
**Massachusetts Department of Revenue
Division of Local Services**

**LOCAL EMPLOYEES
Current Employment Benefit Issues**



2010

Workshop C

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Workshop C

Local Employees **Current Employment Benefit Issues**

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Case Study #1

Health Insurance Contribution Rates

OVERVIEW OF LAW

Chapter 32B of the Massachusetts General Laws permits municipalities to elect to provide group insurance with certain coverages for their employees and their dependents. The premium cost is shared equally by the employee and the municipality with the employee's 50% being withheld from wages. G.L. c. 32B, §7A authorizes a municipality, if it so accepts, to contribute more than 50% toward the cost of indemnity-type coverage. Any municipality that has not accepted §7A is governed by §7 with respect to indemnity-type and PPO group health insurance plans. If, however, a municipality accepts §16, it is authorized to enter into a contract to make available the services of a health care, or health maintenance, organization ("HMO") as an alternative to indemnity-type group health insurance. If a municipality provides HMO coverage to its employees under §16, an employee plan must pay a minimum of 10% and a maximum of 50% of the premium. The municipality's contributions must be between 90% and 50% of premiums.

Section 7A states that "[n]o governmental unit ... shall provide different subsidiary or additional rates to any group or class within that unit." However, no language similar to that in §7A making the premium contributions uniform for all employees is present in §16.

Chapter 150E, §1 defines "Employer" or "Public Employer" for school employee collective bargaining purposes to include the school committee with the chief executive officer of the municipality. Chapter 71, §41 authorizes the school committee to award contracts to the superintendent and business administrator for up to 6 years, to provide for salaries, "fringe benefits and other conditions of employment."

FACTS

The Town of West Wayward accepted the provisions of Chapter 32B in 1958. It voted in 1981 to make HMOs available to its municipal employees under G.L. c. 32B, §16. Currently, West Wayward offers a group health insurance policy to all its municipal employees (indemnity plan), with an option to elect alternative coverage by a health maintenance organization (HMO).

West Wayward has accepted §7A, and contributes to the indemnity plan premiums at the level of 60%. The balance is furnished by employees through a deduction from their wages (supplemented by direct payment to the employer, if necessary). As for the HMO plan, several years ago, the town's selectboard

determined that the town would contribute 75% and its employees pay 25% toward that plan.

Professional employees of West Wayward's schools have been organized into two bargaining units: Unit A which includes all classroom teachers and school nurses and Unit B which includes all department heads and administrators with the exception of the Superintendent and Business Manager.

The School Committee is in the process of negotiating different contribution rates for Unit A and Unit B for the insurance plans. For the indemnity plan, the School Committee has proposed that Unit A employees will continue to contribute 40% towards their premiums while Unit B employees will receive a reduction in their premium payments to 30%. For the HMO plan, the School Committee has proposed that Unit B employees will continue to pay 25% of the premiums while Unit A employees will receive a reduction in their premium payments to 15%. The Superintendent and Business Manager pay 10% of their health insurance premiums pursuant to special employment contracts. Both have the HMO plan.

ISSUES

- 1. Can the School Committee negotiate different insurance premium contribution rates with different bargaining units?**
- 2. Can the School Committee bind itself and the Town of West Wayward to pay for the increased costs resulting from its negotiated collective bargaining agreement?**
- 3. Can the Town of West Wayward adjust the School Department's budget to compensate for any additional health insurance costs to be borne by the town?**
- 4. Can the school department pay a higher percentage contribution for the health insurance coverage of the Superintendent and Business Manager?**

Case Study #2
Vacation and Sick Leave Buyback

OVERVIEW OF LAW

G.L. c. 149, §148 requires employers to make payment of wages to employees within specific time periods. All wages earned by employees working five or six days during a pay period shall be paid within six days of the termination of the pay period, or within seven days if the employee has a seven-day workweek. Wages of an employee who is involuntarily discharged must be paid on the day of discharge. Employees who voluntarily resign must be paid on the next regular payday.

The word “wages” includes any holiday or vacation payments due an employee under an oral or written agreement. Like wages, the vacation time promised to an employee is compensation for services which vests as the employee’s services are rendered. See Elec. Data Sys. Corp. v. AG, 454 Mass. 63 (2009).

Massachusetts courts have recognized that wages for time worked in excess of normal working hours are “wages” for purposes of G.L. c. 149, §148. See Parow v. Howard, 17 Mass. L. Rep. 149 (2003)(Middlesex Superior Court overtime decision). Employees are not entitled to recover compensation for personal and sick time under G.L. c. 149, §148 absent express agreement. See Souto v. Sovereign Realty Associates, Ltd, 23 Mass. L. Rep. 386 (2007)(Middlesex Superior Court sick leave pay decision).

G.L. c. 149, §150 authorizes an aggrieved employee to bring a civil action within three years against an employer who fails to comply with the requirements of G.L. c. 149, §148. It states that an employee who prevails in a claim for violation for the wage and hour laws “shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys’ fees.” This mandatory treble damages standard applies to all state wage and hour claims, including overtime, minimum wage, premium pay on Sundays, vacation pay, wages due at termination of employment, and wages due to employees wrongly misclassified as independent contractors.

FACTS

The City of Hope Falls has gone through a series of tough budget years, and the mayor expects that layoffs will be inevitable in the current fiscal year. The city has an ordinance authorizing payment of unused vacation and sick leave up to a maximum of 20 days vacation and 150 days of sick leave for “all employees” with at least ten years of city service who retire under Chapter 32.

The school committee has bargained with its teachers for an accumulated sick leave payment upon termination of employment at a maximum of 100 days.

These benefits apply only after 20 years of service, but apply for any voluntary termination of employment, not just retirement. No benefits are paid upon involuntary termination.

The police union collective bargaining agreement provides unlimited accumulated vacation and sick leave benefits upon employment termination after ten years of service, except in the case of "involuntary termination due to criminal conduct." The current mayor has offered the benefits provided in the ordinance as the city's best offer for the new contract. The prior police and fire contracts expired June 30, 2010. The mayor has offered no wage increases for FY2011. Even at that level the mayor believes the department will have to lay off several police officers to balance the budget.

In the past and in FY2011 these "buybacks" have been anticipated by planned retirements and amounts have been appropriated to the departments' personal services accounts to cover them, including the school department.

ISSUES

- 1. Peter Proffit is the elected treasurer of the city with 12 years of service in that position. Although reelected he has recently decided to retire at the end of FY2011. He has stated that he is expecting to receive sick and vacation buyback when he retires, but the City of Hope Falls did not budget for that in the FY2011 budget. Is Proffit entitled to receive the buyback under the city ordinance as a municipal employee?**
- 2. Fiona Finesse was a classroom teacher for 25 years in the city's school system. She worked through June of 2010, but then took a higher paying job in administration in another school system beginning in September 2010. She had accumulated 125 sick leave days and has demanded payment for 100 days under the school contract. The school department did not know she was leaving, and the appropriations for FY2010 have closed out. Is Finesse entitled to the buyback payment under the collective bargaining agreement? If so, can the amount be paid from the FY2011 budget or must an appropriation be made by the city council and mayor to pay an unpaid bill of a prior year?**
- 3. Police Officer Keith Keystone, a 15 year veteran, was fired for cause in August 2010 for an incident involving the improper discharge of his firearm. No criminal charges were brought although it was rumored he intentionally shot at another officer. Is Keystone entitled to buyback for any accumulated sick and vacation days?**
- 4. What mechanisms are available, if any, for the City of Hope Falls to appropriate funds to cover buyback amounts in any form of reserve account to avoid the problem of last minute entitlements in the future?**

Case Study #3

OPEB Liability Trust Funds and Medicare Enrollments

OVERVIEW OF LAW

G.L. c. 32B, §20 is a local option statute (added by Ch. 479 of the Acts of 2008) that authorizes the creation by municipalities of trust funds for their other post employment benefit (“OPEB”) liabilities. These liabilities primarily involve retiree group health insurance benefits. Under G.L. c. 32B, §§9, 9A and 9E every municipality in the commonwealth that has accepted G.L. c. 32B and provides group insurance coverage to its employees is required to provide group insurance coverage to retirees in varying degrees of premium contributions depending on the particular section in effect in the municipality. Additional provisions also make the town responsible for contributing to the coverage of surviving spouses of deceased retirees. Since there was no mechanism for municipalities to set aside funds in reserve for these purposes, other than a few special acts passed for specific communities, G.L. c. 32B, §20 was enacted and became effective January 10, 2009.

Once the municipality accepts the statute, the treasurer sets up an account to be a repository of OPEB funds and makes investment decisions as permitted by Ch. 479 of the Acts of 2008. When the municipality funds the account, the funding schedule should be spread out over a reasonable period. The Division of Local Services has advised that 30 years is reasonable. Further, if a municipality wants to set aside funds for OPEB after it has accepted G.L. c. 32B, §20, an appropriation may be included as part of the annual budget. Unlike most annual appropriations, however, the monies appropriated into the OPEB Liability Trust Fund are restricted and cannot be transferred to another purpose.

Municipalities may by local option self-insure their group health insurance plans pursuant to G.L. c. 32B, §3A. Self-insurance arose as a mechanism to reduce group health insurance costs to the municipalities and employees by eliminating the expense of the insurance company profit margins reflected in third party insurance premiums. If a municipality chooses to use this statute, the municipal employer’s contribution appropriation to employee group health insurance costs is deposited into the claims trust fund to match the agreed upon contribution ratio with the employee contributions deducted. The fund is for the purpose of paying and administering current claims for medical services incurred by plan members.

G.L. c. 32B, §3A is silent as to what happens to amounts remaining in the claims trust fund when the municipality converts to a third-party insurance premium-based system. Nothing in the statute requires that excess amounts in the trust fund be returned to the employees or employee organizations directly, or that they become the municipality’s funds. The only direction in the statute is that the funds, including interest, be used to cover administrative and claims expenses related to providing health care to covered employees.

Municipalities may also by local option require municipal retirees covered by municipal health insurance and who are eligible for Medicare to be covered by Medicare Parts A and B and a Medicare extension or Medigap plan. See G.L. c. 32B, §18. The purpose of the extension plan is to ensure that retirees do not receive lesser benefits than what they had prior to the adoption of G.L. c. 32B, §18. Therefore, before adopting §18, the municipality needs to have an actuarial review of its extension plans completed in order to satisfy the requirements that the benefits provided under the combined Medicare/extension plan coverage must be actuarially comparable to the retiree's existing coverage.

G.L. c. 32B, §18A, also a local option provision, applies only to future retirees who are Medicare eligible. No employee who has retired prior to a municipality's acceptance of G.L. c. 32B, §18A is required to accept medicare benefits if he or she had previously waived them.

FACTS

The town of Massidet has a significant percentage of its work force approaching retirement age in the next five years. It has done well meeting its unfunded pension liabilities but has yet to address its unfunded retiree health insurance liabilities. It is contemplating accepting G.L. c. 32B, §20, the OPEB Liability Trust Fund (Fund) at its next town meeting, to get a start on meeting its impending liabilities for retiree health insurance.

Massidet previously accepted G.L. c. 32B, §18A to require its employees and retirees to enroll in Medicare part B and get on an extension plan, but a few pre-existing retirees did not have to sign up and have not done so. The town would now like to require the pre-existing retirees to enroll in Medicare part B and get on an extension plan.

ISSUES

- 1. The town does not want to be obligated to appropriate funds to the OPEB trust fund in accordance with an actuarial study it has already performed to determine its unfunded liability and come up with a 30 year full-funding schedule. Must it seek a special act to avoid compulsory appropriations?**
- 2. The treasurer has asked town counsel whether the OPEB fund is considered a trust fund for the employees or is a town fund. If the fund is a town fund, the treasurer wants to know if a town creditor could reach it as a means of obtaining relief under a sizable court judgment against the town which it has yet to pay.**
- 3. Massidet just went from a self-insured claims trust fund method of providing health insurance to a premium based system. After an audit it**

is clear that the town has \$100,000 left in the claims trust fund. Can the town appropriate the money from the fund to the OPEB trust fund when it establishes the new fund? If not, what can that money be used for?

- 4. The selectboard has negotiated a collective bargaining agreement with the DPW workers, the town's only union outside the school department. In the agreement, in exchange for a wage increase, the union employees have agreed to make 10% contributions to the Town's OPEB fund, beginning July 1, 2010. The contract provides that other town employees must also make such contributions in order for the union contract provision to be binding. The board of selectmen has sent notice to all the town's employees, except those in the school department, indicating that it will now be taking out an additional 10% of the employees' health insurance premiums for the OPEB fund. Do the union/non-union employees have any claim against the town for making such a withholding?**
- 5. Does the town have a mechanism, short of special legislation, that would allow it to require its pre-existing retirees to enroll in Medicare Part B and be covered under a town's extension plan?**

Case Study #4

Health Insurance for Elected Officials

OVERVIEW OF LAW

Upon acceptance of Chapter 32B, G.L. c. 32B, §3 requires a municipality to provide group insurance for its employees. An “employee” is defined in G.L. c. 32B, §2(d) as any person in the service of a municipality who receives compensation for such service and whose duties require no less than 20 hours per week of regular service to the municipality. An elected official qualifies as an employee and is eligible for group health insurance coverage if such elected official receives compensation for his or her services and works at least 20 hours per week regularly. In addition, the appropriate public authority may in its discretion, decide to cover elected officials who work less than 20 hours per week.

G.L. c. 32B, §2(a) and (d) provides the board of selectmen of a town or mayor of a city with the authority to set the policy of the municipality for its group insurance program. The statutory scheme has been interpreted as providing uniformity among “employees.”

Salaries and stipends are sufficient to qualify as compensation where they have been paid for rendered services; reimbursements for out-of-pocket costs are not. Fees or charges received from third parties for service of process by an officer are not considered compensation under this provision. See Ramponi v. Board of Selectmen of Weymouth, 26 Mass. App. Ct. 826 (1989).

FACTS

The selectboard of the town of Great Benefette recently hired a town manager, Stan Stickler, who promised to create a workable financing plan to bring fiscal stability to the town in these difficult economic times. In reviewing Great Benefette’s finances and personnel policies, Stan was surprised to learn that the town offers health insurance coverage to the *elected* positions of town clerk, town moderator, treasurer-collector, accountant, council on aging director, conservation commission chair, building commissioner and members of the Select and Zoning Boards and Board of Assessors. The position of town clerk is a full-time, paid position. The positions of town moderator, treasurer-collector, accountant, council on aging director, conservation commission chair and building commissioner are all part-time, paid positions requiring under 20 hours per week. The positions on the Select and Zoning Boards and Board of Assessors are part-time, unpaid positions which do not require a set number of hours. However, the members of these boards each receive a yearly stipend of one dollar.

Stan immediately got to work and drafted a memo to the selectboard requesting that they exercise their discretion to discontinue the practice of providing coverage to elected officials who work fewer than the 20-hour minimum. Within a week, word started circulating that the selectboard was planning to take a vote at its next meeting that elected town officials who do not regularly work twenty hours per week for compensation would no longer be eligible for participation in the town's group insurance program. However, the selectboard would leave unchanged the health insurance coverage for the members of the Select and Zoning Boards and Board of Assessors for the stated purpose of enticing candidates to run for those seats.

A few days later, Stan received a visit from the treasurer-collector who casually mentioned to him that the town constable, who is the brother-in-law of one of the members of the selectboard, also received coverage under the town's group insurance plan. The treasurer-collector politely asked Stan if the constable, whose job has no fixed duties requiring any set number of hours and does not pay a regular salary, should be receiving insurance coverage.

Stan is now wondering if a better approach might be to simply deny coverage to any newly elected officials, but continue it for any current elected officials who work fewer than the 20-hour minimum.

ISSUES

- 1. Can board of selectmen vote to discontinue insurance coverage of *select* elected town officials whose duties require less than twenty hours a week?**
- 2. Should the elected members of the select and zoning boards and boards of assessors have been eligible for participation in the town's health insurance plan?**
- 3. Is a position such as the constable's eligible for participation in the town's health insurance plan?**
- 4. Can the town of Great Benefette grandfather in those elected officials currently serving until such time as they fail to be re-elected?**

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**JAMES A. ANDERSON & others¹ v. BOARD OF SELECTMEN OF WRENTHAM
& another²**

¹ Two other Wrentham police officers, the town's fire chief and superintendent of public works, and the Wrentham Police Association, an "employee organization" within the meaning of G. L. c. 150E, § 1 (1988 ed.).

² The town of Wrentham.

No. N-5116

Supreme Judicial Court of Massachusetts, Norfolk

406 Mass. 508; 548 N.E.2d 1230; 1990 Mass. LEXIS 50

November 9, 1989

January 18, 1990

PRIOR HISTORY: [***1] CIVIL ACTION commenced in the Superior Court Department on March 9, 1988.

The case was heard by *William H. Welch, J.*

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: *So ordered.*

COUNSEL: *Paul V. Mulhern, Jr.*, for the defendants.

Charles J. Maguire, Jr., for the plaintiffs.

Margery E. Williams, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

JUDGES: Liacos, C.J., Wilkins, Abrams, O'Connor, & Greaney, JJ.

OPINION BY: GREANEY

OPINION

[*508] [**1231] We are asked in this case to interpret *G. L. c. 32B, § 7A*, a local option statute which permits municipalities to contribute more than 50% of their employees' group insurance premiums.³ In particular, we must decide [*509] whether § 7A empowered the Wrentham town meeting to set unilaterally the town's rate of contribution toward [***2] the group health and life insurance provided to the town's employees. We conclude that § 7A did not authorize the town meeting's action and reverse a Superior Court judgment that made a contrary determination.

³ *Section 7A* (1988 ed.) reads, in pertinent part, as follows:

"A governmental unit which has accepted the provisions of section ten [of c. 32B] and which accepts the provisions of this section may, as a part of the total monthly cost of contracts of insurance authorized by sections three and eleven C [of c. 32B], with contributions as required by section seven [of c. 32B], make payment of a subsidiary or additional rate which may be lower or higher than a premium determined by the governmental unit to be paid by the insured, the combination of which shall result in the governmental unit making payment of more, but not less, than fifty per cent of the total monthly cost for such insurance. No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit."

[***3] The background of the case is as follows. On December 14, 1987, a special town meeting was convened in Wrentham. At the meeting, the voters agreed to accept *G. L. c. 32B, § 7A*.⁴ The meeting then voted to pay 99% of the premium of the group life and health insurance for all the town's employees and their dependents and to transfer \$ 150,000 from the town's treasury to pay for the costs of the additional contribution percentage. Approximately two weeks later, the board of selectmen (board) refused to comply with the special town meeting vote to pay 99% of the group life and health insurance premiums, but, rather stated that it would continue to fund only 50% of the insurance premium costs, the minimum amount required by § 7A. The board's refusal to pay the additional 49% represents a net weekly loss to each participating town employee of \$ 14.58 for individual coverage and \$ 34.54 for family coverage.

⁴ Sometime prior to this meeting, the town had voted to accept *G. L. c. 32B* in accordance with the provisions of § 10 thereof.

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[***4] The plaintiffs, five town employees, and the Wrentham Police Association, commenced an action in the Superior Court seeking a declaration pursuant to G. L. c. 231A, that the town meeting had the authority to set unilaterally the 99% [*510] contribution rate.⁵ The plaintiffs also sought an order directing the board to implement the town meeting vote on the rate. After the defendants filed their answer, the plaintiffs moved for summary judgment [**1232] pursuant to *Mass. R. Civ. P. 56 (a)*, 365 Mass. 824 (1974), essentially on the undisputed facts set forth above. A judge in the Superior Court allowed the plaintiffs' motion, concluding in his memorandum that "it is the town meeting . . . which sets the rate under *G. L. c. 32B, § 7A*." A judgment entered declaring that the board was obligated to abide by the town meeting vote of December 14, 1987, that established the contribution rate at 99%. The judgment also stated that the relief ordered would operate prospectively with the 99% contribution rate to be used by the selectmen in negotiating the next insurance contract or contracts. The plaintiffs filed a motion seeking reconsideration of the determination that the new [***5] rate should not apply retroactively. That motion was denied. The defendants appealed from the entire judgment. The plaintiffs appealed from the portions of the judgment concerning the retroactivity of the new contribution rate. We transferred the case to this court on our own motion.

5 There is no dispute that the town meeting properly accepted § 7A in accordance with *G. L. c. 32B, § 7A (d)*.

In controversy is the interpretation of the language in § 7A, which refers to "a premium determined by the governmental unit to be paid by the insured." The term "[g]overnmental unit" is defined in *G. L. c. 32B, § 2 (f)*, as "any political subdivision of the commonwealth," while "[p]olitical subdivision" is defined in § 2 (g), as including a "town." The plaintiffs contend that the reference in § 7A to the town (as "the governmental unit") can mean only the town meeting, and thus excludes the board. The plaintiffs maintain that this conclusion is supported by the separate definition in § 2 (a) of "[a]ppropriate [***6] public authority," as including the board of selectmen, and the reference in other parts of *G. L. c. 32B* to the "appropriate public authority" (board) as performing other duties with respect to insurance [*511] coverages for town employees. See, e.g., *G. L. c. 32B, §§ 3, 5, & 8A* (1988 ed.). The defendants, on the other hand, argue that the reference to the town in § 7A is meant to be a more general reference to the municipality as a whole, not exclusively to the town meeting. The defendants point to numerous other provisions of *G. L. c. 32B* (which we need not detail here), that they maintain will have a strained and illogical meaning if "govern-

mental unit" is rigidly construed to mean only "town meeting."⁶

6 A brief has been filed by the Massachusetts Teachers Association as amicus curiae which supports the result sought by the defendants on this issue.

We agree with the defendants' position that the reference in § 7A to the "town" is a general reference to the municipality as a whole and not a specific reference [***7] to the town meeting. In substance, § 7A requires that any premium contribution above the 50% minimum be "determined by the governmental unit." That determination requires several distinct steps. First, the town must vote to accept § 7A under the procedure set forth in *G. L. c. 32B, § 7A (d)*. Second, a particular contribution percentage must be selected. Third, the town must fund the resulting contribution percentage. It is clear that the town meeting is the only branch of town government empowered to take the first and third steps. See (with respect to the first step) *Jenkin v. Medford*, 380 Mass. 124, 126-127 (1980); and (with respect to the third step) *G. L. c. 40, § 5* (1988 ed.); *G. L. c. 150E, § 7* (1988 ed.). The second step, however, involves the chief executive officer of the town, in this case the board of selectmen, in a mandatory task. Under State law, the contribution percentage to be paid on behalf of unionized employees must be collectively bargained by the employer. See *G. L. c. 150E, § 6*; *School Comm. of Medford v. Labor Relations Comm'n*, 380 Mass. 932 (1980). In that collective bargaining process, the town [***8] manager or board of selectmen is the exclusive bargaining representative of a town; the town meeting has no direct [*512] role in the process of negotiations. See *G. L. c. 150E, § 1*;² *Labor Relations Comm'n v. Natick*, 369 Mass. 431, 438 (1976); *Weymouth School Comm.*, 9 M.L.C. 1091, 1094 (1982).

7 With respect to unionized school employees, the town's bargaining agent is the school committee or its representative. See *G. L. c. 150E, § 1* (1988 ed.).

[**1233] The role of the town manager or board of selectmen in the collective bargaining process is an essentially executive function mandated by statute. We have held that, when a board of selectmen is acting in furtherance of a statutory duty, the town meeting may not command or control the board in the exercise of that duty. See *Russell v. Canton*, 361 Mass. 727 (1972); *Breault v. Auburn*, 303 Mass. 424 (1939); *Lead Lined Iron Pipe Co. v. Wakefield*, 223 Mass. 485 (1916). [***9] These decisions reflect an application of the more general principle that "[a] municipality can exercise no direction or control over one whose duties have been

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defined by the Legislature." *Breault v. Auburn, supra* at 428, quoting *Daddario v. Pittsfield*, 301 Mass. 552, 558 (1938).

We think it follows from these considerations that the essence of good faith bargaining would be thwarted if the parties entered negotiations at a point where the very subject of those negotiations -- the insurance premium contribution rate -- had already been inflexibly established by the town meeting. Good faith bargaining requires "an open and fair mind as well as a sincere effort to reach a common ground." *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557, 572 (1983). It would be antithetical to this notion to permit a party to the bargaining process to come to the table with a fait accompli.⁸

8 Furthermore, permitting resort to the town meeting on a subject of mandatory collective bargaining would enable a party to the negotiations to circumvent the bargaining process altogether. If a party was unable to achieve the desired contribution rate through collective bargaining, it could simply put the issue before the town meeting and pack the meeting with voters who supported its position. Such a practice would render the bargaining process an empty formality. "We do not attribute to the Legislature an intention to pass a largely ineffective collective bargaining statute" *School Comm. of Newton, supra* at 566. See *Weymouth School Comm.*, 9 M.L.C. 1091, 1095 (1982) (noting that, if a benefit can be obtained through collective bargaining, it would "undermine the purposes of Chapter 150E" to permit an end run around that process).

[***10] [*513] In a situation where two or more statutes relate to a common subject matter, they should be construed together to constitute an harmonious whole consistent with the legislative purpose. *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513-514 (1975). Consistent with this principle, we doubt the Legislature intended in *G. L. c. 32B, § 7A*, to undermine the well-established collective bargaining requirement that exists in this area.⁹ Rather, § 7A, read together with the pertinent provisions of G. L. c. 150E, preserves, as to unionized employees, traditional functions. Negotiation of any contribution rate over 50% is handled by the town manager or board of selectmen. Negotiations would then be followed by a request for an appropriation necessary to fund the costs of any agreed upon contribution **[**1234]** rate.¹⁰ By passing on **[*514]** the latter, the town meeting will have its say on the subject. Nothing further argued by the plaintiffs dissuades us from this view.¹¹ Our conclusion renders it unnecessary to consider the issue raised in the cross appeal by the plaintiffs

with respect to the retroactive payment of the benefits voted by the town **[***11]** meeting.

