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

**Current Developments  
in  
Municipal Law**



**2014**

**Massachusetts and Federal Court Cases**

**Book 2**

**Amy A. Pitter, Commissioner  
Robert G. Nunes, Deputy Commissioner**

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# MASSACHUSETTS AND FEDERAL COURT CASES

## Book 2

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**BEACON SOUTH STATION ASSOCIATES, LSE<sup>1</sup> vs. BOARD OF ASSESSORS OF BOSTON**

1 Also known as EOP-South Station, LLC.

**No. 13-P-739**

**APPEALS COURT OF MASSACHUSETTS**

*85 Mass. App. Ct. 301; 9 N.E.3d 334; 2014 Mass. App. LEXIS 48*

**February 12, 2014, Argued  
May 14, 2014, Decided**

**PRIOR HISTORY: [\*\*\*1]**

Suffolk. Appeal from a decision of the Appellate Tax Board.

**DISPOSITION:** Decision of Appellate Tax Board affirmed.

**HEADNOTES**

*Taxation, Abatement, Exemption, Leased property, Real estate tax: abatement, exemption. Massachusetts Bay Transportation Authority. Boston. Contract, Lease of real estate. Real Property, Lease.*

**COUNSEL:** Anthony M. Ambriano for the defendant.

Stephen H. Oleskey for the plaintiff.

**JUDGES:** Present: Kafker, Milkey, & Sullivan, JJ.

**OPINION BY: KAFKER**

**OPINION**

[\*301] [\*\*335] KAFKER, J. The principal issue in this case is whether certain real estate in Boston owned by the Massachusetts Bay Transportation Authority (MBTA) and leased to a private, for-profit entity was exempt from taxation pursuant to *G. L. c. 161A, § 24*, in fiscal years 2009 and 2010.<sup>2</sup> The property in question is the South Station Headhouse (Headhouse), which the MBTA [\*302] leases to Beacon South Station Associates, LSE, also known as EOP-South

Station, LLC (EOP).<sup>3</sup> The Headhouse consists of an enclosed concourse through which the public passes to access MBTA and Amtrak train platforms, an underground subway connection, office and retail space, a surface facility and parking area, and the surrounding sidewalks. The real estate taxes assessed on the Headhouse were \$1,439,974.76 in 2009, and \$1,135,463.55 in 2010. EOP filed challenges to the 2009 and 2010 fiscal year assessments on the property with the board of assessors of Boston (assessors), and then appealed to the Appellate [\*\*\*2] Tax Board (board) following the assessors' refusal to abate the taxes. The board ruled that *G. L. c. 161A, § 24*, "expressly exempted the property of the MBTA from taxation, whether or not leased for business purposes," and granted the abatements. The assessors appealed.

2 As discussed *infra*, our decision applies to the version of the statute in effect for the tax years at issue.

3 Beacon was the initial lessee of the property but assigned its interest to EOP in 1998. Although Beacon was the original petitioner involved in the challenge to the taxes assessed in 2009, the petition was later amended to name EOP as the petitioner for both 2009 and 2010. We will refer primarily to EOP as the interested party for the sake of clarity.

On appeal, the assessors' primary argument is that the board erred in its conclusion,

and the § 24 exemption did not apply to the Headhouse at all because EOP, a private entity, leased the Headhouse from the MBTA and operated it for profit in the tax years in question. Alternatively, the assessors argue that even if the Headhouse was not subject to a blanket assessment for the years in question, EOP could be taxed on the tenant improvements made to the property because [\*\*\*3] EOP owned these improvements according to the terms of the lease, and they were therefore not property of the MBTA. Examination of *G. L. c. 161, § 24*, as in effect in 2009 and 2010, its legislative purpose, and the case law interpreting the statute compel us to conclude that no part of the property was subject to taxation in 2009 or 2010, and we therefore affirm the decision of the board abating the taxes for those years.

Background. The stipulated factual record is replete with evidence detailing the financial hardships of both South Station and the MBTA. We begin with a brief summary of the history of South Station and how the plans to revitalize it were intended to benefit the ailing MBTA.

[\*303] Following the increase in air and highway travel after World War II, and through the 1970s, the use of South Station steadily declined and the property deteriorated as a result.<sup>4</sup> Although the Boston Redevelopment Authority (BRA), after purchasing South Station in 1965, originally concluded that it was "infeasible [\*\*\*336] of economic conversion for a better use," the BRA, along with Federal, State, and local agencies, eventually reconsidered and determined that South Station could become a transportation [\*\*\*4] hub and multiuse complex. South Station was reimagined as a "public meeting place" that would include office and retail space and a "grand and spacious" concourse for intra- and intercity travelers and commuters.

4 In 1970, South Station had one working elevator, and one open staircase. One floor of the station was

abandoned, and another floor was closed after a fire.

As a result, the BRA conveyed South Station to the MBTA in 1979. The MBTA began a \$195 million renovation and restoration of the Headhouse in 1984. Funding for this restoration was provided by the MBTA, Amtrak, the Urban Mass Transit Authority, the Federal Railroad Administration, private development corporations, and EOP's predecessor, Beacon.

In 1988, to advance the revitalization plans, the MBTA entered into a long-term lease agreement with Beacon, pursuant to which Beacon agreed to expend a substantial amount of money to renovate and operate the property, and in turn, to earn and share revenue by leasing space to subtenants. Beacon provided \$22 million to finance the renovation, supervised the rehabilitation of the Headhouse, and provided property management services for the MBTA. The lease "was not intended to be a conventional, [\*\*\*5] profit-making commercial real estate lease, but rather a lease to provide a public service as well as to offset the cost of redeveloping and operating the facility." The initial term of the lease expires on December 31, 2024. The lease also contains an option for two fifteen-year extensions. Although the MBTA retains ownership of the land and the Headhouse, the lease specifies that Beacon -- now EOP -- retains title to any and all tenant improvements, but any such improvements not removed at the end of the lease term become property of the MBTA. "Tenant's Improvements" are defined in the lease as follows:

[\*304] "Any and all appurtenances, furnishings, fixtures, equipment, improvements, additions and other property attached to or installed in the Premises by or on behalf of Tenant, including, without limitation, Tenant's Work, any and all Tenant Alterations<sup>5</sup> and any and all appurtenances, furnish-

ing, trade or other fixtures, equipment, improvements, additions and other property installed by or for the use or benefit of any and all Subtenants."

The renovation of the Headhouse, completed in 1989, included interior improvements, with retail and food kiosks on the first floor and office space on [\*\*\*6] the upper floors.

5 "Tenant's Work" and "Tenant's Alterations" are defined elsewhere in the lease under similarly broad provisions.

Under the lease, EOP's rental payments to the MBTA are either the greater of (i) a minimum guaranteed rent of \$330,000 per year, or (ii) fifty percent of the difference between net available income (as defined in the lease) and the annual capital improvement contribution. The lease also provides that real estate taxes are deducted from the net available income in calculating the annual rent due.

Since 1990, real estate taxes have been assessed on the entirety of the Headhouse. In addition to the various for-profit sublessees that occupy the private retail and office space, both Amtrak and the Commonwealth also sublet office space during the tax years at issue. As explained above, the total real estate taxes for 2009 and 2010 were \$1,439,974.76 and \$1,135,463.55, respectively. The parties stipulated below that the rental payments to the MBTA would have been greater if [\*\*337] the property had not been subject to real estate taxes. For example, in 2009, EOP would have paid \$791,936.71, instead of the \$330,000 minimum.<sup>6</sup> In issuing its decision on the 2009 and 2010 abatements, [\*\*\*7] the board emphasized that EOP paid significantly less rent to the MBTA than it would have if taxes had not been assessed.

6 The 2010 rental payment had not been made as of the date of the board hearing, and therefore neither the ac-

tual payment nor any hypothetical payment adjusted for abatement are in the record.

Although the South Station revitalization was successful, the MBTA continues to face grave financial difficulties, including substantial debt. As of early 2011, this debt totaled \$5.5 billion.

[\*305] Discussion. 1. Standard of review. "At the outset it should be noted that an exemption from taxation is a matter of legislative grace and may be recognized only when the taxpayer shows that he comes within either the express words or the necessary implication of some statute conferring this privilege upon him." *Assessors of Newton v. Pickwick Ltd.*, 351 Mass. 621, 623, 223 N.E.2d 388 (1967) (Pickwick). See *Boston Chamber of Commerce v. Assessors of Boston*, 315 Mass. 712, 716, 54 N.E.2d 199 (1944); *Willowdale LLC v. Assessors of Topsfield*, 78 Mass. App. Ct. 767, 769, 942 N.E.2d 993 (2011).

2. Statutory scheme and MBTA exemption. In 2009 and 2010, the MBTA exemption statute, *G. L. c. 161A*, § 24, inserted by St. 1999, c. 127, § 151, [\*\*\*8] provided:

"Notwithstanding any general or special law to the contrary, the [MBTA] and all its real and personal property shall be exempt from taxation and from betterments and special assessments; and the [MBTA] shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions . . . ."<sup>7</sup>

7 In contrast, *G. L. c. 59*, § 2B, as amended by St. 1980, c. 261, § 13, generally subjects public property to taxation where it is leased to a private party, and it provides in relevant part:

"[R]eal estate owned in fee or otherwise or held in

trust for the benefit of the United States, the commonwealth, or a county, city or town, or any instrumentality thereof, if used in connection with a business conducted for profit or leased or occupied for other than public purposes, shall for the privilege of such use, lease or occupancy, be valued, classified, assessed and taxed annually as of January first to the user, lessee or occupant in the same manner and to the same extent as if such user, lessee or occupant were the owner thereof in fee, whether or not there is any agreement by such user, lessee or occupant to pay taxes assessed under this section."

As [\*\*\*9] the board recognized, by its plain terms the statutory exemption applied to all of the property at issue without regard to whether or for what purpose the property was leased. See *White v. Boston*, 428 Mass. 250, 253, 700 N.E.2d 526 (1998) (courts are constrained to follow statute's plain language). There was no exception carved out of the § 24 exemption for private leases. Moreover, during the years at issue, § 24 expressly provided that the property of the MBTA shall be exempt from taxation "[n]otwithstanding any general or special law to the contrary." [\*306] The Legislature employs the "notwithstanding" language to trump the effect of other potentially inconsistent statutes. In this instance it trumped the effect of *G. L. c. 59, § 2B*, the general tax statute.

3. Prior case law interpreting private leases. We also have specific guidance from the Supreme Judicial Court on the issue of the taxability of MBTA leases to private

parties. In *Pickwick*, 351 Mass. at 623-625, the Supreme Judicial Court addressed this question while construing substantially similar statutory [\*\*\*338] language in the predecessors to the MBTA exemption statute and the general public property taxation statute in effect in 2009 and 2010.<sup>8</sup> The [\*\*\*10] court interpreted the exemption statute to "encompass all the [MBTA's] real and personal property," including any property leased from the MBTA by a private, commercial entity, regardless of the purpose for which that property was used. *Id.* at 624. The court emphasized that the Legislature's purpose in establishing the exemption was to alleviate the ailing transportation authority's "crushing financial burden." *Id.* at 626. Consistent with that purpose, the court adopted an interpretation of the exemption that included lessees. *Ibid.* "If the exemption did not include lessees of the authority, the lessee . . . could reduce its rental payments to the authority by the amount of the tax. . . . Such a construction would completely negate the legislative intent . . . ." *Id.* at 624-625. See *Martha's Vineyard Land Bank Commn. v. Assessors of W. Tisbury*, 62 Mass. App. Ct. 25, 32, 814 N.E.2d 1147 (2004), quoting from *Pickwick*, 351 Mass. at 624-626 ("tax exemption that 'primarily benefit[s]' the public by improving the authority's finances had to be liberally read to extend the exemption to the authority's lessees 'by necessary implication,' so as to prevent dissipation of the authority's revenues by having the [\*\*\*11] lessees reduce their rental payments by [\*307] the amount of any tax, because '[t]he [authority's] public purpose is of controlling significance in construing [the] express exemption from taxation'").

8 We do not detail the entire legislative history of the statutes here, as the board did below. We think it sufficient to note that the language at issue in *Pickwick* was from the exemption statute that preceded the version at issue here, but the language in both statutes was nearly identical. The only difference in the exemption language

interpreted in *Pickwick* was the absence of the "[n]otwithstanding any general [\*\*\*339] or special law to the contrary" language which was added when the prior MBTA exemption statute was replaced by *G. L. c. 161A, § 24*. See St. 1999, 127, § 151.

In an attempt to circumvent *Pickwick*, the assessors claim that the holding in that case was effectively overruled before the tax years at issue here by subsequent amendments to the general tax statute. We are not persuaded by this argument. As the court stated in *Pickwick*, the specific MBTA exemption statute controls over the general tax law. *Pickwick*, 351 Mass. at 625-626. See *Cabot v. Assessors of Boston*, 335 Mass. 53, 63-65, 138 N.E.2d 618 (1956). [\*\*\*12] See generally *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 18, 725 N.E.2d 188 (2000), quoting from *Risk Mgmt. Foundation of Harvard Med. Insts., Inc. v. Commissioner of Ins.*, 407 Mass 498, 505, 554 N.E.2d 843 (1990) ("It is a basic canon of statutory interpretation that 'general statutory language must yield to that which is more specific'"). Had the Legislature wished to limit the exemption after *Pickwick*, it would have had to have done so more expressly and more directly than the changes in the general tax statute relied on by the assessors. Cf. *G. L. c. 91 App., § 1-17*; *G. L. c. 59, § 2B*; *G. L. c. 59, § 5*, Second. See also *Commissioner of Rev. v. Cargill, Inc.*, 429 Mass. 79, 82, 706 N.E.2d 625 (1999) ("Had the Legislature intended to limit the credit in the manner advocated by the commissioner, it easily could have done so"). Despite the various changes to the general tax statute in the years since *Pickwick*, the MBTA exemption statute had been amended only once, in 1999, prior to the tax years in question. See St. 1999, c. 127, § 151. Rather than undermining *Pickwick*, this amendment added the prefatory clause, "[n]otwithstanding any general or special law to the contrary." This amendment, as previously explained, [\*\*\*13] reinforces the specific MBTA exemption by its plain language, evincing the legislative intent that this par-

ticular exemption supersedes any other implicated general tax statute.

Finally, we note that the Legislature, in 2013, expressly amended the MBTA exemption statute as part of a comprehensive transportation funding overhaul, adding language specifically excluding lessees from the scope of the MBTA exemption if the property is "leased, used, or occupied in connection with a [\*308] business conducted for profit." St. 2013, c. 46, § 50.<sup>9</sup> This change, explicitly narrowing the exemption, reinforces the conclusion that there was a preexisting exemption from taxation for lessees for prior tax years. See *Brooks v. School Comm. of Gloucester*, 5 Mass. App. Ct. 158, 161, 360 N.E.2d 647 (1977) ("an amendment to a statute presumably intends a change" to that statute).

9 Beginning in 2007, the city of Boston made several requests that the Legislature amend the MBTA exemption statute to tax MBTA property leased for business purposes.

In light of the foregoing, we conclude that the board correctly applied the statutory tax exemption to the leased property in 2009 and 2010.<sup>10</sup>

10 The assessors also argue that the MBTA had the [\*\*\*14] ability to "bargain away" its exemption in negotiating the lease, and that the lease contemplates that EOP will pay taxes on the property. This argument is unpersuasive, as a party's understanding of whether property is subject to taxation or an exemption does not control the issue. The outcome is determined by reference to the relevant statutes and case law.

4. Tenant improvements. In the alternative, the assessors argue that because the tenant improvements are privately owned according to the terms of the lease -- a fact that distinguishes this case from *Pickwick* -- these improvements are subject to real estate

taxes as private property. According to the assessors, the statutory exemption cannot cover the tenant improvements because EOP has title to these improvements, and thus they do not constitute real or personal property of the MBTA.<sup>11</sup> As an initial matter, it is not clear from the record that the assessors raised this issue before the board, and the board, therefore, did not squarely address this issue in its decision. Even if properly raised below, the argument is without merit.

11 The [\*\*\*15] assessors rely solely on the statutory text and do not cite any cases to support this argument.

Real estate taxes are usually assessed on land and buildings as a unit. Cf. *Franklin v. Metcalfe*, 307 Mass. 386, 389, 30 N.E.2d 262 (1940), and cases cited; *Ellis v. Assessors of Acushnet*, 358 Mass. 473, 475, 265 N.E.2d 491 (1970) ("The law is well settled that land and buildings erected thereon or affixed thereto are properly taxed as a unit and this rule is not affected by private agreements or by the degree of physical attachment to the land"). As the board found, there is no dispute that the land and buildings comprising South Station are owned by the MBTA. They were conveyed to the [\*309] MBTA by the BRA in 1979. They are real property of the MBTA and, without any showing to the contrary, exempt from taxation. See *G. L. c. 161A*, § 24. And, as we concluded above, for fiscal years 2009 and 2010, the Headhouse cannot be taxed simply because it is leased to a private party, as the property is owned by the MBTA and thus subject to the exemption statute and the interpretation of that statute in *Pickwick*, 351 Mass. at 623-624.

[\*\*340] The assessors, therefore, ask us to carve out the tenant improvements from otherwise tax-exempt property, [\*\*\*16] and to tax those improvements as real estate. We are not persuaded by this argument, as we discern no authority to impose real estate taxes on tenant improvements where the rest of the property -- the land and the building itself -- is plainly exempt. Cf. *Franklin v. Metcalfe*, 307 Mass. at 389; *Ellis v. Assessors*

*of Acushnet*, 358 Mass. at 475. In fact, the assessors' own actions undermine this type of separate treatment, as their assessments of the property have never attempted to carve out the improvements as separate real estate. And, although the board did not address this precise issue, its finding that the property as a whole belonged to the MBTA and was tax-exempt is consistent with how real estate taxation generally operates -- by assessing the land and buildings as a unit, and not severing improvements for separate taxation. Here, that unit is exempt from taxation as real property of the MBTA.

Our examination of the exemption's statutory purpose further compels the conclusion that the improvements are not subject to taxation. It is clear that the exemption was broadly intended to alleviate the financial burden on the MBTA. See *Pickwick*, 351 Mass. at 624 & n.4. In this case, [\*\*\*17] the taxes assessed on the Headhouse have substantially reduced the rental payments to the MBTA. And, as the board noted, "the primary concern of the court in *Pickwick* -- the specter of decreased revenue to an already ailing transportation agency -- remains an issue at present." The lease provisions granting title to the improvements to EOP were intended to provide an incentive to a private party to participate in a partnership that would make the South Station renovation financially feasible for the financially beleaguered MBTA. The benefits of the improvements and the [\*310] property as a whole were intended to inure to the MBTA and, by extension, the public.<sup>12</sup> Cf. *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 634-635, 80 S. Ct. 1050, 4 L. Ed. 2d 1002 (1960) (despite statute subjecting property of Reconstruction Finance Corporation to taxation, and despite corporation having record title to certain property, property was exempt from taxation because benefits of property inured to United States); *Emhart Corp. v. State Tax Commn.*, 363 Mass. 429, 432, 294 N.E.2d 388 (1973) ("mere paper transfer" of property may not alter availability of exemption).

12 Furthermore, EOP's title to the improvements is only temporary. According to the [\*\*\*18] terms of the lease, the improvements will become the MBTA's property at the end of the lease -- as early as 2024 -- unless they are removed by EOP.

Conclusion. For the reasons discussed above, we affirm the board's ruling that the South Station Headhouse, including the tenant improvements, was exempt from taxation in 2009 and 2010.

Decision of Appellate Tax Board affirmed.

**HEATHER A. BORRONI vs. DIRECTOR OF THE DIVISION OF UNEMPLOYMENT ASSISTANCE & another<sup>1</sup>**

1 Town of Berkley.

**13-P-442**

**APPEALS COURT OF MASSACHUSETTS**

*85 Mass. App. Ct. 1127; 10 N.E.3d 671; 2014 Mass. App. Unpub. LEXIS 795*

**June 25, 2014, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**DISPOSITION:** [\*1] Judgment affirmed.

**JUDGES:** Cypher, Kantrowitz & Cohen, JJ.

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, Heather A. Borroni, appeals from a District Court decision upholding the decision of the board of review of the Division of Unemployment Assistance which denied the plaintiff unemployment benefits under *G. L. c. 151A, § 25(e)(1)*. We affirm.

*Background.* The plaintiff was dismissed from her position as a teacher in the Berkley School Department, effective December 23, 2009, when her provisional educator's certificate expired (provisional certificate). Her claim for unemployment benefits was denied by the Division of Unemployment Assistance (DUA). The plaintiff appealed, and after a hearing, a review examiner found her eligible for unemployment benefits. The employer appealed that decision to the board of review (board) which reversed after a remand for subsidiary findings. The plaintiff then sought judgment on the pleadings in the District

Court under *G. L. c. 30A, § 14*. The judge ruled that the board's findings were supported by substantial evidence, were not arbitrary or capricious, and were not based on any error of law. The plaintiff filed this appeal, challenging the board's [\*2] decision that she left work voluntarily, within the meaning of *G. L. c. § 151A, § 25(e)(1)*.

*Discussion.* The essence of the plaintiff's argument is that Berkley knowingly placed her in a position where the expiration of her provisional certificate resulted in her termination, and therefore her separation from employment was not voluntary. The plaintiff was hired by Berkley on November 1, 2008. At that time she held two provisional certificates under *G. L. c. 71, § 38G*, issued on September 27, 2002 -- one for grades five to eight, and one for grades eight to twelve, and had taught for four years in Attleboro under the former, and in West Bridgewater for one year under the latter. Because of that prior employment, and the limitation that a provisional certificate may be used only for five years,<sup>2</sup> when she began teaching at Berkley, the plaintiff's certificates would only be valid for one year and four years, respectively. Initially assigned to teach eighth grade, for reasons of course and personnel changes, Berkley assigned the plaintiff to teach seventh grade for the school year 2009-2010. In the spring of 2009, based on a review of the plaintiff's application records, her principal reminded [\*3] her that her provisional certificate for grades five to eight would lapse on December 31, 2009.

2 A provisional educator certificate is valid for only five years of employment, after which a teacher must obtain a standard certificate. *G. L. c. 71, § 38G*.

The record before the board shows that the plaintiff knew her provisional certificate would lapse but took no action toward obtaining a standard educator certificate (standard certificate) until she informed the superintendent of schools in November that her parents agreed to loan her funds to pay

the tuition for a program which would lead to obtaining a standard certificate. At that time it was too late to enter the program which already had begun. The plaintiff states that at that time she also requested a transfer to teach eighth grade English, and asked the superintendent to request a waiver from the certification requirement from the Commissioner of the Department of Education. These requests were denied. The board ruled that, "[a]s established by the findings, the employer had valid reasons for denying both of the [plaintiff's] requests."<sup>3</sup>

3 The superintendent testified at the hearing before the review examiner that the transfer requested [\*4] in the middle of the school year would have been unduly disruptive to students and the eighth grade teacher. He also stated that he had only applied for waivers from certification for positions which were considered difficult to fill, such as special education or mathematics.

Accordingly, the board concluded that, in allowing her provisional certificate to lapse, and in failing to secure a standard certificate, the plaintiff "brought her unemployment onto herself." Nothing appears in this record supporting the plaintiff's assertion that Berkley's acts constituted any impediment to her continued employment. "[I]n determining whether an employee left work 'voluntarily' for purposes of § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed . . . but whether the employee brought his unemployment on himself." *Olmeda v. Dir. of the Div. of Employment Sec., 394 Mass. 1002, 1003, 475 N.E.2d 1216 (1985)*.

Judgment affirmed.

By the Court (Cypher, Kantrowitz & Cohen, JJ.),

Entered: June 25, 2014.

**DORIS COPLEY vs. TOWN OF DARTMOUTH & another<sup>1</sup>**

1 David G. Gressman, individually and in his official capacity as executive administrator of the town of Dartmouth. (Although this defendant's surname appears by the spelling "Cressman" in many materials in the record appendix, it appears as "Gressman" in the complaint.)

**13-P-678**

**APPEALS COURT OF MASSACHUSETTS**

*85 Mass. App. Ct. 1103; 3 N.E.3d 1119; 2014 Mass. App. Unpub. LEXIS 257*

**March 3, 2014, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**SUBSEQUENT HISTORY:** Appeal denied by *Copley v. Town of Dartmouth*, 468 Mass. 1102, 2014 Mass. LEXIS 342, 8 N.E.3d 279 (2014)

**DISPOSITION:** [\*1] Judgment affirmed.

**JUDGES:** Green, Sikora & Carhart, JJ.

**OPINION**

MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

The plaintiff, Doris Copley, appeals following the entry of summary judgment in favor of the defendants, the town of Dartmouth (town) and its executive administrator. On appeal, Copley argues that the motion judge erred in his application of a public policy rationale as a basis for ruling that a renewal clause in her employment contract was unenforceable.<sup>2</sup> We affirm.

2 The defendants also contended that the renewal provision of the contract violated *G. L. c. 44, § 31*. The motion judge decided it did not, and the defendants did not raise this issue on appeal.

Discussion. We review a grant of summary judgment de novo, and determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991).

Copley argues she was wrongfully terminated based on a renewal clause in her employment agreement with the town where she worked as a municipal paralegal specialist. The agreement at issue was entered into on March 1, 2006, [\*2] and was set to expire on February 28, 2009.<sup>3</sup> This contract contained a provision stating that the agree-

ment "shall be renewed under the current terms, except for just/good cause defined in the Town Charter." Additionally, the contract was subject to funding by the town and purported to impose upon the board of selectmen an "affirmative duty to budget for the position and to speak in favor of funding this position in total." The town did not enter into a new agreement with Copley at the expiration of her contract on February 28, 2009. Copley remained in her position and was paid at the same rate as provided in the agreement. On April 9, 2010, the town's executive administrator notified Copley that she was being laid off from the position due to lack of funds.<sup>4</sup> Copley argues that the contract dictates that the board must renew her contract unless the funds are lacking or there is just cause.

3 Although Copley argues she was not directly employed by the board of selectmen, the board set the parameters of the agreement and ultimately approved it.

4 Prior to this, Copley was given notice on June 9, 2009, that the town decided not to renew her contract.

We agree with the motion judge's determination [\*3] that summary judgment for the defendants was appropriate. The agreement that the board of selectmen would advocate for funding every year is unenforceable. "[I]t is a principle universally accepted that the public interest in freedom of contract is sometimes outweighed by public policy, and in such cases the contract will not be enforced." *Beacon Hill Civic Ass'n v. Ristorante Toscano.*, 422 Mass. 318, 321, 662 N.E.2d 1015 (1996). It is against public policy for an ever-changing board to be mandated to fund this position year after year. It is generally understood that, under

the "common law apart from statute . . . a public officer cannot give an appointee a tenure of office beyond his own." *Duggan v. Taunton*, 360 Mass. 644, 649, 277 N.E.2d 268 (1971), quoting from *Opinion of the Justices*, 275 Mass. 575, 579, 175 N.E. 644 (1931).

Although public policy questions largely depend on the particular facts and circumstances of each case, agreements for long periods of time or those that bind future boards may be considered unenforceable. See *Duggan, supra* at 651. As the board members change, so do the needs and concerns of a town. Public policy demands that boards of selectmen be granted some autonomy to make decisions as to personnel [\*4] and funding best suited for the town at that time.

Under the express terms of the contract, renewal of the plaintiff's employment term was subject to appropriation. It is undisputed that the budget approved by the town meeting did not include any appropriation for the plaintiff's position. Accordingly, just cause existed to justify nonrenewal of the plaintiff's contract. To the extent that the plaintiff claims breach of the obligation undertaken by the selectmen to advocate for an appropriation, that provision is unenforceable, as it is against public policy. A governmental authority cannot bargain away the democratic process, or bind itself to take a particular position on a matter of policy, in perpetuity, regardless of the circumstances applicable at the time.

Judgment affirmed.

By the Court (Green, Sikora & Carhart, JJ.

Entered: March 3, 2014.

RONALD T. GARNEY vs. MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM

SJC-11493

SUPREME JUDICIAL COURT OF MASSACHUSETTS

469 Mass. 384; 2014 Mass. LEXIS 597

April 10, 2014, Argued  
August 18, 2014, Decided

**NOTICE:** THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE MASSACHUSETTS REPORTER USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

**PRIOR HISTORY:** [\*\*1]

Worcester. Civil Action commenced in the Superior Court Department on January 14, 2010.

The case was heard by *John S. McCann, J.*, on motions for judgment on the pleadings.

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

**DISPOSITION:** Judgment affirmed.

**HEADNOTES**

MASSACHUSETTS OFFICIAL REPORTS  
HEADNOTES

*Retirement. Public Employment, Forfeiture of retirement benefits. School and School Committee, Retirement benefits.*

This court concluded that a former secondary school teacher's pleas of guilty to criminal charges arising from his purchase and possession of child pornography did not warrant forfeiture of his pension, where, although the criminal conduct at issue violated the special public trust placed in

teachers, it neither directly involved his position as a teacher nor contravened a particular law applicable to that position, and therefore did not come within the forfeiture provision of G. L. c. 32, § 15 (4).

**COUNSEL:** *Robert G. Fabino (James H. Salvie, Special Assistant Attorney General, with him)* for the defendant.

*Michael C. Donahue* for the plaintiff.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.<sup>1</sup>

1 Chief Justice Ireland participated in the deliberation on this case prior to his retirement.

**OPINION BY:** CORDY

**OPINION**

CORDY, J. This case concerns the scope of the pension forfeiture requirement of *G. L. c. 32, § 15 (4)*, and specifically whether forfeiture is warranted where a teacher has engaged in criminal activity that endangers children generally, but does not involve the students whom he taught, the school district for which he worked, or the use of his status as a teacher. The plaintiff, Ronald T. Garney, a ninth grade science teacher, was arrested in 2006 for the purchase and possession of child pornography. Shortly after his arrest, he received notice that he would be dismissed from his position for conduct unbecoming [\*\*2] a teacher and resigned prior to his dismissal. He subsequently pleaded guilty to

purchasing and possessing child pornography. In August, 2007, when he reached [\*385] retirement age, Garney filed a retirement application with the defendant, the Massachusetts Teachers' Retirement System (MTRS), and received retirement benefits until 2009, when the MTRS board (board) issued a decision concluding that Garney's benefits were forfeited by operation of *G. L. c. 32, § 15 (4)*, due to his convictions.<sup>2</sup> A District Court judge affirmed the board's decision, and Garney petitioned for certiorari review in the Superior Court pursuant to *G. L. c. 249, § 4*. A Superior Court judge reversed the decision of the District Court and vacated the decision of the board. MTRS appealed, and we transferred its appeal to this court on our own motion.

2 The board also concluded that Ronald T. Garney did not have a right to a superannuation retirement allowance under *G. L. c. 32, § 10 (1)*, because of his convictions. This issue was disposed of during the Superior Court proceedings and is not before us. See note 6, *infra*.

Although cognizant of the severity of the offenses of which Garney was convicted, we conclude that on the [\*\*3] specific facts of this case, those offenses neither directly involved his position as a teacher nor contravened a particular law applicable to that position, and therefore did not come within the forfeiture provision of *G. L. c. 32, § 15 (4)*. Consequently, we affirm the decision of the Superior Court judge allowing Garney's motion for judgment on the pleadings and vacating the board's decision otherwise.

*Background.* For over twenty years, Garney worked as a ninth grade science teacher and served as a coach and referee at sporting events for the Amherst-Pelham regional school district (district).<sup>3</sup> In November, 2004, the office of the United States Immigration and Customs Enforcement identified Garney as a purchaser of child pornography in the course of an investigation into Web sites that sold such illicit material.<sup>4</sup>

It informed the Amherst police department, which monitored Garney's postal mail, electronic mail (e-mail) address, and credit card activity until November 28, 2006, when it executed a warrant to search Garney's apartment. There, police found images of child pornography on his home computer, as well as several hand-labeled compact discs and video recordings, on either videotape [\*\*4] cassettes [\*386] or digital video discs, containing child pornography.

3 Garney taught in the Amherst-Pelham regional school district from 1984 until his resignation in 2006. In the early 1970s, he worked briefly for the Hingham and Bridgewater public schools.

4 Garney had been identified through the electronic mail (e-mail) address and credit card numbers he submitted to the Web sites, and by the unique Internet Protocol (IP) address of his computer.

Garney admitted to viewing child pornography since as early as 1994, to purchasing and possessing child pornography, and to joining several child pornography Web sites as early as 2000 or 2001. He indicated that he had renewed his membership to one such Web site in the weeks prior to his arrest and had last visited one of the Web sites the day prior to his arrest. Although Garney occasionally used an e-mail address issued to him by the Department of Elementary and Secondary Education to access the Web sites, there were no other connections to his position as a teacher. He accessed and stored the illicit material on his home computer, purchased it using his own funds, and did not possess or view material that depicted any of his students or otherwise [\*\*5] involve them.<sup>5</sup>

5 At the time of Garney's plea, twenty-one children in the photographs and video recordings had been identified. The children ranged from four to fifteen years of age at the time

the material was created, and were known to be located in a variety of jurisdictions, primarily outside the United States. None were from the school or the school district where Garney taught.

As a result of the investigation and Garney's arrest for the purchase and possession of child pornography, the superintendent of the school district informed Garney that the district intended to dismiss him for conduct unbecoming a teacher, pursuant to *G. L. c. 71, § 42*. Two days prior to the effective date of his dismissal, on December 13, 2006, Garney resigned his position.

Garney was thereafter indicted and, on December 20, 2007, pleaded guilty to eleven counts of purchasing and possessing child pornography, in violation of *G. L. c. 272, § 29C*. He was sentenced to from two and one-half to three years in a house of correction, followed by probation, registration as a sex offender, and other penalties.

On August 7, 2007, after his arrest but prior to his plea and sentencing, Garney filed a retirement application [\*\*6] with MTRS. His retirement became effective on August 22, 2007, at which time he had twenty-two years and three months of retirement credit, and he began to receive a gross monthly retirement benefit of \$2,393.78. On May 22, 2008, after his convictions, MTRS notified Garney that it was initiating proceedings to consider whether his convictions triggered the operation of *G. L. c. 32, § 15 (4)*, which requires forfeiture of public employee retirement benefits "after final conviction of a criminal offense involving violation of the laws applicable to [the employee's] office or position." [\*387]

After receiving recommended findings of fact from a hearing officer, the board concluded on March 27, 2009, that Garney's retirement was forfeited by operation of both *G. L. c. 32, §§ 10 (1) and 15 (4)*.<sup>6</sup> The board determined that there was "a direct link between Mr. Garney's employment and his possession of child pornography," in part

because he used an e-mail address provided by the Department of Elementary and Secondary Education, and that therefore he met the requirements of *G. L. c. 32, § 15 (4)*, warranting forfeiture.

<sup>6</sup> *General Laws c. 32, § 10 (1)*, provides a right to a superannuation retirement allowance [\*\*7] for certain public employees but prohibits that allowance where an employee "is removed or discharged from his office or position" with "moral turpitude on his part." This allowance is permitted, however, if the employee "resigns or voluntarily terminates his service," as Garney did. See *id.* During the subsequent Superior Court proceedings, the parties agreed that *G. L. c. 32, § 10 (1)*, is inapplicable, and this ground is not raised on appeal.

