing, distribution of literature, publication, speeches, complaints and expression of opinions by County employees suggesting or advocating a strike or supporting the Union or employees' position in an employment dispute with the County, whether or not such expressions occur in the context of an actual strike against the County, it is constitutionally overbroad.

It is absurd to believe that the average County employee grasps the nuances of this section and concludes that he or she may speak on these subjects with immunity. The only express limitation on the sweeping prohibitions against activities undertaken by County employees advocating or supporting a particular strike, or the right to strike in general, is the provision that expression of opinions or complaints which are not designed to and do not interfere with the full and faithful performance of job duties by County employees are not prohibited. But these sections clearly could be construed to include such activity as peaceful in-

formational picketing, distribution of literature, public and private speeches and discussions concerning labor relations.

3. By depriving the County employee of that employee's job through discharge and by limiting the employee's return to "County service as a new employee . . . in accordance with the regular employment practice of the County in effect at that time for the position sought," there is clearly a deprivation of constitutionally cognizable rights. A balancing of interests is thus required to determine whether due process rights are afforded. On one side is the County's interest in prohibiting strikes by public employees; on the other side is the employee's interest in his or her job and tenure rights, which can be considerable. This section proceeds to invert procedural expectations by finding and creating a presumption of guilt by engaging in the strike or concerted action and then reposing in one officer the rights to initiate, investigate and discharge without the opportunity afforded the County employee to appear before the officer and to make a record. This procedure afforded by that section is far too summary in nature. It places a premium on the County employee's ability to express the employee's defense in writing. Nor does it persuade the Court that a right to appeal to the Civil Service Commission saves these infirmities since the section mandates the Commission to find that the presumption is rebutted only "by a preponderance of the probative evidence." Surely, since the procedure is constitutionally defective, an "appeal to the Commission" cannot rectify it.

4. Section 47.5 unconstitutionally deprives County employees of equal protection, because there is no rational justification for depriving employees who do not strike of their statutorily-guaranteed right to bargain for improvement in their wages, hours and working conditions, while preserving the bargaining rights of other nonstriking employees, simply because the first group of non-striking employees is represented by a union which has been found to be engaged in prohibited actions.

5. That all County employees are required to sign an acknowledgment of receipt and execute a "statement" where the employee agreed not to "instigate, participate in or afford leadership to" a strike constitutes at the very least a test required as a condition of employment which is prohibited by Article XX, Section 3, of the California Constitution. That the statement need not be signed under oath is not dispositive; all that is necessary to show is that the local government sought to require an "oath, declaration or test." This statement constitutes a "test" of the employee's fitness to discharge the duties he has been hired to perform by testing the employee's willingness to forego and refrain from any

strikes or other concerted action to withhold services from the County.

6. Excising the invalid portions of Section 47.5 would render the remainder meaningless. Therefore, under well recognized principles, the entire section is invalid.

The Court grants the motion for summary judgment, orders that a permanent injunction issue against defendants enjoining and restraining said defendants from enforcing and implementing Section 47.5 and orders that a writ of mandate issue to compel defendants to vacate Section 47.5 and to refrain from implementing said section. Plaintiffs' counsel shall prepare the judgment, injunction and writ of mandate.

DATED: June 28, 1983.

/s/Leon Savitch
Judge of the Superior Court

APPENDIX II

PROPOSED CHARTER AMENDMENT A

Section 47.5 is added to Article X of the Charter of the County of Los Angeles to read as follows: Section 47.5—Discharge of Striking Employees.

(a) No employee of the County of Los Angeles shall instigate, participate in, or afford leadership to a strike against the County of Los Angeles, or engage in any form of concerted action to withhold service from said County, or any of its departments, commissions or agencies.

(b) A strike or concerted action to withhold services from said County, or any of its departments, commissions or agencies shall be defined as the failure of any employee or group of employees to report for duty, the absence of an employee or group of employees from duty, the stoppage of work or the abstinence in whole or in part from full, faithful and proper performance of the duties of employment, for the purposes of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of employment or of intimidating, coercing or unlawfully influencing others not to remain in or assume public employment; provided, however, that nothing herein shall limit or impair the right of any employee or group of employees to express or communicate a complaint or opinion on any matter related to conditions of public employment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of public employment.

(c) Any employee of the County of Los Angeles who instigates, participates in or affords leadership to a strike against the County of Los Angeles or any of its departments, commissions or agencies, or engages in any form of concerted action to withhold services therefrom shall be subject to discharge from County service and said person shall not be reinstated or returned to the employ of the County of Los Angeles: except that the employee may apply to return to County service as a new employee and may be employed in accordance with the regular employment practices of the County in effect at the time for the position sought.