9 In fact, the procedure proposed by the plaintiffs in this case has been found to be impermissible on several occasions. In *Town of Provincetown*, 9 M.L.C. 1315 (1982), the town and its employees' union were engaged in collective bargaining for a new contract. The union presented a list of demands, which did not include an increase in the contribution to its members' insurance premiums. After negotiations stalled, the union put before the town meeting a proposal to authorize an additional 30% contribution under § 7A. The town meeting adopted the proposal. Subsequently, the town filed a charge with the Labor Relations Commission alleging that the union had bargained in bad faith in violation of *G. L. c. 150E, § 10 (b)(1) & (2)*. Reasoning that "bypassing the employer's or employees' representative on mandatory subjects subverts collective bargaining," 9 M.L.C. at 1320, the commission held that the union's attempt to use § 7A rather than collective bargaining to obtain the additional 30% contribution constituted illegal bad faith bargaining. See *id.* at 1321. Similar results have been reached in *Commonwealth v. Labor Relations Comm'n*, 404 Mass. 124 (1989) (unilateral executive action on mandatory subject of collective bargaining prior to impasse constitutes illegal bad faith bargaining); *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557 (1983) (same); *Weymouth School Comm.*, 9 M.L.C. 1091 (1982) (recourse to town's legislative branch to obtain job benefit available through collective bargaining constitutes illegal bad faith bargaining).

[***12]

10 The last sentence of the first paragraph of § 7A extends the benefits of any increase in the contribution rate obtained by unionized employees to nonunionized employees. However, a municipal employer may pay a higher premium percentage for certain employees pursuant to G. L. c. 32B, § 15, as appearing in St. 1988, c. 82. See also St. 1989, c. 653, § 37, amending G. L. c. 32B, § 16.

11 In particular, we reject the plaintiffs' argument that the definition of the term "appropriate public authority" in *G. L. c. 32B, § 2 (a)*, settles the issue because the Legislature, if it had intended to include the board of selectmen in the process outlined in § 7A, would have used "appropriate public authority" in place of "governmental unit." The Legislature's choice not to use

406 Mass. 508, *; 548 N.E.2d 1230, **;
1990 Mass. LEXIS 50, ***

the term "appropriate public authority" merely indicates that the Legislature did not intend to confer the authority stated in § 7A solely on the board of selectmen. The choice by no means implies exclusion of the board from a proper role in the statutory process. Indeed, if the plaintiffs' argument is accepted, the school committee of a town or its representative would have no role to play establishing § 7A benefits. This result also is not contemplated by G. L. c. 150E.

[***13] The judgment is reversed. A new judgment is to enter which declares that the defendant board is not obligated to abide by the December 14, 1987, vote of the special town meeting which purported to establish under G. L. c. 32B, § 7A, the town's rate of contribution on group insurance benefits paid the town's employees at 99%.

So ordered.

CHAPTER 32B Section 7A Contribution and withholding for premiums; subsidiary or additional rate; payments in lieu of withholding; acceptance of section

Section 7A. A governmental unit which has accepted the provisions of section ten and which accepts the provisions of this section may, as a part of the total monthly cost of contracts of insurance authorized by sections three and eleven C, with contributions as required by section seven, make payment of a subsidiary or additional rate which may be lower or higher than a premium determined by the governmental unit to be paid by the insured, the combination of which shall result in the governmental unit making payment of more, but not less, than fifty per cent of the total monthly cost for such insurance. No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit.

...

CHAPTER 32B Section 16 Optional insurance for services of health care organizations

Section 16. Upon acceptance of this section as hereinafter provided, the appropriate public authority of the governmental unit shall enter into a contract, hereinafter described, to make available the services of a health care organization to certain eligible and retired employees and dependents, including the surviving spouse and dependents of such active and retired employees, on a voluntary and optional basis, as it deems to be in the best interest of the governmental unit and such eligible persons as aforesaid,

...

All persons eligible for the insurance provided under section five shall have the option to be insured for the services of a health care organization under this section but shall not be insured for both. Eligible persons, having elected coverage under this section by making application as provided in section six, shall pay a minimum of ten percent of the total monthly premium cost or rate for coverage under this section, and the governmental unit shall pay the remainder of the total monthly premium cost or rate; provided, however, that nothing in this chapter shall preclude the parties to a collective bargaining agreement under chapter one hundred and fifty E from agreeing that such eligible persons shall pay a percent share of such total monthly premium cost or rate which is higher than said ten percent; provided, further, that such eligible persons shall in no event be required to pay more than fifty percent of such total monthly premium cost or rate. ...

CHAPTER 150E Section 7 Collective bargaining agreements; term; appropriation requests; provisions; legal conflicts, priority of agreement

Section 7. (a) Any collective bargaining agreement reached between the employer and the exclusive executed by the parties, and a copy of such agreement shall be filed with the commission and with the house representative shall not exceed a term of three years. The agreement shall be reduced to writing, and senate committees on ways and means forthwith by the employer.

(b) The employer, other than the board of higher education or the board of trustees of the University of Massachusetts, a county sheriff, the PCA quality home care workforce council, the alcoholic beverage control commission, or the state lottery commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

...

CHAPTER 71 Section 34 Support of schools; appropriations; recommendations

Section 34. Every city and town shall annually provide an amount of money sufficient for the support of the public schools as required by this chapter, provided however, that no city or town shall be required to provide more money for the support of the public schools than is appropriated by vote of the legislative body of the city or town. In acting on appropriations for educational costs, the city or town appropriating body shall vote on the total amount of the appropriations requested and shall not allocate appropriations among accounts or place any restriction on such appropriations. The superintendent of schools in any city or town may address the local appropriating authority prior to any action on the school budget as recommended by the school committee notwithstanding his place of residence. The city or town appropriating body may make nonbinding monetary recommendations to increase or decrease certain items allocating such appropriations.

The vote of the legislative body of a city or town shall establish the total appropriation for the support of the public schools, but may not limit the authority of the school committee to determine expenditures within the total appropriation.

From: Blau, Gary
Sent: Wednesday, July 14, 2010 9:33 AM
To: 'Josh Coleman'
Subject: 2010-855 - Group Insurance Issues

Attachments: 92-660.pdf; EM2007-191 - Request for legal advice.htm
Josh:

I thought we had published an article in our newsletter City & Town in the 1990s on collective bargaining for health insurance, but cannot find it in our publication archives and apparently we did not. I found four collective bargaining articles published in 1995 and 1996, but they did not include health insurance issues. With respect to your numbered statements, I have the following comments.

1) A community that has not accepted M.G.L. c. 32B, §7A is governed by c. 32B, §7 with respect to indemnity (and PPO) plans, and Section 7 requires a 50% contribution from the employer and employee toward health insurance premiums. It is only if the community has accepted Section 7A that it may pay a percentage contribution greater than 50% on such plans, and in that case the last sentence of the first paragraph specifies that "No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit." That has been interpreted as requiring uniformity of the rate of the governmental unit with respect to indemnity (and PPO) plans for its employees. See Watertown Firefighters, Local 1347, IAFF, AFL-CIO v. Town of Watertown, 376 Mass. 706 (1978). Note that this uniformity does not necessarily apply to the municipal contributions to premiums for retirees or surviving spouses because contribution rates are partially dependant on the acceptance of other sections of Chapter 32B. See, for example, Section 9 (default 0% contribution of town for retirees), Section 9A (local option 50% contribution of town for retirees, which by its specificity is uniform), Section 9E (local option - more than 50% contribution rate for retirees, uses same uniformity phrase as Section 7A), Section 9B (default 0% contribution of town for surviving spouses), Section 9D (local option 50% contribution of town for surviving spouse, which by its specificity is uniform), Section 9D½ (local option - more than 50% contribution of town for surviving spouses, no uniformity provision) and Section 9D¾ (local option - up to 50% contribution of town for surviving spouse, no uniformity provision)

2) Section 16 of Chapter 32B specifically provides that:

Eligible persons, having elected coverage under this section by making application as provided in section six, shall pay a minimum of ten percent of the total monthly premium cost or rate for coverage under this section, and the governmental unit shall pay the remainder of the total monthly premium cost or rate; provided, however, that nothing in this chapter shall preclude the parties to a collective bargaining agreement under chapter one hundred and fifty E from agreeing that such eligible persons shall pay a percent share of such total monthly premium cost or rate which is higher than said ten percent; provided, further, that such eligible persons shall in no event be required to pay more than fifty percent of such total monthly premium cost or rate. (emphasis added)

Section 16 does not contain similar language to that in Section 7A requiring uniformity of rates for all town employees. The underscored language appears to authorize different town HMO contribution rates between 50% and 90% for employees with separate collective bargaining agreements for different unions, and we have suggested as much in a prior opinion (92-660) and email response EM2007-191, attached. Literally the language of Section 16 does not distinguish between town-side and school-side collective bargaining agreements, although the board of selectmen in a town is usually the bargaining agent for town-side agreements (as well as the appropriate public authority with the power to enter into municipal group health insurance contracts under M.G.L. c. 32B), while the school committee is the bargaining agent for school department employees (with no specific authority to enter into group health insurance contracts under chapter 32B). M.G.L.c. 150E, §1 (Definition of Employer); c. 4, §7 (Definition of Chief Executive Officer).

Unlike other town collective bargaining agreements which cannot be effective without a town meeting appropriation of the cost items, a school committee may negotiate agreements with school department employees without such an after-the-fact town meeting appropriation, at least to the extent it has sufficient unencumbered funds in its budget to cover the negotiated cost. School committees have line item autonomy to move otherwise budgeted and unencumbered school funds to school negotiated collective bargaining obligations payable from its budget, under M.G.L. c. 71, §34 and are excluded from the statutory obligation to seek cost item appropriations for collective bargaining agreements under M.G.L. c. 150E, §7(b). At least to the extent the school committee has sufficient unencumbered funds in its budget to cover the first year of a collective bargaining agreement, we think the committee may legally bind itself to such an agreement. However, we still believe the committee has no authority to bind itself beyond its own unencumbered funds under M.G.L. c. 44, §31, which prohibits any town department, including the school department, from incurring liabilities in excess of its appropriations.

Since towns usually budget for their share of group health insurance contributions in a line item outside any town departmental budget, it may be argued that a town school department has no authority to negotiate a higher HMO health insurance rate for its employees, having no appropriation within its control from which to pay the increase. While the school committee has line item autonomy under M.G.L. c. 71, §34 it may not transfer amounts to an item outside its own budget without town meeting vote and arguably may not expend its own budgeted funds for any such negotiated rate increase, since the town has chosen to cover its health insurance obligations from an appropriation outside the school's budget.

Nevertheless, it is hard to say that health insurance contribution rates are not part of the terms and conditions of employment subject to collective bargaining or are not part of compensation for the services rendered by the school department employees. If the school committee refuses to bargain over such an issue raised by an employee union it may be subject to an unfair labor practice charge and the issue of authority to bargain may be decided by the Commonwealth Employment Relations Board (CERB).

Assuming *arguendo* the school committee may negotiate health insurance contribution rate increases for its employees and cannot or does not pay for the increased costs from its own budget, the town may legally be required to cover the employer's share of the cost. M.G.L. c. 32B, §3. In that case, in order to insure that the increased costs negotiated by the school committee are covered by the schools from its allocated funds, the town may reduce the school's overall appropriation and include the reduced amount in the general health insurance line to cover the additional costs for the school employees. Note that group health insurance costs for current school department employees is included in the net school spending requirements that must be met by the town, whether these amounts are budgeted to the school committee or to the general health insurance line. See 603 CMR 10.06(2)(g).

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
blau@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Josh Coleman [mailto:jcoleman@long-law.com]
Sent: Friday, July 09, 2010 12:17 PM
To: Blau, Gary
Subject: Follow-up

Hi Gary, thanks for taking the time to speak with me.

I wanted to confirm my understanding of our conversation regarding a School District proposing different contribution rates for different bargaining units for the HMO plan.

1) Section 7 PPO requires uniformity in contribution rates. Is this based on the statutory language in Section 7(a) that employer shall contribute "remaining 50 percent of such premium" or is there another relevant provision.

2) Section 16 does not require uniformity of HMO contribution rates and is subject to collective bargaining. However, as you mentioned, if the School Dept is successful in negotiating different rates with the different bargaining units, this may create a funding issue with the Town. Since the Town may decide to adjust the School Dept budget, depending on the rates negotiated for the different units. In other words, the Town may decrease the School Dept. budget to compensate for any additional health insurance cost incurred by the Town.

I would appreciate your response (if possible by Monday) and also the bulletin if your able to find it re: collective bargaining.

Thanks again,
Josh

Josh Coleman, Esq.
Long & DiPietro
175 Derby Stret, Unit 17
Hingham, MA 02043

Ph: 781.749.0021 Ext. 107
Fax:781.749.1121 .

CHAPTER 71 Section 41 Tenure of teachers and superintendents; persons entitled to professional teacher status; dismissal; review

... A school committee may award a contract to a superintendent of schools or a school business administrator for periods not exceeding six years which may provide for the salary, **fringe benefits**, and other conditions of employment, **including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of duties or office, liability insurance, and leave for said superintendent or school business administrator.** Nothing in this section shall be construed to prevent a school committee from voting to employ a superintendent of schools who has completed three or more years' service to serve at its discretion.

CHAPTER 41 Section 108N Town manager, administrator, executive secretary, or administrative assistant; employment contract

Notwithstanding the provision of any general or special law to the contrary, any city or town acting through its board of selectmen or city council or mayor with the approval of the city council, as the case may be, may establish an employment contract for a period of time to provide for the salary, **fringe benefits**, and other conditions of employment, **including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performances of duties or office, liability insurance, and leave for its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or the person performing such duties having a different title.**

... **In addition to the benefits provided municipal employees under chapters thirty-two and thirty-two B, said contract may provide for supplemental retirement and insurance benefits.** ...

CHAPTER 41 Section 108O Employment contracts for police chiefs and fire chiefs

Section 108O. Any city or town acting through its appointing authority, may establish an employment contract for the salary, **fringe benefits**, and other conditions of employment, **including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of his duties or office, liability insurance, conditions of discipline, termination, dismissal, and reappointment, performance standards and leave for its police chief and fire chief, or a person performing such duties having a different title.** In communities where said police chief and fire chief is subject to the provisions of chapter thirty-one, the provisions of chapter thirty-one shall prevail when the provisions of this section conflict with the provisions of said chapter thirty-one.

... **In addition to the benefits provided municipal employees under chapters thirty-two and thirty-two B, said contract may provide for supplemental retirement and insurance benefits.** ...



January 30, 2007

Kerry Scott
107 TradeWinds Road
Oak Bluffs, MA 02557-1167

Re: Personal Services Contracts
Our File No. 2006-189

Dear Ms. Scott:

You have inquired as to which town officers may have personal services contracts. You provided us with a list of the following such contract positions: town administrator, police chief, police lieutenant, fire chief, marina manager, highway superintendent, principal assessor, finance director, waste water manager, town accountant, library director, information technology manager, water district manager and water district administrator. You also indicate that some discussion has been made to provide such contracts for the building official and zoning officer, now in union positions.

We do not know what you mean precisely when you refer to personal services contracts. The town's personnel by-law exempts persons with "professional" services contracts, and we assume you are referring to such contracts. However, we are not provided with the terms and conditions of such contracts to know what they may be providing that is different from contracts with other town employees. Based on what has been provided, we can only offer the following general information regarding individual employment (personal service) contracts:

All employees, including elected officials, have employment contracts with the municipality in which they work for the wages, benefits (health insurance, etc.) and leave package provided by the municipality as a result of budget appropriations, benefits provided in the general laws and municipal by-laws or ordinances, and establishment of a salary or wage under one of the applicable statutory provisions or local by-laws or ordinances. See GL c. 41, §108 (elected officials' salaries fixed by town meeting, appointed officials' salaries fixed by the appointing authority), GL c. 41, §108A (authorizing salary and wage compensation plan by by-law or ordinance) and GL c. 150E (authorizing collective bargaining agreements). The usual rule, however, is that individual employment contracts are limited to one year and do not include any special fringe benefits not otherwise available to other employees. The reason is that

appropriations for these operating expenses are made annually and no binding contracts can be made in excess of available appropriations. GL c. 44, §31.

At issue is the ability to enter into a binding contract for more than one year and provide additional fringe benefits beyond the usual compensation package when an appropriation funding the entire multi-year package of wages and benefits is not available at the time the contract is made. There are limited circumstances where multi-year employment contracts are expressly authorized by state law. Collective bargaining agreements, for example, can be binding up to three years and once approved in the first year, set the salary and compensation levels for the remaining years. G.L. c. 150E, §7; *Boston Teacher's Union, Local 66 v School Committee of Boston*, 386 Mass. 197, 212-13 (1982) (school committee bound to pay salary increases in second and third years of three year collective bargaining agreement).

In addition, other statutes authorize special contract authority for particular officials. Under GL c. 41, §108N, the board of selectmen in a town may enter into special contracts with certain municipal officers (town managers, town administrators, executive secretaries, administrative secretaries and town accountants) "for a period of time", which may include additional health and retirement benefits, severance pay, relocation expenses, liability insurance and other special benefits. We have interpreted the statute as authorizing multi-year contracts for a reasonable period. A similar, but less generous statute authorizes the appointing authority to give special contracts to police and fire chiefs (GL c. 41, §108O), but the statute provides no express provision authorizing multi-year agreements. Another statute authorizes the school committee to give special multi-year contracts (up to 6 years) with special benefits to school superintendents and school business managers (GL c. 71, §41).

As a general rule, unless one of these exceptions applies, or special legislation has been provided authorizing them, municipal employment contracts purporting to be for more than one year would be subject to appropriation in subsequent years of the contract. That is, they would not be binding in a future year unless an appropriation sufficient for the purpose has been made in the annual budget. In addition, without general or special legislation authorizing fringe benefits not generally available to other town employees pursuant to a by-law, a significant question may arise as to the legitimacy of such benefits.

For example, a town may not generally provide additional health insurance or pension benefits for employees not provided other town employees under GL c. 32B or GL c. 32. Under GL c. 41, §108N and 108O such additional benefits are specifically allowed for city and town managers, town administrators, executive secretaries, accounting officers, police chiefs and fire chiefs. GL c. 41, §21A specifically allows a town by by-law to provide sick and vacation benefits and other forms of leave. No officer or board has the inherent authority to negotiate a contract to provide more favorable leave benefits to a particular employee. A town may also provide specific

additional fringe benefits in a collective bargaining agreement, in excess of those provided in a by-law, to the extent they do not conflict with any general laws. GL c. 150E, §7. Any such agreement may also provide benefits in excess of (or less than) those provided by any general law listed in GL c. 150E, §7(d).

Thus, from your list, it would appear that special personal services contracts could be provided for the town administrator, police chief and town accountant, under the statutes described above. Whether such special contracts may be binding in future years or with added fringe benefits for any of the other officers may depend on the specific facts and special laws applicable to them.

We are not familiar with the specific local special laws and by-laws of the town and your question may be better directed to town counsel. We hope this information is helpful.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC/GAB

454 Mass. 63, *; 907 N.E.2d 635, **;
2009 Mass. LEXIS 175, ***; 14 Wage & Hour Cas. 2d (BNA) 1861

**ELECTRONIC DATA SYSTEMS CORPORATION vs. ATTORNEY GENERAL &
another. ¹**

1 Division of Administrative Law Appeals (DALA).

SJC-10260

SUPREME JUDICIAL COURT OF MASSACHUSETTS

*454 Mass. 63; 907 N.E.2d 635; 2009 Mass. LEXIS 175; 14 Wage & Hour Cas. 2d
(BNA) 1861; 158 Lab. Cas. (CCH) P60,819*

**February 2, 2009, Argued
June 11, 2009, Decided**

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on January 2, 2007. The case was heard by Nancy Staffier Holtz, J., on a motion for judgment on the pleadings. The Supreme Judicial Court granted an application for direct appellate review.

Elec. Data Sys. Corp. v. AG, 440 Mass. 1020, 798 N.E.2d 273, 2003 Mass. LEXIS 720 (2003)

DISPOSITION: Judgment affirmed.

COUNSEL: Robert P. Morris, for the plaintiff.

Kevin Conroy, Assistant Attorney General (Marsha Hunter, Assistant Attorney General, with him), for Attorney General.

The following submitted briefs for amici curiae: Ben Robbins, Martin J. Newhouse, & Jo Ann Shotwell Kaplan, for New England Legal Foundation & others.

Sherley E. Cruz & Cynthia Mark, for Greater Boston Legal Services.

Philip J. Gordon, for National Employment Lawyers Association, Massachusetts Chapter.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: BOTSFORD

OPINION

[**636] [**63] BOTSFORD, J. In this case we return to the question whether the written vacation pay policy of the plaintiff, Electronic Data Systems Corporation (EDS), violates *G. L. c. 149, § 148* (Wage Act, or § 148), when applied to an employee who is involuntarily [**64] terminated. See *Electronic Data Sys. Corp. v. At-*

torney Gen., 440 Mass. 1020, 798 N.E.2d 273 (2003) (EDS I). Giving deference to the Attorney General's reasonable [***2] interpretation of the Wage Act and in agreement with the Superior Court [**637] judge and the division of administrative law appeals (DALA), we conclude that the statute requires such an employee to be paid for unused vacation time remaining at the time of involuntary discharge; and that because the EDS policy does not provide for such payment, it contravenes the Wage Act. We therefore affirm the judgment of the Superior Court. ²

2 We acknowledge the amicus brief of New England Legal Foundation, Associated Industries of Massachusetts, and Retailers Association of Massachusetts in support of EDS; and the amicus briefs of Greater Boston Legal Services and the National Employment Lawyers Association, Massachusetts Chapter, in support of the Attorney General.

Background. The facts are not contested. Francis Tessicini was an employee of EDS or one of its predecessor companies for twenty-one years, from 1984 to 2005. On April 8, 2005, EDS eliminated Tessicini's position.

EDS's written vacation pay policy (vacation pay policy, or policy), as updated on July 30, 2004, provides that beyond the first year of employment, the amount of an employee's paid vacation time is based on the number of full calendar [***3] years he or she has worked for EDS or one of its predecessor companies. Under the policy, a person who has been employed for twenty years or more is eligible for five weeks of paid vacation per calendar year, to be used by December 31 of that year or lost. ³ [**65] The policy further provides that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

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3 In particular, the policy states:

"After your first calendar year of employment, you are eligible for vacation as follows:

"If you have worked for EDS this number of full calendar years:	You can take this many days of vacation:
1 year to 9 years	3 weeks per calendar year
10 years to 19 years	4 weeks per calendar year
20 years and beyond	5 weeks per calendar year

"...

"If you are a salaried employee, any unused vacation expires on December 31 and may not be carried forward, subject to state law exceptions."

At the time of his discharge on April 8, Tessicini had used only one day of vacation in calendar year 2005. Pursuant to its vacation pay policy, when EDS discharged Tessicini, it did not pay him for any part of his [***4] unused vacation time. On May 5, 2005, Tessicini filed a written complaint with the Attorney General's fair labor division, alleging that EDS owed him vacation payments under the Wage Act. ⁴ The Attorney General issued a citation that, as amended, required payment of \$ 1,799.70 to Tessicini, and assessed a civil penalty of \$ 3,490 for intentional failure to make timely payment of wages. EDS appealed from the citation to DALA, which issued a written decision affirming the citation, but calculating the payment owed to Tessicini as \$ 1,970.95. ⁵ EDS then [**638] sought review of DALA's order in the Superior Court pursuant to *G. L. c. 30A, § 14*. Ruling on EDS's motion for judgment on the pleadings, a judge in the Superior Court denied the motion and affirmed DALA's decision. EDS appealed, and we granted its application for direct appellate review.

4 The fair labor division was then known as the fair labor and business practices division.

5 The payment to Tessicini was calculated by prorating his five weeks of vacation per year over the fourteen weeks he had worked, and subtracting the day of vacation he actually took, requiring EDS to pay his salary for 5.75 vacation days. EDS does not challenge the [***5] figure arrived at by DALA as to that payment. EDS does argue, in a short footnote and without citation, that there is no basis for the civil penalty assessed. The footnote does not rise to the level of appellate argument, and we deem the argument waived. See

Commonwealth v. Lydon, 413 Mass. 309, 317-318, 597 N.E.2d 36 (1992), citing *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 921 (1975).

Discussion. Pursuant to *G. L. c. 30A, § 14 (7) (c)*, EDS challenges DALA's decision affirming the Attorney General's citation, and the citation itself, as being based on an error of law. We review questions of law in administrative decisions de novo. *Belhumeur v. Labor Relations Comm'n*, 432 Mass. 458, 463, 735 N.E.2d 860 (2000), cert. denied, 532 U.S. 904, 121 S. Ct. 1227, 149 L. Ed. 2d 137 (2001).

The Wage Act provides in pertinent part:

"Every person having employees in his service shall [*66] pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week . . . ; and any employee discharged from such employment shall be paid in full on the day of his discharge The word 'wages' shall include any holiday or vacation payments [***6] due an employee under an oral or written agreement. . . .

"...

"No person shall by a special contract with an employee or by any other means exempt himself from this section" (emphasis added).