On Garney's petition for review pursuant to *G. L. c. 32, § 16 (3)*, a District Court judge affirmed the board's decision. The judge observed that teachers occupy a position of special trust, see *Perryman v. School Comm. of Boston, 17 Mass. App. Ct. 346, 349, 458 N.E.2d 748 (1983)*, and that the crime Garney committed directly contravened his duty to protect the welfare of children. Therefore, the requisite link between his criminal convictions and his public position was established, such that his crimes "involv[ed] violation of the laws applicable to his office or position." See *G. L. c. 32, § 15 (4)*. Relying on *State Bd. of Retirement v. Bulger, 446 Mass. 169, 175, 843 N.E.2d 603 (2006)*, the judge noted that the private nature of the crime, and the fact that it did not involve [\*\*8] any school resources or any of Garney's students,<sup>7</sup> did not call for a different result where the welfare of children is a core tenet of the teaching position, and the crime that Garney committed was directly at odds with this tenet.

<sup>7</sup> Although the judge observed that Garney occasionally used an e-mail address issued to him by the Department of Elementary and Secondary

Education in accessing the Web sites containing child pornography, he otherwise noted that there was no evidence that Garney used school funds, engaged in the activity at school, used school computers, or "created or disseminated child pornography or involved any students from the school district in his illegal behavior or displayed any illicit material to them."

Garney then petitioned the Superior Court for certiorari pursuant to *G. L. c. 249, § 4*. A Superior Court judge allowed Garney's motion for judgment on the pleadings, reversed the decision of the District Court judge, and vacated the decision of the board [\*388] that Garney's pension was forfeited under *G. L. c. 32, § 15 (4)*. Relying on our decisions in *Bulger, 446 Mass. at 171*, and *Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 4-5, 665 N.E.2d 998 (1996)*, the judge reasoned [\*\*9] that, although Garney's crimes were severe and undoubtedly warranted both criminal prosecution and dismissal from his position, there was not a direct link between his convictions and his position as a teacher, because his criminal offenses did not involve the use of school resources and he did not use his position as a teacher to facilitate his crime. Further, the judge rejected the District Court judge's interpretation of *Bulger, supra at 175, 179-180*, and the argument of MTRS that because teachers fill a special societal role, a conviction of possession of child pornography necessarily violates the laws applicable to that role. MTRS appealed, and we transferred the case from the Appeals Court on our own motion to clarify the scope of our decision in *Bulger, supra at 178-180*.

*Discussion.* Our review of the board's decision pursuant to *G. L. c. 249, § 4*, is a limited one. See *Bulger, 446 Mass. at 173*. We may "correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff. ... [and] may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely af-

ected the real interests [\*\*10] of the general public. ..." *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth, 430 Mass. 783, 790, 724 N.E.2d 288 (2000)*, quoting *Carney v. Springfield, 403 Mass. 604, 605, 532 N.E.2d 631 (1988)*.

The parties' dispute pertains to the scope of *G. L. c. 32, § 15 (4)*, which directs the forfeiture of a pension following certain criminal conduct by a member of a contributory retirement system for public employees. See *Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 663, 6 N.E.3d 1069 (2014)*. Section 15 (4) provides in relevant part: "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance. ..."

Where we must interpret the terms of a statute, we look "to the intent of the Legislature ascertained from all [the statute's] 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." *Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606 (1934)*, and cases cited. See *Sullivan v. Brookline, 435 Mass. 353, 360, 758 N.E.2d 110 [\*389] (2001)*. Because *G. L. c. 32, § 15*, involves the [\*\*11] forfeiture of property, it is penal in nature, and we must draw its limits narrowly, so as not to exceed the scope or reach of the penalty as contemplated by the Legislature. *Bulger, 446 Mass. at 174-175*. See *Gaffney, 423 Mass. at 3 & n.3; Collatos v. Boston Retirement Bd., 396 Mass. 684, 686-687, 488 N.E.2d 401 (1986)* (*G. L. c. 32, § 15*, "imposes a penalty on employees" and "enforce[s] the criminal law by suspending the sword of retirement benefits forfeiture over those employees who otherwise might be tempted to transgress").

We have observed previously that "[t]he substantive touchstone [of *G. L. c. 32, § 15 (4)*,] intended by the General Court is criminal activity *connected with* the office or po-

sition. ... [T]he General Court did not intend pension forfeiture to follow as [an automatic consequence] 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 added). *Gaffney*, 423 Mass. at 4-5. This "direct link" requirement "does not mean that the crime itself [\*\*12] must reference public employment or the employee's particular position or responsibilities," *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 67 Mass. App. Ct. 612, 616, 855 N.E.2d 1106 (2006), S.C., *Maher v. Retirement Bd. of Quincy*, 452 Mass. 517, 895 N.E.2d 1284 (2008), cert. denied, 556 U.S. 1166, 129 S. Ct. 1909, 173 L. Ed. 2d 1058 (2009), or that the crime necessarily must have been committed at or during work. *Durkin v. Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119, 981 N.E.2d 763 (2013). However, where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, there must be some direct connection between the criminal offense and the employee's official capacity by way of the laws directly applicable to the public position. See *Gaffney*, *supra* at 5.

It is clear that the criminal offenses for which Garney was convicted neither referenced public employment nor bore a direct factual link to his teaching position. See G. L. c. 279, § 29C. Garney committed his crimes outside of school, without using school resources or otherwise using his position to facilitate his crimes, and without involving students in his illicit activities.<sup>8</sup> In numerous cases, this lack of a factual link has been [\*\*13] fatal to the [\*390] retirement board's claim that forfeiture is warranted. See, e.g., *Retirement Bd. of Maynard v. Tyler*, 83 Mass. App. Ct. 109, 113, 981 N.E.2d 740 (2013) (no forfeiture where fire fighter sexually abused boys because offenses were "personal in nature, occurring outside the

firehouse while [fire fighter] was not on duty," and "no evidence that [fire fighter] used his position, uniform, or equipment for the purposes of his indecent acts"); *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 543, 545, 954 N.E.2d 541 (2011) (no forfeiture where public library employee convicted of possession of child pornography because offenses occurred at home on personal computer, and employee did not use position to facilitate crime); *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 646-647, 654, 933 N.E.2d 666 (2010) (no forfeiture where housing authority custodian convicted of indecent assault and battery of daughter because offense not committed on public property or against anyone who resided there, and otherwise had no connection to custodian's official position). See also *Massachusetts Teachers' Retirement Bd. vs. Lambert*, Mass. Super. Ct., No. SUCV2005-02540B, slip op. at 1-2, 9 (Mar. 26, 2007) (Superior [\*\*14] Court judge held forfeiture not warranted where teacher convicted of possession of child pornography because offense committed at home, on personal computer, without involvement of any students or children known to teacher). Contrast *Gaffney*, 423 Mass. at 4, 5 (forfeiture where superintendent of town water and sewer department convicted of larceny because superintendent tasked with managing budget and stole from own department); *Durkin*, 83 Mass. App. Ct. at 116-117, 119 (forfeiture where police officer convicted of assault and battery by means of dangerous weapon for shooting another officer with department-issued firearm while intoxicated off duty); *Maher*, 67 Mass. App. Ct. at 616-617 (forfeiture where city inspector convicted of breaking into city hall and stealing documents from own personnel file because "multiple, direct links" between offenses and position).

8 Although Garney did use an e-mail address issued by the Department of Elementary and Secondary Education to access at least some of the pornography Web sites, this fact

does not appear to have persuaded either the District Court judge or the Superior Court judge that there was a sufficient factual link between his criminal [\*\*15] offenses and his teaching position. We agree.

Relying on our decision in *Bulger*, 446 Mass. at 179-180, MTRS argues that, despite the lack of a factual connection between Garney's crimes and his public position, there is a direct link here because the position of a teacher is one that holds a special public trust, and Garney's criminal conduct of possessing child pornography strikes at the "heart" of this position by violating [\*391] one of its "fundamental tenets," as embodied in the professional standards for teachers. As a result, MTRS contends, the board and the District Court judge correctly concluded that forfeiture was warranted. Garney asserts that creating a distinct forfeiture category for teachers because of their special obligations to society would expand *G. L. c. 32, § 15 (4)*, "to accomplish an unexpressed result," *Bulger*, supra at 175, and accordingly asks us to affirm the Superior Court judge's determination that there was no direct link between Garney's conduct and his position. We conclude that the fact that Garney's position is one of special public trust, and that criminal conduct of the type committed by Garney violates that trust, is insufficient in and of itself to warrant [\*\*16] forfeiture under *G. L. c. 32, § 15 (4)*. Rather, the conduct must either directly involve the position or be contrary to a central function of the position as articulated in applicable laws, thereby creating a direct link to the position.

1. *Special public trust.* Undoubtedly, teachers hold a position of special public trust; they must impart "the basic values of our society" to students and ensure their well-being in the process. *Perryman*, 17 Mass. App. Ct. at 351. See *Brum v. Dartmouth*, 428 Mass. 684, 709, 704 N.E.2d 1147 (1999) (Ireland, J., concurring); *Dupree v. School Comm. of Boston*, 15 Mass. App. Ct. 535, 538, 446 N.E.2d 1099 (1983). Indeed, "conduct consistent with this special trust is

an obligation of the employment." *Perryman*, supra at 349. It is for this reason that teachers must demonstrate "sound moral character" to acquire teacher certification, *G. L. c. 71, § 38G*, and may be suspended or dismissed from service where they engage in "conduct unbecoming a teacher," *G. L. c. 71, §§ 42 and 42D*, or have been convicted "of a crime involving moral turpitude" or that otherwise "discredits the profession" or demonstrates a lack of "good moral character," 603 Code Mass. Regs. § 7.15(8)(a)(1)(c) (2012). However, [\*\*17] these parameters for entering or remaining in the profession are not the same as the standard for forfeiting a pension to which an employee has contributed and that he or she earned over the course of many years of public service. See *Bulger*, 446 Mass. at 178-179 ("standard for pension forfeiture based on dereliction of duty is more narrow and specific" than standard for dismissal, and not every offense implicating norms and expectations of position necessarily violates applicable law and requires forfeiture); *Durkin*, 83 Mass. App. Ct. at 119 n.5 ("not every off-duty illegal act qualifies" for forfeiture). See also *Gaffney*, 423 Mass. at 3 & n.3 (language of *G. L. c. 32, § 15 [4]*, must be construed narrowly because of its penal character). [\*392]

In advocating for a reading of *G. L. c. 32, § 15 (4)*, that requires forfeiture where a teacher's criminal conduct violates the special public trust placed in teachers, MTRS misinterprets *Bulger*, 446 Mass. at 176-180, as adopting a broader reading of *G. L. c. 32, § 15 (4)*, than the narrow language of the statute permits. Our decision in *Bulger*, supra, did not call for forfeiture whenever a special public trust is violated. Rather, the court concluded [\*\*18] that forfeiture was warranted where a clerk-magistrate's specific criminal conduct, perjury and obstruction of justice, was directly contrary to the most fundamental tenets of his position, to ensure truth-telling in judicial matters and proceedings and to uphold the integrity of the judicial system. *Id.* These tenets and responsibilities were embodied in the Code of Professional

Responsibility for Clerks of the Courts, *S.J.C. Rule 3:12*, as amended, 427 Mass. 1322 (1998) (code), a law applicable to his position.<sup>9</sup> See *Bulger, supra at 176-177*. See also *Berkwitz, petitioner, 323 Mass. 41, 47, 80 N.E.2d 45 (1948)* (court rules have force of law).

<sup>9</sup> In *State Bd. of Retirement v. Bulger, 446 Mass. 169, 169, 171, 843 N.E.2d 603 (2006)*, a clerk-magistrate of the Boston Juvenile Court was convicted of perjury and obstruction of justice in Federal court during grand jury investigations of alleged criminal offenses committed by his brother, James "Whitey" Bulger, and others, and of criminal offenses related to harboring and concealing James Bulger. In assessing whether the clerk-magistrate had violated a law applicable to his office in engaging in this criminal conduct, the court first identified the central functions of the [\*\*19] clerk-magistrate position underlying its daily tasks: to administer oaths, thereby ensuring truth-telling; to ensure "the effective functioning of the courts"; and to preserve the integrity of judicial processes. See *id. at 176-177*, quoting *Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Court Dep't, 439 Mass. 352, 359, 787 N.E.2d 1032 (2003)*.

The court observed that the Code of Professional Responsibility for Clerks of the Courts (code), in "enunciating the high standards to which clerks are held," forbids a broader range of conduct than that which merits forfeiture. *Bulger, 446 Mass. at 177 & n.6, 178*. Among the code's requirements are that clerk-magistrates "comply with the laws of the Commonwealth [and] rules of the court" and "conduct personal affairs in such a way as not to cause public disrespect for the court and the judicial system."

*S.J.C. Rule 3:12, Canons 2 and 4(B)*, as appearing in 407 Mass. 1301 (1990). After considering the relationship between the code and the clerk-magistrate's crimes, the court concluded that his specific criminal offenses constituted an identifiable "violation of [a] law[ ] applicable to [the] office or position," *G. L. c. 32, § 15 (4)*, because [\*\*20] they contradicted the "fundamental tenets of the code and of his oath of office." *Bulger, supra at 179-180*. His crimes were so connected to the core function of his position in preserving the integrity of the judicial system and ensuring truth-telling that they could not be "separated from the nature of his particular office." *Id. at 180*.

We reached a similar conclusion in a more recent case, *Buonomo [\*\*393], 467 Mass. at 670-671*. There, we concluded that a register of probate violated the laws applicable to his office by committing larceny, embezzlement, and associated crimes, because the code requires clerks and registers "to contribute to the preservation of public confidence in the integrity, impartiality, and independence of the courts" and to "comply with the laws of the Commonwealth." *S.J.C. Rule 3:12, Canons 1 and 2*, as appearing in 407 Mass. 1301 (1990). His conduct, we determined, "compromised the integrity of and public trust in the office of register of probate" and therefore explicitly violated the core function of his position as embodied in the provisions of the code. See *Buonomo, supra at 671*.

The narrow basis for our holdings in *Bulger* and *Buonomo* demonstrates that *G. L. c. 32, § 15 (4)*, [\*\*21] requires something more specific than a violation of a special public trust in the particular public position. The plain language of *G. L. c. 32, § 15 (4)*, clearly requires a direct link between the criminal offense and a violation of the laws applicable to the office. *Gaffney, 423 Mass. at 4-5*. See *Bulger, 446 Mass. at 179* (where member is "convicted of a criminal offense

that does *not* involve any violation of the laws applicable to his office or position ... the member does not forfeit his entitlement to a retirement allowance"). Criminal conduct that is merely inconsistent with a concept of special public trust placed in the position or defiant of a general professional norm applicable to the position, but not violative of a fundamental precept of the position embodied in a law applicable to it, may be adequate to warrant dismissal, but it is insufficient to justify forfeiture under *G. L. c. 32, § 15 (4)*. See *Bulger, supra* at 179-180; *Gaffney, 423 Mass. at 4-5*. See also *Tyler, 83 Mass. App. Ct. at 109-110, 113*; *Scully, 80 Mass. App. Ct. at 543, 545*; *Herrick, 77 Mass. App. Ct. at 654*.

Were we to hold otherwise, and conclude that where a teacher's criminal conduct violates the special [\*\*22] public trust placed in teachers, forfeiture is warranted, we would permit forfeiture nearly any time a teacher engages in criminal conduct. This would expand the parameters of *G. L. c. 32, § 15 (4)*, well beyond what the Legislature intended for it to encompass. Cf. *Tyler, 83 Mass. App. Ct. at 112* (considerations of fire fighter's general obligation to protect the public "while understandable, are so broad ... as to engulf nearly every public official, especially police officers and fire fighters, convicted of any crime. The reach of the statute as currently written is not so broad"). Cf. also *Lambert, Mass. Super. [\*394] Ct., No. SUCV2005-02540B, slip op. at 9* (application of *G. L. c. 32, § 15 [4]*, cannot extend to any "violation of broad standards of fitness to serve as a teacher" because this would expand scope beyond that intended by Legislature, as "[v]irtually every criminal conviction of a teacher puts in question the soundness of his moral character and fitness for the position"). Our reading of the statute is consistent with the mandate that we interpret the statute narrowly. See *Bulger, 446 Mass. at 174-175*.<sup>10</sup>

10 As noted above, the penal character of the forfeiture required by *G. L.*

*c. 32, § 15 (4)*, [\*\*23] compels us to interpret the statutory language narrowly. See *Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 3, 665 N.E.2d 998 & n.3 (1996)*. If the Legislature desires a different result, it must state so clearly in amended legislation. See *Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 672, 6 N.E.3d 1069 (2014)* (Legislature expanded applicability of forfeiture to "broader range of circumstances" with St. 1987, c. 679, § 47, in response to *Collatos v. Boston Retirement Bd., 396 Mass. 684, 687-688, 488 N.E.2d 401 (1986)*, which interpreted predecessor statute narrowly).

## 2. *Laws applicable to teaching position.*

We turn next to whether Garney's conduct violated any laws applicable to his position as a teacher, and conclude that it did not.

At its core, the function of a teacher is that of educator. See Webster's Third New International Dictionary 723, 2346 (1993) (defining "educate" as "to bring up" or "to train by formal instruction and supervised practice"; defining "teacher" as "one that teaches or instructs"; and defining "teach" as "to show, instruct," "to cause to know a subject," and "to impart the knowledge of"). Teachers must give effect to the mandate embodied in Part II, c. 5, § 2, of the Constitution [\*\*24] of the Commonwealth, that "the magistrates and Legislatures of this Commonwealth ... provide education in the public schools." *McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621, 615 N.E.2d 516 (1993)*. This mandate derives from the belief that an educated people is "essential to the preservation of ... [a] democratic State." *Id. at 561*. Since 1789, teachers have been instructed to "exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice[,] ... a sacred regard for truth," and other virtues, such as humanity, sobriety, moderation, and temperance, and "to point out to [students] the evil tendency of the

opposite vices." *G. L. c. 71, § 30*. See *McDuffy, supra at 594 & n.66*, quoting *St. 1789, c. 19, § 4*.

Private possession of child pornography by a secondary school teacher does not directly contravene this central function where [\*395] there is no indication that this possession compromised the safety, welfare, or learning of the children whom he was tasked with teaching or impeded his ability to provide adequate educational lessons to his students. As reprehensible as Garney's crimes may be, [\*\*25] the entirely private nature of his conduct does not call into question the effectiveness of the educational system of the Commonwealth.

The central function of the teaching position is buttressed by additional, important principles, the violation of which may be a ground for dismissal from a teaching position, see *G. L. c. 71, § 42*, but whose fulfillment is not so central to the role of the teacher in ensuring students' education that a violation justifies forfeiture of retirement benefits. For example, teachers are expected to "[u]nderstand[ ] [their] legal and moral responsibilities" and "[u]nderstand[ ] legal and ethical issues as they apply to responsible and acceptable use of the Internet and other resources." See *603 Code Mass. Regs. § 7.08(2)(e)(1), (7) (2005)*.<sup>11</sup> Even if Garney's criminal offenses suggest a lack of understanding of these ethical obligations and responsibilities, his personal possession of pornography, without any known impact on his teaching or his students, cannot be said to violate the core function of teaching so as to create the direct link required between conduct and office for forfeiture under *G. L. c. 32, § 15 (4)*. The critical alignment of crime and office [\*\*26] through an applicable law, as required by this narrow statute, is simply not present.<sup>12</sup>

11 Although this older version of the regulations was in place at the time of Garney's convictions and the board's decision, a more recent version of *603 Code Mass. Regs. § 7.08(2) (2014)* sets

forth four categories of professional standards for teachers: curriculum, planning, and assessment; teaching all students; family and community engagement; and professional culture. This final category articulates the expectation that teachers will "[p]romote[ ] the learning and growth of all students through ethical, culturally proficient, skilled, and collaborative practice." *603 Code Mass. Regs. § 7.08(2)(d)*.

12 This is in stark contrast to the relationship between the criminal offenses and the core responsibilities of the position in *Bulger, 446 Mass. at 175-180*. There, the clerk-magistrate's convictions of perjury and obstruction of justice struck at the very core of the role of the clerk-magistrate and compromised the integrity of the judicial system; this close nexus is what warranted forfeiture. See *id. at 179-180*.

In this respect, a teacher's conduct that fails to reach inside the schoolhouse doors does [\*\*27] not satisfy the standard for forfeiture under *G. L. c. 32, § 15 (4)*. For this reason, MTRS's claim that [\*396] Garney's status as a mandated reporter of child abuse provides the requisite connection for forfeiture also must fail. As a mandated reporter, *G. L. c. 119, § 21*, a teacher who, "in his [or her] professional capacity, has reasonable cause to believe that a child is suffering physical or emotional injury resulting from [abuse, neglect, or sexual abuse] ... shall immediately communicate with the [Department of Children and Families] ... [and] file a written report ... detailing the suspected abuse or neglect" or "notify the person or designated agent in charge of [the school]." *G. L. c. 119, § 51A (a)*. See *Matter of a Grand Jury Investigation, 437 Mass. 340, 352-353, 772 N.E.2d 9 (2002)*. The report filed must contain the names and addresses of the child and the adults responsible for the child's care, as well as the child's age, sex, extent of injuries or abuse, and other relevant information. *G. L. c. 119, § 51A (d)*.

Although mandated reporters may report suspected abuse or neglect of which they become aware at any time, the duty to report applies only to information learned in one's professional [\*\*28] capacity, in this case while Garney was fulfilling his teaching and coaching responsibilities. *G. L. c. 119, § 51A (a)* (duty applies when mandated reporter learns of abuse or neglect "in his [or her] professional capacity"). Not only did Garney not know the identities of the children in the pornography and therefore did not have the requisite information, but he also did not learn of this abuse in his professional capacity. As Garney's criminal conduct was independent of his role as a teacher, he was not required under the plain meaning of *G. L. c. 119, § 51A*, to report this conduct.<sup>13 14</sup>

13 The mandated reporter statute was clearly intended to ensure the immediate care and protection of identifiable endangered children within the Commonwealth, as the statutory scheme instructs the Department of Children and Families (department) to investigate reports promptly and in person. See *Covell v. Department of Social Servs.*, 439 Mass. 766, 772, 791 N.E.2d 877 (2003); *B.K. v. Department of Children & Families*, 79 Mass. App. Ct. 777, 782, 950 N.E.2d 446 (2011) (*General Laws c. 119, § 51A*, intended to provide department with information to protect children's health and safety before harm occurs); *Cooney v. Department of Mental Retardation*, 52 Mass. App. Ct. 378, 382-383, 754 N.E.2d 92 (2001) [\*\*29] (social policy of *G. L. c. 119, § 51A*, is "to encourage certain professionals to report known or suspected abuse so that those who are vulnerable and at risk ... may be protected"). Investigation into the well-being of the child subjects of pornography is likely beyond the investigative and protective functions of the department where, as here, the

identities of the majority of the children are unknown, and those who had been identified at the time of Garney's plea and whose locations were known were located in other, primarily foreign, jurisdictions.

14 We agree with the Massachusetts Teachers' Retirement System that a particular public position's status as a mandated reporter suggests that the position may hold a special public trust. See *Retirement Bd. of Maynard v. Tyler*, 83 Mass. App. Ct. 109, 114-115, 981 N.E.2d 740 (2013) (Graham, J., dissenting) (mandated reporter status is "[i]llustrative of the special trust conferred on firefighters and [emergency medical technicians]"). However, we have concluded that a violation of the special public trust placed in teachers is not determinative to the analysis under *G. L. c. 32, § 15 (4)*.

In sum, we recognize that Garney's possession of child [\*\*397] pornography, [\*\*30] in violation of *G. L. c. 279, § 29C*, was violative of children's safety, rights, and dignity overall, and further violative of the special public trust placed in teachers to ensure the welfare of children in the Commonwealth. See *G. L. c. 71, § 30*; *St. 1997, c. 181, §§ 1, 2* (enacting *G. L. c. 279, § 29C*). Nonetheless, there is no reference to public employment in the criminal statute under which Garney was convicted, no direct factual link between Garney's conduct and his teaching position, and no violation of any identifiable law applicable to that position. Consequently, we must conclude that forfeiture of Garney's retirement benefits under *G. L. c. 32, § 51 (4)*, was not warranted.

*Conclusion.* We affirm the decision of the Superior Court reversing the decision of the District Court and vacating the decision of the board.

Judgment affirmed.

**HULL RETIREMENT BOARD vs. CONTRIBUTORY RETIREMENT APPEAL BOARD  
& others<sup>1</sup>**

1 David Leary and the public employee retirement administration commission.

**No. 13-P-1825**

**2014 Mass. App. LEXIS 119**

**September 16, 2014, Decided**

**DISPOSITION:** Judgment affirmed.

**HEADNOTES** *Contributory Retirement Appeal Board. Municipal Corporations, Retirement board, Police. Police, Retirement. Public Employment, Paid leave, Accidental disability retirement, Retirement. Retirement.*

**COUNSEL:** [\*1] *Michael Sacco* for Hull Retirement Board.

*Terence E. Coles* for David Leary.

**OPINION**

The Hull retirement board (board) appeals from a Superior Court judgment affirming a decision of the contributory retirement appeal board (CRAB) upholding a division of administrative law appeals (DALA) magistrate's determination requiring the board to amend the effective retirement date of defendant David Leary. We affirm.

1. *Background.* Leary was a police officer in the town of Hull (town). On November 19, 2001, he sustained an injury on the job and was placed on accidental injury leave with full pay. See *G. L. c. 41, § 111F*, as amended through St. 1990, c. 313. Leary remained on § 111F leave until April 15, 2003, when the chief of police (chief) removed him from paid injury leave status and placed him on an unpaid leave of absence. Leary believed the chief's action did not comply with the law, and sought to have the town reinstate his § 111F benefits. In the meantime, in July, 2003, Leary applied for accidental disability retirement under *G. L. c. 32, § 7*. The board approved Leary's appli-

cation on January 30, 2004. His disability retirement allowance became effective as of April 15, 2003, the last day that Leary received compensation in the form of his § 111F benefits. [\*2]

Notwithstanding his application for retirement and the subsequent approval of that application, Leary continued to seek payment of § 111F benefits from the town, specifically for the period between April 15, 2003, and January 30, 2004. An agreement for payment initially was reached but unraveled when, on the advice of defendant public employee retirement administration commission (PERAC), the board refused to change Leary's effective retirement date from April 15, 2003, to January 30, 2004. In 2006, Leary filed suit, seeking enforcement of his agreement with the town.

In March, 2008, Leary and the town entered into a settlement agreement, later reduced to a judgment, whereby the town would pay Leary \$44,424.47 in additional § 111F benefits to cover the period from April 15, 2003, to January 30, 2004. Pursuant to the agreement, the funds were placed in an escrow account, with release to Leary "pending the outcome of Leary's efforts to get the [board] and/or Commonwealth of Massachusetts, either through its administrative agencies and/or judicial system, to recalculate his retirement benefits based on Leary's receipt of the additional *Section 111F* benefits." Leary presented his case to the board; it again refused. [\*3] Leary appealed the board's decision to DALA<sup>2</sup> and, following a hearing, a DALA magistrate ordered Leary's retirement date to be corrected to January 30, 2004, and his retirement allowance recalcu-

lated accordingly. CRAB affirmed the DALA decision; a judge of the Superior Court likewise affirmed CRAB's decision. This appeal followed.

2 Leary also appealed to DALA the board's first refusal to change his retirement date; the two cases later were consolidated.

2. *Discussion.*<sup>3</sup> *General Laws c. 41, § 111F*, governs leave with pay status for police officers and firefighters injured in the line of duty through no fault of their own. The statute provides for payment until a recipient is either "retired or pensioned" or "such incapacity no longer exists"; amounts payable under § 111F "shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter." *General Laws c. 32, § 7*, provides accidental disability retirement for qualified members in service. Leary's effective retirement date under *G. L. c. 32, § 7*, is "the date ... he last received regular compensation for his employment in the public service."<sup>4</sup> *G. L. c. 32, § 7(2)*, as amended through St. 2000, c. 123, §§ 23A, 24. The DALA magistrate, CRAB, [\*4] and the Superior Court judge each determined that the escrowed supplemental § 111F payments constituted "regular compensation" received by Leary, as provided by § 111F, such that Leary's effective retirement date was required to be changed to January 30, 2004, to comport with the requirements of *G. L. c. 32, § 7(2)*. We agree.

3 "We review CRAB's decision under a deferential standard and will reverse only if its decision was based on an erroneous interpretation of law or is unsupported by substantial evidence." *Foresta v. Contributory Retirement Appeal Bd.*, 453 Mass. 669, 676, 904 N.E.2d 755 (2009). See *G. L. c. 30A, § 14(7)*.

4 Under the statute, an individual's effective retirement date is determined

by looking to whichever of the following occurred last: the above noted date of last receipt of regular compensation, the date the injury was sustained, or the date six months prior to the filing of the written application. The latter two do not apply here. See *G. L. c. 32, § 7(2)*.

The town having concluded that Leary was entitled to the additional § 111F benefits, the parties crafted a settlement agreement memorializing that entitlement and the means of payment. To avoid an apparent windfall, and to take into account the board's role in recalculating Leary's retirement benefit, the terms of the agreement include provisions for either repayment to the board [\*5] of any prior retirement amounts incorrectly paid or reversion of the escrow funds to the town. The agreement does not, however, vest the board with the authority to veto Leary's entitlement to payment of the § 111F funds.<sup>5</sup> Thus, the board's position that Leary did not actually "receive[ ]" the additional benefits under the terms of the settlement agreement is unfounded.

5 The settlement agreement states: "The Town agrees to pay Leary the total amount of ... (\$44,424.47). This sum represents the compensation owed by the Town to Leary pursuant to the Town's Board of Selectmen's April 5, 200[5] vote approving [*G. L.*] *c. 41, § 111F* benefits for April 15, 2003 through January 30, 2004 for Leary . ..." The judgment provides: "Judgment for the Plaintiff David S. Leary in the sum of ... \$44,424.47 ... , without interest or costs, and all rights of appeal waived; and Judgment satisfied."

The board further argues that there is no explicit authority permitting it to change a member's effective retirement date. The claim is without merit. Nothing in the language of *G. L. c. 32, § 7(2)*, limits a retirement board's ability to redetermine the effective retirement date and recalculate retirement benefits if circumstances so require.

[\*6] See, e.g., *Blair v. Selectmen of Brookline*, 26 Mass. App. Ct. 954, 526 N.E.2d 1317 (1988) (accepting, without comment, a board's ability to change an effective retirement date); *G. L. c. 32, § 20[5][c][2]*, as appearing in St. 2000, c. 159, § 91 (allowing a retirement board to correct "an error ... in

the records ... or an error ... made in computing a benefit").<sup>6</sup>

6 We express no opinion whether an "error" was made in this case, thereby triggering the provisions of *G. L. c. 32, § 20(5)(c)(2)*.

Judgment affirmed.

**MARYANN McSHEA vs. TOWN OF WESTFORD**

**13-P-185**

**APPEALS COURT OF MASSACHUSETTS**

*84 Mass. App. Ct. 1126; 1 N.E.3d 293; 2013 Mass. App. Unpub. LEXIS 1224*

**December 30, 2013, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**DISPOSITION:** [\*1] Decision and order of Appellate Division affirmed.

**JUDGES:** Rubin, Milkey & Agnes, JJ.

**OPINION**

MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28*

Maryann McShea, a retired police officer, filed an action alleging that the town of Westford (town) owed her various health benefits. After a jury-waived trial, a District Court judge issued an amended judgment that was generally in her favor, although he also ruled that, going forward, she had an obligation to change health care plans. The judge ordered the town to pay specified damages, while referring the question of additional damages to an administrative body that he ordered the town to reconstitute in a particular manner. Both sides appealed. In a detailed and thoughtful opinion, the Appellate Division of the District Court Department (Appellate Division) vacated the amended judgment and ordered that a new judgment enter for the town. The Appellate Division rested on both the merits and, as to part of the case, lack of jurisdiction. We affirm.

Factual background. Forging the memorandum of agreement (MOA). On December 2, 1991, McShea slipped on ice while on duty and suffered various injuries to her head and back. She continued to work as a police officer until 1998, [\*2] but eventually applied for a disability retirement. The Public Employee Retirement Administration Commission approved her request on June 30, 2000. Subsequently, McShea requested that the town pay her postretirement medical expenses that she claimed she had incurred, or would incur in the future, in treating the injuries that caused her to pursue the disability retirement. McShea, the town manager, and a representative of the police union negotiated a one-page MOA to that effect. No attorneys were involved. Terms of the MOA. The principal dispute here involves a provision in the MOA that obligates the town to indemnify McShea for certain medical expenses incurred after November 13, 2001.<sup>1</sup> Specifically, with respect to such "future costs," the MOA stated that, in accordance with the terms of *G. L. c. 41, § 100B*, the town would indemnify McShea for "all Medical Expenses incurred for treatment due to injury related to [McShea's] disability."

1 Although the MOA refers to "future costs," an undefined term, the parties agree that the operative date is not the date the agreement eventually was signed, but rather, November 13, 2001, the date that the town voted to accept the provisions of *G. L. c. 41, § 100B*. [\*3] The town separately paid McShea a portion of her expenses incurred prior to November 13, 2001.

Also in dispute is a second provision in the MOA that concerns McShea's health insurance plan. At the time the MOA was signed (and continuing), McShea was covered by a health care plan that witnesses referred to as "Blue Cross Elect." This was a so-called "preferred provider organization" plan that was more expensive than the various health maintenance organization (HMO) plans that the town also made available.

According to McShea's testimony, she chose this plan because it provided unlimited chiropractic coverage. The MOA stated that the town would pay McShea for her share of the incremental additional cost of Blue Cross Elect until such time as McShea chose to switch to less expensive HMO coverage.<sup>2</sup>

2 The MOA included a separate provision that appears to indicate that, at least at the start of the arrangement, McShea in effect would be funding her share of the additional insurance coverage through reductions in her retirement benefits. Neither side has focused on that provision. McShea did testify that the paragraph of the MOA providing for a reduction in her retirement pay never has "been [\*4] an issue," and at oral argument, counsel for McShea stated his belief that his client's retirement pay was not in fact reduced by the town (calling into some question how she was harmed).

The town manager signed the agreement on December 21, 2001, and the police union representative and McShea both signed it on December 26, 2001. It is uncontested that the agreement never was submitted to the town's board of selectmen (selectmen) for approval.