(d) In the event of any such strike or concerted action, it shall be the duty of the Chief Administrative Officer or appropriate appointing authority to identify any employee of the County under his jurisdiction who is in violation of the provisions of this Section, and to initiate discharge proceedings against such employee in accordance with the applicable provisions of this Charter. Prior

to initiating such a discharge proceeding, the Chief Administrative Officer or appropriate appointing authority shall provide notice to the employee of the charges against the employee and shall provide the employee with a timely opportunity to respond thereto. If the Chief Administrative Officer, or other appropriate appointing authority, after completing an investigation, determines that te charges are supported by the evidence submitted, and that the employee instigated, participated in, or afforded leadership to a strike against the County of Los Angeles or any of its departments, commissions or agencies, or engaged in any form of concerted action to withhold services therefrom, said appointing authority shall discharge the employee involved, and said person shall not be reinstated or returned to the employment of the County of Los Angeles; except as stated in paragraph (c) of this Section.

(e) In determining whether an employee engaged in a strike or in any form of concerted action to withhold service from said County or any of its departments, commissions or agencies, the Chief Administrative Officer or appropriate appointing authority shall use the following presumption which is rebuttable: Any employee who is absent from work without permission or who abstains wholly or in part from the full performance of the employee's duties in the employee's normal manner without permission, on the date or dates when a strike or concerted action to withhold services occurs, shall be presumed to have engaged in such strike or in concerted action to withhold services on such date or dates.

(f) A discharge imposed pursuant to this Section shall be appealable to the Civil Service Commission. However, notwithstanding other provisions of this Charter, in deciding whether the discharge of an employee for violating the provisions of this Section is proper, the Civil Service Commission shall be bound by the presumption stated in paragraph (e) of this Section. If, in the opinion of the Civil Service Commission, this presumption is not rebutted by a preponderance of the probative evidence, the Civil Service Commission shall sustain the discharge of the employee, and the County shall not be required to reinstate the employee.

(g) No officer, board, commissioner, appointing authority, or other agent of the County, elected or appointed, shall have the power to grant amnesty and/or to waive any of the provisions of this Section, and/or to authorize, appease, condone or consent to any employee's instigating, participating in, or affording leadership to a strike against the County of Los Angeles or any of its departments, commissions or agencies, or engaging in any form of concerted action to withhold services therefrom. No person exer-

cising any authority, supervision or direction over the County of Los Angeles, or any of its boards, commissions or agencies shall have the power to authorize, approve, condone or consent to a strike or other concerted activity prohibited by this Section; and no such person shall authorize, approve, condone or consent to such strike or other concerted activity prohibited by this Section.

(h) Every employee of the County of Los Angeles, whether employed on the effective date of this Section or thereafter employed, shall be furnished a copy of the provisions of this Section and shall acknowledge receipt thereof by executing the following statement which shall be filed with the office of the Civil Service Commission:

"I hereby acknowledge receipt of a copy of the provisions of Section 47.5 of the Charter of the County of Los Angeles and agree that I understand that during my term of employment with the County, I shall neither instigate, participate in, or afford leadership to a strike against the County of Los Angeles, or any of its departments or agencies, or engage in any concerted action to withhold my services from the County of Los Angeles, or any of its departments or agencies."

"I further understand that if I instigate, participate in or afford leadership to such a strike or engage in any such concerted action I shall be subject to discharge and shall not be reemployed by the County; except that I may apply to return to County service as a new employee and may be employed in accordance with the regular employment practices of the County in effect at that time for the position which I seek."

"Furthermore, I understand that I will be rebuttably presumed to have engaged in such a strike or other prohibited concerted action against the County of Los Angeles, its commissions, departments and agencies, if I am absent from work without permission or if I abstain wholly or in part from the full performance of my duties in the normal manner without permission from the appropriate appointing authority on the date or dates when a strike or other form of concerted action to withhold services from said County, or any of its commissions, departments or agencies occurs."

"I further understand that no officer, board, commissioner or appointing authority of the County, elected or appointed, shall have the power to grant amnesty to any person who violates the prohibition in section 47.5 of the Charter against instigating, participating in, or affording leadership to a strike against the County, or engaging in any concerted action to withhold services from the County, or any of its departments, commissions or agencies."

(i) In the event that an employee organization has instigated, participated in or afforded leadership to a strike against the

County of Los Angeles, or any of its departments, commissions or agencies; or to any concerted action to withhold service therefrom; the Board of Supervisors of the County of Los Angeles is hereby prohibited from granting any improvement of wages, hours, or working conditions to employees represented by that organization beyond those in effect or last offered by the County prior to the commencement of such strike or concerted activity, until the commencement of the meet and confer negotiations for the next bargaining year at a time regularly scheduled for commencement under County policy and provisions governing such negotiations. This remedy shall not preclude the County of Los Angeles from securing any other equitable or legal relief to which it may be entitled under state law.

(j) If any provisions of this Section 47.5 or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this Section which can be given effect without the invalid provisions or application; and to this end the provisions of this Section are severable.