G. L. c. 149, § 148. The parties offer differing interpretations of these statutory provisions. EDS argues that because "vacation payments" under the Wage Act's partial definition of "wages" are only those "due" under the terms of an oral or written employment agreement, the

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agreement may restrict or limit an employee's right to those payments without violating the Act's "special contracts" clause. Applying that interpretation to this case, EDS claims that under the language of § 148, no payment is "due" Tessicini "under [the] written agreement," *id.*, where its policy explicitly provides that employees leaving EDS on a voluntary or involuntary basis will not be paid for unused vacation time. The Attorney General, in turn, argues that, once Tessicini had accumulated vacation time according to the vacation pay policy, it became "due" under the definition of "wages," and therefore constituted "wages earned," which § 148 mandates must be paid in full on the day of his discharge; the Attorney [***7] General considers the portion of EDS's vacation pay policy denying payment for unused vacation time to constitute an unenforceable "special contract" under the "special contracts" clause of the statute.

In *EDS I*, which concerned an earlier version of the EDS vacation pay policy that was worded slightly differently, the same parties offered the same interpretations of the Wage Act that they present here. *EDS I*, 440 Mass. at 1020-1021. At that time, EDS's policy stated, "If you leave the company, you do not receive vacation pay for unused vacation time" (emphasis added). *Id.* at 1020. Construing the policy against EDS as the drafter, we [**67] [***639] concluded that the policy reasonably could be read to require forfeiture of unused vacation time only for employees who voluntarily left employment. *Id.* at 1021. Because the employee in *EDS I* was involuntarily terminated, we did not reach the interpretive question whether the Wage Act permits an employer not to pay an employee for unused vacation time when he or she is involuntarily terminated. *Id.* at 1021-1022. Following *EDS I*, EDS modified the wording of its policy to make clear that employees leaving involuntarily also forfeit unused vacation time. This [***8] case, arising under the modified policy, presents the question we earlier left open.

As EDS and the Attorney General recognize, the critical phrase in § 148 is the partial definition of "wages": "The word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." Given its express reference to what is "due" to the employee under an "agreement," we begin with a review of the vacation pay policy itself. As the Superior Court judge noted, there are contradictions in the policy. While the policy does state, in connection with its provision refusing payment for unused vacation time if an employee leaves or is terminated, that "vacation time is not earned," the structure of and other language in the policy indicate otherwise. The policy states that employees are eligible for "vacation pay" (emphasis added) based on the number of hours worked each week, and, after the first year, ties the number of paid vacation

weeks for which an employee is eligible to the number of years the employee "ha[s] worked" for EDS. The clear import of these provisions is that paid vacation at EDS is earned.

Against this background, we turn to the interpretive task [***9] at hand, namely, the meaning of § 148. We do not do so in a vacuum. In 1999, pursuant to the Attorney General's exclusive authority to enforce G. L. c. 149, the Attorney General issued Advisory 99/1, an advisory regarding the Wage Act's treatment of employers' vacation policies.⁶ The advisory states:

"Employers who choose to provide paid vacation to [**68] their employees must treat those payments like any other wages under [the Wage Act]. . . . Like wages, the vacation time promised to an employee is compensation for services which vests as the employee's services are rendered. Upon separation from employment, employees must be compensated by their employers for vacation time earned 'under an oral or written agreement.'" *Id.* at 1.

In a section titled "No Forfeiture of Earned Vacation Time," the advisory states:

"Since [the Wage Act] provides for the timely payment of all wages earned, an employer may not enter into an agreement with an employee under which the employee forfeits earned wages, including vacation payments. Examples of these agreements are vacation policies that condition the payment of vacation time on continuous employment [**640] or that require that employees provide notices to quit. [***10] Employees who have performed work and leave or are fired, whether for cause or not, are entitled to pay for all the time worked up to the termination of their employment, including any earned, unused vacation time payments." *Id.* at 2.

The advisory further provides that an employer may require employees to "use all of their accumulated vacation time by a certain period of time or lose all or part of it," but that:

"Under such policies, the employer must provide adequate prior notice of the policy to employees and must ensure that employees have a reasonable opportunity to use the accumulated vacation time

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within the time limits established by the employer. Otherwise, a cap on accrual or a 'use it or lose it' policy may result in an illegal forfeiture of earned wages." *Id.* at 3.

Finally, the advisory provides that, unless another [*69] schedule is specified in the agreement, vacation time is earned according to the time period in which the employee actually works:

"For example, if an employee is to receive twelve vacation days 'in a year,' and the employee voluntarily or involuntarily terminates his or her employment after ten months . . . the employee would be entitled to ten vacation days . . . [***11] . . ." *Id.* at 3-4.

6 The Attorney General's enforcement authority is granted by *G. L. c. 23, § 3 (b)*, which reads in relevant part:

"Notwithstanding any general or special law to the contrary, the attorney general shall have exclusive authority to conduct field investigations, inspections, and civil and criminal prosecutions with respect to, and otherwise enforce, said chapters 149 and laws pertaining to wages, hours and working conditions . . ."

When Advisory 99/1 was issued, substantially similar language was codified at *G. L. c. 23, § 1 (b)*, as appearing in St. 1996, c. 151, § 112.

The duty of statutory interpretation is for the courts, to be sure, but "[i]nsofar as the Attorney General's office is the department charged with enforcing the wage and hour laws, its interpretation of the protections provided thereunder is entitled to substantial deference, at least where it is not inconsistent with the plain language of the statutory provisions." *Smith v. Winter Place LLC*, 447 Mass. 363, 367-368, 851 N.E.2d 417 (2006) (discussing Attorney General advisory interpreting *G. L. c. 149, § 148A*). See *Felix A. Marino Co. v. Commissioner of Labor & Indus.*, 426 Mass. 458, 460, 689 N.E.2d 495 (1998) (deferring to commissioner [***12] in interpreting ambiguous term in *G. L. c. 149, § 26*).

The Wage Act does not require employers to provide their employees with paid vacation. As the advisory reflects, however, the Attorney General interprets the Wage Act to mean that when an employee does provide for paid vacation and an employee is entitled to paid vacation under the terms of an employment agreement, the entitlement is another form of compensation, and becomes "due" day by day as the employee performs his or her duties. ' It can be lost by disuse, but if an employee is "discharged from . . . employment," the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be "paid in full on the day of his discharge." *G. L. c. 149, § 148*.

7 The judge emphasized the fact that vacation time under EDS's policy is "based on the number of full calendar years [the employee has] worked for EDS," in holding that vacation time was "earned." Although that fact supports the conclusion that EDS views vacation time as compensation for work done, it is not necessary to the outcome. The key point, as the Attorney General's 1999 advisory states, is that "vacation time promised [***13] to an employee is compensation for services which vests as the employee's services are rendered." Advisory 99/1, at 1.

[*70] EDS argues that the Attorney General's interpretation of § 148 is unreasonable for several reasons. First, EDS asserts that "the Wage Act is merely the method by which private agreements regarding vacation policies may be enforced," [***641] and therefore that the provision of the Wage Act dealing with vacation payments as "wages" comes into play only where an employer violates its own policy. We do not agree. The Wage Act is intended to protect employees and their right to wages. See *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698, 703, 831 N.E.2d 304 (2005); *Boston Police Patrolmen's Ass'n v. Boston*, 435 Mass. 718, 720, 761 N.E.2d 479 (2002) (clear purpose of Wage Act is to prevent unreasonable detention of wages). See also *Cumpata v. Blue Cross Blue Shield of Mass., Inc.*, 113 F. Supp. 2d 164, 168 (D. Mass. 2000) (Wage Act "meant to protect employees from the dictates and whims of shrewd employers"). As its "special contracts" clause recognizes, the Wage Act would have little value if employers could exempt themselves simply by drafting contracts that placed compensation outside its bounds -- as EDS [***14] attempted to do, when it stated that "vacation time is not earned."

EDS also contends that the legislative history of the Wage Act reveals a clear intent not to require vacation payments on termination unless the particular employment agreement so stipulates. The language in the Wage

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Act partially defining "wages" and addressing vacation payments was added in 1966. St. 1966, c. 319. EDS points out, correctly, that 1966 House Doc. No. 199, proposing to add to § 148 the language, "[t]he term 'wages' shall include any holiday or vacation payments due an employee" was initially rejected, and then was accepted with the modifying language "under an agreement oral or written" inserted. See 1966 House J. 1211-1212, 1441. Contrary to EDS, we derive no clear guidance from this sparse historical record. The addition of the modifying phrase may well have been considered necessary to clarify that the "holiday or vacation payments" amendment to the Wage Act did not create an independent statutory duty to provide paid holiday or vacation time, or that an employer could provide for paid holiday or vacation benefits to its employees in oral as well as written employment agreements. Certainly, this legislative [***15] history in itself does not evince a clear intent to allow employers free rein to deny or condition earned "vacation payments" in any [*71] way they choose, so long as they include the language to do so in an employment agreement.

EDS further argues that the Attorney General's position is incompatible with the policy, included within the same advisory, that an employer may require employees to "use all of their accumulated vacation time by a certain period of time or lose all or part of it." Advisory 99/1, at 3. In EDS's view, this position shows that the Attorney General did not consider entitlement to paid vacation time to be the equivalent of earned wages, or else it could not be lost if unused. However, as quoted previously, the advisory permits loss of accrued vacation

time only where the employee has a reasonable opportunity to use (and be paid for) that time. *Id.* The Attorney General has therefore adopted a consistent view that an employee earns, by his or her service, the right to take paid vacation; the employee may lose the right through voluntary nonuse, but if an employer interferes with the employee's ability to use it, for example by discharging the employee, the employer must [***16] pay the value of the earned vacation.

The Attorney General's interpretation is not the only meaning that could be attached to the phrase "vacation payments due . . . under an [employment] agreement" in § 148. For example, the term "vacation payments" could refer exclusively to payment for vacation already taken, and not include payment for unused vacation time at termination. However, the [**642] Attorney General's reading of § 148 is a reasonable one, at least as applied to an employee who, like Tessicini, has earned and is entitled to paid vacation time under the terms of his employment agreement and who is involuntarily "discharged." Accordingly, we defer to her interpretation. See *Smith v. Winter Place LLC*, 447 Mass. at 367-368; *Felix A. Marino Co. v. Commissioner of Labor & Indus.*, 426 Mass. at 461 (deferring to implementing agency's definition where statutory term was "ambiguous" and "fairly debatable"). *We do not reach the question whether the Wage Act requires an employee who leaves a job voluntarily, with earned vacation time unused, to be paid for that earned and unused vacation time.*

Judgment affirmed.

Brian Parow, individually and on behalf of a class of persons similarly situated v. Richard Howard, in his official capacity as Mayor of the City of Malden et al.

02-1403-A

SUPERIOR COURT OF MASSACHUSETTS, AT MIDDLESEX

17 Mass. L. Rep. 149; 2003 Mass. Super. LEXIS 428

November 12, 2003, Decided

DISPOSITION: Summary judgment granted.

JUDGES: [*1] R. Malcolm Graham, Justice of the Superior Court.

OPINION BY: R. Malcolm Graham

OPINION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Brian Parow, individually and on behalf of the uniformed fire fighters in the City of Malden (City) filed this class action alleging that the defendants, Richard Howard and the City (sometimes referred to hereinafter as the Defendants), have instituted a policy of delaying payments of overtime to the Plaintiffs in violation of G.L.c. 149, Sec. 148, thus entitling them to damages and injunctive relief. The Defendants claim that any damages suffered by the affected firefighters are *de minimis*, and deny the claim that the Defendants adopted a longstanding policy of violating G.L.c. 148. After hearing, this Court grants summary judgment in favor of the Plaintiffs.

FACTS

The facts as viewed in the light most favorable to the nonmoving Defendants, as contained in the summary judgment record, are as follows.

1. Plaintiff, Brian Parow, is a uniformed fire fighter for the Defendant, City. He has worked numerous overtime shifts for the City over the three years preceding the filing of this lawsuit [*2] on April 3, 2002. He brings this case individually and on behalf of a class of persons similarly situated. The class consists of Malden fire fighters and officers who have worked overtime shifts and who have not been paid wages for their overtime in a timely fashion. The class meets all of the requirements of *Rule 23 of the Massachusetts Rules of Civil Procedure*.

2. Defendant City is a duly incorporated municipality of approximately 50,000 residents within the Commonwealth of Massachusetts, and is responsible for maintaining the Fire Department. During the period relevant to Plaintiffs' complaint, the City employed approximately 120 firefighters who were represented by IAFF Local 902 (Union). Defendant Richard Howard is the duly-elected Mayor of the City. In that capacity he is responsible for the overall administration of the Fire Department and, in particular, for requesting sufficient appropriations to pay for overtime worked by Plaintiffs.

3. Plaintiffs generally work one of two work schedules: (1) officers and fire fighters assigned to fire stations work two separate twenty-four-hour shifts every eight days; and (2) officers and fire fighters assigned to fire prevention positions [*3] work four or five shifts per week. Plaintiffs' pay period runs from Sunday through Saturday; they are paid on the Thursday following the pay period.

In compliance with *G.L.c. 48, §§ 58C and 58D*, City fire fighters are compensated overtime pay at a rate of one and one-half times their regular rate for work in excess of 42 hours in a week. Each plaintiff received earned overtime compensation during the course of his employment, and each fire fighter was compensated at the stated overtime rate.

4. As of the date of the Plaintiffs' Complaint, no fire fighter in the City was due overtime pay for the period of April 2, 1999 through April 3, 2002. However, on hundreds of occasions during the three years preceding the filing of the instant lawsuit, the City did not pay Plaintiffs for the overtime worked within seven days after the pay period during which the Plaintiffs worked overtime. In most cases, the delayed overtime payments represent four (4) to twelve (12) hours per employee.

In some cases, members of the class of Plaintiffs waited three or more months before receiving payment for overtime work. Defendants acknowledge that a limited [*4] number of fire fighters experienced delay in receiving overtime compensation, but note that all over-

time due was paid by the time the Plaintiffs filed this action.

5. Despite repeated demands made upon the Defendants by the Union, on numerous occasions during the period following the filing of the Complaint at bar, the City failed to pay Plaintiffs for their overtime within seven days after the pay period during which they worked the overtime. A detailed summary of the delays in payment of overtime compensation suffered by the Plaintiffs is set forth in the uncontested affidavit of Plaintiff, dated March 5, 2003 which is incorporated herein by reference.

DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Mass.R.Civ.P. 56(c)*; *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 465, 645 N.E.2d 1165 (1995); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); *Massachusetts Mun. Wholesale Elec. Co. v. Springfield*, 49 Mass.App.Ct. 108, 109, 726 N.E.2d 973 (2000).

B. Payment of Earned Overtime [*5] Under *G.L.c. 149, § 148*.

General Laws c. 48, § 58D, provides that fire fighters, including Plaintiffs, may not be required to work more than forty-two (42) hours per week. Moreover, *G.L.c. 48, § 58C* provides that any fire fighter who in fact works more than 42 hours on average in a week shall be paid overtime for such work, at a time not less than one and one-half his basic hourly rate of compensation, unless, in the alternative, such individual elects to be given time off in lieu of additional pay. Hence, Massachusetts law requires public employers to pay fire fighters overtime pay (one and one-half the basic hourly rate) for all hours of work in excess of 42 hours in a week.

Furthermore, *G.L.c. 149, § 148* provides, in relevant part, that an employee who has earned wages must be paid such wages within seven (7) days of the termination of the pay period during which such wages were earned.

Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him within six days of the termination of the pay period during which the [*6] wages were earned if employed for five or six days in a calendar week, or to within seven days of termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than

five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; . . .

G.L.c. 149, § 148 (emphasis added).

The Legislature enacted *Section 148* to limit "the interval between the completion of a work week and the payday on which the wages earned in that week will be paid." *American Mutual Liab. Ins. Co. v. Comm'r of Labor & Industries*, 340 Mass. 144, 145, 163 N.E.2d 19 (1959). The statute sought "primarily to prevent unreasonable detention of wages . . . The cure which the Legislature prescribed for the evil noted was to require regular and frequent payment . . . Payment long in arrears [*7] could mean . . . dissipation on payday of a large part of the accumulation sums by irresponsible employees with consequent adverse effect on family and community. The statutory remedy met this possible evil." *Id. at 147* (emphasis in original) (citations omitted). The Legislature deemed it important that employees receive wages regularly and promptly after they had been earned. *Mutual Loan Co. v. Martell*, 200 Mass. 482, 485, 86 N.E. 916 (1909).

Defendants argue that the purpose of the statute is to protect employees from themselves, not to function as a procedural mechanism by which the Plaintiffs may benefit without suffering tangible harm. They further argue, and this Court concludes, that the Plaintiffs have failed to prove that Defendants deprived fire fighters of overtime pay pursuant to a "long standing policy" that violated *G.L.c. 149, § 148*. Several hundred fire fighters were paid on time, and there is no evidence presented that the City regularly issued overtime payments to fire fighters consisting of excessively large lump sum payments. Finally, the Defendants argue that because (1) the delayed overtime payments were small (mainly [*8] consisting of four (4) to twelve (12) hours per fire fighter) and (2) all fire fighters ultimately received any compensation due them, the Defendants acted reasonably and the fire fighters' damages are minimal.

However, the clear intent of the statute is to require the timely payment of wages, *American Mut. Liab. Ins. Co.*, 340 Mass. at 147, and the Defendants acknowledge that they have repeatedly failed to do so with respect to Plaintiffs' overtime wages. Section 150 of *G.L.c. 149* sets forth a limited number of defenses that an employer may raise to avoid liability thereunder. Late payment is not among those defenses. Defendants could only avoid liability by showing that they had actually paid Plaintiffs'

earned overtime wages in the time permitted under *Section 148*. The Defendants cannot meet this standard.

Moreover, there is no support, factually or legally, for the Defendants' *de minimis* argument. First, a failure to pay Plaintiffs' earned overtime wages for months is never *de minimis*. Second, the statute does not provide such a defense. Rather, the statute mandates prompt payment of wages in the time permitted, regardless of the amount.

In the case at [*9] bar, Defendants have consistently violated *G.L.c. 149, § 148*, by failing to pay Plaintiffs their earned overtime wages within seven days of the termination of the pay period in which they worked the overtime. Moreover, Defendants have knowingly violated the statute. Even after the case at bar was filed, Defendants failed to pay the Plaintiffs for overtime worked within the period required by statute.

C. DAMAGES

Plaintiffs contend that pursuant to *G.L.c. 149, § 150*, a Court finding of a violation of *Section 148* mandates an award of treble damages plus attorneys fees and costs. Defendants argue that whether such damages are appropriate is determined by the court's discretion. Pursuant to *G.L.c. 149, § 150*, Plaintiffs claiming to be aggrieved by a violation of *§ 148* may prosecute an action for damages, including an award of treble damages, "for any loss of wages and other benefits" and attorneys fees and costs:

Any employee claiming to be aggrieved by a violation of section one hundred and forty-eight . . . may . . . institute and prosecute . . . a civil action for injunctive relief and any damages [*10] incurred, including treble damages for any loss of wages and other benefits. An employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of the litigation and reasonable attorney fees.

Indeed, some Courts have interpreted the language in *§ 150* to require the award of treble damages, attorneys fees and costs, See *Gibbs v. Archie*, 2002 Mass.App.Div. 205 (2000); *Bollen v. Camp Kingsmont*, 2000 Mass.App. Div. 56 (2000); *Chiappetta v. Lyons*, 1999 Mass.App. Div. 276 (1999). However, this Court determines that whether such an award is mandatory or discretionary need not be addressed here. That issue is irrelevant be-

cause this Court concludes that, even if discretionary, treble damages are warranted. Although the actions of the Defendants cannot be described as outrageous and stemming from an evil motive, their actions were willfully indifferent to the Plaintiffs' rights.

This Court determines that damages are to be awarded to the Plaintiffs based on the interest (calculated at a rate of twelve percent per annum) earned on the overtime wages for the time period beginning when the wages [*11] were unlawfully withheld until payment was received. *G.L.c. 231, § 6C*. This interest is to be trebled pursuant to *G.L.c. 149, § 150*. Plaintiffs are also awarded the costs of litigation and reasonable attorney fees, the amount of which must be determined at a subsequent hearing.

D. Injunctive Relief

In violation of *G.L.c. 149, § 148*, Defendants have failed to pay Plaintiffs, even after this lawsuit was instituted, for earned overtime wages within seven days after the pay period in which the Plaintiffs earned the overtime. Accordingly, this Court enters an order permanently enjoining Defendants from continuing this unlawful conduct.

CONCLUSION AND ORDER

For the foregoing reasons, this Court *ORDERS* that Plaintiffs' motion for summary judgment is *ALLOWED* and enters an award for:

(a) Permanent injunctive relief, barring Defendants from continuing to violate *G.L.c. 149, § 148*;

(b) treble damages on the amount of all interest (calculated at a rate of twelve percent per annum) earned on the overtime wages for the time period beginning when the wages were unlawfully [*12] withheld until payment was received; and

(c) reasonable attorneys fees and costs and prejudgment interest.

BY THE COURT:

R. Malcolm Graham

Justice of the Superior Court

Date: November 12, 2003

Renato Souto and others similarly situated v. Sovereign Realty Associates, Ltd. et al.**Docket Number: 05-01281****SUPERIOR COURT OF MASSACHUSETTS, AT MIDDLESEX***23 Mass. L. Rep. 386; 2007 Mass. Super. LEXIS 550***December 14, 2007, Decided**

JUDGES: [*1] Thayer Fremont-Smith, Justice of the Superior Court.

OPINION BY: Thayer Fremont-Smith

OPINION*MEMORANDUM OF DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT*

Upon filing, this action was removed to the United States District Court in the District Court of Massachusetts. There, Souto sought to recover unpaid wages against Sovereign Realty Associates, Ltd. ("Sovereign") and its president, Stuart Roffman ("Roffman"), for Sovereign's alleged violations of the Fair Labor Standards Act ("FLSA"), violations of *Massachusetts General Law Chapters 149 and 151*, breach of contract, fraud, and promissory estoppel. Sovereign subsequently moved for judgment on the pleadings on portions of Count I, II, III, IV, VII and moved to strike Count II of Souto's complaint. Souto then moved to amend his complaint. The District Court allowed both of Sovereign's motions and denied Souto's motion. Consequently, all that remains before the Court is Souto's claim for unpaid wages¹ under the Massachusetts Wage Act, *G.L.c. 149, §148*, as asserted in Count I of Souto's complaint.²

¹ These encompass regular and overtime wages, as well as compensation for unused vacation, personal, and sick time.

² The pleadings subsequent to the complaint [*2] were filed in the Federal District Court, so are not docketed in this case. The file of this case, however, does contain a copy of the summary judgment pleadings, which are referenced in this memorandum.

BACKGROUND

The following facts, taken largely from a Memorandum issued by the United States District Court in the District Court of Massachusetts form the basis for Souto's action. Souto worked as a maintenance repair-

man for Sovereign from 1994 until July 3, 2002. In 1998, Sovereign agreed, through Roffman, to sponsor Souto's Application for Labor Certification. Thereafter, Roffman forced Souto to perform tasks beyond the duties of his job, including wearing a pager twenty-four hours a day, seven days a week and performing Roffman's personal chores. Roffman and other Sovereign managerial employees treated Souto poorly, called him names, and humiliated him in front of other Sovereign employees. As a result of this treatment, Souto contacted the Massachusetts Division of Employment and Training. On July 3, 2002, Sovereign terminated Souto's employment. Souto filed this action with the Court on April 13, 2005.

DISCUSSION

Summary judgment is appropriate where there is no genuine issue of [*3] material fact and the moving party is entitled to a judgment as a matter of law. *Mass.R.Civ.P. 56(c); Cassesso v. Comm'r of Corr.*, 390 *Mass. 419, 422, 456 N.E.2d 1123 (1983); Cmty. Nat'l Bank v. Dawes*, 369 *Mass. 550, 553, 340 N.E.2d 877 (1976)*. The moving party must affirmatively demonstrate that there is no genuine issue of material fact on each relevant issue. *Pederson v. Time, Inc.*, 404 *Mass. 14, 17, 532 N.E.2d 1211 (1989)*. A "material fact" is one that might affect the outcome of the suit under the applicable law. *Mulvihill v. The Top-Flite Golf Co.*, 335 *F.3d 15, 19 (1st Cir. 2003)*. "Genuine" means that the evidence would permit a reasonable fact finder to resolve the point in favor of the nonmovant. *Id.*

If the moving party does not bear the burden of proof at trial, it must either: 1) submit affirmative evidence negating an essential element of the non-moving party's claim; or 2) demonstrate that the non-moving party's evidence is insufficient to establish its claim. *Kourouvacilis v. General Motors Corp.*, 410 *Mass. 706, 711, 575 N.E.2d 734 (1991)*. The non-moving party may not defeat the motion for summary judgment by resting merely on the allegations and denials of its pleadings, but must set forth specific facts with affidavits, deposition testimony, [*4] answers to interrogatories, or admissions on file showing that there is a genuine issue for trial. *Mass.R.Civ.P. 56(e)*. The Court will interpret all infer-

ences in the light most favorable to the non-moving party. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 438, 646 N.E.2d 111 (1995).

G.L.c. 149, §148, in pertinent part, provides that "every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or within seven days of the pay period during which the wages were earned if such employee is employed seven days in a calendar week." The Massachusetts legislature enacted this statute "to limit 'the interval between the completion of a work week and the payday on which the wages earned in that week will be paid.'" *Parow v. Howard*, 17 Mass. L. Rptr. 149, 150 (Mass.Super. 2003) [17 Mass. L. Rptr. 149] (quoting *American Mutual Liab. Ins. Co. v. Comm'r of Labor & Industries*, 340 Mass. 144, 145, 163 N.E.2d 19 (1959)) [11 Mass. L. Rptr. 52]. In furtherance of this purpose, the Massachusetts Legislature also [*5] enacted *G.L.c. 149, §150*, which authorizes an aggrieved employee to bring a civil action within three years against an employer who fails to comply with the requirements of *G.L.c. 149, §148*.