Denial of her medical expenses. In the spring of 2002, McShea requested that the town reimburse her for certain expenses that were incurred from January, 2002, to March, 2002. Those expenses included more than \$1,000 for massage therapists, \$885 for chiropractors, and \$276 for an annual membership in the Boston Sports Club. In accordance with *G. L. c. 41, § 100B*, the town formed a three-person indemnification panel to review the documentation that McShea submitted. After determining that McShea failed to demonstrate that her expenses were reasonable and necessary, the indemnification panel denied her claim on April 26, 2002. However, the indemnification panel also informed her that it would reconsider her claim if she submitted to an independent [\*5] medical examination by any one of three listed phy-

sicians. McShea accepted that invitation, and she was examined by Dr. Robert Swotinsky, an occupational medicine specialist at Fallon Medical Center. Dr. Swotinsky concluded that the services for which McShea sought reimbursement were not medically necessary, and he explained his opinion in a detailed eight-page report. Based on that opinion, the indemnification panel reaffirmed its earlier denial of McShea's claim.

McShea's action. McShea filed her action in District Court on July 15, 2004. She alleged that the town breached the MOA obligations in two respects. First, she alleged that the town failed to reimburse her for expenses related to her disability incurred after November 13, 2001.<sup>3</sup> By the date of trial, she claimed \$22,996 in unreimbursed medical expenses, a figure that included not only those expenses that the indemnification panel had reviewed (and denied), but also additional expenses that the panel had not reviewed. Second, McShea alleged that the town violated the MOA by failing to pay her share of the added cost of Blue Cross Elect coverage. For this alleged violation, she sought damages of \$10,239.

3 She pleaded this both [\*6] as a contract claim (count 1) and as a violation of the governing statute, *G. L. c. 41, § 100B* (count 2). However, with respect to indemnification, the MOA merely incorporated the provisions of the statute. Thus, as to those expenses, the two counts were congruent.

Stipulated "remand." The case was scheduled for trial in May of 2006. At a hearing held on May 18, 2006, the town argued -- apparently for the first time -- that the MOA was unenforceable because it never had been approved by the selectmen.<sup>4</sup> The town did not seek to press the issue at that time, e.g., in a motion for summary judgment. Nor did the trial go forward as scheduled. Instead, the parties agreed to stipulate to what they termed a "remand." Specifically, the parties agreed that a reconstituted indemnification panel would reconsider its

ruling on the expenses it had reviewed, and consider for the first time those expenses it had not yet reviewed. In addition, the parties agreed to refer to the selectmen the dispute over the payment of the higher health insurance premiums.

4 No transcript from the May 18, 2006, hearing appears in the record. However, at trial, counsel for both sides acknowledged that the unenforceability [\*7] issue was raised, albeit briefly, at the earlier hearing.

Meanwhile, the litigation was transferred to inactive status. However, the indemnification panel never was reconstituted because the town was unable to identify a doctor who would serve on it.<sup>5</sup> There is no explanation in the record as to what happened to the referral of the insurance premium issue to the selectmen.

5 Although *G. L. c. 41, § 100B*, states that one member of an indemnification panel must be a physician (without further qualification), the parties purported to agree that the physician on the board would be "a Public Employee Retirement Administration Commission . . . physician who specializes in the type of injury sustained by [McShea] (i.e., Orthopedic Surgeon or Osteopath)." The physician who formerly served on the panel was a retired gynecologist.

Town presses unenforceability. With the remand having foundered, the case was returned to active status, and a one-day trial was held on June 8, 2007. Early in the trial, town counsel conceded that the MOA had been "signed by certain parties," but then, harking back to the position the town had at least touched on the previous year, added, "The town is disputing that [the [\*8] MOA] was enforceable against the town." At the close of McShea's case, the town moved for an involuntary dismissal on the ground that McShea had failed to prove that the MOA had been approved by the selectmen, as re-

quired by the town charter.<sup>6</sup> Although the judge deferred ruling on the motion, he expressed skepticism about the merits of the town's argument because, in his view, the town had "unclean hands" given the role that town officials played in drafting and executing the MOA.

6 See St. 1989, c. 480, § 10 (town manager is "responsible for the negotiation of all contracts with town employees over wages, and other terms and conditions of employment," while providing that "such contracts shall be subject to the approval of the board of selectmen"). Neither below, nor on appeal, has McShea argued that this provision applies only to contracts with current employees. That issue is therefore not before us.

The town proceeded to put on its witnesses, and it elicited unchallenged testimony that the selectmen never had approved the MOA. At the end of the trial, the town renewed its legal argument that the MOA, never having been approved, could not be enforced. The judge implicitly rejected [\*9] this argument by ruling that the town breached the MOA, and the docket reflects that the judge eventually denied the town's motion for involuntary dismissal.

Trial judge's ruling. Although the judge ruled that the town breached its agreement to indemnify McShea for her medical expenses, he acknowledged that he lacked the ability to determine which of her claimed expenses were reasonable (and otherwise met the statutory criteria). He therefore decided to refer such issues to the indemnification panel, which he ordered the town to reconstitute in a particular fashion. In terms of the make-up of the indemnification panel, the judge determined it to be "counterproductive" to require that the town "find a 'physician' per se." Accordingly, he purported to excuse the town from this express statutory requirement, stating that it would be sufficient for the town to have "a licensed medical professional, including a registered nurse or a

physician's assistant, but [for reasons the judge did not explain] not a chiropractor." He then [\*10] laid out particular procedures the indemnification panel would have to follow on a set schedule, and he threatened contempt sanctions if it did not follow those requirements.

With regard to the MOA provision requiring the town to pay for McShea's share of the extra cost of coverage under the Blue Cross Elect plan, the judge rejected the town's position that this obligation was intended to be temporary, and he ordered the town to pay \$6,272.52 in damages (plus interest). Nevertheless, he sua sponte ruled that McShea would have to switch to a less expensive health care plan if she wanted to hold the town to paying part of her share of the health care premiums (even though the new "intermediate [middle]" plan would not provide the expanded coverage that McShea contended was an essential part of the negotiated MOA). According to the judge, her obligation to change plans was implicit in her general duty to mitigate damages.

Appellate Division decision. On the parties' cross appeals, the Appellate Division ruled in favor of the town. It relied primarily on the fact that the MOA never had been approved by the selectmen, as required by the town charter. The Appellate Division also ruled that [\*11] the District Court judge lacked authority to order the town to reconstitute the indemnification panel. As grounds for this conclusion, the Appellate Division reasoned that a claim that the town violated *G. L. c. 41, § 100B*, only could be brought in Superior Court or the Supreme Judicial Court, as an action in the nature of certiorari.

Discussion. Jurisdiction. On appeal, McShea requests that we vacate the Appellate Division decision and reinstate the District Court amended judgment in its entirety (save for the requirement that she switch insurance plans).<sup>7</sup> Nevertheless, McShea has addressed only the primary grounds on which the Appellate Division relied, and she failed to address the separate conclusion that the

District Court lacked jurisdiction over the indemnification portion of her case.<sup>8</sup> McShea therefore has waived that issue.

7 Ruling as it did, the Appellate Division had no occasion to reach McShea's contention that the judge erred in ruling that she had a duty to switch health care plans. The same is true here.

8 It appears that McShea failed to appreciate that the jurisdictional problems infected her entire indemnification claim.

Both parties appear to assume that these jurisdictional [\*12] defects do not dispose of the entire case, and that we therefore still need to reach the merits. That is because they view the MOA terms that apply to McShea's health insurance premiums as something other than indemnification. Without reaching the question whether that premise is necessarily correct, we turn to the enforceability of the MOA, the primary ground on which the Appellate Division relied.<sup>9</sup>

9 See *Mostyn v. Department of Environmental Protection*, 83 Mass. App. Ct. 788, 792, 989 N.E.2d 926 (2013) (recognizing that it is sometimes appropriate to address merits, even in the face of some jurisdictional doubt).

Enforceability. The dispute over the enforceability of the MOA is a narrow one, because the governing legal principles are not in dispute. "A contract with [a municipality] is not formed until the necessary statutory requirements are fulfilled." *Urban Transp., Inc. v. Mayor of Boston*, 373 Mass. 693, 696, 369 N.E.2d 1135 (1977). Accordingly, "one dealing with the officers or agents of a municipal corporation must, at his peril, see to it that those officers or agents are acting within the scope of their authority." *Sancta Maria Hosp. v. Cambridge*, 369 Mass. 586, 595, 341 N.E.2d 674 (1976). This principle is strictly applied in light [\*13] of the "salutary functions of placing cities and towns on a sound financial basis and pre-

venting waste, fraud, and abuse," and courts insist that any statutory prerequisites "be satisfied precisely." *United States Leasing Corp. v. Chicopee*, 402 Mass. 228, 231, 232, 521 N.E.2d 741 (1988) (city not estopped from claiming contract was unauthorized even though town counsel had stipulated when contract was signed that person signing it had authority to do so).<sup>10</sup>

10 The judge's view that a contract executed with apparent authority can be enforced because of "unclean hands" is at odds with the case law.

Because there was uncontested evidence that the MOA never was approved by the selectmen, McShea is left to argue that the town somehow waived the argument that the contract cannot be enforced. She first argues that the town made a binding admission as to the contract's enforceability in its answer. In light of the undisputed fact that the parties had negotiated and signed the MOA, the town's admission that the parties had "entered an agreement" cannot be construed as an unambiguous judicial admission that the town fully had complied with underlying statutory prerequisites before executing it (particularly where [\*14] the town in its answer simultaneously denied the terms of the MOA).<sup>11</sup> "To be binding, a judicial admission must be 'clear,' . . . and this one is not." *Harrington v. Nashua*, 610 F.3d 24, 31 (1st Cir. 2010) (defendant municipality not bound by ambiguous statement in answer to plaintiff's complaint).<sup>12</sup>

11 McShea's arguments based on the wording of the joint pretrial memorandum fail for similar reasons.

12 See also 29A Am. Jur. 2d *Evidence* § 783 (2008) ("A judicial admission is a deliberate, clear, unequivocal statement of a party . . . about a concrete fact within that party's knowledge, . . . not a matter of law").

McShea also argues that a municipality must raise a defense that a signed contract never was duly authorized as an affirmative

defense. See *Mass.R.Civ.P. 8(c)*, 365 Mass. 749 (1974) (listing "illegality" as affirmative defense). There is no merit to this argument. This is not a case where a municipal defendant was arguing that it would be illegal to enforce an otherwise authorized contract; instead, it is one where the municipality pointed out that the contract never was authorized. The case law recognizes the issue of authorization as an element that the party seeking to enforce [\*15] a municipal contract ordinarily must prove. Indeed, the case on which McShea principally relies states that, "at least where the question is seasonably raised," it is the plaintiff's burden to prove compliance with the underlying statutory requirements "as with other essential elements of [her] case." *Dos Santos v. Peabody*, 327 Mass. 519, 521, 99 N.E.2d 852 (1951). Granted, there is some force to McShea's argument that the town did not "seasonably" raise the issue here. However, if the *Dos Santos* language suggests that municipalities might have an initial burden to raise authorization defects in a seasonable fashion, it further suggests that the consequences of a municipality's failure to do so would be to relieve the party seeking to enforce the contract of its burden to prove that the contract was duly authorized. In the case before us, the question who carried such a burden is beside the point because the town itself provided affirmative evidence that the MOA

never had been approved. That is, it is now academic whether McShea's case necessarily was doomed by her failure to supply proof that the MOA had been approved.<sup>13</sup>

13 To be sure, it obviously would have been preferable for the town to have raised [\*16] and pressed the unenforceability issue at an earlier point in the litigation. Nevertheless, it is undisputed that the town flagged the issue more than one year before the case was tried. Given how emphatically the case law declines to enforce municipal contracts absent strict compliance with underlying statutory requirements, we cannot reasonably say that any delay here was so severe as to cause the town to forfeit its unenforceability argument.

In sum, we conclude that the Appellate Division correctly determined that the MOA is unenforceable. Thus, to the extent that the District Court had jurisdiction of any of McShea's claims, her case failed on the merits.

Decision and order of Appellate Division affirmed.

By the Court (Rubin, Milkey & Agnes, JJ.),

Entered: December 30, 2013.

**NEW ENGLAND FORESTRY FOUNDATION, INC. vs. BOARD OF ASSESSORS OF HAWLEY**

**SJC-11432**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***468 Mass. 138; 9 N.E.3d 310; 2014 Mass. LEXIS 305***

**January 6, 2014, Argued**

**May 15, 2014, Decided**

**PRIOR HISTORY: [\*\*\*1]**

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial

Court granted an application for direct appellate review.

## HEADNOTES

*Administrative Law*, Agency's interpretation of statute, Findings, Judicial review, Appellate Tax Board: final decision. *Taxation*, Real estate tax: charity, Real estate tax: exemption, Appellate Tax Board: appeal to Supreme Judicial Court, Appellate Tax Board: findings, Judicial review. *Charity. Corporation*, Non-profit corporation. *Statute*, Construction.

**COUNSEL:** Douglas Hallward-Driemeier (Jesse Mohan Boodoo & Jacob Scott with him) for the plaintiff.

Rosemary Crowley (David J. Martel with her) for the defendant.

The following submitted briefs for amici curiae: Robert H. Levin, of Maine, for Massachusetts Land Trust Coalition, Inc., & another.

Gregor I. McGregor & Luke H. Legere for Massachusetts Association of Conservation Commissions, Inc., & another.

James F. Sullivan for Massachusetts Association of Assessing Officers.

Robert E. McDonnell & Patrick Strawbridge for The Nature Conservancy, & another.

Lisa C. Goodheart, Susan A. Hartnett, Phelps T. Turner, & Joshua D. Nadreau for The Trustees of Reservations.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

**OPINION BY:** SPINA

## OPINION

[\*139] [\*\*312] SPINA, J. This case comes to us on direct appellate review from a decision of the Appellate Tax Board (board). The taxpayer, New England Forestry Foundation, Inc. (NEFF), is a nonprofit corporation organized under *G. L. c. 180*. NEFF is

the record owner of a 120-acre parcel of forest land in the town of Hawley. In 2009, NEFF applied [\*\*\*2] to the board of assessors of Hawley (assessors) for a charitable tax exemption on the parcel under *G. L. c. 59, § 5, Third (Clause Third)*.<sup>1</sup> The assessors denied NEFF's application, and NEFF appealed to the board. The board likewise denied the application on the basis that NEFF had failed to carry its burden to show that it occupied the land in Hawley for a charitable purpose within the meaning of Clause Third. NEFF again appealed, and both NEFF and the assessors filed applications for direct appellate review. We granted the parties' applications, and we reverse the board's decision.<sup>2</sup>

1 *General Laws c. 59, § 5, Third (Clause Third)*, in relevant part, exempts from taxation "real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized."

2 We acknowledge the amicus briefs submitted in support of New England Forestry Foundation, Inc. (NEFF), by The Nature Conservancy and Massachusetts Audubon Society; The Trustees of Reservations; Massachusetts Land Trust Coalition, Inc., and Land Trust Alliance, Inc., and Massachusetts Association of Conservation Commissions, Inc.; and The Compact of Cape Cod Conservation [\*\*\*3] Trusts, Inc. We also acknowledge the amicus brief submitted in support of the board of assessors of Hawley (assessors) by Massachusetts Association of Assessing Officers.

[\*\*313] 1. Background. The taxpayer, NEFF, is a Massachusetts nonprofit corporation organized under *G. L. c. 180*, and it has received tax-exempt status from the Federal government under *26 U.S.C. § 501(c)(3) (2006)*. NEFF was incorporated in 1944 and pursues the mission of "providing for the conservation and ecologically sound man-

agement of privately owned forestlands in New England, throughout the Americas and beyond." NEFF is dedicated to several activities in furtherance of this mission [\*140] including "[e]ducating landowners, foresters, forest product industries, and the general public about the benefits of forest stewardship and multi-generational forestland planning"; "[p]ermanently protecting forests through gifts and acquisitions of land for the benefit of future generations"; "[a]ctively managing [f]oundation lands as demonstration and educational forests"; "[c]onservation, through sustainable yield forestry, of a working landscape that supports economic welfare and quality of life"; and "[s]upporting the development and [\*\*\*4] implementation of forest policy and forest practices that encourage and sustain private ownership." In its 2010 restated articles of organization, NEFF described its charitable purposes in part as to "create, foster, and support conservation, habitat, water resource, open space preservation, recreational, and other activities" by "promoting, supporting, and practicing forest management policies and techniques to increase the production of timber in an ecologically and economically prudent manner," to utilize "best management practices . . . to protect habitat, water, and other natural resources," and to "support and engage in and advance scientific understanding of environmental issues through research." As one of the largest land-conservation organizations in Massachusetts, NEFF owns over 23,000 acres of land in five States and holds conservation easements on over one million additional acres across seven States. Of NEFF's land holdings, approximately 7,500 acres are located in Massachusetts in thirty-nine municipalities.

The property at issue in this case is a 120-acre parcel of forested land known as the Stetson-Phelps Pine Ridge Farm (Hawley forest). NEFF purchased the forest as [\*\*\*5] part of a larger tract of land in 1999 from private landowners, Muriel Shippee and her brother, Harold Phelps. According to NEFF,

the farm and its surrounding land had been in Shippee's family for generations, and she sold the land to NEFF in order to ensure that it would not be developed. After NEFF purchased the entire tract, it subdivided the land and sold a portion containing a house and barns and approximately twenty acres of open field to private landowners with no connection to the organization. However, NEFF retained a conservation restriction over the property to ensure that it is not developed in the future. The remainder of the [\*141] land, owned by NEFF, constitutes the Hawley forest and is abutted on two sides by the Kenneth Dubuque Memorial State Forest, which is owned and maintained by the Department of Conservation and Recreation.

Soon after acquiring the forest from Shippee and Phelps, NEFF hired an independent licensed forester to develop a "forest management plan" for the maintenance of the forest.<sup>3</sup> The first round of [\*\*\*314] activities recommended by the plan was carried out in 2000, and included such actions as removal of "mature and poor quality white pine and spruce saw logs" [\*\*\*6] to "release good quality growing stock"; "[c]ombination strip cuts and patch cuts for wildlife and softwood regeneration," and the layout of a "loop demonstration trail" near "old growth type hemlocks" taking into consideration "erosion on fragile soils." In 2009, the plan was updated, and a tree inventory of the forest was conducted. The 2009 plan recommended that NEFF conduct a patch harvest of approximately sixty-five acres in 2010 and a harvest of a second patch in 2016.

3 According to the testimony of NEFF's conservation easement coordinator and forester, a "forest management plan" is a strategic plan for the maintenance of a forest that identifies characteristics of the forest that need to be managed and goals for the long-term management of the natural resources contained in a forest. Foresters in Massachusetts must be licensed pursuant to *G. L. c. 132*, §§

47-50, and 302 Code Mass. Regs. §§ 14.00 (2013).

Prior to tax year 2010, NEFF had applied for and received forest-land classification for the Hawley forest under *G. L. c. 61, § 2*. Chapter 61 sets forth a reduced-taxation scheme for private landowners who hold forest land in an undeveloped state and manage the land according to [\*\*\*7] a forest management plan issued by a licensed State forester. *G. L. c. 61, §§ 1-8*. Accordingly, for tax year 2010, property tax on the Hawley forest was assessed to NEFF at a reduced rate totaling less than two hundred dollars, despite the land's \$96,000 value. In a letter to the assessors, NEFF explained that it subsequently applied for a full property tax exemption under Clause Third, rather than accepting the reduced taxation under *G. L. c. 61*, due in part to the administrative costs of preparing for and filing for *G. L. c. 61* status on all its properties because *G. L. c. 61, § 2*, requires renewal every ten years.

NEFF submitted its application for a Clause Third property [\*142] tax exemption in November, 2009. Clause Third provides that the real property of a charitable organization is exempt from taxation if the land is occupied by the charitable organization or its officers for the purposes for which it was organized. In April, 2010, the assessors deemed NEFF's application denied as of February, 2010, on the basis that NEFF had failed to provide sufficient information to enable the assessors to make a decision regarding its application for exemption within the three-month period required [\*\*\*8] by statute. See *G. L. c. 59, § 64*.

NEFF appealed to the board under formal adjudication procedures set forth in *G. L. c. 58A, § 7*, and *G. L. c. 59, §§ 64 and 65*. Following an adjudicatory hearing, the board issued a thorough, written opinion including findings of fact and conclusions of law. The board denied NEFF's request for an exemption on the basis that NEFF had failed to carry its burden to show that it occupied the land in Hawley for a charitable purpose

within the meaning of Clause Third. Specifically, the board concluded that NEFF was not carrying out a charitable purpose within the meaning of the statute because forest management is not a traditional charitable purpose and because the benefits of NEFF's activities in the Hawley forest do not inure to a sufficiently large and fluid class of persons due in part to NEFF's insufficient efforts to promote the use of the land by the public. The board further concluded that NEFF did not occupy the Hawley forest in furtherance of its claimed charitable purposes because it offered "at best vague testimony" regarding what it termed "active management" of the land, and provided evidence of only one planned educational activity to take [\*\*\*9] place in the Hawley forest. Additionally, the board concluded that a Clause Third exemption was not available to NEFF because the tax-reduction scheme for forest land under *G. L. c. 61* demonstrates that the Legislature intended only to reduce the tax burden [\*\*\*315] on forest land, not to eliminate it completely. Although the board's findings of fact are supported by substantial evidence, we conclude that the board erred in denying NEFF a charitable tax exemption under Clause Third.

2. Application of *G. L. c. 59, § 5*, Third. As a threshold matter, the assessors argue, as the board held, that a Clause Third exemption is not available to NEFF in part because the Legislature [\*143] intended *G. L. c. 61* to be the extent of the tax benefit afforded to private landowners holding undeveloped forest land. Similarly, the assessors now argue that Clause Third does not apply to land-conservation organizations like NEFF because the Legislature intended for The Trustees of Reservations to be the only private, nonprofit entity permitted to hold conservation land completely free from property taxes. Neither of these arguments is availing.

a. *General Laws c. 61, "Classification and Taxation of Forest Land and Forest [\*\*\*10] Products."* *General Laws cc. 61, 61A, and 61B*, together set forth a reduced-taxation scheme for land privately

held as forest, agricultural, or recreational land. The assessors argue that the enactment of this statutory scheme demonstrates a legislative intent to provide for reduced taxation, but not a complete exemption, for privately held, undeveloped forest land. Specifically, *G. L. c. 61, § 2*, permits any private landowner holding not less than ten acres of land for forest production to apply to the local board of assessors for a forest-land classification, which subjects that land to property taxation at a reduced rate. See *G. L. c. 61, §§ 2, 2A*; *South St. Nominee Trust v. Assessors of Carlisle*, 70 *Mass. App. Ct.* 853, 854, 878 *N.E.2d* 931 (2007). In order to obtain forest-land classification, the landowner must implement a forest management plan and submit to compliance monitoring by the State forester. See *G. L. c. 61, § 2*; *South St. Nominee Trust*, *supra* at 854-855. The classification must be renewed every ten years. *G. L. c. 61, § 2*. Additionally, *G. L. c. 61* contains provisions discouraging the conversion of the land to another use. For example, if a landowner wishes to sell the land to a buyer [\*\*\*11] who plans to remove it from forest-land classification, the sale will be subject to conveyance taxes based on the total value of the sale of the land. *Id.* at § 6. However, if the landowner sells the land to the State or municipality, or to a nonprofit conservation organization, no conveyance tax is assessed. *Id.* Similarly, if the landowner wishes to sell the land during a period in which it is classified and taxed as forest land, the municipality in which the land is located has a right of first refusal to "meet a bona fide offer" to purchase the land. *Id.* at § 8. A municipality also may assign this right to a nonprofit land-conservation organization of its choosing. *Id.* [\*144] Therefore, *G. L. c. 61* creates financial incentives for private landowners to hold land as undeveloped forest land and provides mechanisms to protect forest land from development. The assessors argue that such a result demonstrates that the Legislature could not have intended Clause Third to apply to land-conservation organizations because Clause Third does not, by its terms, help to

ensure that land is held in its undeveloped state as does *G. L. c. 61*.

Although Clause Third does not protect land from development, this [\*\*\*12] does not defeat the application of Clause Third to NEFF or any other land-conservation organization. *General Laws c. 61* and Clause Third serve distinct purposes. *General Laws c. 61* is part of a broader statutory scheme animated by conservationist values that expressly creates a program of incentives to encourage conservation [\*316] by private landowners, whether charitable corporations or otherwise. In contrast, Clause Third does not seek to encourage charitable organizations to pursue particular substantive policy goals or charitable activities. Rather, if a corporation qualifies as a "charitable" enterprise within the meaning of the statute, Clause Third exempts the organization's property from taxation based on the theory that property held for philanthropic, charitable, religious, or other quasi-public purposes in fact helps to relieve the burdens of government. *Opinion of the Justices*, 324 *Mass.* 724, 730-731, 85 *N.E.2d* 222 (1949). Therefore, a charitable organization makes a sufficient "in-kind" contribution to the community that its property may be exempt from taxation without offending the notions of fairness and proportionality inherent in the system of taxation in the Commonwealth. See *id.* *Chapter 61* [\*\*\*13] and Clause Third may overlap in their application to certain taxpayers, but they are components of distinct statutory schemes. Chapter 61 provides a scheme of tax incentives for any nongovernment landowner who holds undeveloped forest land. Clause Third provides a tax exemption for property held by any qualifying charitable organization. Although a particular taxpayer, like NEFF, may be eligible for both of these tax benefits, such overlap does not indicate a legislative intent for one statute to somehow "preempt" the other.

Furthermore, the Legislature has had multiple opportunities [\*145] to address the interaction of *G. L. c. 61* and Clause Third and never has indicated that the statutes are

mutually exclusive. For example, the preamble to *G. L. c. 59, § 5*, lists certain tax exemptions included in § 5 that may not be combined with other exemptions or tax benefits also included in the section. *General Laws c. 59, § 5*, Twenty-Sixth, expressly references c. 61. When that clause was added to § 5, the Legislature could have added a reference to it in the preamble of § 5 providing that charitable organizations could not obtain both a property tax reduction under c. 61 and a tax exemption under [\*\*\*14] Clause Third. However, the Legislature chose not to do so. Therefore, *G. L. c. 59, § 5*, does not contain any express or implied language precluding conservation organizations from seeking the property tax exemption available to eligible charitable organizations under Clause Third.

Similarly, *G. L. c. 61* does not contain any express or implied indication that the Legislature intended for c. 61 to preclude land conservation organizations from seeking or qualifying for a property tax exemption under Clause Third. Chapter 61 references expressly "nonprofit conservation organization[s]." *G. L. c. 61, §§ 6, 8*. Thus, the Legislature considered nonprofit land-conservation organizations when it enacted the statute. Yet the Legislature never stated that c. 61 should serve as the only source of a property tax benefit for nonprofit conservation organizations. Indeed references to nonprofit land-conservation organizations in c. 61 demonstrate a view of these organizations as assisting municipalities in carrying out the purposes of the statute rather than acting as private landowners who must be encouraged to preserve land in its undeveloped state. Therefore, we conclude that the board erred in holding [\*\*\*15] that c. 61 precludes NEFF from eligibility for a Clause Third property tax exemption.

b. Statute creating The Trustees of Reservations. The Trustees of Reservations (Trustees) were established by St. 1891, c. 352, § 1 (Trustees' enabling act) under the name "The Trustees of Public Reservations" for the purpose of "acquiring, holding, ar-

ranging, maintaining and [\*\*317] opening to the public, under suitable regulations, beautiful and historical places and tracts of land within this Commonwealth." By the express terms of the original statute, lands up to \$1 million in value acquired by the Trustees [\*146] and kept open to the public in accordance with the statute were exempt from taxation "in the same manner and to the same extent as the property of literary, benevolent, charitable and scientific institutions incorporated within this Commonwealth . . . ."<sup>4</sup> St. 1891, c. 352, §§ 2, 3. The assessors assert that the Legislature's grant within the Trustees' enabling act of a tax exemption for property held by the Trustees demonstrates that the Legislature did not otherwise intend for land privately held for conservation purposes to qualify for a property tax exemption under Clause Third. Rather, the assessors [\*\*\*16] argue, the Legislature intended that the Trustees alone be permitted to hold only a limited amount of Commonwealth land free from taxation for the purposes of conservation.

4 At the time, the statute providing for a property tax exemption for charitable organizations was substantially the same as it is today. Compare St. 1888, c. 158, § 1 (exempting from taxation "[t]he personal property of literary, benevolent, charitable and scientific institutions and temperance societies incorporated within this Commonwealth, and the real estate belonging to [them] occupied by them or their officers for the purposes for which they were incorporated"), with *G. L. c. 59, § 5*, Third (exempting from taxation "[p]ersonal property of a . . . literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth . . . and real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized").

However, the assessors' arguments disregard the historical context in which the Trustees' enabling act was passed. The Trustees of Reservations was the first land-conservation entity of its kind anywhere [\*\*\*17] in the United States. G. Abbot, *Saving Special Places: A Centennial History of The Trustees of Reservations* 4 (1993). The statute creating the Trustees was inspired by the writings of Charles Eliot who proposed the creation of a board of trustees that would be empowered to hold important parcels of land for preservation and public enjoyment much like The Trustees of the Museum of Fine Arts had been established to "erect[] a museum for the preservation and exhibition of works of art" and the Trustees of the Public Library had been tasked with the "care and control" of the Boston Public Library. St. 1878, c. 114, §§ 1, 5. St. 1870, c. 4, § 1. Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 *Nat. Resources & Env't* 244, 244 (2001). Additionally, other statutes establishing nonprofit or benevolent organizations in the same [\*147] era also contained language similar to the Trustees' enabling act referencing the general tax exemption for charitable organizations. E.g., St. 1882, c. 248, § 3 ("An Act to incorporate the Longfellow Memorial Association"). Consequently, the language treating land acquired by the Trustees as exempt "to the same extent" as land held by other charitable [\*\*\*18] organizations likely demonstrates the Legislature's intent to ensure that organizations like the Trustees were covered by the general charitable tax exemption, not to acknowledge that they were not.

Furthermore, the fact that the Trustees were created by statute does not indicate a legislative intent that they were to serve as the Commonwealth's only land-conservation organization. In the 1800s, and even earlier, numerous private charitable organizations were established by statute, including Massachusetts General Hospital and the Museum of Fine Arts, as well as Harvard College, which was established by [\*\*318] colonial charter in 1650. St. 1870, c. 4 ("An Act to

incorporate The Trustees of the Museum of Fine Arts"). St. 1811, c. XCIV ("An Act to incorporate certain persons, by the name of The Massachusetts General Hospital"). The Charter of the President and Fellows of Harvard College (May 31, 1650). None of these statutes purports to establish the exclusive hospital, museum, or college in the Commonwealth that may be eligible for a charitable tax exemption.

Additionally, the initial limitation on the total amount of property the Trustees could hold was increased over time, and the limit was [\*\*\*19] eliminated altogether in 1971. St. 1963, c. 289 (increasing amount of land the Trustees could hold to \$10 million). St. 1971, c. 819, § 3 (amending *G. L. c. 180, § 6*, to permit charitable corporations, including the Trustees, to hold real and personal property in unlimited amount). Therefore, the limit initially imposed by the Legislature on the amount of Trustee property that may be exempt from taxation cannot be used to support an argument that the Legislature presently intends to limit the amount of tax-exempt conservation land in the Commonwealth. Furthermore, in a context similar to this case, the board has granted the Trustees a property tax exemption under Clause Third, therefore implicitly contradicting the argument that the Legislature intended for the Trustees' enabling act to serve as the exclusive source of a property tax exemption for [\*148] conservation land in the Commonwealth. *Trustees of Reservations vs. Assessors of Windsor, App. Tax Bd., No. 159046, 1991 Mass. Tax LEXIS 18 (Dec. 2, 1991)*.<sup>5</sup> We conclude that neither the Trustees' enabling act, nor the present legal treatment of the Trustees is evidence of a legislative intent to exclude from property tax exemption land-conservation organizations [\*\*\*20] that otherwise meet the requirements of Clause Third.

<sup>5</sup> We stated in *Milton v. Ladd*, 348 *Mass. 762, 766, 206 N.E.2d 161 (1965)*, that "[w]e read [the Trustees' enabling act] to provide a somewhat

broader exemption . . . than would be available under the general exemption statute." However, in that same decision we immediately went on to acknowledge that the enabling act could likewise be subject to a more narrow interpretation than Clause Third, placing on the Trustees an additional obligation, not required of all charitable organizations, that it make its lands open to the public. In *Ladd*, we did not go so far as to resolve the precise boundaries between Clause Third and the Trustees' enabling act. The holding of *Ladd* was based on an interpretation of the Trustees' enabling act alone. *Id.* Therefore, our statements in *Ladd* do not lend support to the assessors' argument that the Trustees' enabling act somehow demonstrates a legislative intent to preclude conservation organizations from qualifying for a charitable tax exemption under Clause Third.

3. Property tax exemption under *G. L. c. 59, § 5, Third*. Clause Third provides an exemption from taxation of real property when such property is held by a "charitable [\*\*\*21] organization" and "occupied by [the organization] or its officers for the purposes for which it is organized." *G. L. c. 59, § 5, Third*. Qualification for a tax exemption under Clause Third is a two-pronged test. *Mary Ann Morse Healthcare Corp. v. Assessors of Framingham*, 74 Mass. App. Ct. 701, 703, 910 N.E.2d 394 (2009). See *Harvard Community Health Plan, Inc. v. Assessors of Cambridge*, 384 Mass. 536, 541, 427 N.E.2d 1159 (1981). The first requirement is that the organization seeking the exemption qualify as a "charitable" organization within the meaning of Clause Third. *Harvard Community Health Plan, supra*. The second is that the organization occupy the property in furtherance of its charitable purposes. *Id.* *Mary Ann Morse Healthcare Corp., supra* at 705. [\*\*319] Although each prong is closely related, and certain facts may be relevant to

both, each requirement should be considered in turn.

Exemption statutes are strictly construed, and the burden lies with the party seeking an exemption to demonstrate that it qualifies according to the express terms or the necessary implication of a statute providing the exemption. *Milton v. Ladd*, 348 Mass. 762, 765, 206 N.E.2d 161 [\*149] (1965), citing *Animal Rescue League of Boston v. Assessors of Bourne*, 310 Mass. 330, 332, 37 N.E.2d 1019 (1941). [\*\*\*22] We uphold findings of fact of the board that are supported by substantial evidence. We review conclusions of law, including questions of statutory construction, de novo. *Bridgewater State Univ. Found. v. Assessors of Bridgewater*, 463 Mass. 154, 156, 972 N.E.2d 1016 (2012). We conclude that the board erred in denying NEFF a property tax exemption and that NEFF is a charitable organization that, during the relevant tax year, occupied its parcel in Hawley for its charitable purposes within the meaning of *G. L. c. 59, § 5, Third*.

a. Charitable purpose requirement. The text of Clause Third defines a charitable organization as "a literary, benevolent, charitable or scientific institution or temperance society incorporated in the commonwealth" or a trust created for the same purposes. An organization's legal status as a charitable corporation or its exemption from Federal taxation under § 501(c)(3) of the United States tax code is not sufficient to satisfy this requirement. An organization must prove that "it is in fact so conducted that in actual operation it is a public charity." *Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 102, 747 N.E.2d 97 (2001), quoting *Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313, 69 N.E.2d 463 (1946).

In [\*\*\*23] the context of the property tax exemption, we have long recognized that "charity" may constitute more than "mere alms giving." *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 255, 1 N.E.2d 6 (1936), quoting *New Eng-*

*land Sanitarium v. Stoneham*, 205 Mass. 335, 342, 91 N.E. 385 (1910). The dominant purpose of a charitable organization must be to perform work for the public good, not merely its own members. *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732, 889 N.E.2d 414 (2008), citing *Massachusetts Med. Soc'y v. Assessors of Boston*, 340 Mass. 327, 332, 164 N.E.2d 325 (1960). As Justice Gray, writing for the court in 1867, stated, in the legal sense, a charity is "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining [\*150] public buildings or works or by otherwise lessening the burdens of government." *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867). See *New Habitat, supra*. This definition describes the "traditional objects and methods [\*\*\*24] of charity." *Id.* The closer an organization's dominant purposes and methods hew to these traditional charitable purposes, the more likely the organization is to qualify as a "charitable organization" under Clause Third. *Id.* at 733. When an organization's dominant purposes are further from these traditionally charitable purposes, additional factors become more significant in determining whether the organization qualifies as charitable within [\*\*320] the meaning of the statute.<sup>6</sup>

6 The additional factors relevant to this analysis include, but are not limited to, "whether the organization provides low-cost or free services to those unable to pay"; "whether it charges fees for its services and how much those fees are"; "whether it offers its services to a large or 'fluid' group of beneficiaries and how large or fluid that group is"; "whether the organization provides its services to those from all segments of society and from all walks of life"; and "whether the or-

ganization limits its services to those who fulfil certain qualifications and how those limitations help advance the organization's charitable purposes." *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 732-733, 889 N.E.2d 414 (2008).

NEFF's [\*\*\*25] purposes are traditionally charitable within the meaning of Clause Third and the definition of charity set forth in *Jackson, supra*. First, NEFF's charitable programs and activities, both in Hawley and throughout New England, are of the sort that their benefit inures to an indefinite number of people. Historically, the "benefit" provided by land held as open space or in its natural state has been measured by the direct access of people to that land for such purposes as recreation, scenic views, or education. See, e.g., *Holbrook Island Sanctuary v. Brooksville*, 161 Me. 476, 486, 214 A.2d 660 (1965); *Hawk Mountain Sanctuary Ass'n v. Board for the Assessment & Revision of Taxes of Berks County*, 188 Pa. Super. 54, 57, 145 A.2d 723 (1958). However, as the science of conservation has advanced, it has become more apparent that properly preserved and managed conservation land can provide a tangible benefit to a community even if few people enter the land. For example, the climate change adaptation advisory committee of the Executive Office of Energy and Environmental Affairs has identified the conservation of large forested blocks of land as an effective means of contributing to "ecosystem resilience" in the face of rising [\*\*\*26] temperatures and more severe [\*151] storms because forests naturally absorb carbon and other harmful emissions.<sup>7</sup> Additionally, open space land naturally absorbs and helps dissipate stormwater runoff without the need for drainage systems that are required in paved and developed areas.<sup>8</sup> Furthermore, forest land helps to clean the air by filtering particulates naturally, and it regulates and purifies the fresh water supply by stabilizing soils that store water over time and filter contaminants.<sup>9</sup> Such benefits may extend beyond the parcel of land itself. Consequently, NEFF's

activities are not of the sort that inure only to a limited group of people such as the organization's own members.<sup>10</sup> Contrast *Nature Preserve, [\*\*321] Inc. vs. Assessors of Pembroke, App. Tax Bd., No. F246663, ATB 2000-796, [\*152] 797, 799, 807, 811, 2000 Mass. Tax LEXIS 85 (Sept. 25, 2000)* (denying exemption to organization that held sixty-five acres of forest land on which it conducted no conservation activities but had installed benches, trails, and pond for recreation and meditation and was open only to registered members). Therefore, by holding land in its natural pristine condition and thereby protecting wildlife habitats, filtering the air and water supply, [\*\*\*27] and absorbing carbon emissions, combined with engaging in sustainable harvests to ensure the longevity of the forest, NEFF engages in charitable activities of a type that may benefit the general public.<sup>11</sup> See *Carroll v. Commissioner of Corps. & Taxation, 343 Mass. 409, 413, 179 N.E.2d 260 (1961)* ("it is in the general public interest that [the] waste of natural resources be overcome").

7 Executive Office of Energy and Environmental Affairs, Massachusetts Climate Change Adaptation Report 12, 26, 38, 39 (Sept. 2011) (Climate Change Report).

8 Climate Change Report, *supra* at 34. According to an independent report commissioned by the Trust for Public Land, the city of Boston alone saves approximately \$553,000 annually as a result of carbon, sulfur, and ozone absorption by trees and shrubs in city parks. The Trust for Public Land, *The Return on Investment in Parks and Open Space in Massachusetts* 18 (Sept. 2013) (Return on Investment). Additionally, it is estimated that the city's parks provide natural stormwater retention services valued at \$8.67 million annually based on city water management costs. *Id.*

9 Return on Investment, *supra* at 13.

10 The Appellate Tax Board has required land-conservation organiza-

tions [\*\*\*28] seeking a property tax exemption to show that they are a charitable organization under Clause Third by demonstrating that they invite, encourage, and facilitate the entry of the public at large onto their lands. See, e.g., *Brookline Conservation Land Trust vs. Assessors of Brookline, App. Tax Bd., Nos. 281854-56, 285517-19, ATB 2208-679, 693-695 (June 5, 2008)*; *Forges Farm, Inc. vs. Assessors of Plymouth, App. Tax Bd., Nos. F283127, F283128, F283129, ATB 2007-1197, 1205-1206, 2007 Mass. Tax LEXIS 70 (Oct. 18, 2007)*. Although this inquiry may be somewhat useful in seeking to ensure that an organization is a "bona fide" land conservation organization, as opposed to a group organized as a charity that simply is seeking to set aside land for its own private use or as a buffer around members' own private property, we emphasize that public access to the land is not required for a nonprofit conservation organization to qualify for a Clause Third exemption provided that the organization can demonstrate that in practice it is an organization carrying out land conservation and environmental protection activities of the sort whose benefits inure to the public at large. We do not propose a precise formula for determining [\*\*\*29] whether an organization is a "bona fide" conservation organization, but factors that may prove relevant could include membership in regional, State or national coalitions of conservation organizations; recognition by government entities or the scientific or academic community as a trusted community resource; partnership with local municipalities in carrying out *G. L. c. 61, 61A, or 61B* (such as being selected by a town or city to exercise its right of first refusal under *G. L. c. 61, § 8*); ownership of multiple parcels in various locations of a similar ecological sort or of a variety consistent

with the organization's stated mission; expertise of staff members in land conservation and environmental initiatives; success in receiving competitive grants from Federal or State agencies; certifications or accreditations from government or other appropriate entities; invitations from policy makers or State agencies to participate in regional or Statewide strategic planning initiatives; or like indicia of the organization's status as a genuine land-conservation organization.

11 Similarly, other jurisdictions have held that land conservation activities can benefit the general public regardless [\*\*\*30] of the public's access to the land itself. For example, the New Mexico Court of Appeals held that a land-conservation organization that held land in the Pecos River Canyon in its "natural and undisturbed" state provided a "substantial benefit to the public" through its "environmental preservation and beautification" of the region. Therefore the land qualified for a property tax exemption despite the absence of any evidence that the public used the land for recreation or its own scenic views. *Pecos River Open Spaces, Inc. vs. County of San Miguel*, 2013-NMCA-029 at P16 (Jan. 11, 2013). See *Turner v. Trust for Pub. Land*, 445 So. 2d 1124, 1126 (Fla. Dist. Ct. App. 1984) (stating that "[t]here can be little question that conservation serves a public purpose" and concluding that particular parcel served "greatest public good" when it was left entirely undeveloped -- without trails, walkways, or educational facilities).

Moreover, NEFF's work in Hawley, and throughout Massachusetts, is traditionally charitable in the sense that it assists in lessening the burdens of government. See *New Habitat*, 451 Mass. at 732. Conservation and

environmental protection are express obligations [\*\*\*31] of the government in Massachusetts. *Article 97 of the Amendments to the Massachusetts Constitution* provides a right of the people to "clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, [\*153] historic, and esthetic qualities of their environment" and identifies as a "public purpose" the government's [\*\*\*322] protection of people in their right to the conservation, development, and utilization of natural resources. Therefore, the safeguarding of natural resources and basic environmental quality in the Commonwealth is a duty of the government. Moreover, in *G. L. c. 21A*, the Legislature established the Executive Office of Energy and Environmental Affairs (EEA) and within it, among other entities, the Departments of Environmental Protection, Conservation and Recreation, and Fish and Game. *G. L. c. 21A*, §§ 1, 7. *General Laws c. 21, § 2*, requires the EEA and its departments to carry out State environmental policy, including, the "management of air, water and land resources to assure the protection and balanced utilization of such resources within the commonwealth" and "promot[ing] the perpetuation, extension, and proper management of the public and private forest [\*\*\*32] lands of the commonwealth."

In Hawley, NEFF is acting in a manner that assists the State in achieving its conservation policy goals. The Hawley forest is abutted on two sides by the Kenneth Dubuque Memorial State Forest. By acquiring property that directly abuts the State Forest, NEFF has helped to extend a block of forested land preserved by the State. The preservation of increasingly large and contiguous forested blocks has been identified by the EEA as important to the preservation of species that require a certain amount of continuous area to thrive and to the biodiversity of forest lands more generally.<sup>12</sup> Furthermore, NEFF is committed to managing its forest lands according to many of the same principles the Department of Conser-

vation and Recreation has set forth for the management of its own forest lands.<sup>13</sup>

12 See Massachusetts Division of Fisheries & Wildlife, Department of Fish & Game, Executive Office of Environmental Affairs, *Comprehensive Wildlife Conservation Strategy* 15-16 (rev. Sept. 2006).

13 The Department of Conservation and Recreation seeks to utilize its woodlands to provide, among other objectives, "educational examples of excellent forestry to landowners and the general [\*\*\*33] public," "protect[] forest productivity through sustainable forestry," enhance ecosystem resilience in watershed forests through active management, and produce high-quality, high-value local forest products. See Department of Conservation & Recreation, *Landscape Designations for DCR Parks & Forests: Selection Criteria and Management Guidelines* 37 (Mar. 2012). Similarly, NEFF is committed to managing its lands actively as demonstration and educational forests, conserving forest resources through sustainable forestry, increasing the production of timber in an "ecologically and economically prudent manner," and, with regard to the Hawley forest in particular, "[m]aintain[ing] and/or enhanc[ing]" recreational or aesthetic qualities and wildlife habitats, producing income from periodic timber harvests, and managing the timber resource over the long term to produce "high quality saw logs."

More broadly, too, NEFF and other conservation organizations [\*154] that align their missions with the conservation goals of the State have been identified as essential partners in Statewide conservation efforts. For example, a number of statutory schemes make nonprofit land-conservation organizations the partners [\*\*\*34] of municipalities in conservation and land use programs. E.g.,

*G. L. c. 44B, § 12 (a)* (permitting municipalities to appropriate funds for purchase of open space "community preservation" lands so long as lands are encumbered by conservation restrictions held by another government entity or nonprofit organization); *G. L. c. 184, §§ 31-33* (permitting conservation restrictions to be held by government entity or by charitable corporation or trust with conservationist purpose); *G. L. c. 61, § 8* (permitting municipality to assign to nonprofit conservation organization its right of first refusal to purchase land from private [\*\*\*323] landowner intending to remove land from forest classification). Furthermore, the contribution that privately held forest land can make to improving air and water quality and mitigating the effects of erosion, rising temperatures, and other ecosystem disruptions assists the government by reducing the cost associated with safeguarding air and water supplies and responding to the effects of pollution.<sup>14</sup>

14 See Return on Investment, *supra* at 13, 18.

Moreover, we are not alone in recognizing conservation organizations as serving a traditionally charitable purpose by lessening [\*\*\*35] the burdens of government. For example, in California, which, like Massachusetts has a strong public policy in favor of environmental protection, and which has adopted the definition of "charity" first set forth by this court in 1867 in *Jackson, 14 Allen at 556*, at least one appellate court has recognized that property used exclusively as a nature preserve to protect native plants or animals may qualify as charitable because it lessens the government's burden to preserve ecological communities and native flora and fauna. *Santa Catalina Island Conservancy* [\*155] *v. County of Los Angeles*, 126 Cal. App. 3d 221, 236, 237, 178 Cal. Rptr. 708 (Cal. Ct. App. 1981). Therefore, because NEFF's stated mission and land conservation activities are of the sort to inure to an indefinite number of people and lessen the burdens of government, NEFF pursues tradi-

tionally charitable purposes and activities within the meaning of Clause Third.

b. Occupancy requirement. In order to qualify for a charitable tax exemption, NEFF must do more than satisfy the charitable status requirement. It must also show that it "occupies" the Hawley Forest in furtherance of its charitable purposes. *G. L. c. 59, § 5, Third*. Occupancy is "something more [\*\*\*36] than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized." *Assessors of Boston v. Vincent Club*, 351 Mass. 10, 14, 217 N.E.2d 757 (1966), quoting *Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage*, 225 Mass. 418, 421, 114 N.E. 712 (1917). The dominant use of the property must be "such as to contribute immediately to the promotion of the charity and to participate physically in the forwarding of its beneficent objects." *Vincent Club*, *supra*, quoting *Babcock*, *supra* at 422. Although extent of use is a factor, it is not decisive. *Vincent Club*, *supra*, quoting *Babcock*, *supra* at 421-422. However, if the charitable use of the property is "merely incidental" to a noncharitable use, the property will not be exempt from taxation. See *Boston Symphony Orchestra, Inc.*, 294 Mass. at 257.

We also have held that so long as the property is immediately appropriated to a use that furthers the organization's purposes, the courts shall defer to the organization's officers and directors in determining the extent of property required and the specific uses of the land that will best promote those purposes. *Assessors of Dover v. Dominican Fathers Province of St. Joseph*, 334 Mass. 530, 540-541, 137 N.E.2d 225 (1956). [\*\*\*37] The decisions of the organization will be entitled to deference so long as the directors act in good faith and not unreasonably in determining how to occupy and use the property at issue. *Id.* at 541.

The requirement contained in Clause Third that the charity "occupy" the land and

the deferential rule set forth in *Dominican Fathers* can best be reconciled by considering the purpose [\*156] of Clause [\*\*324] Third. See *Bridgewater State Univ. Found.*, 463 Mass. at 160 & n.10. Clause Third recognizes the contribution a charity makes to the public either on, or through, its use of its property. Unlike a private landowner whose land ownership burdens the government by making use of a range of public services and benefits, the burden a charity's ownership of land places on the government may be offset by its use of the land in a manner that benefits the public and lessens the burdens of government. See *Opinion of the Justices*, 324 Mass. at 730. Thus, it is fair and proportional to tax privately held land but to exempt those lands that are held charitably so long as the charity in fact uses the land in a manner that contributes to the community and reduces the burdens of government. *Id.* at 730-731, 733. The [\*\*\*38] requirement that land be occupied for the organization's charitable purposes, then, is best understood as the Legislature seeking to ensure that the land is not being held as a private landowner would hold it but that it is being held as an entity would hold it for the public good.

In the case of open space or conservation land, this inquiry is complicated by the fact that both private and charitable landowners may have an incentive to hold land in an undeveloped state. See, e.g., *G. L. c. 61, §§ 2, 2A* (providing reduced taxation rate for privately owned forest land on application by landowner). As a result, even after an organization has demonstrated that it is a bona fide charitable organization within the meaning of Clause Third, it also must demonstrate that it occupies the parcel at issue in a manner less like a private landowner and more like an entity seeking to further the public good.

In the case of NEFF, the board approached this inquiry by focusing on the degree of public access NEFF encouraged and achieved at the Hawley forest and concluded that NEFF's promotion of public access was insufficient to demonstrate that it occupied

the land for the benefit of the public. However, [\*\*\*39] Clause Third does not require imposing an affirmative duty to promote and facilitate public access on conservation lands in order to satisfy the occupancy requirement. To impose this sort of duty exceeds the scope of the inquiry at the core of Clause Third's occupancy requirement. Additionally, in certain circumstances, such as in the case of a particularly fragile habitat or ecosystem, [\*157] a public access requirement could operate to thwart the very conservation objectives an organization is seeking to achieve. See *Mary Ann Morse Healthcare Corp.*, 74 Mass. App. Ct. at 706 (Clause Third should not be interpreted in manner that results in penalizing organization for pursuing its charitable mission).

Therefore, we conclude that in a case such as NEFF's where the entry of the public onto the land is not necessary for the organization to achieve its charitable purposes, the promotion and achievement of public access is not required to demonstrate occupancy of the land in order to qualify for a Clause Third exemption. The right that is most central to the "bundle" of rights enjoyed by a private property owner is not the freedom from an obligation to invite visitors, it is the affirmative right [\*\*\*40] to exclude others from one's property. *United States v. Craft*, 535 U.S. 274, 278, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002). See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (describing right to exclude as "universally held to be a fundamental element of the property right"). Consequently, the appropriate inquiry begins with whether the entity takes affirmative steps to exclude the public from the land, such as through physical [\*\*325] barriers, "no trespassing" signs, or actively patrolling the land.

If a charitable organization engages in such exclusion, the organization faces a heightened burden to show that such exclusion of the public is necessary to enable it to achieve its charitable purposes. Although an organization may succeed in meeting this

burden, it may do so only by presenting compelling facts demonstrating that the exclusion of the public is necessary to achieve a public benefit through other activities carried out on, or through use of, the land, such as when conservation activities may pose a danger to public safety or where the ecosystem is so fragile that any human presence could undermine the organization's conservation efforts. Such rationales may often be time-limited, such as during a timber [\*\*\*41] harvest when trees are being felled or during the nesting period of a vulnerable species. Placing a high burden on organizations that actively exclude the general public from their lands helps to identify and exclude from exemption those land-conservation organizations that treat their land more as a private club or a buffer zone around [\*158] the private property of organization insiders. However this requirement also acknowledges that in particular circumstances the exclusion of the public from the land may be necessary for a bona fide land-conservation organization to carry out its mission and therefore should not per se preclude an organization from otherwise demonstrating that it occupies the land.

Here, the evidence presented to the board demonstrated that NEFF did not take active steps to exclude the public from its land during the tax year in question. Rather, it took steps to inform the public that the land is available for recreation, and it permits the land's regular use by a snowmobiling club and keeps the land open for hiking and hunting. If NEFF's only claimed charitable purpose were recreational or educational, it may have had to demonstrate more regular use of the land for [\*\*\*42] recreation or education in order to carry its burden to show that the land was appropriated immediately to its charitable purposes. See, e.g., *Wheaton College v. Norton*, 232 Mass. 141, 148-149, 122 N.E. 280 (1919) (granting exemption to "wild woodland" owned by college where paths through woods were "favorite walks" of pupils and thereby important to health and enjoyment of students and essential to col-

lege's accomplishment of its charitable purposes). However, NEFF's charitable purposes also involve the conservation of forest land through sustainable forestry practices along with the enhancement of environmental quality through the promotion of improved water quality and biodiversity. NEFF presented evidence that it engages in sustainable forestry practices at appropriate intervals in the Hawley forest, and that the Hawley forest serves as a location where NEFF can track the effects of its land management. Additionally, NEFF produces a range of awareness-raising materials and holds conferences and continuing education programs for foresters regarding sustainable forestry practices to educate even those who may not enter a NEFF property to view it pre- or postharvest. Further, the fact that the [\*\*\*43] Hawley forest directly abuts a State forest on two sides promotes biodiversity by extending the habitat area for species in the State forest. The fact that the Hawley forest abuts the State forest, rather than the private property of organization insiders, also tends to show that NEFF occupies the land in fur-

therance of its charitable purposes, and not merely to create a [\*159] buffer zone around private land. Furthermore, on acquiring the Hawley forest, NEFF not only immediately placed the land under a forest management plan, but also hired an outside forestry consulting [\*\*326] firm, rather than having one of the licensed foresters on its own staff develop the plan. This also tends to show that NEFF immediately appropriated the land in furtherance of its conservation goals and did not merely implement a forest management plan for the purposes of a tax reduction under *G. L. c. 61*, §§ 2, 2A. Consequently, where NEFF does not exclude the public from its land and offered evidence demonstrating how NEFF uses the land as a site on which it carries out sustainable forestry practices, the board erred in concluding that NEFF did not meet its burden to show that it occupied the Hawley forest within the meaning [\*\*\*44] of Clause Third.

4. Conclusion. For the foregoing reasons, the decision of the board is reversed.

So ordered.

**PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION vs. DAVID MADDEN**

**13-P-1587**

**APPEALS COURT OF MASSACHUSETTS**

*86 Mass. App. Ct. 1107; 2014 Mass. App. Unpub. LEXIS 912*

**August 7, 2014, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED

THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

**DISPOSITION:** [\*1] Judgment affirmed.

**JUDGES:** Cohen, Sikora & Agnes, JJ.

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

David Madden is the retired mayor and retired chief of the fire department of the town of Weymouth. He appeals from a judgment of the Superior Court reversing a decision of the Contributory Retirement Appeal Board (CRAB) and resulting in a substantial reduction of his pension allowance. For the following reasons, we affirm the judgment.

*Background.* 1. *Factual.* The material facts are undisputed. We draw them from the stipulation submitted by the parties to the magistrate of the Division of Administrative Law Appeals (DALA) who originally heard the case and recommended a decision to CRAB.

a. *Biography.* Madden began service as a Weymouth firefighter in 1977. In or about 1992, the then mayor appointed him to the civil service position of chief of the fire department. In November of 1999 he won election to the office of mayor, and four years later reelection. His second term expired on January 1, 2008.

Two General Laws relate to his tenure in, and retirement from, either of those two positions. Within the chapter governing civil service, *G. L. c. 31, § 37*, inserted by St. 1978, c. 393, § 11, provides in relevant [\*2] part as follows:

"Any person . . . elected . . . to the office of mayor who is a permanent employee in a civil service position . . . shall, upon his written request made to the appointing authority, be granted a leave of absence without pay from his civil service position . . . for all . . . of the term for which he was elected . . . and shall not, as a result of such election, . . . suffer

any loss of rights under the civil service law and rules.

. . .

"Any person who has been granted a leave of absence . . . shall be reinstated at the end of the period for which the leave was granted."

Within the chapter governing retirement benefits, *G. L. c. 32, § 3(2)(g)*, as amended by St. 1974, c. 626, establishes four "Groups" or classes of governmental occupation for calculation of pension amounts. "Group 1" included public "officials and general employees" and "all others not otherwise classified." It would include the office of mayor. "Group 4" included "members of police and fire departments" and positions generally involving physical risk and public safety. The parties agree that Group 4 membership generates a higher rate of pension allowance at an earlier age than does Group 1. *G. L. c. 32, § 5(2)(a)*.

b. [\*3] *Preparation for retirement.* As the end of Madden's second mayoral term approached, he took the following steps. On November 5, 2007, he designated the town solicitor as acting mayor for the limited purpose of reappointing him as fire chief as of January 2, 2008. This process avoided the conflict of interest questions apparent in any self-appointment to the office of fire chief.

On December 27, 2007, the incumbent fire chief agreed to accept a brief demotion to the position of deputy chief as of January 2, 2008. Also on December 27, by letter to the mayor-elect, Madden reported that on January 2 he would end his leave of absence as fire chief and resume that position by reinstatement; that, with her authorization, he simultaneously would take an unpaid leave of absence; and that he would then "immediately file for retirement" from the position of chief. The mayor-elect agreed to the proposal and on January 2 placed him on unpaid leave from the chief's position.

On January 3, Madden filed his papers for superannuation retirement at the Weymouth retirement board (board). *G. L. c. 32, § 10(1)*. He applied for retirement from Group 4 as of January 4. He performed no duties and received no [\*4] pay as a chief after his reappointment. The brief demotion of the incumbent chief to deputy ended with no additional displacement or "bumping" of fire department officers.

2. *Procedural.* The board calculated Madden's pension allowance as a retiring fire chief and member of Group 4, and on or about January 23, 2008, forwarded its determination of pension liabilities between governmental units for approval by the Public Employee Retirement Administration Commission (PERAC). *G. L. c. 32, § 3(8)(c)*. PERAC bears "general responsibility for the efficient administration of the [State wide] public employee retirement system." *G. L. c. 7, § 50*, as amended by St. 1996, c. 306, § 3B. That responsibility extends to approval of the superannuation retirement computations of municipal retirement boards. *G. L. c. 32, §§ 5(3)(d), 21(3) and (4)*.

On March 13, 2008, PERAC remanded Madden's retirement calculation to the board for factual findings. The board conducted an evidentiary hearing, made findings, and affirmed Madden's entitlement to retirement as chief and membership in Group 4. On June 5, 2008, PERAC rejected the board's calculation and substituted its own determination of an amount based on retirement [\*5] from the office of mayor and membership in Group 1. The annual payment resulting from Group 1 membership was \$46,263.24; the amount from Group 4 membership would be \$79,821.32.

The board did not appeal from PERAC's decision and began payment at the Group 1 level. Madden pursued an appeal to CRAB. CRAB assigned the case to DALA for hearing. On the parties' stipulation of material facts and memoranda of law, the DALA magistrate concluded that Madden had not performed the duties nor received the pay of the fire chief; that he had therefore not achieved reinstatement

to that position and membership in Group 4; and that his retirement resulted from the office of mayor and Group 1 membership, and generated the lesser pension.

CRAB then reversed the decision of the magistrate. It reasoned that, as a matter of law, Madden had achieved reinstatement to the chief's position and that it lacked any authority to "impose some minimum service requirement" on a reinstated employee as a prerequisite for effective restoration and accompanying Group membership.

Finally PERAC appealed to the Superior Court from CRAB's decision in accordance with the Administrative Procedure Act, *G. L. c. 30A, § 14(7)*. By [\*6] an extensive memorandum of decision, a judge concluded that reinstatement within the meaning of *G. L. c. 31, § 37*, did require actual performance of the duties of the subject position for some reasonable period of time as a prerequisite for a corresponding retirement Group membership. Accordingly judgment entered in favor of PERAC and against Madden.

*Analysis.* 1. *Standard of review.* As the parties agree, our case presents an issue of law: the meaning of the term "reinstated" in *G. L. c. 31, § 37*, and the related application of proper Group membership in *G. L. c. 32, § 3(2)(g)*. Review of law questions proceeds de novo. See *Trace Constr., Inc. v. Dana Barros Sports Complex, LLC*, 459 Mass. 346, 351, 945 N.E.2d 833 (2011); *Namundi v. Rocky's Ace Hardware, LLC*, 81 Mass. App. Ct. 665, 667-668, 966 N.E.2d 846 (2012). As the Superior Court judge pointed out, the extreme deference due CRAB's determinations of fact or mixed determinations of retirement law and fact is not operative here. See and contrast *Fender v. Contributory Retirement Appeal Bd.*, 72 Mass. App. Ct. 755, 759-762, 894 N.E.2d 295 (2008). The duty of statutory interpretation falls ultimately on the courts and not the administrative agency. See *Town Fair Tire Centers, Inc. v. Commissioner of Rev.*, 454 Mass. 601, 605, 911 N.E.2d 757 (2009). [\*7] See also *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 343-344, 198 N.E.2d 281 (1964);

*Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481, 852 N.E.2d 1061 (2006).

2. *Statutory construction.* Several clear precedents define the purposes of the governing statutes.

a. *Retirement in Group 4 under G. L. c. 32, § 3(2)(g).* In *Pysz v. Contributory Retirement Appeal Bd.*, 403 Mass. 514, 518, 531 N.E.2d 259 (1988), the court observed that the four-part retirement classification scheme of § 3(2)(g) allowed maximum retirement benefits at an earlier age to employees in more hazardous occupations so as to enable or encourage earlier retirement and the succession of younger employees better able to perform arduous work. See *McCarthy v. Sheriff of Suffolk County*, 366 Mass. 779, 786-787, 322 N.E.2d 758 (1975); *Chernick v. Chief Admin. Justice of the Trial Ct.*, 395 Mass. 484, 486 n.3, 480 N.E.2d 639 (1985); *Gaw v. Contributory Retirement Appeal Bd.*, 4 Mass. App. Ct. 250, 253, 345 N.E.2d 908 (1976). The legislative history of the language of Group 4 supports a "restrictive interpretation" of membership. *Id.* at 256.

The classification system aims at the competent performance of challenging work. Actual performance is the test of membership. "It would not be reasonable to construe *G. L. c. 32, § 3(2)(g)*, [\*8] as permitting the transfer of a Group 1 employee engaged in nonhazardous work to Group 2 solely to enable the employee to obtain benefits [which] the Legislature designed as incentive for early retirement of employees engaged in more hazardous [duties]" (emphasis supplied). *Pysz v. Contributory Retirement Appeal Bd.*, *supra*. It would be all the more unreasonable to permit a merely nominal reclassification from Group 1 to the most hazardous category of Group 4.

b. *Reinstatement under G. L. c. 31, § 37.* Similarly we conclude, as did the judge, that reinstatement to a prior civil service position means a return to actual performance of its responsibilities. Two lines of analysis lead to that conclusion.

First, § 37 resides in the civil service chapter, amid an array of provisions protective of continuing performance of a position. As noted above, it assures an elected individual on leave of absence against "any loss of rights under the civil service law and rules." *Section 6C of G. L. c. 31* promotes fair and accurate evaluation of performance; §§ 7-11, 19, and 27 serve the purpose of merit-based promotion; and §§ 41 and 41A protect an employee against discharge, removal, suspension, transfer, [\*9] and lay-off. The premise for these mechanisms and safeguards is the ongoing performance of existing duties. In the light of the entire civil service scheme, we cannot rationally interpret the term "reinstatement]" as merely a momentary conduit to an elevated retirement.

Second, we examine the term in combination with the retirement classification cases discussed above. If the Group system demands actual performance of its constituent positions, we cannot logically permit use of civil service reinstatement rights to frustrate the adjudicated purpose of the classification system.

Finally, like the judge, we observe that § 37 lies within c. 31 (civil service), and not within c. 32 (retirement benefits). We would owe some deference to an interpretation of § 37 by the agency (civil service commission) charged with implementation of it so long as the interpretation was rational and reasonably consistent over time. See *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 515-516, 333 N.E.2d 450 (1975); *Namay v. Contributory Retirement Appeal Bd.*, 19 Mass. App. Ct. 456, 463, 475 N.E.2d 419 (1985). However, in this instance the provision under inspection falls outside of CRAB's bailiwick. Deference is not warranted.<sup>1</sup>

1 We [\*10] note also that CRAB viewed itself as "constrained" to treat the brief formality of reinstatement as valid occupation of the chief's position. That unenthusiastic endorsement further weakens its administrative view.

c. *Subsequent legislation.* After the material events of this case, by St. 2011, c. 176, § 8, the Legislature amended G. L. c. 32, § 3(2)(g), to require employees seeking to retire from Group 4 to perform the duties of their final position for at least twelve consecutive months immediately before retirement. We do not view the addition of that requirement as an indication of the permissible nonperformance of the duties of a Group 4 position before its enactment.

More than twenty-two years earlier, the court in the *Pysz* decision had interpreted § 3(2)(g) to bar elevated pensions for brief, empty, or "sham" occupancy of higher Group titles. *Pysz v. Contributory Retirement Appeal Bd.*, 403 Mass. at 517-518. Legislative amendment of a statute without alteration of language typically signifies approval of the courts' existing interpretation of the language. See *Seagram Distillers Co. v. Alcoholic Bevs. Control Commn.*, 401 Mass. 713, 719, 519 N.E.2d 276 (1988). The 2011 amendment changed no preexisting [\*11] language; rather it made explicit the established implicit requirement of actual performance. It implemented the requirement by insertion of a time standard of performance. An amendment may clarify, rather than create, the substantive terms of existing law. See *Perry v. Commonwealth*, 438 Mass. 282, 288, 780 N.E.2d 53 (2002).

3. *Equities.* As did the judge, we acknowledge several equitable considerations to which Madden is entitled. His conduct was not clandestine, but rather open. By formal

communication with appropriate Weymouth officials (town solicitor; mayor-elect; incumbent chief; retirement board), he proposed his retirement plan and openly carried it out. He had previously performed the duties of the fire chief; the record contains no indication that he was no longer qualified to carry them out.<sup>2</sup> He had undertaken the tasks of an important elective office and left the higher retirement security of an appointive position for those responsibilities.

2 Contrast the circumstances of *Pysz v. Contributory Retirement Appeal Bd.*, 403 Mass. at 516-517, indicating an incapacity to perform the duties of the higher Group position.

Nonetheless those circumstances do not override the settled operation of the [\*12] retirement laws. A person voluntarily assuming a position of elevated authority but diminished retirement benefits must abide by that choice. *Maddocks v. Contributory Retirement Appeal Bd.*, 369 Mass. 488, 494-495, 340 N.E.2d 503 (1976). It remained possible for Madden in early 2008 to perform the duties of fire chief for some limited reasonable period. Apparently such an arrangement was not feasible or negotiable. That outcome does not create an exception from the governing law.

Judgment affirmed.

By the Court (Cohen, Sikora & Agnes, JJ.),  
Clerk

Entered: August 7, 2014.

RONALD PLOURDE vs. POLICE DEPARTMENT OF LAWRENCE

No. 13-P-650

APPEALS COURT OF MASSACHUSETTS

85 Mass. App. Ct. 178; 7 N.E.3d 484; 2014 Mass. App. LEXIS 37

January 7, 2014, Argued

April 9, 2014, Decided

**PRIOR HISTORY:** [\*\*\*1]

Essex. Civil action commenced in the Superior Court Department on September 26, 2011. The case was heard by Robert A. Cornetta, J., on motions for summary judgment, and a motion for reconsideration was considered by him.

**HEADNOTES**

*Massachusetts Wage Act. Governmental Immunity. Public Employment, Collective bargaining, Compensatory time. Employment. Contract, Employment, Collective bargaining contract. Labor, Collective bargaining, Failure to pay wages. Police, Collective bargaining, Compensation, Municipality's liability. Municipal Corporations, Police, Governmental immunity, Special act.*

**COUNSEL:** Corinne Hood Greene for the plaintiff.

Charles D. Boddy, Jr., City Attorney, for the defendant.

Harold Lichten, for Professional Firefighters of Massachusetts, amicus curiae, submitted a brief.