I. Regular Wages

Souto alleges that Sovereign represented to the Government in his Application for Labor Certification that it was paying him \$ 15.53 per hour. It is this allegation which serves as the basis for Souto's claim for unpaid regular wages. In its motion for summary judgment, Sovereign argues that it was Souto's immigration attorney that made this representation to the government, and that Souto has failed to show that Sovereign agreed to or was even aware of this representation. Souto, however, has not set forth specific facts with affidavits, deposition testimony, answers to interrogatories, or admissions on file showing that Sovereign represented to the Government in his Application for Labor Certification that it was paying him \$ 15.53 per hour. In fact, Souto demonstrates through his own deposition testimony that he understood that Sovereign would pay him \$ 10.00 per hour and that Sovereign refused to pay him more. Accordingly, the Court ALLOWS Sovereign's motion with regard to Souto's [*6] claim for unpaid regular wages.

II. Overtime Wages

In addition to regular wages, Souto seeks recovery of overtime wages. Souto alleges that he worked on average 55-60 hours per week, but was never paid for more than 40 hours per week. Recognizing that the District Court dismissed as time-barred his claim for wages at the overtime premium under *G.L.c. 151, §1A* (which has a two-year statute of limitations), Souto claims that he is

still entitled to recover his regular wages for all hours worked under *G.L.c. 149, §148*, for which the statute of limitations is three years. In its motion for summary judgment, Sovereign argues that *G.L.c. 151, §1A*, which provides for "time and one-half" for hours worked over forty hours per week, is the sole vehicle for recovery of overtime wages; as such, Souto is precluded from recovering overtime wages at any rate, premium or regular. To the contrary, Massachusetts courts have recognized that wages at the employee's regular rate for time worked in excess of his normal hours are "wages" nonetheless for purposes of *G.L.c. 149, §148*. *Parow v. Howard*, 17 Mass. L. Rep. 149, 2003 WL 23163114, *3 (Mass.Super.) (allowing recovery of overtime wages under *G.L.c. 149, §148*); *Charles v. Roads Corp.*, 11 Mass. L. Rptr. 52, 1999 WL 1203754, *3 (Mass.Super.) [*7] (finding salary owed to employee for hours worked is an hourly wage regardless of characterization as overtime or otherwise).

Additionally, Sovereign argues in its motion for summary judgment that regardless of whether overtime wages are recoverable under *G.L.c. 149, §148*, Souto did not work additional hours, and that Souto's inability to state when he actually worked overtime precludes recovery. However, Souto's allegation that he worked on average 55-60 hours per week is supported by his own deposition testimony and an affidavit submitted by his former supervisor, Lawrence Dorsey ("Dorsey"). Thus, there is a genuine issue of material fact as to the number of hours that Souto worked. Accordingly, the Court DENIES Sovereign's motion with regard to Souto's claim for unpaid regular wages.

Sovereign also argues that the record conclusively establishes that Souto agreed to work for \$ 400 per week regardless of the number of hours he actually worked. However, there is no evidence in the record that Souto agreed to work for \$ 400 per week regardless of the number of hours he actually worked.

III. Vacation, Personal, and Sick Time

In addition to regular and overtime wages, Souto seeks to recover [*8] compensation for unused vacation, personal, and sick time. In his complaint, Souto alleged that he is owed wages for five sick days, five personal days, and four weeks of vacation per year. Sovereign argues in its motion for summary judgment that Souto's claim for compensation for unused vacation time under *G.L.c. 149, §148* is time-barred and, in the alternative, that there is no statute or regulation that requires an employer to grant his employee vacation time. It further contends that an employee has no right to bank such vacation time.

The first of these arguments is without merit, as the timeliness of Souto's claim under *G.L.c. 149, §148* has already been determined in Souto's favor by the Federal District Court. And while there is no Massachusetts statute or regulation that requires an employer to grant his employee vacation time, "employers who choose to provide paid vacation to their employees must treat those payments like any other wages under *G.L.c. 149, §148*." Office of the Attorney General, "Advisory 99/1, An Advisory from the Attorney General's Fair Labor Practices Division on Vacation Policies" (1999) (citing *Massachusetts v. Marash*, 409 U.S. 107 (1989)). In Massachusetts, [*9] employers must compensate employees for vacation time earned under an oral or written agreement upon separation from employment. *G.L.c. 149, §148*.

Souto maintains, through his own deposition testimony and Dorsey's affidavit, that employees of Sovereign would customarily receive sick, personal, and vacation days as a benefit of their employment. Souto's deposition testimony and Dorsey's affidavit also form the basis for Souto's claim that he took very little time off while working for Sovereign. It would seem that Sovereign is in agreement as to the existence of a vacation policy, as evidenced by the deposition testimony of both Roffman and Lee Torrey ("Torrey"), a Sovereign employee. However, there is no agreement between the parties as to the actual terms of the policy. This disagreement, together with the dispute as to how much vacation time Souto took, is sufficient to create a genuine issue of material fact. Accordingly, the Court DENIES Sovereign's motion with regard to Souto's claim for compensation for unused vacation time.

As to Souto's claim for compensation for unused personal and sick time, *G.L.c. 149, §148* provides only for recovery of accrued wages, vacation, and commission [*10] to be paid an employee. *G.L.c. 149, §148*. As such, Souto is not entitled to recover compensation for personal and sick time under this statute absent express agreement. *Dickens-Berry v. Greenery Rehabilitation and Skilled Nursing Ctr.*, 1993 Mass. Super. LEXIS 57, 1993 WL 818564 (*Mass.Super.*). Because Souto has failed to produce evidence of any such agreement, the Court ALLOWS Sovereign's motion for summary judgment with regard to Souto's claim for compensation for unused personal and sick time.

ORDER

After hearing and consideration of the parties' written submissions, the Court ALLOWS Sovereign and Roffman's motion for summary judgment as to the remaining count (Count I) with regard to Souto's claim for regular wages and compensation for unused personal and sick time but DENIES Sovereign and Roffman's motion for summary judgment as to the remaining count (Count I) with regard to Souto's claim for overtime wages at his regular hourly rate and compensation for unused vacation time.

Thayer Fremont-Smith

Justice of the Superior Court

Dated: December 14, 2007

From: Blau, Gary on behalf of DOR DLS Law
Sent: Friday, June 11, 2010 11:31 AM
To: 'Smith, Diane'
Cc: Nelson, Andrew S.
Subject: 2010-750 - Marlborough - Payment of wages
Diane:

Many cities and towns face this same dilemma, although most will at least appropriate amounts expected to become due during the fiscal year. Some municipalities may also appropriate funds into special purpose accounts that do not close out at year's end and will allow for payment of these obligations even if insufficient funds are available to cover them in the annual line items. Note also that House Bill 1978 has been ordered to a third reading in the House of Representatives and if enacted would add a new section 13D to chapter 40 of the General Laws, authorizing a reserve fund for accrued liabilities for compensated absences such as sick and vacation buybacks. However, for purposes of this response I will assume that when at least some employees leave the employ of the city, the employee becomes entitled to some buy back benefits. If the employee voluntarily leaves, M.G.L. c. 149, §148 requires that the employee be paid in full on the following regular payday, and if the employee is terminated involuntarily, he is entitled to payment in full on the day of his discharge. Failure to comply with the requirements of that provision may subject the particular city officials responsible for the delay to criminal liability, unless the payment was prevented through no fault of such officers, and may also subject the city to civil liability. Failure to comply could easily lead to a triple damage award against the city under M.G.L. c. 149, §150. You may want to discuss the repercussions of failure to pay within the timeframes of the statute and whether that would subject municipal officials or the municipality to penalties with your city solicitor, or the attorney general, who has the responsibility to prosecute criminal complaints against employers not complying with the requirements of this law.

That being said, it is not clear that the benefit must be paid immediately upon the discontinuance of employment. This may depend on how the buyback is structured by ordinance or collective bargaining agreement. A past practice of short delays in paying the obligation may in the case of collective bargaining employees have a binding application, such that the obligation to pay does not arise as of the next pay period. That should also be discussed with your city solicitor and possibly the Attorney General's office, which enforces the prompt payment of wage law. In addition to the state law, I understand the Federal Fair Labor Standards Act may have some application if payment is delayed. You may need to consult the the US Department of Labor, Wages and Hours Division to ascertain whether you have any obligations under that statute to pay within any particular time period.

If no accommodation can be made to delay payments to a time when the city council may make transfers, there may be a technical inability for the city to pay, depending on whether there is sufficient unencumbered funds in the salary accounts to pay the benefits. For example, assuming the person leaves the city's employ early in the fiscal year, there may be sufficient unencumbered funds to cover the obligation at the time, or at least time for the city to take steps either to increase the appropriation by transfer or make staff reductions to free up sufficient funds to complete the year. If the employee leaves service late in the year after all other funds have either been committed or paid, the department head and auditor may be faced with the dilemma. There is no statutory provision allowing the city to pay the obligations in the absence of an appropriation to fund it. Compare this with statutes providing authority to pay without appropriation for unemployment benefits (M.G.L. c. 151A, §14A), group insurance premiums (M.G.L. c. 32B, §3), final court judgments and Division of Industrial Accident awards (M.G.L. c. 44, §31). Thus, as city auditor, you may have to decide whether to withhold payment of the buy back until an appropriation has been made by transfer or otherwise and face potential criminal punishment or treble damage civil liability for the city, or to pay the benefits in the absence of a sufficient unencumbered appropriation, in violation of the municipal finance law.

Again, I recommend you consult with your city solicitor and the attorney general's office to determine a solution to this apparent conflict in the law.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
blau@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Smith, Diane [mailto:dsmith@marlborough-ma.gov]
Sent: Thursday, June 10, 2010 3:34 PM
To: DOR DLS Law
Cc: Nelson, Andrew S.
Subject: Payment of wages

The City of Marlborough's budget is approved by line item. These line items are very detailed within each department, ie. City Auditor, Sick Leave Buy Back, Longevity, etc. It has been recommended by DOR to adopt an abbreviated budget format for all departments. This was accepted for a couple of years but the City Council felt that they did not have enough control so we reverted back to the old ways.

My dilemma is this.....when employees leave they are entitled to accrued vacation and sick leave buy back. In the past the employee was paid what was due and be on their way. Sometimes the individual line items would be thrown into deficit because the departure was unexpected. A transfer request would be sent down on the next agenda and eventually approved. This year the Council made it known that they did not want any payroll line items going into deficit for any reason. They wanted to see the transfer request beforehand, not after the fact. Some have stated that I am breaking the law for allowing this to happen.

I need input as how to better handle this. Because of the Council's wishes we have not been paying exiting employees what they are owed until a transfer has been approved. This is a huge headache and can take up until 2 months!. The Personnel Director just brought to our attention that we are violating Massachusetts's wage and hours laws. We have been lucky so far that we haven't been sued.

Any help would be greatly appreciated!

Diane Smith
City Auditor
City of Marlborough

From: Blau, Gary
Sent: Thursday, December 09, 2004 10:20 AM
To: 'D Thibaudeau Town of Dudley Account'
Subject: Sick Leave Buyback for Elected Officials
Deborah A. Thibaudeau
Town Accountant
Town of Dudley

Re: Sick Leave Buyback for Elected Officials
Our File 2004-483

The issue of application of sick leave buyback, or even just sick leave, to elected officials is not specifically covered in the general laws. GL c. 41, §111B provides a minimum 15 days of sick leave annually to foremen, laborers, workmen & mechanics in any community that accepts the statute, but it does not apply to elected officials. GL c. 40, §21A specifically authorizes a town by by-law to establish the days of leave without loss of pay, including sick leave, for any or all employees, except those appointed by the school committee. While elected officials are sometimes considered town "employees", we think there is some doubt that any such by-law could cover elected officers, as more fully discussed below.

The compensation of elected officials must be fixed by town meeting vote annually under GL c. 41, §108. Unlike other town employees, however, the right to receive a salary as an elected official has sometimes been considered an incident of holding the office and elected officials are not expected to work a specific number of regular hours to receive their pay. See Bell v. Treasurer of Cambridge, 310 Mass. 484, 486-7 (1941) and cases cited. Nevertheless, failure to perform the duties altogether has been held to bar receipt of compensation. Bell, supra at 486-9 (where mayor was unable to perform his duties while incarcerated). In other cases, temporary absence of a public official due to vacation or sickness did not bar receipt of salary during the period of absence. See Paris v. Hiram, 12 Mass. 262 (1815), Barre v. Greenwich, 18 Mass. 129 (1822) & Bell, supra. Thus, sick leave entitlement could be considered superfluous for an elected official.

Sick leave buyback for elected officials is an even more questionable benefit, given that GL c. 41, §108 requires that the salary be fixed annually by vote of town meeting. Payment of additional amounts as a form of bonus for not taking sick leave in future years would appear to be in violation of that provision. Given that elected officials do not appear to be entitled to sick time, accumulation of sick time would also appear to be invalid. Indeed, a powerful argument may be made that sick leave buyback is a violation of GL c. 44, §31 (no department may incur an expense in excess of appropriation) unless an adequate appropriation to cover the expense is made in the year in which the sick time is earned. However, sick leave buyback seems a pervasive practice across the commonwealth, and an argument can be made that to the extent the town has authorized the program by by-law, the town may incur an obligation to pay even in the absence of an appropriation. See Lynn Redevelopment Authority v. City of Lynn, 360 Mass. 503 (1971)(mayor and city council acting together could bind the city beyond the appropriation because mayor and council not a department of the city). If the town has no sick leave buyback bylaw that would clearly cover elected officials, then I believe that any buyback for elected officials would not be appropriate.

Gary A. Blau, Tax Counsel
Property Tax Bureau
Division of Local Services
Massachusetts Department of Revenue
(617) 626-2400
blau@dor.state.ma.us

-----Original Message-----

From: D Thibaudeau Town of Dudley Account
Sent: Tuesday, September 14, 2004 10:55 AM
To: gary blau
Cc: ajames whitney
Subject: legal opinion

Hello Gary,

Deb Wagner suggested I contact you.
Our Town Administrator, A. James Whitney, would like a legal opinion in writing regarding Sick time buy back for elected officials.

In speaking with Deb Wagner, she notified us that elected officials do not receive sick time buyback unless it is setup by a Town by-law.
(This would, in effect, double pay an elected official - and the Town Administrator wanted to be sure this was legal).

Thank you,

Deborah A. Thibaudeau,
Town Accountant
Town of Dudley
40 Schofield Avenue
Dudley MA 01571
508-949-8016 << File: >> << File: >> << File: >>

From: Blau, Gary on behalf of DOR DLS Law
Sent: Monday, July 07, 2008 11:05 AM
To: 'Jennifer Luiz'
Subject: 2008-246 - Buyback payment for employee who's salary is voted at Town Meeting
Jennifer:

Based on your inquiry and the later Faxes sent, it appears that your question is very fact dependent. Thus, we recommend that you seek guidance from town counsel or labor counsel on these issues. However, we can provide some general guidance about the applications of M.G.L. c. 41, §§4A & 108. The former provision allows a municipal board to appoint one of its members to a position subject to oversight by that board, provided town meeting authorizes such appointment for each year of service, and fixes the compensation for the position. M.G.L. c. 41, §108 provides the mechanism for town meeting to fix the salaries of elected officials.

Based on your description of the buyback program for non-union employees, which piggybacks on the union contracts pursuant to the terms of the Employee Benefits statement provided, the town generally allows non-union employees to buyback unused vacation and personal leave time at the end of the fiscal year. As I understand the procedure, since qualifying employees will have been paid the full salary or wages for the year, the amount for the buyback is placed in the line item for each position in the detailed working budget, and then voted by town meeting as part of a lump sum personal services amount in each departmental budget. The actual amounts paid to the employees is a lower amount than the line item amount proposed for the position, in the case that no vacation or personal time is used and that amount has to be bought back.

That additional amount is placed in the employee position line items, but not the elected positions, because the elected officials receive the full amount voted by town meeting in the separate article voted for them under M.G.L. c. 41, §108. Thus, the former Chair of the Board of Assessors did not get any buyback. Although the former chair was a full-time assessor, the salary was budgeted as a single amount in the elected officer's article. For Fiscal Year 2001 the salary was broken up into two salaries, one for the elected chair and the other for an assistant assessor, both paid to the former Chair of the board, but town counsel ruled that this was unlawful under the town by-laws and the conflict of interest law and the salary was restored as a single item in the elected officer article thereafter, until FY2007. That year was a transition year when the former chair retired and a new chair took his place in April 2007.

Based on the uncertainty of who the new chair would be, the board and finance committee suggested that the article fixing elected officer's salaries be modified. As voted in June 2006, the chairman's salary was reduced about 25% to reflect leaving office about 3/4 through the fiscal year. Two member salaries were voted at about \$4,000 each and a third member's salary was voted at about \$1000, reflecting service in an elected position for 1/4 of the year by a newly elected member. An additional \$8750 was budgeted for an assistant assessor for the balance of the fiscal year upon the retirement of the chair. In January 2007, in anticipation of the retirement of the full-time assessor, the board appointed its secretary to a full-time assessor position beginning in April 2007, which was compensated from the assistant assessor line for the balance of the fiscal year. The secretary also ran for and was elected to the board and was apparently voted its chair.

M.G.L. c. 41, §4A prohibits a board from appointing one of its members to a position under that board without disclosure to annual town meeting and town meeting fixing the salary for the position. That restriction did not apply for FY2007, since the former board appointed its secretary to the position. In FY2008 and FY2009 the town returned to budgeting for the Assessors by voting a full-time assessor salary for the chair and two part-time assessors salaries. The intent, apparently, was to have the elected chair serve on a full-time basis. M.G.L. c. 41, §4A is also not at issue in those years, since the election of a chair by the board, albeit at a higher fixed salary, is specifically permitted by settled law. See M.G.L. c. 41, §24 & *Teed v. Randolph*, 347 Mass. 652 (1964). Thus, it would appear that at least for FY2008 and FY2009, the chair of the board would be entitled only to the salary provided in the article for the Chair of the Board and would not be entitled to any additional vacation or personal leave buyback. Indeed, you have indicated that no additional funds were appropriated to cover the requested buyback.

If the town were to budget for a separate full-time or assistant assessor position, to be appointed by the board of assessors, then appointment of the chair to such a position would require compliance with M.G.L. c. 41, §4A. That is, the town would have to annually authorize the appointment and fix the salary for the appointed position. If that were done, the appointed full-time or assistant assessor would not run afoul of the statute. See also M.G.L. c. 268A, §21A. However, based on town counsel's February 2002 opinion, it may be that such a plan would run afoul of the town's by-laws.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
blau@dor.state.ma.us

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From: Jennifer Luiz [mailto:jluiz@townofdighton.com]
Sent: Monday, June 16, 2008 8:54 AM
To: DOR DLS Law
Cc: Nancy Goulart; Tom Pires
Subject: Buyback payment for employee who's salary is voted at Town Meeting

Good Morning,

We have an issue regarding the payment of buybacks I need your opinion on.

For many years our Chairman of the Board of Assessors (elected) was also the Full time Assessor appointed by the Board of Assessors. This person never tracked his time as far as Vacation, sick, or personal time. Each year at Annual Town Meeting the Town voted his salary along with the salary of our other two members of the Board of Assessors. The Chairmans salary vote also included the wages he received as the Fulltime Assessor. For example:

On a motion of Edward Swartz that the salaries of elected Town Officials as appropriated within department Accounts be established for the Fiscal year ending June 30, 20XX.

BOARD OF ASSESSORS

Chairman \$42,112.87
Members (2) \$3,942.74 each
\$7,885.47 Total

The entire \$42,112.87 is placed in the Salary-Chairman line within the Personnel Services Total. Our Town votes the Total for Personnel Services (#50 Accounts) and Total for Expenses (#70 Accounts)

Last year the Full Time Assessor retired and the person working in the Department ran for the Elected position and won. She was voted to be the Chairman by the Board of Assesors and also appointed as the Full Time Assessor. Because she was a Full time employee for 10 years before she was appointed to the Full time position she had accumulated many hours of sick time. Once she became the appointed Full time Assessor she continued to track her hours and benefited time. We are in the process of paying BUYBACKS this week and she is requesting 98.5 hours of buyback time. Because the total voted at Town meeting is for her salary for the 52 weeks I would like to know how I can pay her for these buybacks. Is it possible to use the Year -End transfer MGL Ch.44 S. 33B? Or because it is specifically voted at Town Meeting would it have to be voted at another Town Meeting to increase her salary for the buybacks or as a prior year bill.

Going forward do you believe we should only vote the Chairmans salary at Town Meeting and create a Full Time line within the Personnel services budget that is voted at Town Meeting thereby breaking out the wages of the two positions, Elected and Appointed. This would allow her to include buyback wages within the Full time line if at the end of the year it is needed. Because, by including potential buybacks in the Chairmans voted salary I believe I technically have to pay this person the entire amount voted and if she has no buybacks at the end of the year she would be receiving extra money she wasn't entitled to.

Thank You In Advance,
Jennifer Luiz
Town Accountant
Dighton MA
508-669-6011

ROBERT D. HERRICK vs. ESSEX REGIONAL RETIREMENT BOARD & another.¹

¹ The Contributory Retirement Appeal Board is a nominal party, it has not participated in this appeal. This matter has been the subject of a prior appeal. See *Herrick v. Essex Regional Retirement Bd.*, 68 Mass. App. Ct. 187 (2007).

No. 09-P-1351.

APPEALS COURT OF MASSACHUSETTS

2010 Mass. App. LEXIS 1205

**April 13, 2010, Argued
September 10, 2010, Decided**

PRIOR HISTORY: [*1]

Essex. Civil action commenced in the Superior Court Department on March 24, 2005. The case was heard by Maureen B. Hogan, J., on motions for judgment on the pleadings. *Herrick v. Essex Reg'l Ret. Bd.*, 68 Mass. App. Ct. 187, 861 N.E.2d 32, 2007 Mass. App. LEXIS 115 (2007)

Superior Court, the judge considered it, nonetheless, for the sake of completeness. Because we agree that the statute in question does not permit the forfeiture of Herrick's pension, the denial of his application for superannuation retirement benefits was error and must be reversed. Thus, we affirm the judgment.

COUNSEL: Christopher T. Casey for Essex Regional Retirement Board. H. Ernest Stone for the plaintiff.

JUDGES: Present: Kantrowitz, McHugh, & Fecteau, JJ.

OPINION BY: FECTEAU

OPINION

FECTEAU, J. The Essex Regional Retirement Board (ERRB) appeals from a Superior Court judgment that reversed the denial of Robert D. Herrick's application for a superannuation retirement. ERRB denied Herrick's application on the ground that he had forfeited his right to a pension due to "moral turpitude" as provided in *G. L. c. 32, § 10(1)*.² A magistrate in the Division of Administrative Law Appeals (DALA) upheld that decision. The Contributory Retirement Appeal Board (CRAB) affirmed in a divided decision, the majority stating that "the behavior attendant to Herrick's resignation was moral turpitude," and finding that the phrase "without moral turpitude" could not have been intended by the Legislature to be confined to "removed or discharged" employees.³ On cross motions for judgment on the pleadings, a Superior Court judge reversed on the ground that CRAB (and the other entities [*2] before it) had committed an error of law in their interpretation of *c. 32, § 10(1)*. The judge also disagreed with the alternative ground argued by ERRB that Herrick's pension was forfeited by operation of *G. L. c. 32, § 15(4)*. Notwithstanding that this contention was raised for the first time in

² *Section 10(1)*, as amended through St. 2000, c. 123, § 24A, provides: "Right to Superannuation Retirement Allowance. Any member . . . who after completing twenty or more years of creditable service, resigns or voluntarily terminates his service, or fails of nomination or re-election, or fails of reappointment, or whose office or position is abolished, or is removed or discharged from his office or position without moral turpitude on his part, or any member who, after having attained age fifty-five, resigns, or fails of nomination or re-election, or fails to become a candidate for nomination [*3] or re-election, or fails of reappointment or is removed or discharged from his office or position without moral turpitude on his part, or any such member whose office or position is abolished, shall, upon his written application on a prescribed form filed with the board, receive a superannuation retirement allowance" (Emphasis supplied.)

³ *Section 10(1)* uses the term, "member," which is defined as an employee included in one of the identified retirement systems. See *G. L. c. 32, § 1*. We shall use the terms "member" and "employee" interchangeably.

Background. Briefly, at the time of his retirement, Herrick worked as a maintenance mechanic and custodian for the Wenham Housing Authority (Authority), and through that employment (and prior employment with the town of Hamilton) was a member of ERRB. On May 1, 2003, Herrick was charged with sexually assaulting his daughter.⁴ That same day he resigned his position

with the Authority and, on May 6, 2003, submitted an application for voluntary superannuation retirement pursuant to *G. L. c. 32, § 5*.³ On May 15, 2003, he pleaded guilty to two counts of indecent assault and battery on a child and was sentenced to two and one-half years in [*4] jail, eighteen months of which to serve.

4 He was initially charged with rape of a child with force and indecent assault and battery on a child. The rape charge was later reduced to an additional count of indecent assault and battery. Whether such charges constitute offenses of moral turpitude is not at issue.

5 There is no dispute that Herrick had more than twenty years of service and that he was over age fifty-five.

On June 27, 2003, ERRB denied Herrick's application for retirement benefits. Herrick appealed from that decision. A hearing was conducted by a DALA magistrate on July 1, 2004, resulting in a decision affirming ERRB's decision. Herrick then appealed from that decision to CRAB, which affirmed the denial of Herrick's pension application, in a two-to-one decision. Herrick then sought timely judicial review in Superior Court, where both parties filed motions for judgment on the pleadings.