**JUDGES:** Present: Katzmann, Fecteau, & Milkey, JJ.

**OPINION BY:** FECTEAU

**OPINION**

[\*178] [\*\*486] FECTEAU, J. The plaintiff, Ronald Plourde, a former captain of the Lawrence police department (department or

defendant), appeals from the denial of his motion for summary judgment and the allowance of the department's motion for summary [\*179] judgment, by a judge in the Superior Court. The plaintiff had sued the city of Lawrence for the value of compensatory time that he had earned and accrued prior to being injured on duty in 2006. He retired due to his disability in 2010 without ever having returned to active duty. In granting the defendant's motion for summary judgment, the motion judge dismissed the plaintiff's claims for breach of contract, breach of good faith and fair dealing, and a claim under *G. L. c. 149, § 148*, and *G. L. c. 151* [\*\*\*2] (collectively, Wage Act). Following the allowance of summary judgment in favor of the defendant, the plaintiff filed a motion for reconsideration, which the judge denied, confirming his previous ruling that the plaintiff's Wage Act claim was barred by sovereign immunity and the provisions of St. 1990, c. 41 (Lawrence Act), which established financial conditions for Lawrence. Because sovereign immunity is inapplicable to this case and because the Lawrence Act cannot be read to negate the defendant's obligations under the Wage Act, we reverse.

1. Background. The summary judgment records contain the following undisputed facts. The plaintiff was employed by the defendant as a police officer from 1985 through 2010. The plaintiff was promoted to captain in 2002 and remained in that position until he retired in 2010. As a captain, he was a party to a collective bargaining agreement (CBA) between Lawrence and the Lawrence Police Superior Officer's Association.

During the course of his employment, and pursuant to the terms of the CBA, the plaintiff was permitted and elected to work additional shifts. The additional shifts were separate and distinct from his salaried administrative role. The CBA [\*\*\*3] referred to these additional shifts as "overtime" and defined them as "work performed over and above his . . . regular tour of duty." The defendant's policies and practices, governed by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (2012), permit officers to elect compensatory time in lieu of wages for overtime hours. Throughout his employment, the plaintiff elected to take compensatory time for many of his overtime shifts.

In 2006, the plaintiff was injured in the workplace and was unable to work. He remained out of work on disability leave until his retirement, approved in June, 2010. At the time of his [\*180] injury, he had accrued 261.5 hours of compensatory time.<sup>1</sup> At the time of his retirement, the plaintiff was paid accumulated sick leave under the parties' CBA (see note 9, infra), but the defendant refused to pay the plaintiff his accrued compensatory time.

1 This is according to the department payroll clerk; the defendant contests the accuracy of this amount.

Consequently, in August, 2011, the plaintiff brought suit against the defendant for its failure to pay his wages, claiming a violation of the Wage Act, breach of contract, and breach of good faith and fair dealing. [\*\*\*4] On September 26, 2013, the parties filed cross motions for summary judgment. [\*\*487] The motion judge denied the plaintiff's motion for summary judgment, and granted the defendant's motion. The judge's decision states that the Wage Act claim was dismissed based on sovereign immunity, the breach of contract claim was dismissed based on the past practices doctrine, and the breach of good faith and fair dealing claim was dismissed based on the Lawrence Act. Subsequently, the plaintiff filed a motion for reconsideration, which the judge denied, affirming his previous ruling and finding that the plaintiff's Wage Act claim was

barred by sovereign immunity, and by an expanded analysis of the Lawrence Act.<sup>2,3</sup> The plaintiff's notice of appeal timely followed this denial.<sup>4</sup>

2 According to the docket, judgment entered on February 21, 2013. The plaintiff served his "motion for reconsideration" on March 6, 2013, thirteen days later. Thus, the motion for "reconsideration" was not timely within the meaning of either *Mass.R.Civ.P. 52(b)*, as amended, 423 Mass. 1402 (1996), or *Mass.R.Civ.P. 59(e)*, 365 Mass. 827 (1974), both of which require such a motion to be served within ten days. Consequently, the motion must [\*\*\*5] be treated as one filed under *Mass.R.Civ.P. 60(b)*, 365 Mass. 828 (1974). See *Piedra v. Mercy Hosp., Inc.*, 39 Mass. App. Ct. 184, 187-188, 653 N.E.2d 1144 (1995).

3 Neither the judge nor the defendant raised the nature of the "reconsideration" motion below, nor does the defendant challenge the scope of the appeal before us. Because the parties have fully briefed the merits of the judge's decision on summary judgment, the judge's decision on reconsideration appears to have widened the scope of his prior rulings in connection with his application of the Lawrence Act, and because the case presents an important question of public law, we consider the merits of the plaintiff's appeal.

4 This notice was filed on April 5, 2013, forty-three days following entry of judgment, and was the plaintiff's only notice of appeal. Because his motion for reconsideration was untimely, it did not toll the usual thirty-day appeal period. See *Piedra, supra at 186-187; Mass.R.A.P. 4(a)*, as amended, 430 Mass. 1603 (1999) ("In a civil case, unless otherwise provided by statute, the notice of appeal . . . shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from").

2. [\*\*\*6] Analysis. a. Sovereign immunity. First, the plaintiff claims [\*181] the judge erred in dismissing his Wage Act claim based on the theory of sovereign immunity. We need not dwell on the question of sovereign immunity, the lead basis for the judge's decision, as it is well settled that municipalities are subject to the Wage Act, a matter of law which Lawrence does not contest. See *Dixon v. Malden*, 464 Mass. 446, 447, 984 N.E.2d 261 (2013) (holding Malden employee entitled to damages for Malden's violation of Wage Act). See also *Treasurer of Worcester v. Department of Labor & Indus.*, 327 Mass. 237, 241-242, 98 N.E.2d 270 (1951) (requiring Worcester to comply with requirements set forth in Wage Act); *Boston Police Patrolmen's Assn., Inc. v. Boston*, 435 Mass. 718, 720, 761 N.E.2d 479 (2002) (Boston employees can bring claim for unpaid wages under Wage Act); *Newton v. Commissioner of the Dept. of Youth Servs.*, 62 Mass. App. Ct. 343, 349, 816 N.E.2d 993 (2004) (holding State employees have right to timely payment of wages under Wage Act). Thus, the judge's ruling was a clear error of law.

b. The Lawrence Act. Second, the plaintiff claims the judge erred in dismissing his claims based on an alleged misinterpretation of the Lawrence Act. That act was meant to [\*\*\*7] ensure the fiscal stability of Lawrence. To that end, the Lawrence Act sets forth a procedure requiring each of Lawrence's departments to work within its budgeted allocation and to provide notice to Lawrence if certain expenses exceed that allocation. The Lawrence Act creates five allotment periods for the fiscal year, [\*\*488] with each period lasting either two or three months.<sup>5</sup> The law states that if a department "has exhausted its time period allotment and any amounts unexpended in previous periods," notice will be given to the mayor and the fiscal oversight board. St. 1990, c. 41, § 3. The mayor then has ten days to decide whether to waive the additional expenses. If the overspending is waived, the relevant department must reduce subsequent allotments. If the overspending is not waived, the relevant department has to immediately reduce

personnel expenses. Lawrence and its [\*182] employees, however, maintain the right to negotiate about the method of implementing the reduction subject to a valid collective bargaining agreement. Section 3 of the Lawrence Act also states that all collective bargaining agreements entered into after its enactment are subject to its terms.

5 The five allotment periods [\*\*\*8] are as follows: "July first through September thirtieth, October first through December thirty-first, January first through the last day of February, March First through April thirtieth, and May first through June thirtieth." St. 1990, c. 41, § 3.

The judge and the defendant focused on § 3 of the Lawrence Act:

"No personnel expenses earned or accrued within any department, board, commission, agency or other unit of city government shall be charged to or paid from any allotment of a subsequent period without the written approval of the mayor, except for subsequently determined retroactive compensation adjustments, or in the case of an emergency involving the health or safety of the people or their property."

The judge determined that the above language created a "use it or lose it" policy where Lawrence employees had to obtain mayoral approval to carry over accrued compensatory time from a previous allotment period. Consequently, the judge determined that the plaintiff's Wage Act claim was barred by the Lawrence Act because he never received mayoral approval to carry over his compensatory time from previous allotment periods, and therefore his compensatory time was "lost." Thus, the defendant [\*\*\*9] argues that under the Lawrence Act, absent mayoral approval, "the plaintiff was entitled to nothing." This interpretation is in error.

The Wage Act requires employers to pay each "employee the wages earned by him." *G. L. c. 149, § 148*. That act states: "The word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." *Id.* "The word 'earn' is not statutorily defined, but its plain and ordinary meaning is '[t]o acquire by labor, service, or performance . . . [w]here an employee has completed [what is] required of him.'" *Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 492, 952 N.E.2d 890 (2011), quoting Black's Law Dictionary 584 (9th ed. 2009). However, the defendant argues that because the Lawrence Act is incorporated into the parties' CBA, Lawrence is shielded from its obligations under the Wage Act. Such an interpretation [\*183] is in direct conflict with the terms of the Wage Act, which expressly states, "No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty." *G. L. c. 149, § 148*. Therefore, despite the defendant's arguments to the contrary,<sup>6</sup> the Lawrence Act, as [\*\*\*10] interpreted [\*489] by the judge and the defendant, is clearly inconsistent with the Wage Act.

6 The defendant argues that the Wage Act and the Lawrence Act are consistent because the Lawrence Act made the plaintiff's compensatory time contingent and the "Supreme Court distinguished between regular wages or assured compensation, and contingent or discretionary compensation." However, in support of this contention the defendant cites no Supreme Court or Supreme Judicial Court case, and the two Federal District Court cases cited are inapposite.

Nonetheless, the defendant argues the judge was correct in dismissing the plaintiff's claim because, even if the Lawrence Act and the Wage Act are inconsistent, the Lawrence Act supersedes the Wage Act. In support of this argument the defendant cites *Pirrone v. Boston*, 364 Mass. 403, 413, 305 N.E.2d 96 (1973), where the Supreme Judicial Court stated, "[O]ur well established principle of

construction' that, absent a clearly expressed legislative intent to the contrary, a Special Act 'made in regard to a place, growing out of its peculiar wants, condition, and circumstances,' must prevail over a conflicting general act." However, in context, this principle is further qualified: [\*\*\*11] "[A]bsent a clear legislative intent to the contrary the provisions of a special charter generally prevail over conflicting provisions of a subsequently enacted general law" (emphasis added). *School Comm. of Boston v. Boston*, 383 Mass. 693, 700, 421 N.E.2d 1187 (1981). See *Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist.*, 461 Mass. 366, 374, 961 N.E.2d 83 (2012) ("It is well established that 'the provisions of a special act generally prevail over conflicting provisions of a subsequently enacted general law, absent a clear legislative intent to the contrary'"). Here, the Lawrence Act was enacted in 1990, subsequent to the Wage Act; without some expression by the Legislature of its intention that the special act override the provisions of the Wage Act, Lawrence's reliance upon a principle of statutory construction that gives the Lawrence Act priority over the Wage Act does not apply.

Given that the motion judge's interpretation of the Lawrence Act conflicts with the Wage Act and that the Legislature cannot [\*184] be seen to have intended a repeal, the Lawrence Act cannot be read as to absolve the defendant's obligations under the Wage Act. "Our jurisprudence has not favored repeal of a statutory [\*\*\*12] enactment by implication." *Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist.*, *supra*. See, e.g., *Emerson College v. Boston*, 393 Mass. 303, 306-307, 471 N.E.2d 336 (1984) (Boston Zoning Code, St. 1956, c. 665, was not impliedly repealed by St. 1975, c. 808, codified at *G. L. c. 40A*, where both had co-existed without problems since 1976, and where zoning in Boston not intended to be governed by *c. 40A*); *Commonwealth v. Feodoroff*, 43 Mass. App. Ct. 725, 728, 686 N.E.2d 479 (1997) (St. 1968, c. 738, § 1, did not supersede and repeal *G. L. c. 271, § 17B*). See generally 1A N.J. Singer & J.D. Shambie

Singer, *Statutes and Statutory Construction* § 23:10 (7th ed. 2009) (discussing judicially created presumption against repeal of prior laws by implication). This presumption is overcome only when the earlier statute "is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand." *Doherty v. Commissioner of Admin.*, 349 Mass. 687, 690, 212 N.E.2d 485 (1965).

"Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation." *Commonwealth v. Hayes*, 372 Mass. 505, 512, 362 N.E.2d 905 (1977), quoting [\*\*\*13] from 1A C. Sands, *Sutherland Statutory Construction* § 23.10 (4th ed. 1972). "As a starting point for our analysis we assume, as we must, that the Legislature was aware of [\*\*490] the existing statutes in enacting the above legislation, and that if possible a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law." *Hadley v. Amherst*, 372 Mass. 46, 51, 360 N.E.2d 623 (1977) (citation omitted). "Additionally, where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513-514, 333 N.E.2d 450 (1975).

"We are obliged to give ambiguous, imprecise, or faultily drafted statutes 'a reasonable construction,' with the primary goal of 'constru[ing] the statute to carry out the legislative intent.'" *Bartlett v. Greyhound Real Estate Fin. Co.*, 41 Mass. App. Ct. 282, 286, 669 N.E.2d 792 [\*185] (1996), quoting from *Massachusetts Commn. Against Discrimination v. Liberty Mut. Ins. Co.*, 371 Mass. 186, 190, 356 N.E.2d 236 (1976). Interpreting the Lawrence Act so as to nullify the Wage Act and arguably violate the FLSA is not a reasonable construction of the special [\*\*\*14] act.<sup>7</sup> The Lawrence Act requires Lawrence to exhaust its current allotment if necessary before turning to the mayor for a waiver or to the union to negotiate about reducing subsequent

allotments. In this case, there was no evidence that, at the time the plaintiff's earned wages became due, the defendant was unaware of its obligations, had exhausted its budgeted allocation, or would exceed its allotment at the time of the plaintiff's retirement by paying the plaintiff's personnel expenses.

7 We note but need not resolve whether the judge's interpretation of the Lawrence Act conflicts with the provisions of the FLSA. The FLSA permits municipalities to compensate officers with compensatory time in lieu of wages. The defendant contends that the Lawrence Act does not violate the FLSA because under 29 U.S.C. § 207(o)(2)(A)(i) (2012), a public agency may provide compensatory time only pursuant to "applicable provisions of a collective bargaining agreement." Thus, the defendant argues that since, by its own terms, the Lawrence Act is incorporated into the parties' CBA, the Lawrence Act does not violate the FLSA. However, as the plaintiff contends, this provision merely makes clear the ways through [\*\*\*15] which a city can impose a compensatory time policy; if a city intends to impose a compensatory time policy pursuant to the FLSA, the employees must agree to such a policy in a collective bargaining agreement, but this section does not nullify § 207(o)(4) of the FLSA, which mandates the payment of accrued compensatory time: "An employee . . . who has accrued compensatory time off authorized . . . shall, upon termination of employment, be paid for the unused compensatory time . . ." (emphasis added).

Furthermore, we note that it is unclear whether the plaintiff's compensatory time was a personnel "expense," as intended by the special legislation, at the time it was accrued. "We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to 'the ordinary and approved usage of the language.'"

*Goodridge v. Department of Pub. Health*, 440 Mass. 309, 319, 798 N.E.2d 941 (2003), quoting from *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). Arguably, compensatory time becomes an "expense" in its usual meaning when an employee actually uses that time. In other words, Lawrence would only have to expend money to cover the employee in question when he or she [\*\*\*16] is absent and using his or her compensatory [\*186] time. While he was on "injured on duty" status, the plaintiff never had a chance to utilize this accrued time, and he apparently did not request payment until he retired. Whether and when Lawrence's obligation ripened into an expense is unclear. Alternatively, the Lawrence Act could also be viewed as requiring the department head, if intending not to request carry-over permission, [\*\*491] to pay the accrued time. In this way, the two statutes can be reconciled.

Additionally, if Lawrence's interpretation of the Lawrence Act is correct, and if drawn to its logical conclusion, employees would be forced to use all earned vacation, sick, and compensatory time before the end of each two or three month allotment period if the department heads and mayor refused to allow them to be carried over. "[C]ourts enforce the statute according to its plain wording . . . so long as its application would not lead to an absurd result." *Worcester v. College Hill Properties, LLC*, 465 Mass. 134, 138, 987 N.E.2d 1236 (2013), quoting from *Martha's Vineyard Land Bank Commn. v. Assessors of W. Tisbury*, 62 Mass. App. Ct. 25, 27-28, 814 N.E.2d 1147 (2004). "If a sensible construction is available, [a court] shall [\*\*\*17] not construe a statute to make a nullity of pertinent provisions or to produce absurd results." *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375-376, 727 N.E.2d 1147 (2000). As explained above, the Lawrence Act prescribes five allotment periods for each fiscal year, each period lasting either two or three months. Our record is silent as to the manner in which mayoral approval would be sought; moreover, it is certainly unclear from the Lawrence Act what mechanism was intended

by which such approval would be requested, assuming it is even applicable to the carry-over of compensatory time. In other words, was it the responsibility of every individual employee to request approval directly from the mayor, or the responsibility of the department head, as the keeper of its department's records, including those for its employees' accrued time, to request mayoral authorization to carry it over.<sup>8</sup> Either [\*187] way, on a practical level, it strains credulity to suggest that a special act designed to ensure Lawrence's fiscal health would mandate such bureaucratic inefficiency, forcing each of Lawrence's numerous department heads, or their employees, to obtain the mayor's signature, every two or three [\*\*\*18] months, for all Lawrence's employees to keep their accrued sick, vacation, and compensatory time and, in default thereof, potentially unsuspecting employees falling into a "use it or lose it" trap whereby earned but accrued compensatory time, in lieu of wages, would be lost. See *Fleet Natl. Bank v. Commissioner of Rev.*, 448 Mass. 441, 448, 862 N.E.2d 22 (2007) ("Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense").

8 The absence of language in the special act that requires action by individual employees seemingly imposes upon the department head to request permission for the carry-over. We express no opinion whether such direct contact would be permitted under *G. L. c. 150E*, §§ 6, 10(a)(5), or the CBA. Thus the interest of the department head conceivably conflicts with that of the department employees.

Last, the defendant paid the plaintiff's accrued sick time upon his retirement, even though the time had been accrued over the course of several fiscal periods.<sup>9</sup> At oral argument, the defendant attempted [\*\*492] to explain this apparent [\*\*\*19] inconsistency by arguing that the accrued sick time was "con-

tractual" and, therefore, since the mayor signed "the contract" the sick time was authorized for carrying over. By "contractual" we can only assume that the defendant is referring to the CBA. We fail to see how the same argument would not apply to the plaintiff's compensatory time. Therefore, construing the Lawrence Act as the defendant suggests would lead not only to inconsistent and absurd results, but a form of selective enforcement. It appears that the defendant is relying on one interpretation of the CBA as "mayoral authorization" to pay the plaintiff's accrued sick time while at the same time relying on an altogether different interpretation of the CBA as incorporating the Lawrence Act to [\*188] bar the payment of the plaintiff's compensatory time. "We will not adopt an interpretation of a statute which relies upon selective enforcement of the statutory provisions." *Worcester v. College Hill Properties, LLC*, 465 Mass. at 145. The defendant cannot arbitrarily invoke the Lawrence Act as a shield to avoid its statutory obligations to pay the plaintiff's compensatory time.

9 Although there was some dispute over the proper amount [\*\*\*20] of sick

time the plaintiff accrued, namely, whether the plaintiff was entitled to the benefit of expanded sick time under an amendment to the CBA, the plaintiff was paid one half of his accrued sick time pursuant to the CBA. Section 3 of art. XII of the CBA reads:

"On the next payday following a Superior Offices' retirement, death, or voluntary termination of employment with ten (10) or more years of service, he/she (or his/her heirs at law) shall be paid a lump sum equivalent of one-half (1/2) of his/her accumulated, unused sick leave then in force."

3. Conclusion. For the reasons stated above, we reverse the motion judge's denial of the plaintiff's motion for reconsideration and remand for proceedings consistent with this opinion.

So ordered.

**ROBERT J. RANDALL & another<sup>1</sup> vs. MARION HADDAD & others<sup>2</sup>**

1 Saint Nectarios Monastery.

2 The Holy Annunciation Monastery Church of the Golden Hills; Attorney General; State Board of Retirement; and Richard Campana.

**SJC-11402**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

**468 Mass. 347; 10 N.E.3d 1099; 2014 Mass. LEXIS 405**

**February 3, 2014, Argued  
June 12, 2014, Decided**

**PRIOR HISTORY:** [\*\*\*1]

Suffolk. Civil action commenced in the Superior Court Department on November 19, 2008. A motion to dismiss was heard by Regina L. Quinlan, J., and entry of corrected judgment on the motion to dismiss was or-

dered by Thomas E. Connolly, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review. *Randall v. Haddad*, 82 Mass. App. Ct. 1119, 2012 Mass. App. Unpub. LEXIS 1098 (2012)

## HEADNOTES

*Judgment, Satisfaction. State Board of Retirement. Attorney General. Governmental Immunity. Retirement. Public Employment, Retirement. Commonwealth, Trustee process. Trustee Process. Practice, Civil, Judgment, Attachment, Trustee process.*

**COUNSEL:** Michael J. Walsh for the plaintiffs.

Daniel G. Cromack, Assistant Attorney General, for Attorney General & another.

Gerald W. Mead, Jr., for Marion Haddad, was present but did not argue.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, & Duffly, JJ.

**OPINION BY:** BOTSFORD

## OPINION

[\*348] [\*\*1100] BOTSFORD, J. In this case, the plaintiffs, a monk of the Greek Orthodox church and the monastery of which he is currently a resident, [\*\*1101] seek to satisfy a judgment they obtained in a separate action in the Superior Court in Middlesex County against the defendants Marion Haddad and The Holy Annunciation Monastery Church of the Golden Hills (Holy Annunciation). The amount of the judgment represents the proceeds from the sale of property in Melrose on which stands a monastery and a church, title to which at the time of sale stood in the name of Holy Annunciation. Despite a court order requiring [\*\*\*2] Haddad and Holy Annunciation to hold the proceeds from the sale of this property in escrow, Haddad deposited \$40,000 of those proceeds in her retirement account with the State Board of Retirement (board). Having received no payment on the judgment in that action, the plaintiffs brought this case in part to name the board as trustee for the \$40,000 Haddad had deposited with it. The board and the Attorney General, both named as defendants, moved to dismiss on grounds that Haddad's funds held by the board were not

subject to attachment and, in any event, principles of sovereign immunity barred the suit against the board. A Superior Court judge (motion judge) agreed and allowed the motion to dismiss. On the plaintiffs' appeal, a panel of the Appeals Court also agreed with the Commonwealth in an unpublished memorandum and order pursuant to *Appeals Court rule 1:28*. See *Randall v. Haddad*, 82 Mass. App. Ct. 1119 (2012). We granted the plaintiffs' application for further appellate review, and we reverse the Superior Court order dismissing the board and the Attorney General.<sup>3</sup>

3 The plaintiffs contend that the Attorney General is a necessary party to this action because "the allegations . . . involve [\*\*\*3] misuse of the funds of a Massachusetts charitable corporation." Because the Attorney General has not contested the plaintiffs' characterization of her as a necessary party, we accept the proposition for purposes of this opinion.

1. *Background.* We summarize the facts as set forth in the plaintiffs' complaint, accepting them as true.<sup>4</sup> See *Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. 15, 20-21, 858 N.E.2d 699 [\*349] (2006). The plaintiff Robert J. Randall is an Orthodox monk of and resides at the plaintiff Saint Nectarios Monastery, an association of Orthodox monks of the Greek Orthodox Missionary Diocese of America. Holy Annunciation is a charitable corporation organized under *G. L. c. 180* in 1983; at all times relevant to this case, Haddad has been its sole officer and director. On April 16, 2004, the plaintiffs filed an action against Haddad and Holy Annunciation in the Superior Court in Middlesex County (Middlesex action; see note 4, *supra*) to [\*\*\*4] determine (among other claims) the proper disposition of the proceeds of what was alleged to be an impending sale of the monastery and church building located on real property in Melrose, title to which stood in the name [\*\*1102] of Holy Annunciation.<sup>5</sup> The monastery and church building were sold on February 3, 2006, to Haddad's sister, and Holy

Annunciation received \$105,700.17 in net proceeds. This sum was deposited in Holy Annunciation's corporate account at Sovereign Bank.<sup>6</sup>

4 The complaint in the case before us (sometimes referred to in this opinion as the Suffolk action) mentions the underlying case brought in 2004 in Superior Court in Middlesex County, captioned *Father Joseph Randall vs. Haddad*, MICV2004-1638 (Middlesex action), but does not describe its allegations in any detail. We have reviewed the complaint in the Middlesex action, see *Jarosz v. Palmer*, 436 Mass. 526, 530, 766 N.E.2d 482 (2002), and include some of its allegations here to explain more of the background of this case. A default judgment against Marion Haddad and The Holy Annunciation Monastery Church of the Golden Hills (Holy Annunciation) entered in the Middlesex action, and for background purposes here, we accept the facts alleged as [\*\*\*5] true. See, e.g., *Nancy P. v. D'Amato*, 401 Mass. 516, 519, 517 N.E.2d 824 (1988) (where defendant in civil action defaults, "well-pleaded facts are deemed to be admitted"); *Productora e Importadora de Papel, S.A. de C.V. v. Fleming*, 376 Mass. 826, 834-835, 383 N.E.2d 1129 (1978).

5 The complaint in the Middlesex action further alleges the following. For many years up to 2002, Father Robert J. Randall had lived as a monk at the Holy Annunciation monastery and had been a director and then president of Holy Annunciation, while Haddad was the corporation's clerk. After the long-serving abbot of the monastery died in February, 2002, Haddad secretly engineered a change in Holy Annunciation's officers and directors, and became herself the sole director and officer of the corporation. She then arranged, again secretly, for the sale of the monastery and church building in Melrose to her sister.

6 Exhibit D to the plaintiffs' complaint in this action is a copy of the statement for Holy Annunciation's account at Sovereign Bank for the period from February 21 to March 19, 2006. It shows that the proceeds from the sale of the monastery property were deposited in the account on February 27, and that immediately before the deposit was [\*\*\*6] made, the balance in the account was \$33.52.

On March 2, 2006, at the conclusion of a hearing in the [\*350] Middlesex action at which Haddad was present, a Superior Court judge ordered the defendants to hold the proceeds of the Melrose property's sale in escrow.<sup>7</sup> Nevertheless, that same day, Haddad withdrew \$98,771 from Holy Annunciation's corporate account, leaving a balance of \$6,755.69. Using the money withdrawn, again on the same day, Haddad caused to be issued multiple bank checks to Richard Campana totaling \$30,901, and on the next day, March 3, obtained a bank check in the amount of \$40,000 and deposited the funds with the board in her State employees' retirement system account.<sup>8</sup> The parties agree that the \$40,000 deposited in Haddad's State retirement account was used to "buy back" creditable years of employment for purposes of calculating her retirement benefits upon retirement.<sup>9,10</sup>

7 The order stated in relevant part: "[A]ll proceeds from the sale of the Monastery building at 211 Bay State Road in Melrose Mass[.], under the direct or indirect custody or control of the defendants or their agents, shall be held in escrow by [the] defendants, pending a hearing and further order of the [\*\*\*7] Court."

8 The record does not indicate what position or job Haddad holds or held as a State employee, but there appears to be no dispute that she is or was a State employee.

9 The addition of the \$40,000 to Haddad's retirement account increased

the funds in it from \$9,396.28 (including earned interest) to \$49,396.28.

10 At the hearing in the Superior Court on the motion to dismiss in this case, the transcript of which is included in the record before us, counsel for the plaintiffs stated that the plaintiffs did not know that Haddad had taken the \$40,000 from Holy Annunciation's bank account and deposited it with the State Board of Retirement (board) until the default judgment had entered in the Middlesex action because of Haddad's failure to respond to discovery before judgment.

On March 21, 2008, default judgment entered for the plaintiffs in the Middlesex action due to Haddad's and Holy Annunciation's failure to provide discovery. Thereafter, a Superior Court judge held an evidentiary hearing on damages, and on August 6, judgment entered in the amount of \$105,000 in favor of the plaintiffs. On October 21, 2008, execution issued in the amount of \$163,506.62 -- an amount that included interest [\*\*\*8] and costs -- against both Haddad and Holy Annunciation. To date, the plaintiffs have not recovered anything on the judgment against either defendant.

In November of 2008, the plaintiffs learned that Haddad had [\*351] filed a request [\*\*1103] with the board to remove the \$40,000 she had deposited in her retirement account. The plaintiffs then filed this case in the Superior Court in Suffolk County (Suffolk action) seeking (1) a declaration that under *G. L. c. 109A*, the transfers through bank checks to Campana and the board were fraudulent and therefore null and void, and an order that the funds be paid to the plaintiffs in partial satisfaction of their judgment against Haddad and Holy Annunciation; (2) an injunction prohibiting the release of the \$40,000 from Haddad's retirement account until the issues concerning the proper disposition of the proceeds were resolved; and (3) issuance of a trustee process summons to the board in relation to the \$40,000 in Haddad's retirement account.

The board and the Attorney General (collectively, the Commonwealth) moved to dismiss the complaint pursuant to *Mass. R. Civ. P. 12 (b) (1)*, 365 Mass. 754 (1974), contending that Haddad's retirement account was exempt from [\*\*\*9] attachment pursuant to *G. L. c. 32, § 19*, and that the Commonwealth had not waived its sovereign immunity to be sued as a trustee.<sup>11</sup> After a hearing, the motion judge agreed, and dismissed the plaintiffs' complaint against the Commonwealth.<sup>12</sup> As indicated previously, the plaintiffs appealed, a panel of the Appeals Court affirmed the order of dismissal,<sup>13</sup> and this court granted the plaintiffs' application for further appellate review.

11 Around the time the plaintiffs filed this case, a judge in the Superior Court granted the plaintiffs' ex parte motion for trustee process to attach the \$40,000 in Haddad's State retirement account.

12 While the plaintiffs' appeal of the order allowing the Commonwealth's motion to dismiss was pending, they settled with Campana. The plaintiffs thereafter moved for summary judgment on their claims against Haddad. The motion was allowed by a judge in the Superior Court. It does not appear from the record that final judgment has entered in the case.

13 Like the judge in the Suffolk action, a panel of the Appeals Court concluded that the Commonwealth had not waived its sovereign immunity from trustee process and that State retirement funds were not subject to attachment [\*\*\*10] by trustee process pursuant to *G. L. c. 32, § 19*. See *Randall v. Haddad*, 82 Mass. App. Ct. 1119 (2012).

2. *Discussion.* We consider the two grounds advanced by the Commonwealth and accepted by the motion judge for dismissing the plaintiffs' complaint.

a. *G. L. c. 32, § 19.* The Commonwealth contends that Haddad's [\*352] retirement account cannot be attached because a public employee's retirement account is exempt from attachment (and from being taken on execu-

tion) pursuant to *G. L. c. 32, § 19* (§ 19). Although the plaintiffs acknowledge that the language of § 19 so states, they urge the court to create an equitable exception to § 19's exemption. In *Utley v. Utley*, 355 Mass. 469, 471, 245 N.E.2d 435 (1969), this court suggested that the judicial creation of an equitable exception to § 19 was not possible. We find it unnecessary to consider the applicability of *Utley* to this case, however, because we conclude that the \$40,000 deposited by Haddad into her retirement account does not fit within § 19's prohibition against attachment.

*Section 19* provides in pertinent part:

"The rights of a member to an annuity, pension or retirement allowance, such annuity, pension or retirement allowance itself, and *all his rights* [\*\*\*11] *in the funds* of any system established under the provisions of such sections, shall be exempt from taxation . . . and from the operation of any law relating to bankruptcy or insolvency and *shall not be attached or* [\*\*1104] *taken upon execution or other process*" (emphasis added).<sup>14</sup>

As the quoted language indicates, the bar against attachment applies to a member's "rights" in the funds of a particular retirement system. By definition, for a member to have "rights" in the funds, the member must have a rightful claim to or ownership interest in those funds. See Black's Law Dictionary 1436 (9th ed. 2009) (defining "right" as "[t]he interest, claim, or ownership that one has in tangible or intangible property"). Accord Webster's Third New International Dictionary 1955 (1993) ("right" means "having proper title or right" or "something to which one has a just claim"). Here, however, Haddad, apparently a member of the State employees' retirement system, see *G. L. c. 32, § 1*, lacked an ownership interest in the \$40,000 [\*353] she deposited with the board, or any rightful claim to these funds. Rather, the funds, part of the proceeds from the sale of Holy Annunciation's monastery and

church property in Melrose,<sup>15</sup> [\*\*\*12] were solely the property of Holy Annunciation, a charitable corporation, on deposit in Holy Annunciation's own bank account,<sup>16</sup> and nothing in the record suggests that Haddad had any right to take and use these funds for her own purposes -- namely, to increase her retirement benefits from the Commonwealth. In the circumstances, because the \$40,000 at issue constituted funds of a separate corporate entity that Haddad misappropriated to herself in violation of her legal and fiduciary obligations as an officer and director of Holy Annunciation as well as an order of the Superior Court, Haddad did not, and does not, have "rights" to the \$40,000 at issue within the meaning of § 19. Accordingly, § 19's bar against attachment of a retirement board member's "rights" in the funds does not apply in this case.<sup>17</sup>

14 The sentence from *G. L. c. 32, § 19* (§ 19), quoted in the text is from the first paragraph of the section. In its second paragraph, the Legislature has set out certain exceptions to the prohibition against attachment and taking on execution, none of which applies in this case. We return to the second paragraph of § 19, see text accompanying note 23, *infra*.

15 The plaintiffs' complaint so [\*\*\*13] alleges, and we have accepted the allegation as true for purposes of this appeal, but the facts in the record, including the Holy Annunciation's bank statement, also provide support for the allegation. The Commonwealth makes no suggestion that the \$40,000 came from any other source.

16 The clear inference we draw from the record is that Haddad's ability to cause the bank to issue a bank check on the funds in Holy Annunciation's account was due to her position as the sole officer and director of the charitable organization.

17 We emphasize the narrow scope of our conclusion. *Section 19* protects from attachment (or being taken on execu-

tion) an annuity, pension, or retirement allowance to which a member of a retirement system governed by *G. L. c. 32* may be entitled, as well as the member's rights in the funds of that system. We are not concerned here with a member's annuity, pension, or retirement allowance. Rather, we deal with a discrete sum of money deposited by a member into the retirement system, a sum (1) that is traceable and identifiable, (2) in which the absence of any rights on the part of the member is exceptionally clear, and (3) that was ordered by a court to be held in escrow. [\*\*\*14] We certainly do not suggest here that whenever there is a claim that a member of a retirement system owes a debt to a third party that remains unsatisfied, the claimant may seek to attach or reach the member's rights to receive a pension or retirement allowance, or even funds the member herself has deposited into the system.

b. *Sovereign immunity.* The Commonwealth argues that even if the \$40,000 Haddad deposited in her retirement account is subject to attachment under § 19, principles of sovereign immunity [\*354] still bar the plaintiffs from bringing a trustee process claim against the board.