Discussion. This case presents an issue of statutory construction. The standards of law applicable to the issue before us were recently summarized in *Tabroff v. Contributory Retirement Appeal Bd.*, 69 Mass. App. Ct. 131, 133-134, 866 N.E.2d 954 (2007), quoting from *Retirement Bd. of Taunton v. Contributory Retirement Appeal Bd.*, 56 Mass. App. Ct. 914, 915, 778 N.E.2d 536 (2002) [*5] (citation omitted): "Massachusetts courts give great deference to decisions of administrative agencies. An administrative agency's interpretation of a statute has long been relied on by Massachusetts courts 'because of the agency's experience, technical competence, and specialized knowledge.'" See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd.*, 421 Mass. 196, 211, 656 N.E.2d 563 (1995), quoting from Cella, *Administrative Law & Practice* § 747 (1986) ("A State administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing"). While the court recognizes that reasonable interpretations of statutes by agencies are entitled to deference, "[a]n erroneous interpretation of a statute by an administrative agency is not entitled to deference." *Woods v. Executive Office of Communities & Dev.*, 411 Mass. 599, 606, 583 N.E.2d 845 (1992). "Deference is not abdication. It does not permit a detectable 'error of law' by the agency." *Anheuser-Busch, Inc. v. Alcoholic Bevs. Control Commn.*, 75 Mass. App. Ct. 203, 209, 912 N.E.2d 1034 (2009), quoting from *Heineken U.S.A., Inc. v. Al-*

coholic Bevs. Control Commn., 62 Mass. App. Ct. 567, 572, 818 N.E.2d 191 (2004). "If an agency interpretation were to collide [*6] with the plain meaning of a statute, the agency view would have to give way." *Anheuser-Busch, supra* at 209.

"We should not disturb an administrative agency's decision unless we determine 'that the substantial rights of any party have been prejudiced' based on one of the reasons set forth in *G. L. c. 30A, § 14(7)*. The deference normally accorded to an administrative agency's decision is no longer appropriate when that agency commits an error of law, *G. L. c. 30A, § 14(7)(c)*, or its decision is unsupported by substantial evidence, *G. L. c. 30A, § 14(7)(e)*." *Tabroff, supra* at 134 (footnote omitted).

G. L. c. 32, § 10(1). We turn first to the scope of the statute's qualifying phrase "without moral turpitude." Herrick contends that it applies only to the situation where a member of a public retirement system is "removed or discharged." The basis on which ERRB denied Herrick's pension application, a determination with which CRAB agreed, is that the phrase "without moral turpitude" modifies all applications for retirement, including those submitted after a member resigns. In a comprehensive and well-reasoned decision, the Superior Court judge disagreed with this interpretation, applying general [*7] principles of statutory construction and grammatical rules; she concluded that the qualifier "without moral turpitude" applied only to those removed or discharged from employment, not to all other antecedent phrases in the statute.

As expressed in *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 686, 488 N.E.2d 401 (1986) (citations omitted): "[a] statute designed to enforce the law by punishing offenders, rather than simply by enforcing restitution to those damaged, is in the nature of a penal statute. Forfeiture of property . . . is punitive." "Penal statutes must be construed strictly 'and not extended by equity, or by the probable or supposed intention of the legislature as derived from doubtful words; but that in order to charge a party with a penalty, he must be brought within its operation, as manifested by express words or necessary implication.'" *Id.* at 686-687, quoting from *Libby v. New York, N.H. & H.R.R.*, 273 Mass. 522, 525-526, 174 N.E. 171 (1930). "We examine the statute, therefore, particularly mindful that its words are not to be stretched to accomplish a result not expressed." *Collatos, supra* at 687.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect [*8] consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). Agency expertise or policy prefer-

ence cannot alter the plain meaning of unambiguous statutory language. See especially *M.H. Gordon & Son, Inc. v. Alcoholic Bevs. Control Commn.*, 371 Mass. 584, 588-590, 358 N.E.2d 778 (1976) (courts cannot acquiesce in expedient enlargement of administrative authority or jurisdiction unsupported by statutory terms). See also *Commonwealth v. Vickey*, 381 Mass. 762, 767, 412 N.E.2d 877 (1980) ("a basic tenet of statutory construction is to give the words their plain meaning in light of the aim of the Legislature, and when the statute appears not to provide for an eventuality, there is no justification for judicial legislation"). "[W]hen the meaning of a statute is at issue, the initial inquiry focuses on the actual language of that statute. 'Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent.'" *Martha's Vineyard Land Bank Commn. v. Board of Assessors of West Tisbury*, 62 Mass. App. Ct. 25, 27, 814 N.E.2d 1147 (2004), quoting from *Pyle v. School Comm. of S. Hadley*, 423 Mass. 283, 285, 667 N.E.2d 869 (1996). [*9] "A statute is plain and unambiguous if 'virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.'" *Martha's Vineyard, supra* at 28 n.4, quoting from *New England Med. Center, Inc. v. Commissioner of Rev.*, 381 Mass. 748, 750, 412 N.E.2d 351 (1980). "A fundamental and well-established principle of statutory interpretation 'is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" *Fleet Natl. Bank v. Commissioner of Rev.*, 448 Mass. 441, 448, 862 N.E.2d 22 (2007), quoting from *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). See *Sullivan, supra*.

Turning, then, to the words of the statute, as the judge observed: "[t]he 'rule of the last antecedent' [*10] holds that, unless there is something in the subject matter, dominant purpose, or language of the statute that requires a different interpretation, 'qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote.' *Russell v. Boston Wyman, Inc.*, 410 Mass. 1005, 1006-1007, 574 N.E.2d 379 (1991), quoting [from] *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 [1st Cir. 1985]. . . . 'It is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires

a different interpretation. . . . According to (this rule) of construction a proviso or an exception is also presumed to be confined to the last antecedent.' *Moulton v. Brookline Rent Control Bd.*, 385 Mass. 228, 230-231, 431 N.E.2d 225 (1982) (citations omitted)." Thus, since the antecedent phrases of the statute are separated from the qualifier by commas, the qualifier applies only to the immediate antecedent within the same phrase that was not separated from "without moral turpitude" by a comma.

The logic of her interpretation becomes apparent [*11] when the use of the phrase "without moral turpitude" is examined in connection with the two means, provided by § 10(1), under which a member may be qualified to retire: (1) "after completing twenty or more years of creditable service," and (2) "having attained age fifty-five." In relation to the former, the situation when a member's "office or position is abolished" is immediately antecedent to the phrase "without moral turpitude" but abolishment of position is clearly unrelated to moral turpitude. This conclusion is compelled when compared to the latter "age fifty-five" retirement, since the phrase "removed or discharged from his office or position without moral turpitude on his part," is followed by the phrase "or any such member whose office or position is abolished," a situation that does not require that it be "without moral turpitude," as such condition is not included. See note 2, *supra*.

Similarly, the judge's interpretation that the phrase "without moral turpitude" relates only to "removed or discharged" is supported by her comparison of § 10(1) with § 10(2)(b1/2). As she points out, the latter section, which pertains to an application for retirement benefits from a member [*12] who resigns after ten years of service, does not contain the phrase "without moral turpitude." That "without moral turpitude" was intended to modify only "removed or discharged" is also evident from *G. L. c. 32, § 10(2)(a)*, inserted by St. 2002, c. 184, § 46, which states that "[t]he retirement board shall require the employer of any employee applying for a termination retirement allowance to certify in writing, under the pains and penalties of perjury, that one of the following circumstances applies: (1) that the employee has failed of nomination or re-election, (2) that the employee has failed of reappointment, (3) that the employee's office or position has been abolished, or (4) that the employee has been removed or discharged from his position without moral turpitude on his part." 6

6 Although § 10(2)(a) was amended by St. 2009, c. 21, § 12, that amendment, which, in effect, simply deleted the first condition, also supports our construction of § 10(1).

The Superior Court judge's decision cited, and was consistent with, the only authority on point, two opinions from the Attorney General which recognized that retirement under the threat of removal is not the equivalent of removal or [*13] discharge under *c. 32, § 10(1)* or *§ 10(2)*. See Opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 134-135 (1963); Opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 172-174 (1977). Moreover, such an interpretation is consistent with a view supported by decisions of both the Supreme Judicial Court and this court, albeit in dicta. See *Massachusetts Bay Transp. Authy. v. Massachusetts Bay Transp. Authy. Retirement Bd.*, 397 Mass. 734, 739, 493 N.E.2d 848 (1986) ("there are laws of the Commonwealth which preclude the payment of retirement benefits to certain public employees who are discharged or convicted for misconduct in office. See *G. L. c. 32, § 10(1)* [1984 ed.]"); *Brown v. Taunton*, 16 Mass. App. Ct. 614, 619 n.6, 454 N.E.2d 488 (1983) ("[w]e note . . . that the 'moral turpitude' provisions of *G. L. c. 32, § 10(1)*, do not apply since the plaintiff was not 'removed or discharged from his office'").

Threatened removal. ERRB contends additionally that Herrick's pension can be forfeited because his resignation, seen as occurring under threat of removal, amounts to constructive removal. Technically, this misapplies the concept of constructive discharge to the facts of this case since Herrick's [*14] motivation to leave his employ was not due to actions of the employer. *GTE Prods. Corp. v. Stewart*, 421 Mass. 22, 34-35, 653 N.E.2d 161 (1995). More broadly, however, ERRB seeks to extend the meaning of "removed or discharged" to be able to reach members who retire under a cloud, in the face of possible or likely removal or discharge for reasons of criminal prosecution for offenses of moral turpitude.

Addressing a similar question, the Attorney General opined "that the term 'removal or discharge' is not so broad that it sweeps within the ambit of *G. L. c. 32, § 10(2)(c)*, a resignation arguably tendered to forestall removal. It is a basic maxim of statutory construction that the words of a statute are to be read in accordance with their common and approved usage and are not to be stretched beyond their fair meaning in order to rationalize a particular result. The words 'removal' and 'discharge' connote an affirmative act by one's employer and have a common usage significantly different from the word 'resignation,' which implies an act by the employee. Indeed the difference between the terms is apparent in the terms of *G. L. c. 32, § 10*, in which the words 'removal or discharge' and 'resigns' are repeatedly [*15] used to describe different situations. Since words used in different portions of a statute are ordinarily given the same meaning throughout, it would be an anomaly of

statutory construction to extend the scope of *G. L. c. 32, § 10(2)(c)* to include resignations as well as removals, when they are made distinct by the immediately preceding language of *§ 10*." Opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 173-174 (1977) (citations omitted). The same rationale can be applied to *§ 10(1)*.

To hold otherwise, and to permit "removed or discharged" to be stretched to accommodate the kind of "constructive" removal suggested by ERRB would permit it to inquire into, evaluate, and weigh reasons that motivated the retirement of a member. Such an interpretation would invite decisions based not upon an identifiable record of proceedings that lead an employer to an objectively discernible removal of its employee, but instead upon subjective criteria that are prone to a range of ills that objective criteria are designed to prevent.

As suggested by the judge, ERRB's reliance on *DeLeire v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. 1, 605 N.E.2d 313 (1993), is misplaced. There, the member was [*16] suspended from his position and sentenced to prison prior to his attempted resignation. Accordingly, the position was considered vacant by operation of *G. L. c. 279, § 30*, and such "removal" or "discharge" was plainly with "moral turpitude." Here, however, Herrick, resigned and applied for retirement prior to his conviction. Moreover, significant to the holding in *DeLeire*, but distinguishable from the case at bar, was the operation of *G. L. c. 268A, § 25*, which precludes payment of retirement benefits to certain suspended employees, and the court's holding that the letter of resignation submitted in that case was not sufficient to end the employee's suspension.

G. L. c. 32, § 15(4). ERRB also argues that forfeiture of Herrick's pension is required pursuant to the provision of *G. L. c. 32, § 15(4)*, which prohibits a member, "after final conviction of a criminal offense involving violation of the laws applicable to his office or position," from receiving a pension. Herrick contends that his conviction was for an offense that did not apply to his position. In consideration of the cases that have interpreted *§ 15(4)*, we decide that this subsection does not apply to the circumstances of [*17] the instant case.

Similar to *c. 32, § 10(1)*, *§ 15(4)* has been held as penal in nature, thus strictly construed. *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 3 n.3, 665 N.E.2d 998 (1996). In *Gaffney*, *supra* at 4-5, the court stated that "[t]he substantive touchstone intended by the General Court [when it enacted *G. L. c. 32, § 15(4)*,] is criminal activity *connected with* the office or position. Yet it is also apparent that the General Court did not intend pension forfeiture to follow as a sequelae of any and all criminal convictions. Only those violations *related to*

the member's official capacity were targeted. Looking to the facts of each case for a *direct link* between the criminal offense and the member's office or position best effectuates the legislative intent of § 15(4)." (Emphasis supplied.) In *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 180, 843 N.E.2d 603 (2006), quoting from *Gaffney*, *supra* at 4, the court further described its decision in *Gaffney* as not limiting the application of § 15(4) to violations of "'highly specialized crimes addressing official actions' or even criminal conduct committed 'in the course of [official] duties,' but encompass[ing] 'criminal activity connected with the [*18] office or position.'"

ERRB contends that Herrick's sexual assault convictions are directly linked to his job as a custodian for the housing project because he had access to keys to the individual units. While the offenses in question are ones of moral turpitude,⁷ the record does not show that the offenses were connected with Herrick's official capacity nor does there appear to be the type of direct link intended by the Legislature, especially since the statute is construed narrowly because of its penal nature. *Gaffney*, *supra* at 3 n.3. Unlike the facts in *Gaffney*, or those in *Maher v. Justices of the Quincy Div. of the Dist. Ct. Dept.*, 67 Mass. App. Ct. 612, 616-617, 855 N.E.2d 1106 (2006) (forfeiture under § 15[4] upheld when a city inspector was convicted of breaking and entering into city hall and stealing from his personnel file), *S.C.*, 452 Mass. 517, 895 N.E.2d 1284 (2008), a case relied upon by ERRB, the facts here do not present a connection or direct link to Herrick's official position; without intending to minimize the offense, we observe that it was not committed upon anyone who was employed by or who resided at the public property nor did it occur there. This lack of connection to Herrick's position is significant, [*19] notwithstanding the recognition in *Gaffney*, *supra* at 3, that *G. L. c. 32, § 15(4)*, was enacted "for an inter-

mediate level of pension forfeiture in a broader array of circumstances" in reaction to the decision by the Supreme Judicial Court in *Collatos*, 396 Mass. at 687-688. In *Collatos*, *supra*, the Supreme Judicial Court construed *G. L. c. 32, § 15(3A)*, to be limited by its plain terms to pension forfeiture for conviction of offenses under the listed State statutes, and not to reach a Federal cognate conviction.⁸ Nonetheless, a direct link between the public position and the offense for which the member is convicted must be shown, a connection which has not been shown here.

7 See note 4, *supra*.

8 The forfeiture of a pension on the ground of moral turpitude may be avoided by an immediate resignation and pension application before the employer has had an opportunity to remove or discharge the employee. We cannot presume that the statutory language was an inadvertent oversight by the Legislature nor may we provide a gloss to the statute that prevents this outcome from reoccurring. We agree with the observations by the judge below, and by two Attorneys General, that if such an outcome was not [*20] intended, its remedy lies with the Legislature. See *Vickey*, 381 Mass. at 767 ("when the statute appears not to provide for an eventuality, there is no justification for judicial legislation").

Conclusion. The pension forfeiture statute at issue is a penal provision that must be strictly construed and, when construed as such, it does not support ERRB's interpretation of the statute or permit the denial of Herrick's application for superannuation retirement benefits. Therefore, the denial of the application was erroneous. We must affirm the judgment.

So ordered.

From: Blau, Gary on behalf of DOR DLS Law
Sent: Thursday, May 20, 2010 4:04 PM
To: 'jdgrossfield@brackettlucas.com.secure'
Subject: 2010-669 - Sick Leave Buyback Fund

Attachments: 95-1185.pdf; 91-240.pdf
Jason:

We have generally concluded that a town may make a special purpose appropriation for the sick leave buyback program which will not close out at year's end, but may be diverted to another use by a future town meeting transfer vote. See Opinions 95-1185 and 91-240 attached. A special purpose fund may be established to provide buyback payments without further appropriation. Certainly the town could establish a stabilization fund, but would have to have a 2/3 town meeting vote to use the funds for any given year's buyback. As with the special purpose fund, town meeting could change the purpose of the stabilization fund fund at a later time, leaving the buyback program unfunded. M.G.L. c. 40, §5B. If the town wants to establish a reserve fund, specifically limiting the use of the funds for buyback obligations, no general law authority is currently available. Special legislation would be required to establish a true reserve fund.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
blau@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Jason D. Grossfield [mailto:jdgrossfield@brackettlucas.com]
Sent: Thursday, May 20, 2010 2:14 PM
To: DOR DLS Law
Subject: Sick Leave Buyback Fund

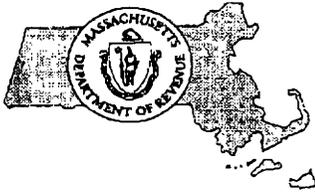
Good Afternoon,

I am looking into how a town can establish a fund for the purpose of a sick leave buy back program. Particularly, the town seeks to appropriate funds from time to time into such a fund and have any unexpended funds roll over from year to year rather than go into the general fund. This program relates to the municipality's obligations under collective bargaining and other non-union employees.

It seems to me that a stabilization fund may be one way to do this. I would like to know if DOR has any guidance or recommended practices in regards to how to fund for this purpose, or if special legislation would be needed.

Thank you for your assistance.

Best,
Jason
Jason D. Grossfield, Esquire
Brackett & Lucas
19 Cedar Street
Worcester, MA 01609
T: (508) 799-9739
F: (508) 799-9799
JDGrossfield@BrackettLucas.com



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

P.O. Box 9655
Boston, MA 02114

(617) 626-2300
FAX (617) 626-2330

MITCHELL ADAMS
Commissioner

ROBERT H. MARSH
Deputy Commissioner

January 8, 1996

Anthony J. Torrissi
Finance Director
Town Offices
36 Bartlet Street
Andover, MA 01810

Re: Funding Unused Vacation & Sick Leave Liability
Our File No. 95-1185

Dear Mr. Torrissi:

You have asked our opinion concerning a proposed special article on town meeting warrant to authorize a transfer from available funds and appropriation up to \$132,000 to a "compensated absence reserve account" for the purpose of funding accrued employee vacation and sick leave liabilities. You have indicated that town auditors have found a potential \$843,933 liability for such benefits which are currently unfunded.

The town cannot legally appropriate such funds to a true "reserve" account as you call it because such accounts require statutory authority and ordinarily connote an inability of the town to transfer the funds to any other purpose, contrary to **G.L. Ch. 44, §33B**. Reserve funds are essentially encumbered for the specific purpose intended. Reserve accounts also usually require a subsequent town meeting vote appropriating them for a proper reserve use.

However, the town could legally make such an appropriation to a special purpose "compensated absence fund". We believe that such an article would be prudent to help to reduce any potential unfunded liability of the town for these benefits. Through this article the town may pay such expenses as they arise without the necessity of further appropriation and without the necessity of annual departmental estimated appropriations to cover the anticipated expenses for a particular year. Special purpose appropriations carry over from year to year to the extent not expended, but still necessary for the purpose. To the extent the funds are not encumbered, they may be transferred to another purpose by town meeting, under **G.L. Ch. 44, §33B**.

We point out one potential reason why such an appropriation directly to such purpose may not be desirable. We note the widespread and common practice in the commonwealth for cities and towns to offer vacation and sick leave accumulations which are then paid at the time

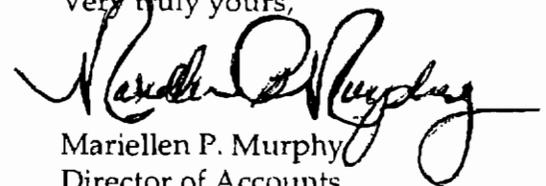
of retirement or termination. These policies have arisen in different ways. In some towns it has become a practice without any by-law or general policy vote of a board of selectmen. In others department heads may have established their own practices. In still others a by-law may provide the policy. See G.L. Ch. 40, §21A. In still others, collective bargaining agreements or practices may have established the policy.

There is clear prohibition in the general laws for municipal departments to incur liability for such benefits in excess of appropriation therefor. G.L. Ch. 44, §31. In addition, where such benefits are provided by collective bargaining for which no appropriation for such a cost item has been made, the benefit provision may not be enforceable. G.L. Ch. 150E, §7(b). However, a cogent argument can be made that a city or town by by-law or town meeting vote could establish such a benefit, in excess of appropriation, which would later be binding on the town. Compare Lynn Redevelopment Authority v. Lynn, 360 Mass. 503, 504-5 (1971) (city council when acting with mayor is not a department of the city and not bound by G.L. Ch. 44, §31) with Broadhurst v. Fall River, 278 Mass. 167, 169-70 (1932) (the mayor constitutes the executive department of a city and cannot incur liability without approval of finance board under city's special act).

The audit report suggests that some employees have been granted special benefits by department heads, such as excess vacation leave accrual. If Andover arguably has no legal liability to pay sick leave and vacation leave accumulations, or some portion thereof, because the policy has not been established by town bylaw or vote or the town has not appropriated sufficient funds for that purpose, the establishment of this fund may be considered such an appropriation and therefor bind the town. You may wish to review how these benefits have been provided to town employees to determine whether some or all of this so-called unfunded liability may not actually be a liability without the establishment of the fund.

We hope this addresses your concerns. If we may be of further service, please do not hesitate to contact us again.

Very truly yours,



Mariellen P. Murphy
Director of Accounts



MASSACHUSETTS DEPARTMENT OF REVENUE

DIVISION OF LOCAL SERVICES

200 Portland Street

Boston 02114-1715

MITCHELL ADAMS
Commissioner

(617) 727-2300

LESLIE A. KIRWAN
Deputy Commissioner

June 4, 1991

Sharon L. Summers
Town Accountant
Town Hall
Ayer, MA 01432

Re: Sick Leave Buyback Account
Our File No. 91-240

Dear Ms. Summers:

You have asked for the proper accounting procedure to set aside sick leave buyback funds in anticipation of the retirement or resignation of town employees who may be eligible for such benefits during the fiscal year. The town's current practice is to budget for such expenses annually by department. Since it is not always known when an employee may retire or resign, amounts in excess of those actually needed are often appropriated, with the result that surplus at the end of the fiscal year must be closed out and new estimated amounts appropriated in the next year.

The Executive Secretary would like to transfer all unspent sick leave buyback funds into a single account to carry over from year to year. This mechanism would have the benefit of avoiding town meetings for transfer votes to replenish individual departmental accounts. It would also have the benefit of more accurate accounting as an ongoing liability, especially if the town continues to appropriate to the article annually any amounts needed to cover potential increases in these obligations.

This purpose may be accomplished by town meeting vote under G.L. Ch. 44, S. 33B transferring the unexpended, unencumbered annual departmental accounts to a single special purpose appropriation which will carry over from year to year. There is no necessity to expend such funds in any particular year if persons expected to retire or resign do not do so. If persons retire or resign unexpectedly, there will be a source of payment in a single townwide account.

Like other special purpose accounts which may be set up for a specific project, amounts in the sick leave buyback appropriation may be transferred by later town meetings to other uses if certain conditions are met. Since there is no statutory restriction which limits spending for that particular purpose, the funds may be transferred to another municipal purpose under G.L. Ch. 44, S. 33B, in one of two ways. If the town official given the authority to expend from the appropriation determines that all or some of the funds are no longer necessary for the purpose, he/she may notify the town accountant who may then close out the unencumbered balances so released. In addition, town meeting may determine that the purpose is no longer required in whole or in part and may transfer any unencumbered funds for another purpose.

When and how much of the funds to encumber will depend on the exact terms of the buyback policy and whether any rights have vested. I understand that the police collective bargaining agreement provides for buyback of 50% of accumulated sick leave upon retirement after at least 15 years of service, up to a maximum of 80 days (160 is the maximum which may be accumulated). Assuming that this is a binding obligation of the town, sufficient amounts should be appropriated annually to the special purpose article which, when added to amounts already in the account, will cover the obligation at current salary rates for each individual who has or will have achieved 15 years of service during the next fiscal year and are or will be eligible for retirement during that fiscal year. Any such amounts should be encumbered and be unavailable for transfer out of the account.

Amounts may be unencumbered if events occur during the fiscal year which eliminate the responsibility of the town to pay any portion of the benefit. For example, if a police officer is sick and depletes the sick leave account, the amount in the sick leave buyback account may be freed up accordingly. Similarly, should a police officer resign or be discharged without retirement, the total amount accumulated for his/her benefit may be unencumbered.

I point out that the mechanism suggested is not the exclusive one and does not have to be adopted by the town. However, it does have the benefit of underscoring the current potential liabilities of the town and avoids the potential difficulties of raising significant lump sums in later years.

In addition, I want to differentiate such special purpose accounts from reserve funds and annual operating accounts. A "reserve fund" is a special appropriation made by town meeting which may only be used for a specific purpose and may not be transferred for another use by town meeting vote. Although such funds carry over from year to year until used for the specified

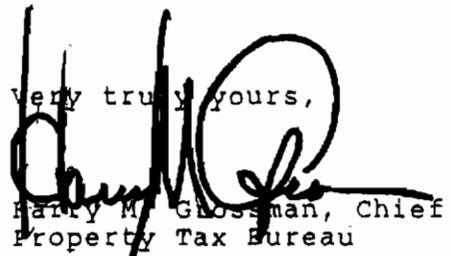
Sharon L. Summers
Page Three

purpose, they must be created by statute and cannot be established merely by town meeting vote.