[\*\*1105] The general rule of sovereign immunity provides that "[t]he Commonwealth 'cannot be impleaded into its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed . . . [by] statute.'" *Woodbridge v. Worcester State Hosp.*, 384 Mass. 38, 42, 423 N.E.2d 782 (1981), quoting *Broadhurst v. Director of the Div. of Employment Sec.*, 373 Mass. 720, 722, 369 N.E.2d 1018 (1977). With respect to the remedy of trustee process,<sup>18</sup> as the Commonwealth notes, this court has held that "the Commonwealth cannot be summoned as a trustee under trustee process without statutory authorization [\*\*\*15] and, therefore, there can be no attachment by trustee process" absent such an authorization. *MacQuarrie v. Balch*, 362

*Mass. 151, 152, 285 N.E.2d 103 (1972)*. See *Massachusetts Elec. Co. v. Athol One, Inc.*, 391 Mass. 685, 688, 462 N.E.2d 1370 (1984) (*Athol One, Inc.*).

18 Under *G. L. c. 246*, a plaintiff bringing an action to recover a money judgment may name a "person" holding property in which the defendant [\*\*\*16] has rights as a "trustee" to hold that property as security for the anticipated judgment. See *G. L. c. 246*, § 20. See also *Mass. R. Civ. P. 4.2*, 365 Mass. 740 (1974) (outlining availability of and procedures for trustee process actions). But under *G. L. c. 4*, § 7, Twenty-third, and general principles of statutory interpretation, when the word "person" is used in a statute, it generally does not include the Commonwealth unless the statute specifically so indicates. See, e.g., *Perez v. Boston Hous. Auth.*, 368 Mass. 333, 339, 331 N.E.2d 801 (1975), quoting *Hansen v. Commonwealth*, 344 Mass. 214, 219, 181 N.E.2d 843 (1962) ("[i]t is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof").

The plaintiffs respond to the Commonwealth's argument that sovereign immunity is not applicable to this case because (1) Haddad's deposit constitutes a fraudulent transfer and the Commonwealth has waived sovereign immunity in adopting the Uniform Fraudulent Transfer Act (UFTA), *G. L. c. 109A*; (2) § 12 of *G. L. c. 258*, the Massachusetts Tort Claims Act, generally waives the Commonwealth's sovereign immunity; and (3) in any event, *art. 5 of the Massachusetts Declaration of Rights* has abrogated sovereign immunity. We conclude that although the bases advanced by the plaintiffs for finding waiver of sovereign immunity are not applicable, in the exceptional circumstances of this case, the doctrine of sovereign immunity [\*355] should not be interposed to prevent the plaintiffs from seeking to have the board serve as a trustee.<sup>19</sup>

19 We briefly discuss hereafter the plaintiff's argument that *art. 5 of the*

*Massachusetts Declaration of Rights* eliminated the doctrine of sovereign immunity. See note 21, *infra*.

With respect to the UFTA, our conclusion that Haddad had no rights in the \$40,000 she deposited in her State retirement account on March 3, 2006, dispenses with the plaintiffs' argument under that statute. The UFTA includes "government [\*\*\*17] or governmental subdivision or agency" in its definition of "[p]erson." *G. L. c. 109A*, § 2. As such, the Commonwealth can be a transferee under the statute. See *id.* Although the inclusion of the Commonwealth as a "person" within the meaning of the UFTA strongly suggests that the Commonwealth has waived its sovereign immunity from trustee process for the purposes of the UFTA, see *G. L. c. 109A*, §§ 2, 8 (a) (2), this suggestion does not help the plaintiffs. Under the UFTA, "a transfer is not made until the debtor *has acquired rights in the asset transferred*" (emphasis added). *G. L. c. 109A*, § 7 (4). Thus, in order for Haddad's transfer of the \$40,000 to the board to fall within the purview of the UFTA, she must [\*\*1106] have acquired rights in those funds.<sup>20</sup> Because, as previously discussed, Haddad had no rights in the funds, the UFTA does not apply.

<sup>20</sup> See, e.g., *In re Leneve*, 341 B.R. 53, 56 (Bankr. S.D. Fla. 2006) (to prove fraudulent transfer under § 548 of *Federal Bankruptcy Code* or Florida fraudulent transfer act, plaintiff must show, among other things, that "the property transferred belonged to the debtor"). See also *In re Spatz*, 222 B.R. 157, 164 (N.D. Ill. 1998) (noting that provisions [\*\*\*18] of UFTA parallel § 548 of *Federal Bankruptcy Code*).

The plaintiffs' reliance on the Tort Claims Act falls short for a similar reason, namely, the statutory language does not reach the plaintiffs' case. The plaintiffs contend that the Legislature abrogated sovereign immunity when it enacted the Tort Claims Act, and they cite *G. L. c. 258*, § 12, for the point. *Section 12* provides that "[c]laims against the common-

wealth, except as otherwise expressly provided in [*G. L. c. 258*] or by any general or special provision of law, may be enforced in the superior court." The plaintiffs argue that because § 12 allows parties to enforce their claims against the Commonwealth and does not include any limitations on doing so, the section operates as a general waiver of sovereign immunity.

[\*356] We previously have rejected this argument. See *Athol One, Inc.*, 391 Mass. at 687-689. In that case, the plaintiff electric utility company named the Commonwealth as a defendant in an effort to reach and apply funds owed by the Department of Public Welfare to Athol One, Inc., the owner of a nursing home that in turn owed money to the plaintiff for electricity service. *Id.* at 686. We noted there that "[t]he common law [\*\*\*19] sovereign immunity waiver granted by § 12 and its predecessors has been interpreted primarily as applicable in actions of contract against the Commonwealth." *Id.* at 687. We went on to conclude that the electric company's suit against the Commonwealth could not be maintained because it did not "derive from" the contractual relationship between the Commonwealth and the nursing home. *Id.* at 689. The same is true in the present case: because the plaintiffs' action here "does not derive from the legal consequences of the contractual relationship" between Haddad and the Commonwealth, *id.*, the Commonwealth has not waived sovereign immunity under § 12.<sup>21</sup>

<sup>21</sup> The plaintiffs also contend that the doctrine of sovereign immunity violates art. 5 of the *Massachusetts Declaration of Rights*. *Article 5* provides: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." The plaintiffs focus on the phrase, "and are at all times accountable to them," and argue that the people of the Commonwealth

[\*\*\*20] eliminated sovereign immunity when they ratified the Declaration of Rights.

The plaintiffs have not cited any case to support their contention that the phrase, "and are at all times accountable to them," in art. 5 is synonymous with "can always be brought into court to be held liable." This does not appear to have been the aim of art. 5. See *Opinion of the Justices*, 160 Mass. 586, 588-589, 36 N.E. 488 (1894) (brief discussion of art. 5 and other constitutional provisions). However, we do not need in this case to consider further the meaning of the phrase in art. 5 on which the plaintiffs rely because we conclude that on the particular facts presented here, sovereign immunity should not apply.

That said, this court has long recognized that "sovereign immunity is a judicially created common law concept," *Morash & Sons v. Commonwealth*, 363 Mass. 612, 615, 296 N.E.2d 461 (1973), and, as such, is subject to judicial abrogation or limitation. See *Whitney v. Worcester*, 373 Mass. 208, 212, 366 N.E.2d 1210 (1977); [\*\*1107] *Morash & Sons*, *supra* at 619. See also *Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc.*, 367 Mass. 658, 659, 327 N.E.2d 882 (1975). In the particular circumstances presented here, the doctrine of [\*357] sovereign immunity should not [\*\*\*21] be available to the Commonwealth to prevent the plaintiffs from pursuing their request for trustee process.

Haddad, at every step, has prevented the plaintiffs from obtaining the relief that court orders and judgments have entitled them to receive. She defied the Superior Court judge's order requiring that she hold the proceeds from the sale of the monastery and church property in escrow by withdrawing almost the full amount from Holy Annunciation's bank account the exact same day. Thereafter, she took \$40,000 of those funds, which constituted charitable organization funds, and misappropriated them for her own personal use by depositing them into her personal State retire-

ment account. In doing so, she sought to deposit them where the plaintiffs could not reach them. Not only did Haddad misappropriate funds from a charitable organization and try to insulate herself from collection of a judgment, the \$40,000 deposit will now become a basis for increasing the amount of her retirement benefits. See *G. L. c. 32, § 5 (2)* (calculation of retirement allowance). See also D.A. Randall & D.E. Franklin, *Municipal Law and Practice*, § 13.4, at 651 (5th ed. 2006) ("The amount of superannuation allowance [\*\*\*22] paid to a retired member depends upon a number of factors, including . . . his creditable membership service . . ."). The increase in benefits becomes a burden that the Commonwealth and its taxpayers will be required to bear for as long as Haddad remains entitled to receive a retirement allowance. Haddad should not be permitted to profit from her misconduct in this way.

We recognize that since enactment of the Tort Claims Act, at least where a party seeks to hold the Commonwealth liable directly for funds, the court has stated that "immunity is still in effect unless consent to suit has been 'expressed by the terms of a statute, or appears by necessary implication from them.'" *Bain v. Springfield*, 424 Mass. 758, 763, 678 N.E.2d 155 (1997), quoting *C & M Constr. Co. v. Commonwealth*, 396 Mass. 390, 392, 486 N.E.2d 54 (1985). Here, however, the plaintiffs do not bring any claim against the Commonwealth directly, and the perfect storm of Haddad's contumacious conduct and perversion of the Commonwealth's public employee retirement law leads us to conclude [\*358] that the defense of sovereign immunity against serving as a trustee should be unavailable to the Commonwealth.<sup>22</sup>

22 Cf. *Sommer v. Maharaj*, 451 Mass. 615, 616, 622, 888 N.E.2d 891 (2008), [\*\*\*23] cert. denied, 556 U.S. 1235, 129 S. Ct. 2381, 173 L. Ed. 2d 1293 (2009) (defendant not permitted to pursue claim that individual retirement account assets were protected by statute from claim of creditor where she helped husband,

against whom judgment had entered in previous proceeding, to circumvent court orders and avoid paying judgment for many years).

It bears noting that with respect to § 19, the Legislature appears to have recognized implicitly that in certain situations, the board may be summoned as a trustee in connection with a member's retirement account, including specifically the member's annuity pension or retirement allowance itself. See *G. L. c. 32, § 19*, second par.<sup>23</sup> Determining that, in the highly unusual [\*\*1108] circumstances presented here, the board is not protected by sovereign immunity from serving in the same trustee role is therefore not inconsistent with § 19 and more generally does no injury to the legitimate purposes that the concept of sovereign immunity is designed to serve. As this court observed in another context:

"[T]his is not a case where sovereign immunity is appropriately invoked in order to protect the discretionary functions of a public official, see *Whitney v. Worcester*, 373 Mass. 208, 219, 366 N.E.2d 1210 (1977), [\*\*\*24] or to prevent the unauthorized actions of a public official, see *George A. Fuller Co. v. Commonwealth*, 303 Mass. 216, 21 N.E.2d 529 (1939), or to shield the public fisc from the specter of virtually unlimited liability. See *Morash & Sons v. Commonwealth*, 363 Mass. 612, 623 n.6, 296 N.E.2d 461 (1973). Nor is this a case where judicial action on sovereign immunity is appropriately deferred to provide an inducement to the Legislature to abrogate the immunity on its own. See, e.g., *Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, Inc.*, 367 Mass. 658, 327 N.E.2d 882 (1975); *Morash & Sons v. Commonwealth*, *supra*. Here, no reasons

[\*359] of 'justice and public policy' argue for the application of sovereign immunity. *Id.* at 623."

*Bates v. Director of the Office of Campaign & Political Fin.*, 436 Mass. 144, 174, 763 N.E.2d 6 (2002). We conclude that on the facts of this case -- that is, where a member of a public employee retirement system misappropriates funds from a charitable corporation and, in violation of a court order, deposits those funds in her personal retirement account to increase her own retirement benefits at the Commonwealth's expense -- the doctrine of sovereign immunity should not be applied to bar the plaintiffs from seeking to hold [\*\*\*25] the board as a trustee of the wrongfully deposited funds.

23 The second paragraph of *G. L. c. 32, § 19*, provides in part:

"Nothing in this section shall prevent a member's annuity pension, retirement allowance or return of accumulated total deductions from being attached, taken on execution, assigned, or subject to other process to satisfy a support order under [*G. L. c. 208* and other specified statutes] . . . or an assignment of marital property under [*G. L. c. 208*]."

3. *Conclusion.* Haddad does not have rights in the \$40,000 she deposited with the board on March 3, 2006, and therefore, *G. L. c. 32, § 19*, does not prohibit those funds from being subject to attachment or to be taken on execution or other process. In addition, in the very particular circumstances of this case, the doctrine of sovereign immunity does not bar the plaintiffs from summoning the State Board of Retirement as a trustee with respect to those funds. We reverse the order allowing the motion to dismiss, and remand the case to the

Superior Court for further proceedings consistent with this opinion.<sup>24</sup>

24 Execution issued against Haddad and Holy Annunciation in the underlying Middlesex action on October 21, 2008. On or [\*\*\*26] about August 24, 2010, Haddad filed a voluntary petition for bankruptcy under Chapter 7 of the Federal Bankruptcy Code. See *In re Haddad*, 464 B.R. 501, 503 (Bankr. D.

Mass. 2011). She received a discharge pursuant to 11 U.S.C. § 727(a) (2006) on December 1, 2010. *In re Haddad*, *supra* at 504. No party has argued the effect, if any, of these concluded bankruptcy proceedings on the plaintiffs' efforts to collect on the judgment against Haddad in the Middlesex action, and we do not address the question.

So ordered.

**RETIREMENT BOARD OF SOMERVILLE vs. JOHN BUONOMO & others<sup>1</sup>**

<sup>1</sup> Justices of the Lowell Division of the District Court Department of the Trial Court, as nominal parties.

**SJC-11413**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*467 Mass. 662; 6 N.E.3d 1069; 2014 Mass. LEXIS 202*

**January 9, 2014, Argued**

**April 2, 2014, Decided**

**PRIOR HISTORY:** [\*\*\*1]

Middlesex. Civil action commenced in the Superior Court Department on July 20, 2010. Motions for judgment on the pleadings were heard by Thomas R. Murtagh, J. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court. *Somerville Ret. Bd. v. Buonomo*, 2012 Mass. Super. LEXIS 135 (Mass. Super. Ct., 2012)

**HEADNOTES**

*Retirement. Public Employment, Forfeiture of retirement benefits. Register of Probate. Practice, Civil, Action in nature of certiorari.*

**COUNSEL:** Matthew J. Buckley for the plaintiff.

Nicholas Poser for the defendant.

**JUDGES:** Present: Ireland, C.J., Spina, Botsford, Gants, Duffly, & Lenk, JJ.

**OPINION BY: SPINA**

**OPINION**

[\*662] [\*\*1071] SPINA, J. In 2009, John Buonomo was convicted of eighteen counts of breaking into a depository, *G. L. c. 266, § 16*, eight counts of larceny under \$250, *G. L. c. 266, § 30 (1)*, and eight counts of embezzlement by a public officer, *G. L. c. 266, § 51*. He committed these offenses during the time that he held office [\*663] as register of probate of Middlesex County. At issue is whether, pursuant to *G. L. c. 32, § 15*, and as a consequence of his convictions, Buonomo forfeited the retirement allowance that he previously had earned as a member of the board of aldermen for the city of Somerville. Based on the language and intent of *G. L. c. 32, § 15 (4)*, inserted by St. 1987, c. 697, § 47, we conclude that even though Buonomo's convictions involved violations of the laws applicable to his office or position as [\*\*\*2] register of probate, he nonetheless forfeited

his entitlement to a retirement allowance from the retirement board of Somerville (board) related to his prior service as a member of the board of aldermen. There is no requirement in § 15 (4) that the public office to which a member's criminal convictions relate be the same as the public office from which that member is receiving a retirement allowance. Accordingly, we reverse the decision of the Superior Court that reached a contrary conclusion.<sup>2</sup>

2 Because we decide this appeal on the basis of *G. L. c. 32, § 15 (4)*, we do not consider whether Buonomo would be required to forfeit his retirement allowance pursuant to *G. L. c. 32, § 15 (3)*, which pertains to misappropriation of governmental funds or property.

1. Statutory framework. The provisions of *G. L. c. 32, § 15*, pertain to dereliction of duty by a member of a contributory [\*\*1072] retirement system for public employees. See *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 170, 843 N.E.2d 603 (2006). *General Laws c. 32, § 15 (4)*, provides:

"In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement [\*\*\*3] allowance under the provisions of [§§ 1-28], inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero."<sup>3</sup>

3 *General Laws c. 32, § 1*, defines a "[m]ember" as "any employee included in the state employees' retirement system, . . . or in any county, city, town . . . contributory retirement system, . . . established under the provisions of [§§ 1-28], [\*\*\*4] inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law." There are two kinds of membership in a contributory retirement system for public employees -- a "[m]ember in [s]ervice" and a "[m]ember [i]nactive." *G. L. c. 32, § 3 (1) (a) (i), (ii)*. A "[m]ember in [s]ervice" is "[a]ny member who is regularly employed in the performance of his duties." *Id.* at § 3 (1) (a) (i). A "[m]ember [i]nactive" is "[a]ny member in service who has been retired and who is receiving a retirement allowance." *Id.* at § 3 (1) (a) (ii).

Forfeiture of a retirement allowance pursuant to *G. L. c. 32, § 15 (4)*, [\*664] is "mandatory and occurs by operation of law . . . . [It] is an automatic legal consequence of conviction of certain offenses." *State Bd. of Retirement v. Woodward*, 446 Mass. 698, 705, 847 N.E.2d 298 (2006), quoting *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 342-343, 733 N.E.2d 1053 (2000).

2. Factual and procedural background. On January 3, 2000, Buonomo retired from his position as a Somerville alderman and began receiving pension benefits from the board. In November, 2000, he was elected register of probate of Middlesex County, and he commenced his term on December 8, 2000.<sup>4</sup> After his election, Buonomo was eligible to join the State employees' retirement system as a member in service, but he chose instead to continue receiving his retirement allowance from the board. See *G. L. c. 32, § 3 (2) (a) (iv)*. As a consequence, he remained [\*\*\*5] an inactive member of the Somerville

retirement system, see note 3, *supra*, while at the same time working and collecting his salary as register of probate. See *G. L. c. 32, § 91 (a)*.

4 *General Laws c. 217, § 5A*, provides that "[e]ach register, before entering upon the performance of his official duties, in addition to the oaths prescribed by the constitution, shall take and subscribe an oath that he will faithfully discharge said duties and that he will not during his continuance in office, directly or indirectly, be interested in, or benefited by, the fees or emoluments which may arise in any suit or matter pending in either of the courts of which he is register." Further, "[e]ach register shall give bond to the state treasurer for the faithful performance of his official duties." *G. L. c. 217, § 12*.

On August 6, 2008, Sergeant Brian P. Connors of the State police filed an application in the District Court for the issuance of a criminal complaint charging Buonomo with eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer. In support of the application, Sergeant Connors alleged that in June, 2008, State [\*\*\*6] police assigned to the Public Protection, Anti-Terrorism, Corruption and Technology Unit of the Middlesex [\*665] County district attorney's office [\*\*1073] commenced an investigation into suspected ongoing theft of monies from cash vending machines attached to photocopiers located in the registry of deeds section of a building in Cambridge that housed the Middlesex South registry of deeds as well as the Middlesex Division of the Probate and Family Court Department and the registry of probate.<sup>5</sup> Initial estimates of the losses were reported to be approximately \$2,000 per month over the course of eighteen months. Personnel from the registry of deeds and other witnesses identified Buonomo as someone who had been observed accessing several of the cash

vending machines without authority or permission to do so.

5 The matter of which entity owns the monies from the cash vending machines is unclear. Although the contract between Ricoh Business Solutions and the Middlesex South registry of deeds for the provision of cash vending machines and photocopiers appears in the record appendix, the board refused to admit the contract in evidence. According to the statement of facts in support of the application for a [\*\*\*7] criminal complaint, personnel from the registry of deeds informed Sergeant Connors that "a large percentage of the money from the copy machines goes to the Commonwealth of Massachusetts and is therefore property of the Commonwealth of Massachusetts," but there is no supporting evidence to substantiate this factual assertion. The board did admit in evidence a sentencing memorandum, prepared by the Commonwealth in the wake of Buonomo's criminal convictions, which states that "[o]n a monthly basis, seventy two percent of the money collected is returned to the Registry of Deeds and the remaining percentage goes to [Ricoh Business Solutions]." However, such a statement is hearsay and not dispositive as to the owner of the monies in the cash vending machines.

As a result of the information they gathered, officers conducted video surveillance for six weeks, focusing on two geographical areas where the machines were located. On diverse dates between June 23 and August 5, 2008, Buonomo was observed unlocking machines in the registry of deeds section of the building with a key, opening them, removing money, closing the machines, and then leaving the area.<sup>6</sup> Marked currency was used during the [\*\*\*8] course of the investigation.

6 The cash vending machines attached to photocopiers were accessible to the general public during normal business hours. We may take judicial notice of the fact that the hours of operation of the Middlesex Division of the Probate and Family Court Department are 8 A.M. to 4:30 P.M. See Mass. G. Evid. § 201 (2014). On June 23, 24, 25, and 27, 2008, Buonomo was observed accessing the machines between 5 P.M. and 7:40 P.M. He also was observed accessing the machines on July 11 at 5 P.M.; July 13 (Sunday) at 2:38 P.M.; July 14 at 5:41 P.M.; July 23 at 5:35 P.M.; July 24 at 5:38 P.M.; July 25 at 4:52 P.M.; July 30 at 6:59 and 7 P.M.; July 31 at 5:24 and 5:32 P.M.; August 1 at 4:44 and 4:51 P.M.; August 4 at 6:47 P.M.; and August 5 at 7:15 P.M.

[\*666] Officers interviewed Buonomo at the registry of deeds on August 6 and then placed him under arrest. The following day, approximately one month before the return of indictments in the Superior Court, criminal complaints<sup>7</sup> issued in the District Court charging Buonomo with eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer.<sup>8</sup> On October 15, 2009, [\*\*\*9] he [\*\*1074] pleaded guilty to all thirty-four charges in the Superior Court. Buonomo was sentenced to two and one-half years in a house of correction on the charge of breaking into a depository; he was given a concurrent sentence of two years on the charge of embezzlement by a public officer; he was placed on supervised probation for ten years to take effect from and after his house of correction sentences; and he was ordered to pay a fine of \$1,000.<sup>9</sup>

7 The criminal complaints are not part of the record in this case, but they were filed as part of a motion for suspension of John R. Buonomo, S.J.C. No. OE-0121 (Aug. 7, 2008). We may take judicial notice of papers filed in a

related action. See *Brookline v. Goldstein*, 388 Mass. 443, 447, 447 N.E.2d 641 (1983), and cases cited.

8 By order dated August 19, 2008, this court, pursuant to *G. L. c. 211*, §§ 3 and 4, suspended Buonomo without compensation from all duties and powers as register of probate of Middlesex County. According to the retirement board of Somerville (board), Buonomo resigned from office on September 5, 2008.

9 Because the plea colloquy is not part of the record here, we cannot ascertain the precise facts underpinning Buonomo's guilty pleas.

In a letter [\*\*\*10] dated November 24, 2009, the board notified Buonomo that it intended to revoke his pension pursuant to *G. L. c. 32*, § 15 (3) and (4). At Buonomo's request, the board held an evidentiary hearing on the matter. By decision dated January 21, 2010, the board informed Buonomo that, in light of his criminal convictions, it had voted to forfeit his pension under § 15 (3) and (4).

Pursuant to *G. L. c. 32*, § 16 (3) (a), Buonomo appealed the board's decision to the District Court, which reversed the board's decision and reinstated Buonomo's pension.<sup>10</sup> In a [\*667] memorandum of decision and order dated May 28, 2010, a judge determined, among other things, that the board lacked a basis for revoking Buonomo's pension because the crimes of which Buonomo was convicted did not arise from or otherwise involve his work as a Somerville alderman, for which he was receiving the retirement allowance.

10 According to Buonomo, after the board was found to be in contempt of court for refusing to resume the payment of Buonomo's retirement allowance in accordance with the District Court's order, the board retroactively paid the amount due to Buonomo, and it resumed the payment of his monthly benefits in August, 2010.

On [\*\*\*11] July 14, 2010, the board filed a complaint for relief in the nature of certiorari pursuant to *G. L. c. 249, § 4*, in the Supreme Judicial Court for Suffolk County.<sup>11</sup> The single justice ordered the matter transferred to the Superior Court in accordance with *G. L. c. 211, § 4A*, for disposition. The parties proceeded to file cross motions for judgment on the pleadings. In a memorandum of decision and order dated April 27, 2012, a judge allowed Buonomo's motion, denied the board's motion, and entered a judgment affirming the decision of the District Court.

11 *General Laws c. 32, § 16 (3) (a)*, expressly provides that "[t]he decision of the [District] [C]ourt [in reviewing the board's determination] shall be final." It is well established that "certiorari is the only way of reviewing decisions declared final by statute." *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 134, 680 N.E.2d 45 (1997), quoting *MacKenzie v. School Comm. of Ipswich*, 342 Mass. 612, 614, 174 N.E.2d 657 (1961).

The judge stated that although it was undisputed that Buonomo's criminal convictions were directly related to his position as register of probate, they were not related to his position as a Somerville alderman. Buonomo's misconduct, the judge [\*\*\*12] continued, neither occurred while he was an alderman nor involved any of his duties in that capacity. The judge said that although the enactment of *G. L. c. 32, § 15 (4)*, broadened the range of crimes leading to forfeiture of retirement benefits, it still required a nexus between the offenses and the member's office or position. In the judge's view, because the board was unable to establish a direct link between Buonomo's criminal convictions and his position as a Somerville alderman, the board could not initiate forfeiture proceedings. Therefore, the judge concluded that the District Court judge did not commit a substantial error of law by holding that [\*\*1075] Buonomo was not required to for-

feit his retirement allowance under *§ 15 (4)*. The board appealed the judge's decision, the case was entered in the Appeals Court, and we transferred it to this court on our own motion.

[\*668] 3. Standard of review. The scope of judicial review for an action in the nature of certiorari under *G. L. c. 249, § 4*, is limited. See *Bulger*, 446 Mass. at 173. "Certiorari allows a court to 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff. . . . [\*\*\*13] In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public.'" *Id.*, quoting *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth*, 430 Mass. 783, 790, 724 N.E.2d 288 (2000). See *State Bd. of Retirement v. Woodward*, 446 Mass. at 703-704.

4. Discussion. The thrust of the board's argument is that, although the Superior Court judge correctly determined that pursuant to *G. L. c. 32, § 15 (4)*, there must be a direct link between Buonomo's office or position and his criminal convictions, the judge improperly concluded that the relevant office or position was the one from which Buonomo was receiving a retirement allowance. In the board's view, the judge's interpretation of *§ 15 (4)* had the effect of reading into the statutory language a requirement that the Legislature did not impose. We agree.

Our analysis of *G. L. c. 32, § 15 (4)*, is guided by the familiar principle 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 [\*\*\*14] 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." *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). See *Sullivan v. Brookline*, 435 Mass.

353, 360, 758 N.E.2d 110 (2001), and cases cited. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. See *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996); *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233, 240, 475 N.E.2d 1201 (1985); *Tilton v. Haverhill*, 311 Mass. 572, 577-578, 42 N.E.2d 588 (1942). "For purposes of statutory construction, G. L. c. 32, § 15 (4), [\*669] is considered to be penal and, therefore, its language must be construed narrowly, not stretched to accomplish an unexpressed result." *Bulger*, 446 Mass. at 174-175. See *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 3 n.3, 665 N.E.2d 998 (1996); *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 686-687, 488 N.E.2d 401 (1986).

We begin by considering whether Buonomo's multiple criminal convictions involved violations of the laws [\*15] applicable to his office or position, namely, that of register of probate. Then, we proceed to consider whether he nonetheless is entitled to receive a retirement allowance from a different office or position, namely, that of Somerville alderman.

The scope of G. L. c. 32, § 15 (4), was enunciated in *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. at 4, where this court said that "[t]he substantive touchstone intended by the General Court is criminal activity connected with the office or position." *Section 15 (4)* is not limited to "highly specialized crimes addressing official actions." [\*1076] *Id.* Rather, by using a broad phrase -- "violation of the laws applicable to his office or position" -- to describe the precondition to forfeiture, "the intent clearly is to avoid having the precise form of the criminal enforcement action make a difference with respect to the pension forfeiture issue." *Id.*, quoting G. L. c. 32, § 15 (4). When considering whether the forfeiture

provision has been triggered, the facts of each case are examined for "a direct link between the criminal offense and the member's office or position." *Gaffney v. Contributory Retirement Appeal Bd.*, *supra* at 5. In *Gaffney*, [\*16] such a direct link existed because the member, the superintendent of the Shrewsbury water and sewer department, stole monies from that department. See *id.* at 2-4. We are mindful 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." *Id.* at 5.

In *Bulger*, a member of the State employees' retirement system who was granted a superannuation retirement from his position as clerk-magistrate of the Boston Juvenile Court subsequently pleaded guilty to two counts of perjury and two counts of obstruction of justice in Federal District Court. See *Bulger*, 446 Mass. [\*670] at 170-171. This court said that when the member committed such crimes, he violated the "fundamental tenets" of the Code of Professional Responsibility for Clerks of the Courts (the code), *S.J.C. Rule 3:12*, as amended, 427 Mass. 1322 (1998), and of his oath of office. *Bulger*, *supra* at 179. We further said that "[t]he nature of [the member's] particular crimes [could not] be separated from the nature of his particular office when what [was] at stake [was] the integrity of our judicial system." *Id.* at 180. [\*17] Consequently, we concluded that the member's convictions involved "violation[s] of the laws applicable to his office or position," G. L. c. 32, § 15 (4), such that forfeiture of his pension was statutorily required. *Bulger*, *supra*. Contrast *Retirement Bd. of Maynard v. Tyler*, 83 Mass. App. Ct. 109, 112-113, 981 N.E.2d 740 (2013) (member not required to forfeit pension after convictions relating to sexual abuse of young boys where no direct link between criminal offenses and position as firefighter); *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 543, 954 N.E.2d 541 (2011) (member not required to forfeit pension after convic-

tions for possession of child pornography on home computer where no direct link between criminal offenses and position at public library); *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 654-655, 933 N.E.2d 666 (2010), S.C., 465 Mass. 801, 992 N.E.2d 250 (2013) (member not required to forfeit pension after conviction of indecent assault and battery of daughter where no direct link between criminal offense and position as custodian).

The office of register of probate is one created and defined by statute. See *G. L. c. 217, §§ 4, 5A, 15*. The duties of a register of probate are "in the main concerned [\*\*\*18] with administering justice." *Opinion of the Justices*, 300 Mass. 596, 598, 14 N.E.2d 465 (1938). The high standards to which registers of probate are held are plainly enunciated in the code, which is applicable to registers. See *S.J.C. Rule 3:12, Canon 1*, as appearing in 407 Mass. 1301 (1990). The purpose of the code is to "define norms of conduct and practice appropriate to persons serving in the positions covered by the [c]ode and thereby to contribute to the preservation of public confidence in the integrity, impartiality, and independence of the courts." *Id.* The code imposes on an individual covered by its provisions "a significant responsibility for upholding the integrity of the judicial system, for promoting [\*671] public [\*1077] confidence in the administration of justice, for honoring the public trust placed in such office, for avoiding the appearance of any impropriety in his activities, and for fulfilling the mandates of the oath of office." *Bulger*, 446 Mass. at 177. The "laws" applicable to the office of register of probate include the code because "it establishes the very standards governing the norms of conduct and practice associated with such office." *Id.* at 177-178. See *Opinion of the Justices*, 375 Mass. 795, 813, 376 N.E.2d 810 (1978) [\*\*\*19] (Supreme Judicial Court has "the authority by rule to establish standards of conduct for judicial employees and officials"); *Berkwitz, petitioner*, 323 Mass. 41, 47, 80 N.E.2d 45 (1948) (rules of court "have

the force of law and are just as binding on the court and the parties as would be a statute").

*Canon 2 of S.J.C. Rule 3:12*, as appearing in 407 Mass. 1301 (1990), states that a register "shall comply with the laws of the Commonwealth." By pleading guilty to eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer, Buonomo violated Canon 2, and, therefore, he violated the laws applicable to the office of register of probate. Buonomo's commission of such criminal offenses, which was facilitated by his access and proximity to the cash vending machines, compromised the integrity of and public trust in the office of register of probate.

Having concluded that Buonomo was convicted of criminal offenses "involving violation[s] of the laws applicable to his office or position," *G. L. c. 32, § 15 (4)*, we turn to the matter whether Buonomo was required to forfeit his pension where the office to which his criminal convictions related [\*\*\*20] was not the same as the office from which he was receiving a retirement allowance. In Buonomo's view, because his criminal convictions were unrelated to the position from which he earned a pension, forfeiture was not required. We disagree.

The language of *G. L. c. 32, § 15 (4)*, is unequivocal. It provides that "[i]n no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of [§§ 1-28]"<sup>12</sup> (emphasis [\*672] added). The statute does not say that the office or position whose laws were violated be the same as the one from which the member is receiving a retirement allowance. There simply is no such limiting language in § 15 (4). We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design. See *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 803, 711 N.E.2d 589 (1999); *Dartt v. Browning-Ferris*

*Indus., Inc. (Mass.)*, 427 Mass. 1, 8, 691 N.E.2d 526 (1998). By reading the language of § 15 (4) as requiring pension forfeiture only when a member violates the laws applicable to the position from which that member [\*\*\*21] is receiving a retirement allowance, we would be unduly narrowing the circumstances that lead to pension forfeiture. Such a consequence would be contrary to what the Legislature intended when, in response to our decision in *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 488 N.E.2d 401 (1986),<sup>13</sup> it enacted St. [\*\*1078] 1987, c. 679, § 47, which inserted *G. L. c. 32, § 15 (4)*, providing for pension forfeiture in a broader range of circumstances than previously had been permitted. See *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. at 3. By pleading guilty to eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer, Buonomo violated the laws applicable to the office of register of probate, a position of public trust, and thereby forfeited his entitlement to any retirement allowance under *G. L. c. 32, §§ 1-28*.

12 Because the pension forfeiture language in *G. L. c. 32, § 15 (4)*, pertains to "any member," it applies to Buonomo as an inactive member of the Somerville retirement system (emphasis added). See note 3, *supra*. If the Legislature had wanted to limit the applicability of this forfeiture provision to active members, it [\*\*\*22] would have used the words "any member in service," instead of "any member."

13 In *Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 687-688, 488

N.E.2d 401 (1986), this court concluded that the Legislature intended *G. L. c. 32, § 15 (3A)*, inserted by St. 1982, c. 630, § 20, to require a forfeiture of a public employee's pension only if the employee was convicted of one of two specific State crimes. We construed the statute narrowly because of its penal character. See *id. at 686-687*. Thus, a Federal conviction for a violation of the so-called "Hobbs Act," 18 U.S.C. § 1951(a) (1982), did not trigger pension forfeiture. See *id. at 687-688*.

5. Conclusion. The judgment is reversed, and the case is remanded to the Superior Court where a new judgment shall enter reversing the judgment of the District Court, affirming the [\*673] decision of the board, and remanding to the District Court for further proceedings in accordance with this opinion.<sup>14</sup>

14 The board has requested an order of restitution for any retirement benefits paid to Buonomo subsequent to the original order of forfeiture that was issued by the board. See *G. L. c. 32, § 20 (5) (b)* (board of contributory retirement system has such powers and duties as are [\*\*\*23] necessary to comply with provisions of *G. L. c. 32, §§ 1-28*). See also Rep. A.G., Pub. Doc. No. 27, at 152, 156 (1979) ("In cases in which retirement benefits have been received in violation of any provision of c. 32, it is therefore the duty of the [b]oard to take remedial action," which may include recoupment of improperly received benefits.)

**JAMES R. RILEY vs. CITY OF LYNN**

**13-P-641**

**APPEALS COURT OF MASSACHUSETTS**

*85 Mass. App. Ct. 1111; 5 N.E.3d 970; 2014 Mass. App. Unpub. LEXIS 455*

**April 4, 2014, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28* ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, *RULE 1:28* DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28*, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**JUDGES:** [\*1] Wolohojian, Agnes & Sullivan, JJ.

**OPINION**

**MEMORANDUM AND ORDER PURSUANT TO *RULE 1:28***

Police officer James R. Riley (Riley) was injured on the job on May 29, 1980. The city of Lynn (city) declined to indemnify him for his injuries. In 1984 Riley obtained a judgment in the Superior Court declaring that he "is permanently disabled, under the provisions of *General Laws Chapter 41, Section 111F*, . . . and that he is accordingly entitled to all com-

penensation and benefits afforded to a disabled police officer" (the 1984 judgment). Since 1984, Riley has brought multiple proceedings to compel payment of amounts due under the 1984 judgment. At issue in this appeal is whether, as a result of the injury, Riley is currently entitled to indemnification for full mouth restoration, including dental implants and crowns.

After a bench trial on Riley's 2008 complaint for declaratory judgment,<sup>1</sup> a judge of the Superior Court found that the injuries to Riley's teeth and mouth were the natural and proximate result of a work related injury, and the direct and proximate cause of the current infection and periodontal disease resulting in the need for full mouth restoration. The judge also found that the expenses for tooth [\*2] extraction and the projected expenditure of \$84,000 in dental bills to repair the teeth were reasonable.<sup>2</sup> However, the judge concluded that Riley was not entitled to indemnification for these expenses because *G. L. c. 41, § 100B*, did not explicitly provide compensation for dental expenses for retirees, and because the city did not provide dental coverage to its employees or retirees. For the reasons which follow, we reverse this portion of the judgment, and affirm in all other respects. Riley's right to indemnification arises under the 1984 judgment. It references *G. L. c. 41, § 111F*, which governs leave with pay status for police officers and firefighters injured in the line of duty without fault of their own. See also *G. L. c. 41, § 100* (indemnification of police officers for, inter alia, medical benefits and "related expenses" for injuries incurred in the course of duty without fault). *Section 111F* fills a gap in the workers' compensation system by provid-

ing benefits to injured or disabled police officers and firefighters who have been excluded from coverage under the workers' compensation act, *G. L. c. 152, § 69*. See *Eyssi v. Lawrence*, 416 Mass. 194, 197-198, 618 N.E.2d 1358 (1993). See also *Berube v. Selectmen of Edgartown*, 336 Mass. 634, 147 N.E.2d 180 (1958); [\*3] *Murphy v. Dover*, 35 Mass. App. Ct. 904, 905, 616 N.E.2d 835 (1993). *General Laws c. 41, § 100*, provides indemnification for reasonable medical and "related expenses" in the "event of the physical or mental incapacity or death" of a police officer whose injuries are "incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to [a police officer's] employment, while acting in the performance and within the scope of his duty without fault of his own." *Ware v. Hardwick*, 67 Mass. App. Ct. 325, 331, 853 N.E.2d 599 (2006). Similarly, *G. L. c. 41, § 100B*, provides medical and "related expenses" to accidental disability retirees. See *G. L. c. 32, § 7*.

1 Riley has not appealed from the dismissal of the count for contempt. The city has not filed a brief on appeal or prosecuted its cross appeal.

2 We remanded the matter to obtain specific findings and rulings regarding causation and reasonableness of the projected expenses. We conclude that these findings are supported by the record.

The issue before us is narrow. That is, did the 1984 judgment require that the city pay for the full mouth restoration? It unequivocally states that Riley is entitled, under the sole form of compensation [\*4] for workplace injury applicable to him, to all compensation and benefits accorded a disabled police officer. The city's treasurer and chief financial officer testified at the hearing on the declaratory judgment action that if a police officer was injured and lost teeth in the line of duty, it would be the responsibility of the city to pay for that work-related injury.<sup>3</sup> The treasurer's testimony constitutes a wholly proper (and obvious) acknowledgment that expenses to

restore teeth caused by an on the job injury are expenses "related" to the injury and the medical care necessary to treat the injury.

3 After establishing that the health benefits for active and retired employees were the same, counsel to Riley asked:

Q. "Sir, and only if you know, if a police officer is operating a motor vehicle on duty in the City of Lynn and he . . . loses control of his vehicle on . . black ice, and smashes into a telephone pole and hits his head against the windshield and he has injuries to other parts of his face but also his mouth and he loses a series of teeth in the mouth, do you say that the City of Lynn is responsible for the payment of that work related injury?"

A. "Yes."

Because the plaintiff [\*5] is now a retiree,<sup>4</sup> the city maintained at trial that his entitlement to benefits derived solely from *G. L. c. 41, § 100B*, which, among other things, also provides medical benefits and "related expenses" to police officers receiving accidental disability retirement.<sup>5</sup> We think the treasurer's testimony is dispositive of this claim in the narrow context of this case. The benefits sought pursuant to the 1984 judgment were sought in Riley's capacity as a recipient of benefits afforded to disabled police officers who have been injured in the line of duty, and whose injuries are causally related to the on the job injury. The city's argument construes the 1984 judgment to mean that Riley was entitled to payment of benefits related to a workplace injury only so long as he did not retire. This caveat appears nowhere in the judgment and is inconsistent with the testimony at trial and the judgment's command.

4 Riley's complaint alleges that he is a retiree. The city asserted below that he was an accidental disability retiree, see *G. L. c. 32, § 7*, but there is nothing in the record before us on this point.

5 The city claimed at trial that dental care was neither a medical expense nor a related expense [\*6] within the meaning of *G. L. c. 41, § 100B*. We do not reach the question of the scope or applicability of § 100B, particularly in view of the city's failure to brief the appeal or cross appeal, or appear for argument. Riley has at all times argued that he is entitled to the benefit under the 1984 judgment, not § 100B.

The city additionally argued below that Riley was barred from receiving compensation for the loss of his teeth because the medical benefits for employees and retirees offered by the city do not include dental implants. In essence, the city maintains that it is liable for medical expenses to the extent that it agreed to provide health insurance benefits to cover the liability.<sup>6</sup> Benefits provided to a class of municipal employees or retirees under a plan of medical benefits are distinct from benefits available to police officers who have been injured in the line of duty. Each is analyzed on its own terms. See generally *MacArthur v. Massachusetts Hosp. Serv., Inc.*, 343 Mass 670, 180 N.E.2d 449 (1962) (employee who does not have a "claim of right" to benefits under *G. L. c. 41, § 100*, may still claim benefits under a medical plan which excluded payment for medical expenses where the

member [\*7] would be "entitled" to reimbursement under municipal, State, or Federal law). Indeed, Riley testified that the third-party administrator that administers the city's plan of benefits for employees and retirees refused to cover certain treatment because it was "workers comp."

6 Here, the argument is even more attenuated, as the city is self-insured, but retains a third-party administrator to administer claims. However, the city maintains that dental coverage is not included in its self-insured plan of benefits.

Accordingly, the judgment is modified to provide a declaration that the plaintiff is entitled to indemnification for full mouth restoration, including dental implants and crowns. As so modified, the judgment is affirmed.<sup>7</sup> The case is remanded for further proceedings consistent with this opinion.

7 Although Count I's demand for declaratory relief does not specifically request payment for medical and dental bills, the judge entered judgment for Riley for unpaid medical bills under this count.

So ordered.

By the Court (Wolohojian, Agnes & Sullivan, JJ.),

Entered: April 4, 2014.

SCHOOL COMMITTEE OF LEXINGTON vs. MARK ZAGAESKI

SJC-11536

SUPREME JUDICIAL COURT OF MASSACHUSETTS

469 Mass. 104; 12 N.E.3d 384; 2014 Mass. LEXIS 575

March 4, 2014, Argued

July 14, 2014, Decided

**PRIOR HISTORY:** [\*\*\*1]

Middlesex. Civil Action commenced in the Superior Court Department on April 27, 2012.

Motions to vacate and to affirm an arbitration award were heard by *Bruce R. Henry, J.*

The Supreme Judicial Court granted an application for direct appellate review.

**HEADNOTES**

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HEADNOTES

*Arbitration*, Judicial review. Authority of arbitrator. Award. School committee. *Education Reform Act. Statute*. Construction. *School and School Committee*. Arbitration. Termination of employment. *Public Employment*. Termination.

This court concluded that in light of the stated purposes of the Massachusetts Education Reform Act of 1993 (act), of which the teacher dismissal statute, G. L. c. 71, § 42, is a part, an arbitrator exceeded the scope of his authority under the teacher dismissal statute in awarding reinstatement of a teacher after the school district superintendent had terminated his employment for conduct unbecoming a teacher, in that the superintendent's determination after a thorough investigation that the teacher had engaged in conduct unbecoming a teacher and dismissal of the teacher on that ground was within the superintendent's statutory authority and was not unwarranted in light of the broader implications of the teacher's conduct and the pur-

poses underlying the act; and in that the arbitrator's award of reinstatement (based on an interpretation that the best interests of the pupils meant the same thing as the need to elevate performance standards) overrode the superintendent's decision on an unauthorized basis and ran contrary to the core purpose of the act and the high standards of conduct the public expects from its teachers. LENK, J., dissenting.

**COUNSEL:** *Geoffrey R. Bok* (*Colby C. Brunt* with him) for the plaintiff.

*Daniel S. O'Connor* (*Laura Elkayam* with him) for the defendant.

*Stephen J. Finnegan & Michael J. Long*, for Massachusetts Association of School Committees, Inc. & another, amici curiae, submitted a brief.

*Ira Fader* for Massachusetts Teachers Association, amicus curiae, submitted a brief.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Duffly, & Lenk, JJ. Lenk, J. (dissenting).

**OPINION BY:** SPINA

**OPINION**

[\*\*386] [\*105] SPINA, J. In this case, the plaintiff, the school committee of Lexington (school committee), appealed a decision by a Superior Court judge confirming an arbitrator's award reinstating a teacher, Mark Zagaeski, after the school district superinten-

dent had terminated his employment for conduct unbecoming a teacher. We granted the plaintiff's application for direct appellate review. This case presents an issue left unresolved by this court in *School Dist. of Beverly v. Geller*, 435 Mass. 223, 755 N.E.2d 1241 (2001) (*Geller*). We must determine [\*\*\*2] the scope of authority granted to an arbitrator by *G. L. c. 71, § 42* (teacher dismissal statute), to reinstate a teacher who was dismissed for conduct that the arbitrator found constituted, at least nominally, a valid basis for dismissal.<sup>1</sup>

1 *General Laws c. 71, § 42* (teacher dismissal statute), provides in part that a teacher who has served in a school district for at least three consecutive school years may not be dismissed except for "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to [*G. L. c. 71, § 38,*] or other just cause."

We conclude that in light of the stated purposes of the Massachusetts Education Reform Act of 1993 (Reform Act or Act), of which the teacher dismissal statute is a part, the arbitrator exceeded the scope of his authority by awarding reinstatement of Zagaeski on the basis of the "best interests of the pupils" in the district, despite having found that the school district carried its burden to show facts amounting to conduct unbecoming a teacher. See *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27; *G. L. c. 71, § 42*. We [\*\*\*3] reverse the decision of the Superior Court judge and vacate the arbitration award.<sup>2</sup>

2 We acknowledge the amicus brief filed by the Massachusetts Teachers Association in support of Zagaeski and the amicus brief filed by the Massachusetts Association of School Committees, Inc., and the Massachusetts Association of School Superintendents

in support of the Lexington School Committee.

1. *Background.* a. *Facts.*<sup>3</sup> Zagaeski's dismissal from his position at the [\*\*387] Lexington public schools arose from a series of incidents that took place prior to the spring of 2011.<sup>4</sup> By that time, [\*106] Zagaeski had been employed by the Lexington school district (school district) since 2000 as a physics teacher.<sup>5</sup> Until 2011, Zagaeski's teaching evaluations had been uniformly positive, and he had never been disciplined by the district. He was commended by classroom observers for creating a classroom environment in which students felt comfortable asking questions and were engaged in the learning process.

3 A reviewing court is bound by the facts found by the arbitrator. *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660-661, 925 N.E.2d 803 (2010). Accordingly, we summarize the facts leading up to Zagaeski's dismissal based on the facts found [\*\*\*4] in the arbitrator's award.

4 Zagaeski's dismissal was based on six separate instances of conduct that the school district found to constitute conduct unbecoming a teacher. Because the arbitrator concluded that the school district had carried its burden to establish that only one of these incidents constituted, at least nominally, conduct unbecoming a teacher, we address only that incident.

5 Zagaeski earned his doctorate in cellular biophysics in 1981. Following postdoctoral work, he was employed as a teacher for six years at a private school. He began working at Lexington High School in 2000. He took a leave of absence from the fall of 2002 to the fall of 2004 to work in private industry. He returned to Lexington High School in the fall of 2004 and worked there continuously until his termination in June, 2011.

At Lexington High School, Zagaeski taught an integrated math and physics class for students who tended to be at-risk academically and had struggled in math and science classes in the past. Many of these students also faced behavioral issues and some had been diagnosed with attention deficit disorder and other learning challenges. In order to engage this student population, Zagaeski [\*\*\*5] developed a teaching style that was less hierarchical. He encouraged collaboration and a more relaxed classroom atmosphere. The arbitrator found that, as a result, "the students had a more familiar relationship with Dr. Zagaeski than they would have with a teacher following a more traditional teaching style" and that "[Zagaeski] was more flexible with boundaries than another teacher might have been." However, Zagaeski's nontraditional boundaries eventually caused problems.

In April, 2011, a seventeen year old female student in Zagaeski's class was disappointed with the grade she was then receiving and asked Zagaeski, in front of her classmates, whether there was any way she could "pay ... for a better grade." A male student in the class asked, "You mean short of sexual favors?" Rather than correcting the male student for making a comment encouraging the trade of sex for grades, Zagaeski chose to engage in the dialogue himself. "Yes, that is the only thing that would be accepted," he stated. Students in the classroom laughed, and Zagaeski continued by saying, "Don't be ridiculous" and told the female student that the only way to raise her grade would be better work. He then encouraged [\*\*\*6] her to come after school for extra help if she had questions.

Two days later, the female student did go to Zagaeski's classroom after school for extra help. Zagaeski was in his classroom [\*107] assisting a second female student in setting up equipment for laboratory work that she would be doing that afternoon. The first female student again asked Zagaeski, "[C]an't I just pay you for a better grade?" Zagaeski responded, "Well, no ... you know that the

only thing that I would accept is a sexual favor." The second female student exclaimed, "Dr. Z!" and laughed. However, the first female student made a complaint to her guidance counselor about Zagaeski's comments, which the arbitrator determined was a result of the student feeling troubled by the comments.

[\*\*388] Following the student's complaint, the school principal commenced an investigation, which was then taken up by the central administration. Zagaeski was provided with written notice that an investigation had commenced into allegations of sexual harassment against him, and he was placed on administrative leave. The assistant superintendent then interviewed a number of staff members and students. He also arranged for an investigative interview [\*\*\*7] of Zagaeski, which was attended by the assistant superintendent, counsel for the school district, union counsel for Zagaeski, and the president of the teacher's union.

Following the interview, Zagaeski came to understand that the allegations against him were quite serious. He then wrote a letter to the assistant superintendent expressing remorse and an intent to improve his classroom approach. In the letter he admitted to "the weakness of an appropriate boundary between myself and my students" and the "need to create much clearer guidelines, not only for the students in my classroom, but for my own behavior towards students as well." He also stated, "Allowing ... sexually inappropriate comments in the class to go unchallenged, and even to take part in that banter myself is completely out of line ... ."

Subsequently, the district superintendent reviewed Zagaeski's letter and his personnel file and was briefed by the assistant superintendent regarding the investigative interview and other interviews that the assistant superintendent had conducted with students and staff. The superintendent thereafter provided Zagaeski with formal notice of the district's intent to dismiss him from [\*\*\*8] employment and of his right to meet with the

superintendent to provide additional information on his own behalf. Zagaeski requested such a meeting, which he attended with counsel. Also present at the meeting were the superintendent and assistant superintendent, counsel for the school district, a representative from the Massachusetts Teachers Association and the president of the teacher's union. [\*108]

Soon thereafter, the superintendent informed Zagaeski in writing that he was dismissed from his position. The dismissal was based on six separate instances of conduct found to constitute conduct unbecoming a teacher. The dismissal letter also stated that any one of the instances alone would have been sufficient to justify his dismissal.

b. *Arbitration award.* Pursuant to his rights under the teacher dismissal statute, Zagaeski timely filed an appeal from the school district's dismissal decision, which, as mandated by the statute, resulted in arbitration proceedings. See *G. L. c. 71, § 42*, fourth par. Based on undisputed evidence and Zagaeski's testimony at the arbitration hearing, the arbitrator concluded that the school district had carried its burden to establish only one of its six bases for dismissal [\*\*\*9] of Zagaeski, specifically Zagaeski's admission that, "in response to a female student's inquiry as to whether she 'could just pay ... for a higher grade' [he] responded, 'No. The only thing I would accept is a sexual favor.'"

Regarding this conduct, the arbitrator found that although it was intended only as a joke, it rose to the level of sexual harassment as defined in the school committee's "Policy Prohibiting Harassment."<sup>6</sup> [\*\*389] The arbitrator further found that even though the comments by Zagaeski were not intended to be taken in earnest, objectively they were inappropriate comments for a teacher to make to a student. Furthermore, the comments had the subjective effect of offending the student or making her sufficiently uncomfortable to lodge a complaint with her guidance counselor. Therefore, the arbitrator found that these comments created a hostile

or offensive educational environment for the female student.

6 As reflected in the arbitrator's decision, the policy provides, in part: "Harassment is defined as any communication or conduct that is sufficiently serious to limit or deny the ability of a student to participate in or benefit from the educational program ... . It [\*\*\*10] includes ... any communication ... such as jokes ... that offends or shows disrespect to others based upon ... color [or] gender ... ." It further provides: "While all types of harassment are prohibited, sexual harassment requires particular attention ... . In addition to the above examples, other sexually oriented conduct, whether it is intended or not, that is unwelcome and has the effect of creating ... [an] educational environment that is hostile, offensive, intimidating or humiliating ... may constitute sexual harassment ... ."

Nevertheless, the arbitrator went on to find that this instance of sexual harassment was "relatively less egregious" and that the two comments regarding the trade of sex for grades, separated by [\*109] two days, could be viewed as "one isolated instance" of sexual harassment. Thus the arbitrator concluded that Zagaeski's conduct constituted a "relatively minor and isolated" violation of the harassment policy, which only "nominally" constituted conduct unbecoming a teacher. The arbitrator further found that in light of Zagaeski's strong performance throughout his employment, it would be in the best interests of the pupils in the district that he be retained [\*\*\*11] as a teacher. Therefore, the arbitrator issued an award reinstating Zagaeski with full back pay, less two days of unpaid suspension, which was the most severe discipline for which the school district would have had "just cause," according to the arbitrator.

c. *Superior Court decision.* Following the issuance of the arbitration award, the school

committee filed a complaint and application to vacate the arbitration award in the Superior Court on the bases that the arbitrator had exceeded his statutory authority in modifying the punishment imposed by the school district and that the arbitrator's award violated public policy. Zagaeski filed a counterclaim and application to confirm the award.

Under the teacher dismissal statute, judicial review of an arbitration award is limited to the grounds set forth in *G. L. c. 150C, § 11*. See *G. L. c. 71, § 42*, sixth par. One such ground is if the arbitrator "exceeded [his or her] powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law." *G. L. c. 150C, § 11 (a) (3)*. The Superior Court judge, referencing existing uncertainty in the case law surrounding the precise scope of an arbitrator's authority [\*\*\*12] under the teacher dismissal statute to reduce or alter the disciplinary penalty imposed by a school district, concluded that the arbitrator had not exceeded his authority in issuing the award. The judge stated that although he was inclined to follow the reasoning of Justice Cordy's plurality opinion in *Geller* in support of a conclusion that the arbitrator had exceeded the scope of his authority, the judge was given pause by a footnote in the opinion, which states in relevant part, "This is not the case of an arbitrator finding a teacher to have engaged in minor misconduct that, however, nominally fit within a category on which dismissal could be based. In such circumstances, an arbitrator's finding that the conduct did not rise to the level of misconduct contemplated by the statute as a ground for dismissal is one that would likely lie within the scope of his authority." *Geller, 435 Mass. at 231 n.7* (Cordy, J., concurring). [\*\*390] Therefore, because the arbitrator's award [\*110] in this case tracked precisely the footnote in *Geller* in concluding that Zagaeski's conduct only "nominally" constituted conduct unbecoming a teacher, the judge concluded that the arbitrator's award was not in excess of [\*\*\*13] his statutory authority.<sup>7</sup>

7 The judge further concluded that the arbitration award did not constitute a violation of public policy. We have recognized that an arbitrator may exceed the scope of his or her authority in awarding reinstatement of an employee where the award violates public policy. See *Atwater v. Commissioner of Educ., 460 Mass. 844, 848, 957 N.E.2d 1060 (2011)*. The requirements for establishing that such an award is contrary to public policy are three-fold: (1) the conduct in issue violates a well-defined and dominant public policy set forth in statutory or judicial sources, (2) the conduct in issue is integral to the employee's duties, and (3) the award itself violates public policy because the employee's conduct is of the sort that requires dismissal. *School Comm. of Lowell v. Robishaw, 456 Mass. 653, 664, 925 N.E.2d 803 (2010)*. *Bureau of Special Investigations v. Coalition of Pub. Safety, 430 Mass. 601, 604-605, 722 N.E.2d 441 (2000)*. Because we conclude that the arbitrator exceeded the scope of his authority on other grounds, we need not reach this argument. However, we do acknowledge that there is a well-defined and dominant public policy prohibiting teacher-on-student sexual harassment and that Zagaeski's conduct, [\*\*\*14] undertaken in the classroom setting, was integral to the performance of his employment duties. See *G. L. c. 151C, § 2 (g)* (sexual harassment of student is unfair educational practice); *G. L. c. 214, § 1C* (granting right to be free from sexual harassment in school); *603 Code Mass. Regs. § 26.07(2) (2012)* (requiring public schools to strive to prevent sexual harassment and to respond promptly to reports of its occurrence). See also *School Dist. of Beverly v. Geller, 435 Mass. 223, 238, 755 N.E.2d 1241 (2001) (Geller)* (Ireland, J., concurring in the result), quoting *Massachusetts Highway Dep't v.*

*American Fed'n of State, County, & Mun. Employees, Council 93*, 420 Mass. 13, 17, 648 N.E.2d 430 (1995) (teacher's repeated infliction of physical abuse on students in school was misconduct that "goes 'to the heart of a worker's responsibilities"); *Massachusetts Highway Dep't, supra*.

Consequently, the judge denied the school committee's motion to vacate the arbitration award and granted Zagaeski's application to confirm. The school committee appealed from the decision of the Superior Court and filed an application for direct appellate review. We granted the school committee's application, and we reverse.

2. *Standard of review.* As a general [\*\*\*15] matter, "a reviewing court is strictly bound by an arbitrator's factual findings and conclusions of law, even if they are in error." *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660, 925 N.E.2d 803 (2010), quoting *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758-759, 784 N.E.2d 11 (2003) (*Pittsfield*). This strict standard of review is highly deferential to the decision of an arbitrator, and it reflects a strong public policy in the Commonwealth in favor of arbitration. *Pittsfield, supra* at 758. See *Geller*, 435 Mass. at 228 (Cordy, J., concurring); *Bureau of Special Investigations v. Coalition of Pub. [\*111] Safety*, 430 Mass. 601, 604 n.4, 722 N.E.2d 441 (2000), quoting *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 670 (11th Cir. 1988) ("An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet it may not be subject to court interference"). Such strong public policy arises in part from a general recognition that arbitration has long served as an effective means of resolving labor disputes without resort to the courts. *Pittsfield, supra*. Therefore, in order to protect the efficiency that arbitration affords in resolving [\*\*\*16] these disputes, the Legislature often strictly limits the circumstances in which a court may vacate an arbitral award -- lest arbitration become merely

an intermediate [\*\*391] step between a dispute and litigation in court. *Id.*

In the education context, the Reform Act replaced de novo review of teacher dismissal decisions by the Superior Court with mandatory arbitration in order to "depoliticize[ ] and streamline[ ]" the teacher dismissal process. See *Geller*, 435 Mass. at 225 n.1 (Cordy, J., concurring); 1992 House Doc. No. 5750, at 2 (letter from Governor William Weld accompanying first draft of Reform Act). Compare *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44, with *G. L. c. 71, § 42*, as amended through St. 1988, c. 153, §§ 4-6. The Reform Act provided for limited judicial review of arbitration awards by reference to *G. L. c. 150C, § 11*. See St. 1993, c. 71, § 44. However, a reviewing court *must* vacate an arbitration award under the circumstances set forth in *G. L. c. 150C, § 11 (a)*, including if the arbitrator exceeded his or her authority in granting the award. *G. L. c. 150C, § 11 (a) (3)*. *School Comm. of Lowell v. Vong Oung*, 72 Mass. App. Ct. 698, 704, 893 N.E.2d 1246 (2008), quoting *Board of Higher Educ. v. Massachusetts Teachers Ass'n, NEA*, 62 Mass. App. Ct. 42, 47, 814 N.E.2d 1113 (2004) [\*\*\*17] (under teacher dismissal statute, "[t]he question whether an arbitrator exceeded his or her authority is always subject to judicial review").

Ordinarily, where arbitration is mandated by the terms of a collective bargaining agreement, the scope and limits of the authority of the arbitrator are ascertained by reference to the terms of the agreement. *School Comm. of Chicopee v. Chicopee Educ. Ass'n*, 80 Mass. App. Ct. 357, 364, 953 N.E.2d 236 (2011) (*Chicopee*). Indeed, judicial deference to arbitrators' awards stems in part from a recognition that the parties bargained for and agreed that an arbitrator would serve as a neutral third party in interpreting the written agreement between the parties, whether it be a com- [\*112] mercial contract or a collective bargaining agreement. *Geller*, 435 Mass. at 229-230 (Cordy, J., concurring). In such circumstance, an arbitrator may be uniquely qualified to inter-

pret the "law of the shop." *Id.* However, in a case such as this, where arbitration is mandated by statute, the exclusive source of the arbitrator's authority is the statute itself. *G. L. c. 71, § 42. Chicopee, supra at 365* (observing that in *Geller*, both Justice Cordy's concurrence and Justice Cowin's dissent agreed [\*\*\*18] with this proposition). See *Geller, 435 Mass. at 230 n.5* (Cordy, J., concurring). *Id. at 240* (Cowin, J., dissenting). Consequently, courts are as well, if not better, positioned to interpret the "law of the land" in the form of the statutes of the Commonwealth. *Geller, supra 229-230* (Cordy, J., concurring), and cases cited. Therefore, judicial review of the arbitrator's interpretation of the authorizing statute, particularly regarding the scope of the arbitrator's authority under the statute, is "broader and less deferential" than in cases of judicial review of an arbitrator's decision arising from the interpretation of a private agreement. *Atwater v. Commissioner of Educ., 460 Mass. 844, 856-857, 957 N.E.2d 1060 (2011)*, citing *Geller, supra at 229* (Cordy, J., concurring).

We conclude that in light of the stated purposes of the Reform Act, of which the teacher dismissal statute is a part, combined with the specific language of the teacher dismissal statute itself, the arbitrator exceeded the scope of his authority by awarding reinstatement of Zagaeski. See *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27; *G. L. c. 71, § 42*, fifth and sixth pars.

3. *Statutory scheme.* The statutory scheme governing teacher [\*\*\*19] dismissals set [\*\*\*392] forth in *G. L. c. 71, § 42*, was enacted as part of the Reform Act, which brought broad-based changes to the funding and governance structure of the public education system in Massachusetts. *Geller, 435 Mass. at 225 n.1* (Cordy, J., concurring). See generally St. 1993, c. 71. In enacting this statute, the Legislature declared it a "paramount goal" to provide a public education system of "sufficient quality" to afford all children the opportunity to participate in, and contribute to, the political, social, and economic life of the Commonwealth. *G. L. c. 69,*

*§ 1*, as appearing in St. 1993, c. 71, § 27. The Legislature further identified four specific policy goals the Reform Act was intended to ensure: "(1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of [\*113] resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring [\*\*\*20] progress toward those goals and for holding educators accountable for their achievement." *Id.*

In furtherance of these purposes, the Reform Act made several changes to the statutory scheme governing teacher dismissals, including shifting from school committees to principals and superintendents the responsibility for dismissing teachers, mandating that teachers' appeals from dismissal decisions proceed directly to arbitration, and providing for limited review of an arbitrator's award, rather than de novo review of the dismissal decision, in Superior Court. Compare *G. L. c. 71, § 42*, as amended through St. 1988, c. 153, §§ 4-6, with *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44.

According to the teacher dismissal statute as enacted in 1993, school officials may not dismiss a teacher with "professional teacher status"<sup>8</sup> except for "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards ... or other just cause." *G. L. c. 71, § 42*, third par. If a teacher elects to appeal a dismissal decision to an arbitrator, the burden is on the school district to prove that its dismissal [\*\*\*21] decision was based on one of the grounds set forth in the statute. *G. L. c. 71, § 42*, fifth par.

8 Under § 41 of *G. L. c. 71*, a teacher who has served in the public schools of a school district for the three previous

consecutive years is afforded "professional teacher status," and is entitled to the procedural and substantive employment protections set forth in *G. L. c. 71, § 42*. Zagaeski was a teacher with professional teacher status at the time of his dismissal.

The statute further provides the standard by which the arbitrator must review the school district's decision. Specifically, the statute states: "In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards." *Id.*

Finally, the statute sets forth the range of remedies an arbitrator may grant to a teacher upon a finding that the dismissal decision was "improper under the standards set forth in this section."<sup>9</sup> *G. L. c. 71, § 42*, sixth par.

9 We reject Zagaeski's argument that the remedial language contained in paragraph six of the teacher dismissal statute is the source of [\*\*\*22] the arbitrator's authority. The provision states in part, "Upon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award [equitable remedies]." Plainly, this is a reference back to the standards by which a school district may dismiss a teacher and according to which an arbitrator must review a decision. *G. L. c. 71, § 42*, pars. 3, 5, 6. This provision does not authorize the arbitrator to alter any disciplinary penalty he or she finds to be "improper" according to the dictionary definition of "improper" and without reference to the substantive standards set forth in paragraphs three and five of the statute. Furthermore, the range of equitable remedies available enables an arbitrator to make a teacher whole if the school district is found to have failed to carry its burden to show a valid basis for dismissal. The

range of remedies does not imply complete discretion of the arbitrator to impose a different punishment that he or she prefers. [\*114]

[\*\*393] 4. *Discussion*. The school committee argues in part that the arbitrator exceeded the scope of authority set forth in the teacher dismissal statute by modifying the punishment imposed by the school [\*\*\*23] district despite having found that the school district carried its burden to show conduct unbecoming a teacher. The school committee contends that the arbitrator here found that Zagaeski's conduct constituted conduct unbecoming a teacher because it is the facts found and the manner in which they are described by the arbitrator, not the label ascribed to the conduct, that is dispositive. See *Geller, 435 Mass. at 231* (Cordy, J., concurring). The arbitrator found Zagaeski's conduct to be "obviously ... inappropriate," in violation of the school district's sexual harassment policy, subjectively offensive, and of the sort to create a "hostile educational environment." Thus, the arbitrator described the conduct in a manner establishing that Zagaeski's comments constituted conduct unbecoming a teacher even though the arbitrator concluded that the conduct only "nominally" rose to that level.<sup>10</sup> *Id. at 231 & nn.6-7* (Cordy, J., concurring).

10 Prior to the Reform Act, comments alone, without other physical conduct, were recognized as sufficient to constitute "conduct unbecoming a teacher." See *MacKenzie v. School Comm. of Ipswich, 342 Mass. 612, 616, 174 N.E.2d 657 (1961)*. Although the Reform Act made significant [\*\*\*24] changes to the teacher dismissal statute, it preserved "conduct unbecoming a teacher" as a permitted ground for dismissal of a teacher. Compare *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44, with *G. L. c. 71, § 42*, as amended through St. 1988, c. 153, §§ 4-6. Where the Legislature reenacts statutory language

following a judicial interpretation of it, the Legislature is presumed to accept that interpretation. *Boston Hous. Auth. v. Bell*, 428 Mass. 108, 110, 697 N.E.2d 130 (1998), and cases cited.

The school committee further argues in favor of the interpretation of the statute set forth in Justice Cordy's concurrence in *Geller*. See 435 Mass. at 231, 234 (Cordy, J., concurring). Specifically, the school committee argues that once an arbitrator concludes that the school has proved one of the grounds upon which the statute permits dismissal, the arbitrator is not authorized then to impose a lesser punishment than that selected by the school. See *id.* According to the school committee, footnote seven in Justice Cordy's concurrence could then be understood to mean that only in a circumstance where the conduct at issue is so minor that it does not, in substance, constitute conduct unbecoming a teacher [\*\*\*25] or another enumerated ground permitting dismissal does the arbitrator have the authority to alter the punishment imposed by the school. See *id.* at 231 n.7 (Cordy, J., concurring). The school committee contends that here, the conduct found by the arbitrator was sufficiently egregious to constitute in substance, not merely in name, conduct unbecoming a teacher. Therefore the arbitrator's decision does not fall into the narrow exception for [\*\*\*394] "nominal" conduct contemplated in Justice Cordy's concurrence in *Geller*. See *id.*

Zagaeski argues, however, that the language of the teacher dismissal statute in fact permits an arbitrator to adjust the discipline imposed upon a teacher even after finding that the conduct rises to the level of one of the grounds for which dismissal is permitted by the statute. Specifically, Zagaeski contends that the language of *G. L. c. 71, § 42*, sixth par., contemplates the adjustment of a disciplinary penalty by the arbitrator in that it states, "Upon a finding that the dismissal was *improper* [\*\*\*26] under the standards set forth in this section, an arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any

combination thereof" (emphasis added). *G. L. c. 71, § 42*, sixth par. Zagaeski argues that the finding that dismissal is "improper" may arise from the arbitrator's conclusion that the school district failed to carry its burden to show conduct permitting dismissal, or it may arise from the arbitrator's independent conclusion that dismissal was excessive in light of the nature of the misconduct found to have occurred. Further, Zagaeski argues that the arbitrator cannot have exceeded his authority by considering Zagaeski's past performance as a teacher in determining that his dismissal would not be in the best interest of the students in the district because the dismissal statute mandates that the arbitrator engage in such an inquiry. *G. L. c. 71, § 42*, fifth par.

a. *Scope of arbitrator's authority to alter discipline imposed by school district.* The teacher dismissal statute does not grant the arbitrator the discretion to adjust the discipline selected by the school district to the extent Zagaeski maintains. The purpose of [\*\*\*116] the Reform Act [\*\*\*27] was not to enhance the employment rights of public school teachers. See *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27. Rather, the stated purposes of the Reform Act express a concern for the increased accountability of educators and the improvement of the quality of education provided in public schools. *Id.* Further, the Act eliminated the teacher tenure system, and its reforms to the teacher dismissal statute were intended to "depoliticize and streamline" the teacher dismissal process. St. 1993, c. 71, § 44. 1992 House Doc. No. 5750, at 2 (letter from Governor William Weld accompanying first draft of Reform Act).