"Annual operating accounts" are fiscal year budget appropriations which are made to cover the expenses for operating the town during that fiscal year. Such accounts may be transferred under G.L. Ch. 44, S. 33B for another purpose, but they close out at the end of the year if not spent, because the annual operations have ceased. For example, the current appropriations for sick leave buyback have been made to cover the anticipated cost of operation during a particular year because it is anticipated that an employee entitled to such benefits will retire during the year. That is why such appropriations close out at the end of the fiscal year.

I hope this addresses your concerns. If I may be of further service, please do not hesitate to contact me again.

Very truly yours,



Harry M. Grossman, Chief
Property Tax Bureau

HOUSE DOCKET, NO. 786 FILED ON: 1/8/2009 HOUSE No. 1978
The Commonwealth of Massachusetts

PRESENTED BY: Kevin G. Honan

An Act relative to compensated absences in cities and towns.

PETITION OF:

NAME:

DISTRICT/ADDRESS: Kevin G. Honan

17th Suffolk

[SIMILAR MATTER FILED IN PREVIOUS SESSION

SEE HOUSE, NO. 1949 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO COMPENSATED ABSENCES IN CITIES AND TOWNS.

Be it enacted by the Senate and House of Representatives in General Court assembled,
and by the authority of the same, as follows:

Chapter 40 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by adding after section 13C the following section:-- Section 13D. Any city or town or district which accepts the provisions of this section by majority vote of its city council or the voters present at a town meeting or district meeting, may establish, and appropriate or transfer money to a reserve fund for the future payment of accrued liabilities for compensated absences due any employee or full-time officer of said city or town upon the termination of such employee's or full-time officer's employment. Said municipal or district treasurer shall maintain the reserve fund in an interest bearing account and interest earnings shall be added to the fund. Said city council, town meeting or district meeting may designate the municipal official to authorize payments from this fund, and in the absence of such a designation, it shall be the responsibility of the chief executive officer of said city, town or district.

[2010 – Ordered to a Third Reading in House before summer recess]

CHAPTER 32B Section 20 Other Post Employment Benefits Liability Trust Fund; local option; funding schedule

Section 20. A city, town, district, county or municipal lighting plant that accepts this section, may establish a separate fund, to be known as an Other Post Employment Benefits Liability Trust Fund, and a funding schedule for the fund. The schedule and any future updates shall be designed, consistent with standards issued by the Governmental Accounting Standards Board, to reduce the unfunded actuarial liability of health care and other post-employment benefits to zero as of an actuarially acceptable period of years and to meet the normal cost of all such future benefits for which the governmental unit is obligated. The schedule and any future updates shall be: (i) developed by an actuary retained by a municipal lighting plant or any other governmental unit and triennially reviewed by the board for a municipal lighting plant or by the chief executive officer of a governmental unit; and (ii) reviewed and approved by the actuary in the public employee retirement administration commission.

The board of a municipal lighting plant or the legislative body of any other governmental unit may appropriate amounts recommended by the schedule to be credited to the fund. Any interest or other income generated by the fund shall be added to and become part of the fund. Amounts that a governmental unit receives as a sponsor of a qualified retiree prescription drug plan under 42 U.S.C. 1395w-132 may be added to and become part of the fund.

The custodian of the fund shall be: (i) a designee appointed by the board of a municipal lighting plant; or (ii) the treasurer of any other governmental unit. Funds shall be invested and reinvested by the custodian consistent with the prudent investor rule set forth in chapter 203C.

This section may be accepted in a city having a Plan D or Plan E charter by vote of the city council; in any other city by vote of the city council and approval of the mayor; in a town by vote of the town at a town meeting; in a district by vote of the governing board; in a municipal lighting plant by vote of the board; and in a county by vote of the county commissioners.

Special Act OPEB Fund Provisions

St. 1998, Chapter 472 (Brookline)

St. 2000, Chapter 346 (Bedford)

St. 2002, Chapter 10 (Needham)
Chapter 98 (Waltham)
Chapter 126 (Hingham)
Chapter 139 (Winchester)
Chapter 317 (Lexington)

St. 2004, Chapter 88 (Wellesley)

St. 2005, Chapter 161 (Arlington)

St. 2006, Chapter 72 (Sudbury)
Chapter 272 (Franklin)

St. 2007, Chapter 97 (Belmont)

St. 2008, Chapter 185 (Concord)
Chapter 474 (Lincoln)
Chapter 504 (Ipswich)

St. 2009, Chapter 143 (Brookline, Amending St. 1998, c. 472)

St. 2010, Chapter 149 (Dukes County)

From: Blau, Gary on behalf of DOR DLS Law
Sent: Friday, April 02, 2010 3:05 PM
To: 'Donna Allard'
Subject: 2010-459 - Westminster - Funding an OPEB account
Donna:

Use of a stabilization fund for OPEB purposes is not illegal, but will not meet the requirements of GASB for making the fund irrevocable. As you know, a town meeting may, by a 2/3 vote, change the purposes of a stabilization fund and could eliminate or modify the OPEB purpose of the stabilization fund in the future. M.G.L. c. 40, §5B. <http://www.mass.gov/legis/laws/mgl/40-5b.htm>. Alternatively, the town could accept Massachusetts General Laws Chapter 32B, §20 (<http://www.mass.gov/legis/laws/mgl/32b-20.htm>), establishing an OPEB trust fund which may not be changed by the town, without a special act of the legislature. See M.G.L. c. 32B, §10 & c. 4, §4B (<http://www.mass.gov/legis/laws/mgl/32b-10.htm>) & (<http://www.mass.gov/legis/laws/mgl/4-4-4b.htm>). Although the M.G.L. c. 32B, §20 OPEB statute does not require appropriations into the fund, when funds are so appropriated, according to the actuarial schedule that must be developed under that statute, they must remain in the fund until used for the purposes of paying OPEB liabilities.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
blau@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Donna Allard [<mailto:dallard@westminster-ma.gov>]
Sent: Thursday, April 01, 2010 1:34 PM
To: DOR DLS Law
Subject: Funding an OPEB account

The Town of Westminster is planning to have an article on the upcoming annual town meeting to transfer funds from a stabilization account to establish a new stabilization account for the purpose of funding OPEB. Is this legal?

Donna M. Allard

Town Accountant

From: Mitchell, Mary on behalf of DOR DLS Law

Sent: Friday, February 05, 2010 2:49 PM

To: 'Dory Huard'

Subject: 2010-175 RE: OPEB Trust Accounts

Answers to your questions appear below.

- 1) To adopt section 20 of 32B is it a simple majority vote at town meeting?

Yes. G.L. c.32B, §20 (a local acceptance provision added by C.479 of the Acts of 2008) authorizes the creation by municipalities of trust funds for their OPEB liabilities. Once the provision has been accepted by a municipality, the treasurer sets up an account to be a repository of OPEB funds and makes investment decisions as permitted by Ch. 479.

- 2) If section 20 is adopted do they have to fund the trust?

No. There is no obligation to fund it. However, if the municipality does fund it, the funding schedule should be spread out over a reasonable period, and we have advised the 30 years is reasonable. Further, if a municipality wants to set aside funds for OPEB after it has accepted G.L. c. 32B, §20, an appropriation for that purpose may be included as part of the annual budget.

- 3) Can a community transfer the balance left in a Health Insurance Trust to an OPEB Trust if they have changed from self funded to full rate pay as you go? If so, is this by Town meeting vote?

No. Appropriations for health insurance for town that switched from self-insured to premium-based cannot be deposited to the health insurance trust fund under 32B:3A and money in that fund should be used to pay off claims and pay continuing health insurance premiums until the fund is exhausted.

Mary C. Mitchell, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Massachusetts Department of Revenue
(617) 626-2400
DLSLAW@dor.state.ma.us

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From: Hinchey, Christopher M on behalf of DOR DLS Law

Sent: Tuesday, December 15, 2009 2:38 PM

To: 'giustihingstonco@aol.com'

Subject: 2009-1535 RE: Ch. 479 OTHER POST-EMPLOYMENT BENEFITS
LIABILITY TRUST FUNDS

I don't think there is anything in c.479 of 2008 (GL c.32 §20) that protects the OPEB fund from creditors, but generally even successful creditors cannot levy against particular municipal assets. If someone slips and falls on the city hall steps, and successfully sues the city, he still cannot get a lien against the city hall. A contractor who gets a judgment for an unpaid bill of an enterprise cannot enforce that judgment directly against the enterprise fund; it's a liability of the municipality. Whether the municipality, as an internal accounting matter, pays the judgment from the enterprise fund or elsewhere is irrelevant from the creditor's perspective.

There are a few circumstances in which municipalities can pledge particular revenues to pay revenue bonds, in which case creditors do get interests in specific municipal funds, but that is not the general rule.

Chris Hinchey Tax Counsel
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617-626-2400
dlslaw@dor.state.ma.us

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From: giustihingstonco@aol.com [mailto:giustihingstonco@aol.com]

Sent: Friday, December 11, 2009 1:07 PM

To: DOR DLS Law

Subject: Ch. 479 OTHER POST-EMPLOYMENT BENEFITS LIABILITY TRUST FUNDS

Hi Chris,

In order to be considered a "Plan" in the eyes of the Governmental Accounting Standards Board, the fund must be 1) irrevocable 2) dedicated to pay for retirees benefits and 3) legally protected from creditors of the employer and the plan administrator.

I'm OK with #1 & #2. What do you think about #3? Is it legally protected just by nature of being a trust fund?

Thanks, Chris. I hope you enjoy the holidays.

Dick



February 4, 2010

Jeff Wulfson
Associate Commissioner
Massachusetts Department of Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148

Re: Assabet Valley Regional Vocational School District
Our File No. 2010-62

Dear Mr. Wulfson:

This letter is in response to your request for an opinion about whether the Assabet Valley Regional Vocational School District may continue to operate its self-insurance claims trust fund. That fund, authorized under Massachusetts General Laws Chapter 32B Section 3A, allows political subdivisions providing group health insurance to its employees and retirees under Chapter 32B to self-insure, or partially self-insure. Self-insurance is provided using a claims trust fund into which is deposited employee and employer contributions and from which employee health insurance claims are paid. Your request asks "What happens to the claims trust fund when the political subdivision establishes a self-insurance plan, but later returns to a premium based insurance plan and is no longer self-insured." Apparently counsel for the school district has opined that the statute permits the use of a claims trust fund even if the district is merely paying group insurance premiums to private insurance companies from the fund.

We have arrived at a different interpretation and have concluded that the claims trust fund is for the operation of a self-insurance fund directly from which health insurance claims are paid. While we concluded in our November 21, 2005 letter to counsel for Walpole (enclosed) that the trust fund may be used to pay insurance premiums when a governmental unit switches from self-insured to private insurance for its group insurance needs, we believe that use is limited to the period during which the claims trust fund still has assets. During that period no further amounts should be deposited to the claims trust fund, either from the employees or the governmental unit, and the trust fund is to be closed out when funds no longer remain in it.

The language of the statute relied upon by the school district's counsel is as follows:

Funds made available by appropriations ... for purposes of this chapter ... shall, upon authorization by the subdivision, be transferred from said appropriation account by the treasurer and shall be deposited from time to time by the treasurer in a separate fund to be known as the claims trust fund.

He relies on the language "for purposes of this chapter" as referring to all purposes of the chapter, including provisions in Chapter 32B that authorize the procurement of private insurance. However, we

believe the wording in the first paragraph that authorizes self-insurance and the claims trust fund necessary for providing such coverage is the operative language.

In particular, M.G.L. c. 32B, §3A provides in the opening paragraph:

A city, town, county, except Worcester county, or other subdivision of the commonwealth, when providing hospital, surgical, medical, dental and other health care coverage as authorized by this chapter, and subject to the adequacy of a claims trust fund as hereinafter described, may, in lieu of or in addition to entering into the insurance policies, agreements, or contracts described in this chapter, enter into an administrative services or other contract with one or more insurance companies, nonprofit hospital, medical or dental service corporations organized under chapter one hundred and seventy-six A, chapter one hundred and seventy-six B, or chapter one hundred and seventy-six E, or with one or more health care organizations, or with one or more third-party administrators or other entities to organize, arrange, or provide for the delivery or payment of health care coverage or services, whereby the funds for the payment of claims of eligible persons, including appropriate service charges of the insurance carrier, third party administrator or other intermediary, shall be furnished by the respective subdivision from the claims trust fund for the payment by such intermediary to the health care vendors or persons entitled to such payment in accordance with the terms and provisions of said contract. (emphasis added)

This language makes clear that the purpose of the claims trust fund is solely to cover health service claims, as well as administrative and incidental expenses necessary for providing self-insurance coverage for employees, not to pay insurance premiums to regular health insurance companies.¹

In addition, the details of the trust fund, as further spelled out in the statute, are not consistent with a private insurance system. First, the trust fund is set up to retain employee and employer contributions that will reside in the trust fund indefinitely until needed to pay claims. As a result, the statute provides for interest to remain with the fund and to become part of it. However, if the fund is merely used as a conduit for payment of insurance premiums almost immediately after the funds are withheld from the employees and provided by the employer, there will be no interest or negligible interest earned while the amounts are in the fund. Accounting for any minor interest earned by the funds would be a mere nuisance.

Also, the treasurer is required to make accountings at least annually and earlier, if necessary, to determine if the fund contains the correct ratio of employee to employer contributions that applies to the governmental unit. This task would be irrelevant and burdensome if all the contributions are immediately used to pay private health insurance premiums upon deposit into the fund.

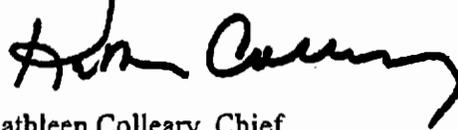
Finally, we see no particular school district purpose in retaining a trust fund that cannot be used for the purpose intended. Thus, when a governmental entity switches from a self-insured health care program to one that is based on payment of premiums to a health insurance company, the claims trust fund should be used to pay off any outstanding claims incurred while the self-insurance program applied, and the balance of any surplus in the trust fund used to pay insurance premiums for covered employees, until the surplus is exhausted. The fund should then be closed. This provides an equitable transition

¹ We believe that trust funds may be used to pay for health insurance premiums in two instances. First, we believe the terms of the self-insurance plan may include a stop-loss policy of insurance to place a cap on the trust fund liability in the case of catastrophic circumstances. That form of insurance is more of an incidental or administrative expense of the self-insured plan, not a regular group health insurance premium based system. In addition, as stated earlier, we believe the trust funds may be used to pay group health insurance premiums when the governmental unit switches from a self-insured system to a premium based plan.

back to premium based insurance, with the maximum benefit of the claims trust fund being applied to employees who paid into the fund and anticipated payment of their claims from it.

If you have further questions, please do not hesitate to contact me again.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:GAB

CC: Patrick Collins, Director of Business, Assabet Valley Reg. Voc. School District
Kevin P. Feeley, Jr., Collins, Loughran & Peloquin, P.C.
Barbara Hansberry, General Counsel, Office of the Inspector General
John J. Sullivan, Melanson Heath & Company, P.C.
Gerard D. Perry, Director of Accounts, Massachusetts Department of Revenue
Enclosure (Our File No. 2005-100)



November 21, 2005

Joyce Frank
Kopelman & Paige
31 St. James Ave.
Boston, MA 02116-4102

Re: Walpole - Health Insurance Claims Trust Fund
Our File No. 2005-100

Dear Ms. Frank:

You have requested our opinion on several questions involving expenditures from the town's health claims trust fund established under GL c. 32B, §3A of the General Laws. In particular, you wish to know:

1. May the town use funds remaining in the trust after the town has switched to a premium based health insurance policy to fund the programs that have replaced the town's previous use of an administrative services contract and claims trust fund?
2. May the town spend such funds in annual increments?
3. Would the appropriate method for the town to make such purchases be to offset the town and employee contributions in the same proportions as their respective shares for each year such funds are used to offset premium costs?
4. Are there any other permissible purposes for which these funds may be spent?
5. May the excess funds be returned to the General Fund?

Summary Answers

1. Any excess remaining in the group health insurance claims trust fund after all obligations of the fund have been paid may be used to pay premiums of current enrollees until the funds have been exhausted.
2. Payment of the funds for insurance premiums may be done incrementally or in lump sum, subject to collective bargaining over the issue.
3. The expenditures for premiums should offset the current employee and employer obligations in the percentages contributed by each to the excess determined at the time of conversion to the fully insured plan.
4. We believe the excess funds may only be used to pay for group health expenses, including premiums and group health administrative expenses.
5. We believe the excess funds may not be returned to the general fund.

Discussion

1. The municipal group insurance claims trust fund is authorized in Massachusetts General Laws Chapter 32B, §3A¹. In cities and towns that choose to employ this provision, the municipal employer's contribution appropriation to

¹ Section 3A. A ... town..., when providing ... health care coverage as authorized by this chapter, and subject to the adequacy of a claims trust fund as hereinafter described, may, in lieu of or in addition to entering into the insurance policies, agreements, or contracts described in this chapter, enter into an administrative services ... contract ... to organize, arrange, or provide for the delivery or payment of health care coverage or services, whereby the funds for the payment of claims of eligible persons, including appropriate service charges of the insurance carrier, third party administrator or other intermediary, shall be furnished by the respective subdivision from the claims trust fund for the payment by such intermediary to the health care vendors or persons entitled to such payment in accordance with the terms and provisions of said contract. ...

Funds made available by appropriations by the ... town ... for purposes of this chapter on the basis of the contributory share of the subdivision as set forth and applicable therein shall, upon authorization by the subdivision, be transferred from said appropriation account by the treasurer and shall be deposited from time to time by the treasurer in a separate fund to be known as the claims trust fund. ... Any interest or return of premium or claims advance, excluding dividends applicable to section eight or eight A, shall be added to and become part of the fund. ... The treasurer shall take measures that will assure a sufficient balance at all times in said fund to make prompt payment for incurred and unpaid claims and other related liabilities. The subdivision insofar as practicable shall prepare annually or sooner a schedule for the treasurer which shall be an estimate of the amounts of anticipated monthly disbursements to be made from said fund and shall as frequently as necessary authorize disbursements therefrom in accordance with the terms and conditions of the contracts authorized by this section.

Where an annual or earlier accounting of administrative service charges, claims paid, and claims incurred and unpaid, under a contract authorized by this section to the subdivision, discloses that payment from the fund has resulted in the contributions of the subdivision and its employees and retirees toward a previously established total monthly premium or rate has been shared on a ratio inconsistent with the share of the contributions as provided from time to time by applicable sections of this chapter, the subdivision shall adjust future contributions toward the total monthly premium or rate to compensate for the inconsistency. Payment to the subdivision by the employees, retirees and surviving spouses of their contribution toward the total monthly premium or rate shall be to the extent and manner as required in the applicable sections of this chapter. (emphasis added)

employee group health insurance costs is deposited in part from time to time into the claims trust fund to match the agreed upon contribution ratio with the employee contributions deducted under GL c. 32B, §7 or §7A. Under those later sections, such employee contributions "shall be paid by the treasurer ... to the carrier or carriers entitled to ..." the premium. GL c. 32B, §7(c) & §7A(c). In the case of self-insurance under GL c. 32B, §3A, the carrier is essentially the town acting in a trustee capacity. Since employee contributions are for the same purposes as the funds appropriated by the town to the claims trust fund; i.e., for paying health service claims and related expenses, we have concluded that it is appropriate for the employee contributions to be commingled in that trust fund.

The clear intent of GL c. 32B, §3A is to assure a steady and predictable source of revenue to cover the administrative expenses and employee benefit claims of the group health insurance plans provided to municipal employees. Unfortunately, the section is silent about what happens to amounts remaining in the claims trust fund when the municipality converts to a third-party insurance premium based system.

Nevertheless, the statute does emphasize that the fund should continually operate utilizing the monthly "premium" contribution ratios determined under Chapter 32B and that if payment of benefits and administrative expenses from time to time deviate from this established ratio, that adjustments have to be made to the contribution rates ongoing until the previously established ratio has been reestablished. Thus, if the fund were to remain ongoing, contributions made thereto would continue to pay future benefits of employees in the predetermined ratios, and future employee/employer contributions could be reduced to reduce any unnecessary surplus or imbalance in the established contribution ratio. By converting to a premium based third party insurance plan, payment for premiums logically substitutes for payment of future administrative expenses and employee benefit claims.

Nothing in GL c. 32B, §3A requires that excess amounts in the trust fund be returned to the employees or employee organizations directly, or that they become the town's funds. The only direction in the statute is that the trust funds, including interest from the funds, be used to cover administrative and claims expenses related to providing health care to covered employees. If Section 3A were the only provision that governed, we think it would be clear that the excess funds should and must be used to pay future benefits, and the easiest way to do that would be to offset future premiums paid by the town and its employees.

A review of the other provisions of Chapter 32B reveals two sections that arguably could require a different use of the excess trust funds. Sections 8 and 8A specifically provide for the distribution of dividends and refunds from an insurance based plan when the insurer declares such a dividend or refund under the policy, or otherwise. Conceivably, any excess retained in a self-insurance fund

could be considered the equivalent of a premium-based dividend or refund, and those statutes might govern, or at least provide some guidance in the matter. In the case of a dividend or refund payable by a third-party insurance provider, the municipality either retains the entire amount under Section 8 (the default provision)² or its proportional share, after taking out amounts necessary to cover administrative expenses of the plan, under Section 8A³. Section 8A requires local acceptance and then supersedes Section 8. We understand that the town of Walpole accepted section 8A in 1969, prior to the establishment of the claims trust fund.

If Section 8A governs, then the use of the excess would first be applied to offset any town administrative expenses incurred during the period the excess was

² GL c. 32B, §8. Any dividend or other refund or rate credit shall inure to the benefit of the governmental unit or to the governmental units participating under section eleven in proportion to the gross premiums paid by each governmental unit.

³ GL c. 32B, §8A. In any governmental unit which accepts the provisions of this section, all dividends, their equivalent and other such refunds accepted by the governmental unit from the carrier or carriers as a result of any policy or policies entered into under the authority of this chapter shall be deposited by the treasurer thereof in a separate fund to be known as the employees' group insurance trust fund.

Prior to the distribution of all such dividends or refunds, the appropriate public authority shall determine the total administrative cost of all policies of insurance entered into under authority of this chapter for the calendar year preceding the date of receipt of the dividend, and shall notify the treasurer to transfer the amount of said total administrative cost from the said trust fund to the appropriate general revenue accounts of the governmental unit.

If the said total administrative cost exceeds the dividend receipts, the entire dividend shall be so transferred; if the dividend receipts exceed the said total administrative cost, the appropriate public authority shall notify the treasurer to transfer to the appropriate revenue accounts that portion of the remaining balance which represents the governmental units' proportionate share of the premium cost of the policy year to which the dividend or refund is attributable. The balance of said dividend remaining in the trust fund shall represent the employees' and retirees' proportionate share of the premium cost. The appropriate public authority at a date deemed practicable shall then authorize the treasurer to expend the remaining balance of the trust fund on behalf of the insured employees and retired employees to reduce the insured employees' and retired employees' share of future premium costs or by a proportionate refund to insured members. The reduction of such costs shall be determined by using the ratio of the dividends received to the insured employees' and retired employees' share of the total premiums which yielded the dividend.

In the event two or more governmental units are participating in accordance with section eleven, all dividends or their equivalent or other such refunds shall first be allocated to the respective governmental units in proportion to the gross premiums paid by each governmental unit to the respective carrier or carriers. ...

acquired, and then to offset the town and employee contributions. The town's proportionate share would then be general fund revenue, under GL c. 44, §53 and could be appropriated for any town purpose, including group insurance purposes. The employee contributions would then be applied to reduce the employee contributions for future premium costs.

Although not free from doubt, we think the better answer is that Sections 8 and 8A do not apply to surplus amounts remaining in a claims trust fund when a town converts to a third party insurance carrier. The rationale for that opinion is several fold. As an initial matter, to the extent any excess were to develop in the fund as it continues from year to year, the employee and town health insurance contribution amounts should be adjusted accordingly to use the surplus to the extent it is not needed to cover extraordinary claims. Secondly, the fund itself is a statutory trust fund established exclusively for payment of health service claims and related expenses, unlike premium contributions paid to a third party insurer. Excess amounts remaining in that fund are therefore arguably not the equivalent of a refund or dividend under Sections 8 and 8A.

In addition, we note that Sections 8 and 8A pre-dated the enactment of Section 3A in 1977. Self-insurance arose as a mechanism to reduce group health insurance costs to the towns and employees by eliminating the expense of the insurance company profit margins reflected in third party insurance premiums. The option was not available when Sections 8 and 8A were enacted, and the prospect of a self-insurance fund as an equivalent dividend or refund was likely not contemplated by the legislature at the time. We would not impute any such intention as a result of the subsequent authorization for self-insurance. Finally, we note that Sections 8 and 8A may have been added in order to clarify and establish a municipal entitlement to any insurance refund in the absence of a vote of acceptance of Section 8A, to avoid ambiguity in the interpretation otherwise. In the absence of Section 8 one might conclude that a refund was in effect a return of premium, which, having been shared by the employer and employees, had to be returned to them in the same proportions as the payments for the premium.

2. With respect to whether the excess funds may be expended in a lump sum or may be paid over a period of time, we think the matter may very well be a term and condition of employment for, or at least a matter of impact on, the active employee members of the plan, and thus subject to negotiation. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) (duty to negotiate over premium contribution percentage for group insurance under collective bargaining law); (Group Insurance Commission v. Labor Relations Commission, 381 Mass. 199 (1980) (Labor Relations Commission ordered the commonwealth to bargain with state employees over repayment of group insurance premiums not withheld from employee pay, which ought to have been withheld, but appeal of Group Insurance Commission of decision dismissed due to lack of standing of the GIC in the case).

We note that the group of employees on the plan is continually changing, and the longer the surplus is kept the population gaining the benefit of premium reductions will be increasingly different from the population that contributed to the fund. However, depending on the size of the surplus and the amount necessary to provide coverage on an annual basis, it may not be possible to use the surplus within a particular year. Since the payment of the surplus to reduce future covered employee premiums is based on practicality and does not require complete equity, we cannot say that extending the recouping period would necessarily be unlawful. We think the better answer is that any payment to reduce premiums should be subject to negotiation with respect to the period of time and amount of premium reductions.

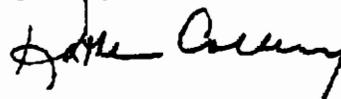
3. We understand the excess in the fund has been maintained so as to reflect the percentage contributions made by the town and its employees during the period when the surplus was generated. The funds, including interest earned thereon, should be used in the same percentage ratios when paying current premium amounts, even if the relative rates of contribution vary in subsequent years.

4. By paying future group insurance premiums from the fund the use would remain consistent with the purposes of the trust fund. Any other use of the funds would be inconsistent with the purpose of the trust fund and we think an impermissible use.

5. Since we have concluded that Section 8A does not apply to an excess retained in a claims trust fund, which requires the excess to be used for health claims and health administrative purposes, we do not believe the funds may be paid to the general fund.

We hope this addresses your concerns. If there are further questions, please do not hesitate to contact us.

Very truly yours,



Kathleen Colleary, Chief
Property Tax Bureau

KC/GAB

From: Blau, Gary on behalf of DOR DLS Law
Sent: Thursday, April 29, 2010 5:20 PM
To: 'csashin@ci.oak-bluffs.ma.us'
Cc: 'mdutton@ci.oak-bluffs.ma.us'
Subject: 2009-866 - Oak Bluffs - Employee Contributions to OPEB
Cheryll:

Please excuse the delay in replying to your request. I have been attempting to obtain information from the town administrator concerning advice received from the town's audit firm or the town's labor counsel concerning the issue you raised. I have still not been able to obtain the information, so I will address your concerns based on my understanding of the OPEB reporting requirements and the new OPEB trust option in M.G.L. c. 32B, §20, added by Chapter 479 of the Acts of 2008. As you know, OPEB is an acronym for Other Post Employment Benefits and primarily encompasses retiree group health insurance benefits for which the municipality is potentially liable. Under M.G.L. c. 32B, §§9, 9A and 9E every municipality in the commonwealth accepting M.G.L. c. 32B and providing group insurance coverage to its employees is required to provide group insurance coverage to retirees to differing degrees of premium contributions depending on the particular section in effect in the town. Additional provisions also make the town responsible for contributing to the coverage of surviving spouses of deceased retirees. Recognizing that municipalities that have not set funds aside to cover the towns' future share of these group health insurance costs may be financially impaired by continuing and growing liabilities, the Government Accounting Standards Board (GASB) issued statements designed to require municipalities to advise the public and potential holders of municipal bonds of the municipal OPEB liabilities. Since there was no mechanism for cities and towns to set aside funds in reserve for this purpose, other than a few special acts passed for particular communities, the 2008 OPEB legislation was enacted, and become effective January 10, 2009.

I have not been able to find any indication that Oak Bluffs has accepted this act, or has any special legislation authorizing a fund for this purpose. While a special act has been proposed to allow the towns on Martha's Vineyard to establish a pooled fund for this purpose, it has not yet been enacted. See House Bill 4105 of the 2009-2010 Session. That special bill, like the local acceptance OPEB statute, merely allows the governmental employers to appropriate money to the fund and is silent on employee contributions. In the absence of the special legislation or acceptance of M.G.L. c. 32B, §20, the town could make a special purpose appropriation for such a purpose at any town meeting, and could supplement it periodically, but the special purpose funds could be transferred for any other municipal purpose at any time under M.G.L. c. 44, §33B without authority or legal obligation from the legislature to restrict the use of the fund for the purpose of funding those future liabilities. The town could also make appropriations into an OPEB stabilization fund, which requires a 2/3 vote to appropriate into or out of the fund. M.G.L. c. 40, §5B. The funds would have to be appropriated for the purpose of paying any particular year's OPEB liability, but the purpose of the fund may be modified under the statute and the funds could be transferred for an unrelated purpose. Even if used for OPEB expenses, town meeting would have to transfer money from the fund to the proper operating account by a 2/3 vote.

The GASB Statements 43 & 45, OPEB special acts and general OPEB statute were designed as mechanisms for municipalities and other governmental units to calculate and periodically recalculate their governmental liabilities for the future retiree benefits, as well as to appropriate funds to be reserved for those purposes. There is no mechanism in any of the special acts or the general legislation for authorizing any withholding of employee salaries for this purpose, nor is there any specific statute authorizing a payroll deduction and an escrow account for this purpose. Compare M.G.L. c. 180, §§17A-17J authorizing municipal payroll deductions for a variety of reasons, including union dues, charitable contributions, income protection insurance and employee benefits; M.G.L. c. 44, §§67 & 67A (payroll deductions for deferred comp plan and IRAs); M.G.L. c. 32B, §§7 & 7A (withholding to pay governmental employee group health insurance premiums); M.G.L. c. 154, §8 (payroll deductions for credit union payments, among other things) and state and federal laws authorizing and requiring deductions for income taxes. The wage deduction here could be covered under M.G.L. c. 180, §17J if it is considered an employee benefit. That may be the case with respect to the union employees, since they may have received an increase in salaries or wages in exchange for the deduction, and they voluntarily agreed to include it as part of their compensation package. However, the rationale appears to fail as an employee benefit for the non-union employees for at least two reasons. Here the benefit is to the employer, which has the legal responsibility for funding its share of retiree health insurance premiums, while the employees fund their shares of

premium at the time payments become due after retirement. There is no indication in the documents you have provided that the amounts deducted are being held by the town to cover a portion of the employees' shares of premiums upon retirement. Nor is it clear that any particular employee will benefit, since the employee may be covered by a spouse's policy or may otherwise have sufficient health insurance coverage. Secondly, the deduction is not voluntary, as required by the statute.

In addition, the policy of requiring this employee withholding appears to have been approved by the town's personnel board, but there is no evidence presented to me that town meeting has voted this or enacted a by-law making such contributions mandatory. It is not clear to us that the personnel board may make such a decision that materially affects the wages that are otherwise payable to the employee.

I have contacted town counsel and labor counsel for Oak Bluffs, as well as the town administrator, and have not received any explanation of the rationale for the employee wage withholding. Town counsel and labor counsel did not appear to have been consulted in the decision. Without further input from the town administrator, town counsel or labor counsel, I cannot conclude that the non-union employee withholding for OPEB purposes is permissible under the general laws, or that any lawful mechanism has been authorized to reserve the funds for the purposes intended.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
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This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Cheryl Sashin [mailto:csashin@ci.oak-bluffs.ma.us]
Sent: Monday, June 22, 2009 4:57 PM
To: DOR DLS Law
Cc: 'Deborah Ratcliff'
Subject: TO GARY BLAU

Re: OPEB Contributions

Gary

I hope you remember I spoke with you at the MCTA conference after the Review Of Legislation course last

Wednesday. I have a copy of contract negotiations for Unit A of AFSCME ratified this year. This is also included

in another Unit B contract also ratified this year.

Section C. This offer is contingent upon the following:

- i. Elimination of Master Medical for all Unit A employees
- ii. **Employee begins making contributions to the OPEB (other post employment Benefits)**

GASB 45 liability at a rate of 6% of the employees' portion of health premiums in FY09

12% of the employees' portion of health premiums in FY10 and 12% of the employees'

portion of health premiums in FY11. This provision is contingent upon all bargaining units

under the jurisdiction of the Selectman and non-union personnel being subject to the same

provisions.

It seems that the GASB contribution was a negotiating factor in 2008 in order to receive a new compensation step and salary increase based on a survey conducted by an outside firm.

As you can see above, the administration just followed suit with the rest of us under the personnel bylaws.

I am interested your opinion regarding the legality of the town making employees fund the unfunded Liability.

In the mean time, I am going to check and see if the Police have the same in their contract. I know the school

employees do not.



Cheryll A. Sashin, CMMC
Tax Collector
Oak Bluffs
(508) 693-3554 X107
email: csashin@ci.oak-bluffs.ma.us
fax: 508-693-5525

CHAPTER 32B Section 18 Medicare extension plans; mandatory transfer of retirees

Section 18. In a governmental unit which has accepted the provisions of section ten and which accepts the provisions of this section, all retirees, their spouses and dependents insured or eligible to be insured under this chapter, if enrolled in medicare part A at no cost to the retiree, spouse or dependents or eligible for coverage thereunder at no cost to the retiree, spouse or dependents, shall be required to transfer to a medicare extension plan offered by the governmental unit under section eleven C or section sixteen; provided, that benefits under said plan and medicare part A and part B together shall be of comparable actuarial value to those under the retiree's existing coverage; provided, further, that retirees or spouse, who has a dependent who is not enrolled or eligible to be enrolled in Medicare part A at no cost shall not be required to transfer to a Medicare extension plan if a transfer requires the retiree or spouse to continue the existing family coverage for the dependent in a plan other than a Medicare extension plan offered by the governmental unit. Each retiree shall provide the governmental unit, in such form as the governmental unit shall prescribe, such information as is necessary to transfer to a medicare extension plan. If a retiree does not submit the information required, he shall no longer be eligible for his existing health coverage. The governmental unit may from time to time request from any retiree, a retiree's spouse and dependents, proof certified by the federal government of their eligibility or ineligibility for medicare part A and part B coverage. The governmental unit shall pay any medicare part B premium penalty assessed by the federal government on said retirees, spouses and dependents as a result of enrollment in medicare part B at the time of transfer into the medicare health benefits supplement plan.

This section shall take effect in a county, except Worcester county, city, town or district upon its acceptance in the following manner:— In a county by vote of the county commissioners; in a city having a Plan D or Plan E charter by a majority vote of its city council; in any other city by vote of its city council, approved by the mayor; in a district, except as hereinafter provided, by vote of the registered voters of the district at a district meeting; in a regional school district by vote of the regional district school committee; and in a town either by vote of the town at a town meeting or, by a majority of affirmative votes cast in answer to the following question which shall be printed upon the official ballot to be used at an election of said town:— “Shall the town require that all retirees, their spouses and dependents who are enrolled in Medicare Part A at no cost to a retiree, their spouse or dependents, or eligible for coverage thereunder at no cost to a retiree, their spouse or dependents, be required to enroll in a medicare health benefits supplement plan offered by the town?”.

CHAPTER 32B Section 18A Medicare extension plans; mandatory transfer of retirees

Section 18A. In a governmental unit that has accepted section 10 and that accepts this section, all retirees, their spouses and dependents insured or eligible to be insured under this chapter, if enrolled in Medicare Part A at no cost to the retiree, spouse or dependents or eligible for coverage thereunder at no cost to the retiree, spouse or dependents, shall be required to transfer to a Medicare extension plan offered by the governmental unit under section 11C or section 16, provided, that the benefits under the plan and Medicare Part A and Part B together shall be of comparable actuarial value to those under the retiree's existing coverage; provided, however, that a retiree or spouse who has a dependent who is not enrolled or eligible to be enrolled in Medicare Part A at no cost shall not be required to transfer to a Medicare extension plan if a transfer requires the retiree or spouse to continue the existing family coverage for the dependent in a plan other than a Medicare extension plan offered by the governmental unit. Each retiree shall provide the governmental unit, in such form as the governmental unit shall prescribe, such information as is necessary to transfer to a Medicare extension plan. If a retiree does not submit the information required, he shall no longer be eligible for his existing health coverage. The governmental unit may from time to time request from a retiree, a retiree's spouse or a retiree's dependent, proof, certified by the federal government, of eligibility or ineligibility for Medicare Part A and Part B coverage. The governmental unit shall pay any Medicare Part B premium penalty assessed by the federal government on the retiree, spouse or dependent as a result of enrollment in Medicare Part B at the time of transfer. *For the purpose of this paragraph, "retiree" shall mean a person who retires after the acceptance of this section by a governmental unit.*

A retiree who retires prior to the acceptance of this section by a governmental unit, his spouse and dependent shall continue to be eligible for benefits provided under this chapter, but may opt to transfer to a Medicare extension plan offered by the governmental unit under section 11C or section 16, thereby becoming ineligible to participate in any other group health insurance benefits available to active employees under this chapter.

This section shall take effect in a county, except Worcester county, city, town or district upon its acceptance in the following manner: In a county, by vote of the county commissioners; in a city having a Plan D or Plan E charter, by a majority vote of its city council; in any other city, by vote of its city council and approval by the mayor; in a district, except as hereinafter provided, by vote of the registered voters of the district at a district meeting; in a regional school district, by vote of the regional district school committee; and in a town, either by vote of the town at a town meeting or, by a majority of affirmative votes cast in answer to the following question which shall be printed upon the official ballot to be used at an election of said town - "Shall the town require that all retirees, who retire after the acceptance of this section, their spouses and dependents who are enrolled in Medicare Part A at no cost to a retiree, their spouse or dependents, or eligible for coverage thereunder at no cost to a retiree, his spouse or dependents, be required to enroll in a Medicare health benefits supplement plan offered by the town?"

CHAPTER 32B Section 10 Acceptance of chapter by county, city, town, municipality or district

Section 10. This chapter, except sections seven A, eight A, nine A, nine C, nine D, nine E, nine F, eleven A, eleven B, eleven D, eleven E, eleven F and sixteen, may be accepted in a county, except Worcester county, by vote of the county commissioners; in a city having a Plan D or Plan E charter by majority vote of its city council, in any other city by vote of its city council, approved by the mayor, in a municipality having a town council form of government, by vote of the town council, subject to the provisions of the charter of such municipality; in a district, except as hereinafter provided, by vote of the registered voters of the district at a district meeting; in a regional school district by vote of the regional district school committee; in a veterans' services district by vote of the district board; in a welfare district by vote of the district welfare committee; in a health district established under section twenty-seven A of chapter one hundred and eleven by vote of the joint committee; and in a town by submission for acceptance to the registered voters in the form of the following question which shall be printed upon the official ballot to be used at an election:—"Shall certain provisions of chapter thirty-two B of the General Laws, authorizing any county, except Worcester county, city, town or district to provide a plan of contributory group life insurance, group accidental death and dismemberment insurance, and group general or blanket hospital, surgical, medical, dental and other health insurance for certain persons in the service of such county, city, town or district and their dependents, be accepted by this town?" If a majority of the voters voting on the question shall vote in the affirmative, this chapter, except sections seven A, eight A, nine A, nine C, nine D, nine E, nine F, eleven A, eleven B, eleven D, eleven E, eleven F and sixteen, shall take effect in such town.

Notwithstanding the provisions of any general law to the contrary, neither the acceptance of this chapter nor the acceptance of any individual section thereof by a governmental unit shall be revoked or rescinded.

This chapter shall not apply to Worcester county nor to its employees, and they shall be eligible for coverage under the provisions of chapter thirty-two A. This action shall be a transferral and not a revocation or rescission.

34 Mass. App. Ct. 333, *; 615 N.E.2d 196, **;
1993 Mass. App. LEXIS 394, ***

JAMES SHEA & others¹ v. BOARD OF SELECTMEN OF WARE

1 Joseph S. Knapp, William H. Steinmetz, Jr., Joseph J. Ciejka, and Andrew Lawrence.

No. 92-P-172

Appeals Court of Massachusetts, Hampshire

34 Mass. App. Ct. 333; 615 N.E.2d 196; 1993 Mass. App. LEXIS 394

March 3, 1993

April 15, 1993

PRIOR HISTORY: [***1] CIVIL ACTION commenced in the Superior Court Department on December 28, 1990.

The case was heard by *George C. Keady, Jr., J.*, on motions for summary judgment.

COUNSEL: *David A. Wojcik* for the defendant.

Alan D. Sisitsky for the plaintiffs.

JUDGES: Kass, Greenberg, & Laurence, JJ.

OPINION BY: LAURENCE

OPINION

[*333] [**197] Beset by funding cuts and economic difficulties, like so many communities in the Commonwealth, the town of Ware on April 2, 1990, decided, by vote of its board of selectmen (board), that elected town officials who do not regularly work twenty hours per week would no longer be eligible for participation in the town's group health insurance plan as of July 1, 1990, the beginning of the town's next fiscal year.² Five elected officials, the plaintiffs here, whose positions did not involve working twenty hours or more per week, had been approved in 1968 by the board as being eligible for participation in the town's insurance plan pursuant to [*334] *G. L. c. 32B, § 2(d)*.³ They had all participated in the plan since 1968. In December, 1990, the plaintiffs sought a declaratory judgment that their termination from the plan was illegal under c. 32B and [***2] an injunction ordering reinstatement of their health insurance coverage.

2 There is no dispute between the parties as to the material facts recited in this opinion.

3 The pertinent language of *G. L. c. 32B, § 2(d)*, as amended through St. 1958, c. 536, which de-

fines the "employees" covered by municipal group insurance policies, reads as follows:

"(d) 'Employee,' any person in the service of a governmental unit . . . who receives compensation for such service or services, whether such person be employed, appointed or elected by popular vote . . . provided, the duties of such person require no less than twenty hours, regularly, in the service of the governmental unit during the regular work week of permanent or temporary employment . . . except that persons elected by popular vote may be considered eligible employees during the entire term for which they are elected regardless of the number of hours devoted to the service of the governmental unit. . . . A determination by the appropriate public authority that a person is eligible for participation in the plan of insurance shall be final." (Emphasis added.)

Section 2(a) of c. 32B identifies the board as the "appropriate public authority" in the case of a town.

[***3] As an accommodation to two of the plaintiffs, Shea and Knapp, the board had continued to make monthly health insurance premium payments on their behalf from July 1, 1990, through January 1, 1991, with the expectation that they would ultimately reimburse the town.⁴ Those individuals refused [**198] to do so, relying on their contention that the board's termination of their plan participation was illegal. In their answer denying the allegations of illegality, the board counterclaimed

against Shea and Knapp for the premium payments made for them after July 1, 1990.

4 Contrary to the plaintiffs' assertion that the April 2, 1990, vote of the board "left them without any health insurance coverage," elected officials who were no longer eligible for the town's group health insurance program were entitled to continue their health insurance benefits for a period of eighteen months from July 1, 1990, pursuant to the provisions of Title X of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986, see 29 U.S.C. §§ 1161(a), 1162(2)(A)(i), 1163 (1988), provided that the individual officials paid the monthly premiums themselves. We note that at no time have the plaintiffs argued that they were entitled to continuation of their health plan participation at municipal expense at least for the balance of their respective elected terms

[*335] [***4] On cross motions for summary judgment, a Superior Court judge allowed the plaintiffs' motion, denied the board's, and dismissed the counterclaim. The judge construed the language of § 2(d), which he saw as "clear and unambiguous," as preventing the board from reversing the eligibility decision they had made in 1968 in the plaintiffs' favor, regardless of any changed conditions. He treated the statutory language making the board's determinations of participation eligibility "final" as irrelevant because it did not preclude judicial review of such decisions. He also ruled that the board's principal authority, *Ramponi v. Selectmen of Weymouth*, 26 Mass. App. Ct. 826 (1989), was distinguishable because it involved the correction of an initial mistake of law as to an individual's qualification as an eligible "employee" and did not address the eligibility of elected officials for benefits under c. 32B. We hold that the judge's view of *G. L. c. 32B*, § 2(d), was erroneous. The judgment for the plaintiffs should be reversed and judgment should be entered for the defendant on its counterclaim.

The plain language of the statute is precisely the reverse of [***5] that underlying the judge's conclusion. Section § 2(d) of c. 32B provides that any employees, including those who work less than twenty hours per week, "may be considered eligible" by the appropriate public authority for municipal group insurance participation notwithstanding the Legislature's bright line exclusion from eligibility of all those who work less than twenty hours in the first proviso of the section. See *Lexington Educ. Assn. v. Lexington*, 15 Mass. App. Ct. 749, 753-755 (1983). Contrary to the judge's implicit assumption that such employees' participation was made mandatory by the statute, the word "may" is not an apt word to

express a positive mandate. It is a word of permission and not of command. It should be construed, if possible, in accordance with its true signification. In general, throughout our statutes, the distinction between *words of permission or discretion* and words of command, including the distinction between 'may' and 'shall,' has been carefully observed. We should not in any case lightly conclude that the distinction has been overlooked." [*336] *Brennan v. Election Commrs. of Boston*, 310 Mass. 784, 786 (1942) [***6] (emphasis added, citations omitted).

In the absence of evidence that the Legislature intended that "may" should be construed as mandatory rather than permissive, see *Young's Ct., Inc. v. Outdoor Advertising Bd.*, 4 Mass. App. Ct. 130, 133-134 (1976); *Beach Assocs., Inc. v. Fauser*, 9 Mass. App. Ct. 386, 389 (1980), the words "may be considered eligible" should be held to permit, but not require, the board to determine whether the otherwise excluded under-twenty-hour employees were to be accorded the benefit of group health insurance coverage. See *Cohen v. Water Commrs., Fire Dist. No. 1, S. Hadley*, 411 Mass. 744, 751 (1992). No evidence of a contrary legislative intent was proffered by either the judge or the plaintiffs.

We find nothing in the legislative history, purposes or language that would support the dubious related proposition advanced by the plaintiffs and accepted by the judge. In essence, they posit that, having once made otherwise ineligible employees participants in the town's insurance program, the board is bound to continue such employees' participation [***7] perpetually by virtue of its initial decision, which can never be undone. This contention finds no support in the rules of statutory construction and the law under c. 32B. The use of the word "may" in the exception clause of § 2(d) "imports the existence of discretion." *Hunters Brook Realty Corp. v. Zoning Bd. of Appeals of Bourne*, 14 Mass. App. Ct. 76, 80 (1982).

The element of discretion on the part of the appropriate public authority with respect [**199] to determinations of insurance eligibility under § 2(d) is also reflected in the finality provision of the section³ and has been explicitly recognized by this court. See *Lexington Educ. Assn. v. Lexington*, 15 Mass. App. Ct. at 754 n.7; *Ramponi v. Selectmen of Weymouth*, [*337] 26 Mass. App. Ct. at 829. As the Supreme Judicial Court has stated, under c. 32B, "[a] community is bound by expressly stated constraints in setting up its [insurance] program, but is given broad authority to act within those constraints." *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Chatham*, 404 Mass. 365, 367 (1989).

34 Mass. App. Ct. 333, *; 615 N.E.2d 196, **;
1993 Mass. App. LEXIS 394, ***

5 The judge's observation that the statute's endowing the board's eligibility determination with finality did not make it unreviewable by a court was correct but legally irrelevant to the central issue of the scope of the board's discretion under § 2(d). See *Ramponi v. Selectmen of Weymouth*, 26 Mass. App. Ct. at 829-830 & n.7.

[***8] We know of nothing, and the plaintiffs have cited nothing, that would support truncating the board's discretion and broad authority under c. 32B so that its eligibility determinations under § 2(d), once made, are permanent and irreversible, regardless of changing conditions. Such a rule would undercut the discretion which § 2(d) confers upon it in a manner that is, as *Ramponi*, *supra*, pointed out, contrary to common sense as well as the statutory language:

"Ramponi [the municipal official whose health insurance participation was terminated by the Weymouth board] . . . concedes, as in common sense he must, that the [***9] selectmen can make a decision under § 2(d) favorable to a person, and then, in the light of changed conditions, reverse the decision for the future."

Ramponi v. Selectmen of Weymouth, 26 Mass. App. Ct. at 829.

The effort to distinguish this pointedly applicable language in *Ramponi* is unpersuasive. The *Ramponi* decision, while involving an initial mistake by the board as to an individual's insurance eligibility, assumed the board's more general discretion under § 2(d) to take away, after reexamination, what it had earlier bestowed when subsequent circumstances demonstrate the propriety of such a reversal and the statute contains no inhibition. That premise is in accord with the analogous principle that the power of superior municipal officials to remove subordinate officers is implicit in and an incident of the power to appoint them, even when removal authority is not expressly stated in the enabling statute. See

Adie v. Mayor of Holyoke, 303 Mass. 295, 300 (1939); *Furlong* [*338] *v. Ayers*, 305 Mass. 455, 456-457 (1940); *Whalen v. Holyoke*, 13 Mass. App. Ct. 446, 454 (1982).

[***10] The plaintiffs have failed to suggest any public policy support for their fundamental proposition that, once made eligible for the town's insurance plan, they can never be terminated. Nor can we divine any public interest that would be advanced by sanctioning the fiscal straitjacket with which the plaintiffs seek to restrain their town, especially when the realities of municipal economic stringency and skyrocketing health insurance costs are matters of common knowledge. We would require explicit statutory language or particularly convincing evidence of intent, which they have failed to provide, before we would be prepared to accept such a counterintuitive and singular outcome. Cf. *O'Brien v. Analog Devices, Inc.*, post 905, 906-907 (1993) ("a lifetime contract [of employment] is so extraordinary that it takes strong proof to establish one . . . [and] particularly explicit expressions of intent . . .").

Finally, the plaintiffs' cursory reliance on the so-called anti-rollback amendment, St. 1988, c. 29, § 3, amending c. 23 of the Acts of 1988 by inserting § 77A, as a constraint on the board's power to reconsider its group insurance eligibility decisions is without merit. [***11] That statute's restriction on a town's ability to increase municipal employees' premium payments protects employees who are appropriately covered by a c. 32B plan. It neither states nor effects any limitation on the power of the appropriate [**200] public authority to make eligibility determinations under c. 32B.

In view of the foregoing, judgment is to be entered for the board on the counterclaim against the plaintiffs Shea and Knapp for the insurance premium payments made on their behalf subsequent to July, 1990. The judgment dated November 26, 1991, is reversed, and judgment is to be entered declaring that the April 2, 1990, action of the board was valid.

So ordered.



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

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MITCHELL ADAMS
Commissioner

LESLIE A. KIRWAN
Deputy Commissioner

January 27, 1995

Lanesborough Board of Assessors
Box 164
Lanesborough, MA 01237

Re: Health Insurance for Elected Officials
Our File No. 95-42

Dear Board Members:

You have requested an opinion concerning the authority of the board of selectmen to establish a policy requiring approval of the board of selectmen before an elected official may be considered eligible for group insurance. The particular policy to which you refer appears in a set of personnel rules and regulations adopted by the board of selectmen. Section XX provides that the town will provide health care for employees who regularly work a minimum of 20 hours per week, provided that no employee shall be included for coverage without the prior approval of the board of selectmen. The policy further provides that "[n]o elected employee shall be eligible for coverage under this section without the approval of the Board of Selectmen".

Eligibility for group health insurance coverage in a town which has accepted G.L. Ch. 32B, is governed by G.L. Ch. 32B, S. 2(d). In pertinent part, that section defines "employees" for group health insurance eligibility purposes as follows:

any person in the service of a governmental unit ... who receives compensation for such service ..., whether such person be employed, appointed or elected by popular vote, ... provided the duties of such person require no less than twenty hours, regularly, in the service of the governmental unit during the regular work week of permanent or temporary employment ...; except persons elected by popular vote may be considered eligible employees during the entire term for which they are elected regardless of the number of hours devoted to the service of the governmental unit. ... A determination by the appropriate public authority that a person is eligible for participation in the plan of insurance shall be final. ... (emphasis added).

In a town the board of selectmen is the **appropriate public authority**. G.L. Ch. 32B, S. 2(a).

Clearly the statute requires that employees, including elected employees, receive compensation as a condition of eligibility for coverage. See Ramponi v. Board of Selectmen of Weymouth, 26 Mass. App. Ct. 826, 828-9 (1989). The board of selectmen could not authorize coverage for an elected official who receives no form of compensation from the town. A stipend is considered compensation, but payment solely as reimbursement for out of pocket expenses would not be considered compensation.

If the elected official receives compensation and works regularly at least 20 hours per week, that official would be considered eligible for coverage. The board of selectmen could not deny coverage to such an employee, but may, pursuant to the authority granted under G.L. Ch. 32B, S. 2(d), make a factual determination whether such elected official works the required minimum number of hours. Lexington Education Association v. Lexington, 15 Mass. App. Ct. 749, 751-2 (1983). This may in part be what the board of selectmen policy requiring board approval is intended to address. To the extent that the board of selectmen seek greater authority to deny coverage to an elected official who clearly works the minimum number of hours regularly, such a policy would not supersede the general law provision. Id at 754, n. 7.

If the elected officials do not work the minimum twenty hours, the exception for elected officials authorizes the board of selectmen to determine, in its discretion, whether such coverage will be extended to them. Shea v. Board of Selectmen of Ware, 34 Mass. App. Ct. 333 (1993). We have also suggested that the board of selectmen cannot exercise such discretion without an appropriation available to pay the town's share of premium contributions. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990). The policy established by the board in this case might be intended for the purpose of determining whether elected officials working less than 20 hours regularly should nevertheless be covered by the town's insurance and that there is a sufficient appropriation to cover the town costs.

We hope this addresses your concerns. If we may be of further service, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau



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MITCHELL ADAMS
Commissioner

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LESLIE A. KIRWAN
Deputy Commissioner

September 1, 1994

Donald Faugno, Chairman
Board of Selectmen
P. O. Box 397
Brookfield, MA 01506

Re: Group Health Insurance
Our File No. 94-706

Dear Mr. Faugno:

You inquire whether the board of selectmen may adopt a policy with respect to group insurance for elected officials who work less than 20 hours per week. The policy provides a town 60% premium contribution only for such officials elected prior to May 1, 1995. Other elected officials working less than 20 hours per week would be entitled to enroll, provided they pay 100% of the premium, under the proposed policy.

We believe that the statute requires a town contribution for all eligible employees, including elected officials who work less than 20 hours per week regularly and who are permitted to participate under **G. L. Ch. 32B, S. 2(d)**. Note that such elected officials must be compensated in order to be eligible. We also believe the statute prohibits enrollment of those elected officials who are not eligible, except to the extent the statute or federal law permits a covered employee who is on an unpaid leave, has left employment or whose coverage has been terminated may continue such coverage upon payment of the entire premium. See Shea v. Board of Selectmen of Ware, 34 Mass. App. Ct. 332, 334 n. 4 (1993). In our opinion, the statute does not permit a distinction between newly elected and formerly elected officials with respect to town contribution. **G. L. Ch. 32B, SS. 7, 7A & 16.**

Donald Faugno
Page Two

We understand that the board of selectmen are merely trying to limit the town's fiscal liabilities without harming elected officials already entitled to coverage with town contributions. However, under the present statutory scheme, the town seems to be limited to the remedy of eliminating coverage for all such elected officials working less than 20 hours per week, as specifically upheld in Shea, supra, or to a distinction between such elected officials who receive compensation and those who do not. G. L. Ch. 32B, S. 2(d).

We hope this addresses your concerns. If we may be of further service, please do not hesitate to contact us again.

Very truly yours,

Harry M. Crossman,
Chief, Property Tax Bureau

From: Blau, Gary
Sent: Monday, May 17, 2010 10:00 AM
To: 'Boodman, Lisa (GIC)'
Subject: FW: 2010-622 - Tewksbury - Health Insurance - Elected Officials - Follow Up Response

Attachments: EM2007-973 - Elected Officials Health Insurance.rtf

Lisa:

I have been thinking about this issue again and have one other comment with respect to Question 1, on the right of elected officials working regularly less than 20 hours per week to be covered under the town's plan upon retirement. If such an elected official is covered under the health plan long enough to have vested in the retirement system, and does not run for reelection, fails to be reelected or is recalled, but has served during any later period when coverage has been denied to such official by vote of the board of selectmen, I believe a scenario exists to deny coverage upon retirement in the absence of a regulation. In the appeals court decision in the McDonald case, adopted by the SJC, the court ruled that in the absence of a regulation prohibiting coverage for persons not actually covered at the time of retirement, the default rule was that a person who was "eligible" for coverage at the time of retirement could not be prohibited from receiving the town's health coverage benefit. In that case a firefighter had been covered during early years of his employment, but had switched to his wife's coverage and was on that coverage when he retired. The court ruled that in the absence of a regulation prohibiting coverage for a retiree not actually covered by the town's plan at the time of retirement, the retiree was eligible for coverage upon retirement.

In the case of elected officials working regularly less than 20 hours per week, if the board of selectmen vote to no longer cover them, any such elected official who becomes disqualified, either at that time or upon the expiration of the current term of office, would not be eligible for coverage while employed as such elected official thereafter. Thus, at the time of retirement such elected official would arguably not be entitled to coverage, under the McDonald decision, even without a regulation barring participation. Nevertheless, it makes sense to provide a clear regulation to prohibit this practice if the town wants to eliminate the right of the elected officials to retain the town's group health insurance coverage after retirement.

Gary

From: Blau, Gary
Sent: Wednesday, May 12, 2010 9:29 AM
To: 'Boodman, Lisa (GIC)'
Subject: 2010-622 - Tewksbury - Health Insurance - Elected Officials

Lisa:

That is fine by me, but we usually put a note at the end of our email responses, just after the address lines, i.e., the one that appears at the end of this reply, explaining that the response is not a public written statement, is not the official opinion of the department, and is informational only. After I completed the response to you I gave it a file number and added it to our database, since it presented a new issue. See the number in the subject line above.
Happy to be of service.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
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This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. It should be considered informational only.

From: Boodman, Lisa (GIC) [mailto:Lisa.Boodman@state.ma.us]
Sent: Wednesday, May 12, 2010 8:21 AM
To: Blau, Gary
Subject: RE: Health Insurance - Elected Officials

Gary,

I have reviewed your input - which obviously is much more detailed guidance than I have provided, and I certainly don't want to claim your analysis as my own. Would you be comfortable with my forwarding the string email below to Mr. Zaroulis with attribution?

From: Blau, Gary [mailto:Gary.Blau@state.ma.us]
Sent: Tuesday, May 11, 2010 5:03 PM
To: Boodman, Lisa (GIC)
Subject: RE: Health Insurance - Elected Officials

Lisa:

See my comments below in red. I have several emails and opinions on these issues and can forward them to you if you want to have them.

Gary

From: Boodman, Lisa (GIC) [mailto:Lisa.Boodman@state.ma.us]
Sent: Monday, May 10, 2010 9:40 AM
To: Blau, Gary
Subject: FW: Health Insurance - Elected Officials

Hi Gary,

This is a murky set of issues. I would appreciate your input (feel free to add here; use it as a draft, if you can assist)

From: Boodman, Lisa (GIC) [mailto:Lisa.Boodman@state.ma.us]
Sent: Monday, May 10, 2010 9:18 AM
To: Charles J. Zaroulis

Subject: RE: Health Insurance - Elected Officials

Hi Attorney Zaroulis,

Thanks for your inquiry. As you know, there is little , if any, explicit guidance in chapter 32B or its caselaw on these issues.

From: Charles J. Zaroulis [mailto:charles.zaroulis@verizon.net]

Sent: Friday, May 07, 2010 11:54 AM

To: Lisa Boodman

Subject: Health Insurance - Elected Officials

Dear Atty. Boodman:

I represent the Town of Tyngsborough, and I am requesting your guidance.

M.G.L. c. 32B, § 2 (d):

Any person ... who receives compensation ... whether ... elected... provided that the duties of such person require no less than twenty hours, regularly ... during the regular work week ... except that persons elected by popular vote **may** be considered eligible employees during the entire term for which they are elected regardless of the number of hours devoted to the service of the governmental unit. ... (My emphasis)

A determination by the appropriate public authority [here, the Board of Selectmen] that a person is eligible ... shall be final. ...

First Issue:

If a member of an elected town board has been elected for more than ten (10) years, is over sixty-five (65) years of age, was enrolled in the group health insurance, and does not seek re-election, is that person eligible to continue in the health insurance plan if the Board of Selectmen now determines that elected officials whose duties require less than twenty (20) hours a week are no longer eligible? Do such an elective official have any vested rights in continuing his or her health insurance?

See M.G.L 32B, § 9: "... Policies shall provide that upon retirement ... health insurance under Sections 4, 11C, and 16 ... shall be continued and the retired employee shall pay the full premium cost, subject to ... Section 9A or Section

9E. ..."

#1: My gut (not legal) reaction is that those persons who were eligible and enrolled in the coverage long enough to have had enough years to vest for the town's pension benefits before the rules changed and are already receiving those benefits and the corresponding health coverage should be entitled to coverage pursuant to section 9, (9A and 9E).

I agree with your gut reaction for the elected official who was covered by the town's insurance at the time of actual retirement from service to the town, but think the cases suggest this outcome, as well as the language of "shall be continued" in Sections 9, 9A & 9E. With respect to prohibiting coverage on retirement for those elected officials not covered by the town at the time of retirement or at the time of leaving town service, I think the town has to adopt a regulation or policy limiting retirement coverage to employees who are covered by the town's plan at the time of retirement. See *Cioch v. Treasurer of Ludlow*, 449 Mass. 690 (2007); *McDonald v. Town Manager of Southbridge*, 423 Mass. 1018 (1996); 39 Mass. App. Ct. 479 (1995). Note that in *Cioch* the court did not reach the issue of employees who deferred retirement after leaving town service and *Cioch* had opted to be covered by her spouse's policy until he retired and then took private insurance until she discovered later that she could be entitled to coverage under her town's plan. If the town has a policy, whether written or not, that has allowed elected officials to be covered upon retirement after having been covered at some time during employment or merely eligible for coverage while employed by the town, I think it must adopt a formal policy eliminating such coverage right, in addition to the Selectmen's determination to no longer allow coverage for those compensated elected officials working more than 20 hours per week regularly for the town.

Second Issue:

If all elected members of various boards receive compensation (One Dollar), may the selectmen (here, the appropriate public authority) determine that certain elected boards be eligible but other elected boards not be eligible? If so, must selectmen enumerate a rational purpose for such a determination or might the Town be subject to a claim of disparate or discriminatory practice?

#2:

I'm of the opinion that people who are paid \$1 are not receiving compensation ("compensation paid for services rendered").

Only if these members are elected by popular vote could they be eligible, and I imagine that picking some but not other board members receiving compensation could be grounds for legal action. Keep in mind :

- elected by popular vote and paid compensation = eligible for health ins

- elected by popular vote and not paid compensation = not eligible b/c they don't receive compensation

I am not sure I agree with the analysis of the \$1 payment to board members, since the only rational basis I can see to vote such an amount would be to allow the board members to receive health insurance benefits and contributions. If the selectmen determined eligibility based on the \$1 stipend, and town meeting voted the stipend for the purpose of allowing the elected official to be covered, I would not say that the town is prohibited from offering the insurance. We have generally concluded that as long as the stipend is more than just reimbursement for out-of-pocket costs, it would be sufficient compensation, and have not suggested that some particular minimum amount is required. That is not to say that placing a minimum compensation for eligibility might not be a rational approach, but the current legislation is not sufficiently clear to make the necessary determinations as to how much is considered "compensation."

We have also concluded, consistent with past GIC policy in times of yore, that the decision to permit compensated elected officials to participate in the group plan notwithstanding working fewer than 20 hours per week regularly, is an all or nothing policy. The rationale for that position is one of avoiding discrimination issues, but it seems to me a rational basis may be used to discriminate between part-time elected officers who work regularly on a weekly basis, but not the required 20 hours, and those elected board members who attend one meeting a month or even less frequently, for health insurance purposes. The elected official who works 15 hours per week may not have another job that qualifies for health insurance benefits, while the monthly "volunteer" more likely has other insurance options.

Third Issue:

Where the Town has accepted Section 32B and where the Board of Selectmen voted that elected officials on Boards are eligible to participate and where the Board of Selectmen now wishes to revoke that determination, may the Board determine that those elected officials presently in office and who are in the group insurance plan are grandfathered so long as they continue to be re-elected and the revocation determination of eligibility only applies to newly elected board members? It all depends upon whether they are eligible for their coverage according to the principles articulated above

We have generally concluded that the BOS may change the policy and revoke eligibility for elected officials and do so immediately or at some definite time in the future not related to the term of office, under *Shea v. Board of Selectmen of Ware*, 34 Mass. App. Ct. 333 (1993). We have also opined that the language in the statute which authorizes coverage of such elected officials "during the entire term for which they are elected" could allow for continued coverage of such

officials only until the end of the current term of office. Once they ran for reelection they would not be covered, and would not be treated differently from anyone else running for the office. The expectation for coverage if elected would not apply to a reelection bid, if the BOS has eliminated coverage for those elected officials who do not work the minimum number of hours.

Would there be any difference if one is elected to a Town board and then elected to a different Town Board?

The Shea v. Ware case is of no assistance on these issues.

Have any guidelines been issued by your office? No.

We have not issued any guidelines either, but I am not sure I understand this last question, unless town counsel is assuming the person is entitled to be covered for all years for which he is reelected, which we do not think is the case.

Finally, I point out that, in part due to our opinions, and perhaps those of the GIC, some towns have sought special acts to deal with their peculiar issues involving group insurance for elected officials. See Chapter 76 of the Acts of 2006 (Sandwich), Chapter 156 of the Acts of 2004 (Swansea) & Chapter 480 of the Acts of 1998 (Carver).

Thank you.

Charles J. Zaroulis
Tyngsborough Town Counsel

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RICHARD E. RAMPONI v. BOARD OF SELECTMEN OF WEYMOUTH & others¹

1 The town of Weymouth and the treasurer of Weymouth.

No. 88-P-85

Appeals Court of Massachusetts, Norfolk

26 Mass. App. Ct. 826; 533 N.E.2d 226; 1989 Mass. App. LEXIS 37

November 15, 1988

January 27, 1989

PRIOR HISTORY: [***1] CIVIL ACTION commenced in the Superior Court Department on August 30, 1985.

The case was heard by *Constance M. Sweeney, J.*, on motions for summary judgment.

DISPOSITION: *So ordered.*

COUNSEL: *Robert L. Marzelli* for the Board of Selectmen of Weymouth & others.

Leo S. McNamara for the plaintiff.

JUDGES: Armstrong, Kaplan, & Brown, JJ.

OPINION BY: KAPLAN

OPINION

[*827] [**226] The plaintiff Ramponi has been one of the appointed constables of the town of Weymouth since April, 1970. He applied to the Weymouth selectmen in December, 1974, to have them recognize him as an "employee" within the meaning of § 2(d) of G. L. c. 32B, as amended through St. 1982, c. 615, § 5, the statute which makes provision for a group health insurance plan whereby the town pays one-half the amounts of the premiums charged to the employees. The selectmen decided in Ramponi's favor. This decision was questioned in October, 1977, by the town treasurer, but the selectmen did not budge. When, in July, 1985, the treasurer renewed the question, the selectmen voted [***3] to remove Ramponi from the plan.² Thereupon Ramponi commenced the present action for a declaratory judgment of reinstatement. Upon cross motions for summary judgment, a judge of the Superior Court entered judgment for the plaintiff. We reverse. Ramponi does not qualify as an "employee" and there is no bar to the selectmen's correcting their initial mistake of law or to the [***227] court's reviewing such a legal determination.³

2 Ramponi had actual notice of the public meeting at which the action was taken, attended it, and spoke. The charges of political motivations Ramponi makes in his brief find no support in the record and are mere distractions from the issue of law.

3 The State Administrative Procedure Act, G. L. c. 30A, does not apply to the review of a decision by a board of selectmen. See *Fratus v. Selectmen of Yarmouth*, 6 Mass. App. Ct. 605, 608 (1978). No question is raised whether the present action would be better styled as an action in the nature of certiorari than as an action for a declaration.

[***4] 1. As shown upon the motions for summary judgment, Ramponi holds appointment as a constable not only by the Weymouth selectmen but also by the appointing authorities in five other towns and the city of Quincy. He also does some work as an auctioneer and a justice of the peace. A constable's main authorized function is to serve process and the like. See G. L. c. 41, §§ 91-95. The municipality may ask him to make a service and so may any private person. For each service he [*828] makes, the constable charges a fee. In fact private requests usually will greatly outnumber those from the municipality.

In the nature of a constable's work, he does not undertake to do any stated number of jobs, nor does the municipality exact any such stipulation. What work he does depends on the requests that happen to be made of him and his willingness or ability to comply with the requests. In light of these circumstances, it will be seen that a constable is not eligible as an "employee" under G. L. c. 32B, § 2(d) (quoted in part in the margin).⁴ It is very dubious that Ramponi can be brought within the opening words "in the service of a governmental unit" and "receives compensation for [***5] such service," when he charges for particular jobs and most of them are done for private persons. That the statute looks to something in the nature of a salary from the governmental unit

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for continuous work, rather than particular charges for individual jobs done at request, is shown by the use of the term "salary" in figuring [*829] the contributions by the multiple governmental units where a person works for more than one unit. And quite clearly, Ramponi cannot meet the first proviso, that "the duties of such person require no less than twenty hours, regularly, in the service of the governmental unit during the regular work week," and so on, when he has no fixed duties that require any set number of hours, and does not have a regular work week.⁵

4 "(d) 'Employee', any person in the service of a governmental unit or whose services are divided between two or more governmental units or between a governmental unit and the commonwealth, and who receives compensation for such service or services, whether such person be employed, appointed or elected by popular vote, . . . provided, the duties of such person require no less than twenty hours, regularly, in the service of the governmental unit during the regular work week of permanent or temporary employment, and provided, further that no seasonal employee or emergency employees shall be included; except that persons elected by popular vote may be considered eligible employees during the entire term for which they are elected regardless of the number of hours devoted to the service of the governmental unit. If an employee's services are divided between governmental units, the employee shall, for the purposes of this chapter, be considered an employee of the governmental unit which pays more than fifty per cent of his salary. But, if no one of said governmental units pays more than fifty per cent of said employee's salary, the governmental unit paying the largest share of the salary shall consider the employee as its own for membership purposes, and said governmental unit shall contribute fifty per cent of the cost of the premium. If the payment of an employee's salary is equally divided between governmental units, the governmental unit having the larger or largest population shall contribute fifty per cent of the cost of the premium. If an employee's salary is divided in any manner between a governmental unit and the commonwealth, the governmental unit shall contribute fifty per cent of the cost of the premium. . . . A determination by the appropriate public authority that a person is eligible for participation in the plan of insurance shall be final. . . ."

[***6]

⁵ Legislative history, showing the evolution of the language now appearing in the proviso, is set

out in *Lexington Educ. Assn. v. Lexington*, 15 Mass. App. Ct. 749 (1983).

2. The judge below did not enter into the question whether Ramponi qualifies as an "employee" under § 2(d). She ruled that the 1974 decision of the selectmen was immovable by them even if it was erroneous. She supported this view by a reference to the next-to-last sentence of § 2(d) (last in the quotation at note 4) which states that a determination by the [***228] selectmen that a person is eligible shall be "final." We read "final" in this context to mean that a positive determination by the selectmen is the end of the administrative line -- there is no administrative body which is a hierarchical superior to the selectmen, capable of reexamining their determination. Ramponi apparently concedes, as in common sense he must, that the selectmen can make a decision under § 2(d) favorable to a person, and then, in the light of changed conditions, reverse the decision for the future. It should be equally [***7] clear that they may correct for the future a decision based on a mistaken view of the law -- an erroneous interpretation of the basic statute.⁶ See discussion in *Aronson v. Brookline Rent Control Bd.*, 19 Mass. App. Ct. 700 (1985); 2 Davis, *Administrative Law Treatise* § 18.09, at 605-611 (1958), and at 620 (1970 Supp.); Davis, *Administrative Law Text* § 18.09, at 369-371 (3d ed. 1972). See also *Boesche v. Udall*, 373 U.S. 472 (1963); *Warburton v. Warkentin*, 185 Kan. 468, 477 (1959). Compare *American Trucking Assns., Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 144-146 (1958). There is, moreover, no equity in the present picture that conceivably [*830] might bar the selectmen from conforming now to the law. The corrective decision involves no retroactive impairment of rights or property. By reason of the treasurer's protests, Ramponi knew his credentials were challengeable, and that and worse would have been evident to him or his advisers upon even a casual reading of § 2(d). To all this should be added the general principle that estoppel may not be raised against the government. [***8] See *Stadium Manor, Inc. v. Division of Admin. Law Appeals*, 23 Mass. App. Ct. 958, 962 (1987).

6 There is no claim that the selectmen would be without power to reverse for the future a decision unfavorable to the person.

Ramponi says "final" also means that there is no judicial review of the selectmen's first decision declaring him eligible.⁷ In a sense this is true: where the decision declares a person eligible, neither the selectmen nor the person wants an appeal. On the other hand, where the selectmen's (second) decision is against the person, judicial review is available: the finality language does not purport and cannot be read to extend to such a case. In-

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deed, Ramponi acted on that understanding in commencing the present action in Superior Court.

7 We need not refer to the many instances where statutory statements that administrative action is final have been held not to preclude judicial review. See *Opinion of the Justices*, 251 Mass. 569, 614-616 (1925); *Hough v. Contributory Retirement App. Bd.*, 309 Mass. 534, 535 (1941); *Taunton Eastern Little League v. Taunton*, 389 Mass.

719, 720 n. 1 (1983); *Gudanowski v. Northbridge*, 17 Mass. App. Ct. 414, 419-420 (1984).

[***9] The judgment appealed from is reversed and judgment will enter declaring that the plaintiff is not an "employee" as defined by *G. L. c. 32B, § 2(d)*.

So ordered.

Chapter 115 of the Acts of 2006

AN ACT RESTRICTING CERTAIN INSURANCE BENEFITS FOR PART-TIME ELECTED OFFICIALS OF THE TOWN OF NORWELL.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. Notwithstanding chapter 32B of the General Laws or any other general or special law to the contrary, part-time elected officials of the town of Norwell who receive a stipend shall not be eligible for participation in the town's contributory health and life insurance benefit plan, but part-time elected officials who receive a stipend and who pay the full monthly cost to the town, plus any administrative costs that may be assessed by the board of selectmen, shall be eligible to participate.

SECTION 2. This act shall take effect on July 1, 2006.

Approved June 21, 2006.

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Chapter 156 of the Acts of 2004

AN ACT RELATIVE TO PART-TIME ELECTED OFFICIALS OF THE TOWN OF SWANSEA.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Notwithstanding chapter 32B of the General Laws or any other general or special law to the contrary, part-time elected officials of the town of Swansea who receive a stipend shall not be eligible for participation in the town's contributory health and life insurance plan. Part-time elected officials elected prior to April 2004 who currently participate in the plan shall be eligible to continue participation until the end of their current terms. Part-time elected officials who receive a stipend and who elect to pay 100 per cent of the cost of such participation plus any administrative costs that may be assessed by the board of selectmen may be eligible to participate in the plan.

Approved July 1, 2004