To be sure, the Act preserved certain employment protections for public school teachers who achieve professional teacher status, and it replaced the phrase "good cause" with "just cause" in the catchall provision of the teacher dismissal statute. Compare *G. L. c. 71, § 42*, as amended by St. 1993, c. 71, § 44, with *G. L. c. 71, § 42*, as amended through St. 1988, c. 153, §§ 4-6. See *Geller*, 435 Mass. at 233 n.9 (Cordy, J.,

concurring) (describing use of the phrase "just cause" as ensuring that dismissals under the catchall provision were limited to serious misconduct). [\*\*\*28] However, these changes were intended to serve as a means of furthering the Act's central goal of enhancing the quality of the Commonwealth's public schools, not as an end in themselves. See *Atwater*, 460 Mass. at 846, 854. The Act affords some measure of employment protection for teachers to enable schools to attract and retain excellent educators while still ensuring that principals and superintendents can act swiftly in making critical staffing decisions in the schools for which they are responsible. See *id.*; *Davis v. School Comm. of Somerville*, 307 Mass. 354, 362, 30 N.E.2d 401 (1940) ("Manifestly one of the most important duties involved in the management of a school system is the choosing and keeping of proper and competent teachers"). The Legislature's decision to shift dismissal [\*\*395] decisions to principals and superintendents and away from school committees, combined with the Governor's stated goal of "depoliticizing" the teacher dismissal process, indicates that the statute was intended to ensure that teachers were dismissed only for valid reasons. However the Legislature did not necessarily intend for arbitrators to have broad discretion to adjust disciplinary decisions based on misconduct that [\*\*\*29] the school had carried its burden to establish.

Our decisions prior to the Reform Act help to shed light on the balance the Act was intended to achieve between empowering [\*117] school officials to manage the teaching staff effectively while providing some measure of protection to professional status teachers. Specifically, cases prior to the Reform Act expressed concern over teacher dismissal decisions by school committees that were based on "personal hostility, ill will or political animosity" such that the school's stated grounds for dismissal were nothing more than pretext. *MacKenzie v. School Comm. of Ipswich*, 342 Mass. 612, 619, 174 N.E.2d 657 (1961). See *Kelley v. School Comm. of Watertown*, 330 Mass. 150, 151,

111 N.E.2d 749 (1953) (reorganization of school administration was "subterfuge" and undertaken in bad faith to enable school committee to demote and replace petitioner); *Sweeney v. School Comm. of Revere*, 249 Mass. 525, 529-530, 144 N.E. 377 (1924) (school committee voted to eliminate position of principal not on good faith need to conserve resources but due to disagreement with principal's political views).

Similar concerns animate footnote seven in Justice Cordy's concurring opinion in *Geller*, 435 Mass. at 231 n.7. Justice [\*\*\*30] Cordy concluded that the teacher dismissal statute does not permit an arbitrator to override a school district's decision to dismiss a teacher if the arbitrator finds that the school has proved conduct amounting to one of the grounds permitting dismissal. *Id.* at 231. However, Justice Cordy acknowledged that at the same time, the statute would permit an arbitrator to override a school district's dismissal decision if the misconduct in issue is so minor that it does not, in substance, constitute the sort of misconduct for which the statute permits dismissal. *Id.* at 231 n.7.

Consequently, if an arbitrator finds that the school district has labeled a teacher's conduct "conduct unbecoming a teacher" when the conduct does not, in substance, truly rise to that level, or that the school district has used that label merely as a pretext to dismiss the teacher based on personal, political, or other unauthorized bases, the arbitrator is empowered to vacate the punishment imposed by the school district. Thus, the statutory directive requiring arbitrators to consider the best interests of the pupils and the need to elevate performance standards in reviewing whether the school district carried its [\*\*\*31] burden to show conduct permitting dismissal is intended in part to prevent politically motivated dismissal decisions. Indeed, the standards governing the arbitrator's review are likely intended to serve as a direct reminder to the arbitrator of the purposes underlying the Reform Act and the proper considerations for a school district to

undertake in its dismissal decisions. See *Geller*, 435 Mass. at 235. [\*118]

In this case, however, there is no indication in the record before us that the grounds on which Zagaeski was dismissed were mere pretext or that his misconduct was so minor that it did not in substance constitute one of the enumerated bases on which the statute permits dismissal. Therefore, Justice Cordy's observation in [\*\*396] footnote seven in *Geller* regarding "minor" misconduct, and the concerns expressed in early case law regarding political dismissals based on "subterfuge," are not implicated here.

Public school teachers hold a position of special public trust. *Perryman v. School Comm. of Boston*, 17 Mass. App. Ct. 346, 349, 458 N.E.2d 748 (1983) ("There are certain forms of employment which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct [\*\*\*32] consistent with this special trust is an obligation of the employment"). *Dupree v. School Comm. of Boston*, 15 Mass. App. Ct. 535, 538, 446 N.E.2d 1099 (1983). They are responsible for more than teaching basic academic skills. See *Geller*, 435 Mass. at 238-239 (Ireland, J., concurring in the result) ("a teacher's responsibilities include the maintenance of a safe environment that is conducive to ... students' growth"). As we recently acknowledged, "[s]tudents must be able to trust that they will be safe in the presence of their teachers and coaches. They must be able to rely on their teachers and coaches to exercise sound judgment and maintain appropriate boundaries, even when they themselves may be unable to do so." *Atwater*, 460 Mass. at 852 (quoting underlying arbitration award). The creation of a hostile learning environment through sexual harassment, whether verbal or physical, can be detrimental to the well-being of students who experience such harassment in part because it may unreasonably interfere with their education. See *G. L. c. 151C*, § 1 (e). Moreover, citizens of this Commonwealth, including public school students, have a constitutional right to be free from

gender-based discrimination, [\*\*\*33] which includes certain forms of sexual harassment. *Art. 1 of the Massachusetts Declaration of Rights*, as amended by *art. 106 of the Amendments to the Massachusetts Constitution*. *O'Connell v. Chasdi*, 400 Mass. 686, 693, 511 N.E.2d 349 (1987) (concluding that sexual harassment can violate rights secured under *art. 1*). Numerous statutory enactments also make clear the importance of protecting children from sexual harassment in school. See *G. L. c. 151C*, § 2 (g) (sexual harassment of student in any program or course of study in educational institution is unfair educational practice); *G. L. c. 214*, § 1C (granting right to be free from sexual harassment as defined in [\*119] *G. L. cc. 151B and 151C*); 603 Code Mass. Regs. § 26.07(2) (requiring public schools to strive to prevent sexual harassment and to respond promptly to reports of its occurrence). Zagaeski's conduct undermined these policies, as well as one of the central purposes of the Reform Act: to ensure an educational setting that safeguards, rather than warps, a child's self-esteem. See *G. L. c. 69*, § 1, as appearing in St. 1993, c. 71, § 27.

Of additional concern, teachers are in part responsible for instilling core constitutional values in students in [\*\*\*34] preparation for their participation as citizens in a democracy. See *Dupree*, 15 Mass. App. Ct. at 539. A teacher who models sexually harassing behavior in front of public school students as if it is all in good fun undercuts our constitutional value of freedom from gender discrimination. See *O'Connell*, 400 Mass. at 693. Indeed, students who witness a teacher engage in such conduct may come to believe that such conduct is acceptable in an academic or professional setting. See *Dupree*, *supra* at 538, quoting *Faxon v. School Comm. of Boston*, 331 Mass. 531, 534, 120 N.E.2d 772 (1954) ("As role models for our children [teachers] have an 'extensive and peculiar opportunity to impress [their] attitude and views' upon their pupils"). Inculcation [\*\*397] of those sorts of values by

teachers is not acceptable in our public schools.

The Reform Act specifically vested in principals the power to dismiss teachers, subject to review and approval by superintendents, in order to raise the accountability of school officials for the success of their schools. See St. 1993, c. 71, § 44. See also *Pittsfield*, 438 Mass. at 760; *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Ass'n/Mass. Community College Council*, 423 Mass. 23, 29 n.6, 666 N.E.2d 479 (1996); [\*\*\*35] 1992 House Doc. No. 5750, at 2. We have long-recognized decisions regarding teacher employment as central to effective school management. See *Higher Educ. Coord. Council, supra* at 28-29; *School Comm. of W. Springfield v. Korburt*, 373 Mass. 788, 794-795, 369 N.E.2d 1148 (1977); *Davis*, 307 Mass. at 362. Although undoubtedly a difficult decision, the superintendent undertook a thorough investigation, determined that Zagaeski engaged in conduct unbecoming a teacher, and dismissed him on that ground. This determination was within the superintendent's statutory authority and was not unwarranted in light of the broader implications of Zagaeski's conduct and the purposes underlying the Reform Act. See *G. L. c. 69, § 1*; *G. L. c. 71, § 42*.

b. *Best interests of the pupils in the district and the need to elevate performance standards.* We further acknowledge that the [\*120] teacher dismissal statute does authorize the arbitrator to engage in a substantive review of dismissal decisions insofar as it requires arbitrators to consider the "best interests of the pupils in the district and the need for elevation of performance standards." See *G. L. c. 71, § 42*, fifth par. To conclude otherwise would render the statutory mandate [\*\*\*36] that the arbitrator undertake these considerations effectively meaningless. See *Geller*, 435 Mass. at 242-243 (Cowin, J., dissenting). However, we disagree that this statutory language authorizes an arbitrator to draw on a teacher's past performance to override a dismissal de-

cision based on a teacher's conduct having threatened the safety and welfare of his or her students. If a teacher's past performance could be used as a basis on which an arbitrator could award reinstatement -- because, as here, the arbitrator concluded it was in the students' best interests to have high performing teachers -- then the "need for elevation of performance standards" and the "best interests of the pupils" would come to mean the same thing. However, the statute should not be construed to render one of the two standards governing the arbitrator's review as redundant of the other. *School Comm. of Brockton v. Teachers' Retirement Bd.*, 393 Mass. 256, 262, 471 N.E.2d 61 (1984), quoting 2A C. Sands, *Sutherland Statutory Construction* § 46.06 (4th ed. 1973) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous").

The distinct meanings of these two standards [\*\*\*37] can be ascertained by reference to the other provisions of the teacher dismissal statute and the stated purposes of the Reform Act. See *Saccone v. State Ethics Comm'n*, 395 Mass. 326, 334-335, 480 N.E.2d 13 (1985) (statutes should be construed to constitute "harmonious whole"; otherwise their purpose may be defeated [citation omitted]). When the Legislature enacted the Reform Act, it identified the importance of safeguarding students' "sense of security or self-esteem" in the classroom as distinct from, though equally as important as, the establishment and achievement of specific educational performance goals. *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27. This distinction between safety and well-being on [\*\*398] one side and academic achievement on the other is also mirrored in the enumerated grounds on which a school district may dismiss a professional status teacher. In one category, a school district may dismiss a teacher for performance-based reasons including "inefficiency," "incompetency," or failure to satisfy performance standards. *G. L. c. 71, § 42*, third par. In the [\*121] other category, a school district may

dismiss a teacher for conduct that jeopardizes the well-being of students or the proper [\*\*\*38] functioning of the school community, including "conduct unbecoming a teacher," "insubordination," or "incapacity." *Id.* Therefore, the standards by which the arbitrator must review a dismissal decision should be construed in light of this same distinction.

Where the teacher conduct in issue is performance-based, the arbitrator should consider the school district's decision primarily in light of the need to raise performance standards. However, when the conduct in issue has jeopardized the safety or self-esteem of students in the classroom setting, the arbitrator should consider the best interests of the pupils primarily in light of the pupils' interest in a safe learning environment. Here, the arbitrator permitted the pupils' interest in the academic success of their school to override their interest in a safe, supportive classroom environment. This determination was in excess of the arbitrator's authority because it had the effect of nullifying one of the stated purposes of the Reform Act. The Legislature cannot have intended a teacher's past academic performance to be used to justify reinstatement of a teacher found to have engaged in conduct that created a hostile learning environment [\*\*\*39] for certain students. See *Commonwealth v. Parent*, 465 Mass. 395, 409, 989 N.E.2d 426 (2013) (statutes may not be interpreted so as to yield absurd results). Despite Zagaeski's apparent success as a classroom teacher, that "track record" should not be used to conclude that it is in the "best interests" of students to reinstate a teacher who was found to have violated the school's sexual harassment policy.<sup>11</sup> By awarding [\*122] reinstatement of Zagaeski based on an interpretation of the "best interests of the pupils" to mean the same thing as "the need to elevate performance standards," the arbitrator's award overrode the superintendent's [\*\*399] decision on an unauthorized basis and runs contrary to the core purposes of the Reform

Act and the high standards of conduct the public expects from its teachers.

11 Although a teacher's length of service and past performance may be considered as factors mitigating against dismissal under the rubric of "just cause" in collective bargaining agreements, and the Reform Act replaced the phrase "good cause" with "just cause" as an enumerated basis on which a teacher may be dismissed, the teacher dismissal statute does not permit an arbitrator to engraft an additional just cause analysis [\*\*\*40] onto each of the grounds enumerated in the statute on which dismissal may be based. See St. 1993, c. 71, § 44. See also *Geller*, 435 Mass. 223, 231, 233 & n.9, 755 N.E.2d 1241 (2001) (Cordy, J., concurring). A plain reading of the teacher dismissal statute makes clear that a school district may dismiss a teacher for any of the enumerated bases "or other just cause" (emphasis added). *G. L. c. 71, § 42*. Therefore, the statute implies that dismissal based on any of the enumerated grounds would be just cause, and "other just cause" stands alone as an additional ground upon which dismissal may be based. The phrase "other just cause" does not permit a reduction in the penalty imposed for conduct constituting one of the other enumerated grounds. See *Geller*, *supra* at 232-233 & n.9 (Cordy, J., concurring). This interpretation of the statute comports with a long history of judicial interpretation of similarly worded provisions in collective bargaining agreements. *Id.* at 232 & n.8 (Cordy, J., concurring), and cases cited. Consequently, the fact that the Reform Act replaced "other good cause" with "other just cause" as a basis for dismissal, without further change to the text of the provision, [\*\*\*41] is not sufficient to indicate a legislative intent to import an addi-

tional just cause analysis into the other grounds permitting dismissal.

5. *Conclusion.* For the foregoing reasons, the order of the Superior Court confirming the arbitrator's award is vacated, and the case is remanded to the Superior Court for entry of an order vacating the arbitration award.

So ordered.

**DISSENT BY: LENK**

**DISSENT**

LENK, J. (dissenting). The arbitrator's decision, fairly read, reflects his conclusion that the plaintiff, the school committee of Lexington, did not carry its burden of proving that the defendant, Mark Zagaeski, engaged in the serious misconduct necessary to establish "conduct unbecoming a teacher," one of six enumerated grounds on which a teacher with professional status can be dismissed under *G. L. c. 71, § 42*. Instead, based on all of the evidence adduced at the arbitration hearing, he determined that Zagaeski's isolated episode of inappropriate behavior, while fitting nominally within that statutory category, was only minor in nature. This was a determination well within the scope of the arbitrator's authority. Hence, I respectfully dissent, parting company as I do with the court's independent assessment of the [\*\*\*42] facts as found, its determination that the conduct at issue could not be deemed anything other than the requisite serious misconduct warranting dismissal, and its conclusion that, by reinstating Zagaeski, the arbitrator exceeded the scope of his authority. To the extent that the arbitrator imposed alternative discipline upon Zagaeski, however, I agree that he exceeded the scope of his authority. While the school authorities did not satisfy the statutory requirements when dismissing Zagaeski, it is solely within their purview whether other discipline instead should be imposed. I [\*123] would accordingly remand the matter. See *School Dist. of Beverly v. Geller, 435 Mass. 223, 224, 755 N.E.2d 1241 (2001) (Geller)*.

1. *Statutory framework.* *General Laws c. 71, § 42*, delineates the circumstances under which teachers who have attained professional status can be dismissed, as well as the scope of arbitrators' review of such dismissals. Three paragraphs of the statute are particularly relevant here. I begin with an analysis of these paragraphs, informed by the somewhat unsettled case law construing them, including both Justice Cordy's concurring opinion and Justice Cowin's dissenting opinion in *Geller, supra*.<sup>1</sup> See *Atwater v. Commissioner of Educ., 460 Mass. 844, 858 n.11, 957 N.E.2d 1060 (2011)*.

1 No [\*\*\*43] opinion in *School Dist. of Beverly v. Geller, 435 Mass. 223, 755 N.E.2d 1241 (2001) (Geller)*, garnered a majority. Justice Cordy authored a concurring opinion, with whom Chief Justice Marshall and Justice Sosman joined. Justice Ireland wrote a separate opinion, concurring in the result, with which Justice Cordy also joined. Justice Cowin dissented, and was joined by Justice Greaney and Justice Spina.

*General Laws c. 71, § 42*, third par., enumerates six grounds on which a teacher with professional status may be dismissed: inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination, failure to satisfy performance standards, "or other just cause." *General Laws c. 71, § 42*, fifth par., allocates to the district the burden of proving one of these grounds, and provides that, "[i]n determining whether the district has proven grounds for dismissal ... , the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards."

[\*\*400] If, in making such a determination, the arbitrator concludes that the district failed to carry its burden of proving an enumerated ground for dismissal, thereby rendering the dismissal "improper under [\*\*\*44] the standards set forth in [*G. L. c. 71, § 42*]," the sixth paragraph of the statute authorizes the arbitrator to award certain rem-

edies to the teacher, namely, "back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof."<sup>2</sup>

2 The arbitrator may not, however, award "punitive, consequential, or nominal damages, or compensatory damages other than back pay, benefits or reinstatement." *G. L. c. 71, § 42*, sixth par.

As the court recognizes, the question regarding an arbitrator's authority to reinstate a teacher who has been found to have engaged in conduct only nominally constituting an enumerated [\*124] ground for dismissal remains unresolved after *Geller, supra*. This reflects in no small measure the deep division in the *Geller* court as to the arbitrator's proper role, represented by Justice Cordy's and Justice Cowin's opposing opinions. Although neither opinion is entirely consonant with my own view of the statute, both recognize, as I do, that the school district does not satisfy its burden of proving the propriety of the discipline imposed simply by showing facts that could conceivably amount to an enumerated ground for dismissal, without regard [\*\*\*45] to the gravity of the act said to have occurred. Rather, under both Justice Cordy's and Justice Cowin's interpretations of the statute, the arbitrator is assigned the duty to determine whether the facts adduced in fact establish "serious misconduct" warranting dismissal on an enumerated ground. See *Id. at 231 n.7* (Cordy, J., concurring); *Geller, supra at 241* (Cowin, J., dissenting). In other words, not all conduct that a school district may see fit to characterize as constituting an enumerated ground for dismissal will in fact rise to the level of serious misconduct that the Legislature envisioned would justify terminating a teacher who has attained professional status. It is the statutorily appointed role of the arbitrator to determine whether proven conduct does indeed rise to that level.

Indeed, that only "serious misconduct" will constitute an enumerated ground for dismissal is implied by the Legislature's in-

sertion, in the 1993 amendment, of a new category of "other just cause," and its simultaneous deletion of "other good cause" as a ground for dismissal. See *St. 1993, c. 71, § 44*. As Justice Cordy observed in *Geller, supra at 233 n.9*, "[i]t is reasonable ... to conclude [\*\*\*46] from the substitution of the word 'just' for 'good' that the Legislature intended to limit the broad range of conduct that had previously been considered as warranting dismissal in this catchall category, to serious misconduct."<sup>3</sup>

3 Although the court asserts that the purpose of the Education Reform Act of 1993 (Reform Act), which amended *G. L. c. 71, § 42*, was not to enhance the employment rights of public school teachers, *ante at 115-116*, there is also nothing to suggest that the amendment was intended to diminish the rights of teachers with professional status. If anything, insofar as the shift from a "good cause" to a "just cause" standard imposed a higher burden on schools, the Reform Act in fact provided greater protection to teachers with professional status, by limiting the circumstances under which they could be dismissed. See *Geller, supra at 233 n.9* (Cordy, J., concurring), and cases cited (explaining that "good cause" had been understood to mean "any ground which is put forward [by the supervising authority] in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the ... task of building up and maintaining an efficient school system," whereas "just [\*\*\*47] cause" suggests "substantial misconduct which adversely affects the public interest" [citations omitted]). Compare *G. L. c. 71, § 42*, as appearing in *St. 1993, c. 71, § 44*, with *G. L. c. 71, § 42*, as amended through *St. 1988, c. 153, §§ 4-6*.

Due regard for employment rights is hardly at odds with the stated purposes of the Reform Act to which the

court refers, namely, to increase the accountability of educators and to improve the quality of education provided in public schools. See *G. L. c. 69, § 1*, as appearing in St. 1993, c. 71, § 27. [\*125]

[\*\*401] According to Justice Cordy's view, however, once an arbitrator determines that a school district has proved "serious misconduct" amounting to an enumerated ground for dismissal, "the arbitrator does not have the authority to judge whether discharge is an excessive penalty for the violation committed." *Id. at 232* (Cordy, J., concurring). The arbitrator is "preclude[d] ... from conducting a further 'just cause' analysis (e.g., weighing the teacher's prior record against the misconduct for the purpose of justifying a different sanction) once he has found that one of the enumerated grounds for dismissal has been proved." *Id. at 234*.

Justice Cowin, on the [\*\*\*48] other hand, would have concluded that the statute authorizes an arbitrator to determine "both whether the grounds [for dismissal] alleged by the school district have occurred and, if so, whether such grounds warrant dismissal." *Id. at 241* (Cowin, J., dissenting). According to Justice Cowin, assessing whether the proven grounds warrant dismissal, or merely a less severe penalty, is not only within the arbitrator's discretion, but required by the statutory directive that arbitrators consider "the best interests of the pupils in the district and the need for elevation of performance standards." See *G. L. c. 71, § 42*, fifth par.; *Geller, supra at 242-243 & n.2* (Cowin, J., dissenting).

I agree with Justice Cowin that *G. L. c. 71, § 42*, authorizes an arbitrator to assess whether the facts found warrant dismissal. In my view, it is within the scope of an arbitrator's authority to determine both whether the conduct alleged by the school district in fact occurred, and, if it did, to decide whether such conduct "r[ose] to the level of [serious] misconduct contemplated by the statute as a ground for dismissal." *Geller, supra at 231*

*n.7* (Cordy, J., concurring). In performing the latter task of [\*\*\*49] determining whether the district has proved grounds for dismissal, the statute requires the arbitrator to take into account "the best interests of the pupils in the district and the need for elevation of performance standards." *G. L. c. 71, § 42*, fifth par.

The Legislature has provided for meaningful review by accredited professional arbitrators, see *G. L. c. 71, § 42*, fourth par., of [\*126] decisions made by school authorities to terminate teachers with professional status. This review is to assure that such decisions are based only on the serious misconduct that the statute details and, of necessity, encompasses both a determination of what occurred and a contextualized assessment of its gravity. The credentialed arbitrator is thus tasked not only with finding facts, but also with weighing those facts in conjunction with the mandatory student-interest and performance criteria, see *G. L. c. 71, § 42*, fifth par., to ascertain whether dismissal is warranted. An arbitrator who does this, and concludes that dismissal was not in fact substantiated, does not thereby overstep his bounds and usurp the role of school authorities. Rather, in so doing, the arbitrator fulfills his or her statutorily [\*\*\*50] mandated duty of discerning whether the district [\*\*402] sustained its burden of proving an enumerated ground for dismissal.<sup>4</sup>

4 Of course, there may be situations in which an arbitrator's reinstatement of a teacher, after finding that the school district had not sustained its burden, would violate public policy, an independent ground to vacate an arbitrator's award. See *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 16-19, 648 N.E.2d 430 (1995). The court does not rely on public policy grounds here, and indeed, "[n]o public policy requires that a teacher be fired in these cir-

cumstances." *Geller, supra at 247* (Cowin, J., dissenting).

Unlike Justice Cowin, however, I do not believe that the statute empowers arbitrators to impose alternative penalties on teachers, short of dismissal, that the arbitrator perceives to be more proportional to the severity of the misconduct he or she determined to have occurred. The sixth paragraph of the statute sets out the actions that arbitrators are authorized to take if they conclude that dismissal was "improper." Those actions are remedial in nature, and are limited to awarding "back pay, benefits, reinstatement, and [\*\*\*51] any other appropriate non-financial relief or any combination thereof"; the statute makes no express provision for the exercise of an arbitrator's own judgment in choosing an ostensibly fair punishment. See *G. L. c. 71, § 42*, sixth par. The statute thus contemplates that an arbitration hearing will have one of two outcomes: either the arbitrator will determine that the district carried its burden, upholding its dismissal decision, or the arbitrator will find that the district did not carry its burden, reversing the district's decision and awarding the teacher some form of relief. Should the school district's dismissal decision be reversed, it remains solely within the purview of the district to determine [\*127] whether other discipline should then be imposed. See *G. L. c. 71, § 42D*.

In sum, I believe that it is the proper function of the arbitrator to find and weigh the facts, and subsequently either to reverse or to uphold a school district's dismissal decision, but not to reduce the punishment imposed by the school. I now turn to a discussion whether the arbitrator here acted within the scope of his authority.

2. *Arbitrator's finding that Zagaeski committed "nominal" misconduct.* In substantial [\*\*\*52] reliance on footnote 7 of Justice Cordy's concurring opinion in *Geller, supra*, the arbitrator found, based on the undisputed facts,<sup>5</sup> that the school district did not

meet its burden of proving an enumerated ground for dismissal. Footnote 7 states,

"We note that the arbitrator found [the teacher's] actions to constitute serious misconduct ('totally inappropriate,' 'unacceptable,' which 'cannot be condoned'), a finding consistent with the evidence adduced at the arbitration hearing. This is not the case of an arbitrator finding a teacher to have engaged in minor misconduct that, however, [\*\*403] nominally fit within a category on which dismissal could be based. In such circumstances, an arbitrator's finding that the conduct did not rise to the level of misconduct contemplated by the statute as a ground for dismissal is one that would likely lie within the scope of his authority."

*Geller, supra at 231 n.7* (Cordy, J., concurring). The arbitrator quoted this footnote in its entirety and used it to frame his discussion of the import of Zagaeski's comments. At the outset of his opinion, the arbitrator set forth a standard of review that incorporated language from this footnote, noting that both parties' [\*\*\*53] briefs cited that standard as governing the matter before [\*128] him.<sup>6</sup>

5 Zagaeski was the only witness at the arbitration hearing; neither the seventeen year old female student who brought Zagaeski's comments to the school's attention nor other witnesses with firsthand knowledge of the underlying events testified. In addition to Zagaeski's uncontradicted testimony (which "provided important context regarding what was going on and being said immediately before, during, and after he made the comments in question to the [seventeen] year old student,") the arbitrator had before him a letter that Zagaeski had written during

the investigation to the assistant superintendent as well as other statements he and his counsel made to the district's representatives during that period. The arbitrator stated, "To meet its burden of persuasion, the school district in this proceeding has relied entirely upon what it asserts are facts as admitted to by Dr. Zagaeski himself."

6 Although "the parties [cannot] properly authorize the arbitrator to act beyond his statutory authority in any event," *Geller, supra* at 230 n.5 (Cordy, J., concurring), the standard of review that the arbitrator set forth nonetheless sheds [\*\*\*54] light on the manner in which he undertook to analyze the facts at hand. According to that standard,

"[I]f the arbitrator finds that the school district has proven one of the six specifically listed grounds for dismissal, *and has proven that the misconduct was serious rather than only minor in nature*, then the arbitrator must uphold the termination decision, unless the arbitrator makes specific and detailed findings that the 'best interest of the pupils in the district ... ' warrant the retention of the teacher notwithstanding the serious misconduct which has occurred." (Emphasis supplied.)

The arbitrator began his analysis by noting, rightly, that Zagaeski's comments to the student regarding trading sexual favors for grades "obviously were inappropriate if taken literally" and were inconsistent with the school district's policy against sexual harassment. And, indeed, it goes without saying that any insinuation that good grades

are available for barter, particularly in exchange for sexual favors, would be wholly improper and have no place in the classroom.

But the arbitrator went on to make nuanced findings that situated the exchange within the context of the "obviously absurd joke" that [\*\*\*55] the student had made to Zagaeski several days before about paying him for a better grade, and another student's comment about sexual favors, to which Zagaeski had responded, "Don't be ridiculous." When the student again reiterated her "ridiculous request" a couple days later, Zagaeski "responded with a joking comment of his own," as a way of referring to the recent exchange, something he considered to be "like an inside joke" with the student.

Given the jesting context in which the remarks were made, Zagaeski's lack of actual intent to solicit sexual favors from the student, and the one-time nature of his behavior, the arbitrator determined that Zagaeski's words essentially amounted to "one ill-advised set of interrelated, joking comments, made in response to ill-advised jokes initiated by his students," and therefore only "nominally" fit within the category of conduct unbecoming a teacher. However, the arbitrator did not, as the court states, conclude that the school district had carried its burden of establishing one of the six enumerated grounds for dismissal. To the [\*129] contrary, the arbitrator concluded that, "[g]iven the relatively minor, and isolated character of Dr. Zagaeski's misconduct, [\*\*\*56] and his proven excellence as a teacher over the course of his decade of work in the Lexington Public Schools, the district *has not proven grounds for dismissal ...*" (emphasis supplied). As the Superior Court judge observed, "[t]he arbitrator's findings regarding Zagaeski's conduct appear to fit precisely within the scenario set out by Justice Cordy in footnote [\*\*\*404] 7 of [*Geller, supra*]."<sup>7</sup>

7 Even if the arbitrator misapprehended the holding of *Geller, supra*, his interpretation -- which the Superior

Court judge tracked -- was a reasonable one, particularly given the fractured nature of the court's opinion in that case. And even assuming that his interpretation was erroneous, "[a]bsent proof of one of the grounds specified in *G. L. c. 150C, § 11 (a)*, a reviewing court is 'strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error.'" *Atwater v. Commissioner of Educ.*, 460 Mass. 844, 848, 957 N.E.2d 1060 (2011), quoting *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660, 925 N.E.2d 803 (2010).

The court acknowledges that this question, regarding an arbitrator's authority to reinstate a teacher after finding that he committed only nominal misconduct, was left open by *Geller, supra*, [\*\*\*57] but does not provide a direct answer. It instead engages in its own assessment of the facts and concludes that, notwithstanding the arbitrator's determination that Zagaeski engaged in only nominal and isolated misconduct, it is not possible that the conduct at issue was anything other than serious, and, as such, the arbitrator acted outside of his authority in "adjusting" the school's disciplinary decision. In so doing, the court inappropriately substitutes its own judgment for that of the arbitrator.

The court appears to share the school committee's conviction that Zagaeski's very utterance of the words to the student itself suffices to establish serious misconduct. But words alone are only a piece of human communication. Words shorn of context, taken only literally, are at a far remove from language embedded in circumstance. In any attempt to understand an event after the fact, establishing who said what generally will only begin to reveal what actually happened. Indeed, determining what actually happened, and the gravity of what actually happened, is precisely what this arbitrator was called upon to do and did. It is not for us to substitute our view for his.

Given my view that the [\*\*\*58] statute authorizes the arbitrator to assess whether the facts as found warrant dismissal, and keeping in mind the "well-settled principle of law that arbitration awards [\*130] are subject to a narrow scope of review," *School Comm. of Chicopee v. Chicopee Educ. Ass'n*, 80 Mass. App. Ct. 357, 364, 953 N.E.2d 236 (2011), I cannot accept the court's analysis or conclusion in this regard.<sup>8</sup> I would [\*\*\*405] instead squarely hold that where, as here, an arbitrator determines that the misconduct at issue was of a minor or nominal nature and, as such, did not constitute the serious misconduct necessary to satisfy an enumerated ground for dismissal, he acts well within the scope of his authority when concluding that the district has not sustained its burden of proving grounds for dismissal. See *G. L. c. 71, § 42*, fifth par.

8 Although arbitrators' factual findings are "not open for our review," *School Comm. of Lowell v. Robishaw, supra* at 664, the arbitrator's determination here that Zagaeski's isolated instance of improper joking with a student constituted minor misconduct, only nominally "conduct unbecoming a teacher," is, in any event, supported by the record, particularly when compared to conduct that has been deemed to fit [\*\*\*59] the rubric of conduct unbecoming a teacher in other cases. For example, in *Atwater v. Commissioner of Educ., supra* at 849-850, the arbitrator found that the teacher invited a student to his house and while there, "inappropriately touched [her], touching her back, reaching down her shirt, and touching her buttocks in a sexual manner as well as hugging the student in an attempt to restrain her from leaving." In addition, the teacher "made numerous attempts" to contact the student via electronic mail and telephone, through her friends, and by following her vehicle and visiting her home, which the arbitrator labeled "serious" misconduct. *Id.* at 850, 852.

Similarly, in *Geller, supra* at 226-227 & n.3, the arbitrator found that the teacher, who had received a warning from school authorities prior to his dismissal, engaged in "unacceptable" conduct over the course of seven months, culminating in three separate incidents involving the use of physical force against students. Quite unlike here, the arbitrator in that case "found facts and described those facts in a manner that clearly establishe[d the teacher's] conduct to be 'conduct unbecoming a teacher.'" *Id.* at 231.

Thus, both these cases involved [\*\*\*60] a pattern of serious misconduct over a prolonged period of time, distinguishable from the isolated and quite dissimilar nature of the misconduct at issue in this case.

Far from an arbitrary substitution of the arbitrator's own judgment for that of the school district, such a determination amounts to a conclusion that the dismissal was "improper," as per *G. L. c. 71, § 42*, sixth par. Upon such a finding of impropriety, the arbitrator is empowered to "award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof." *G. L. c. 71, § 42*, sixth par. Thus, I believe that the arbitrator here did not exceed his authority in reinstating Zagaeski, particularly in light of his clear reliance on footnote 7 of Justice Cordy's concurrence in *Geller, supra*, which essentially provided a roadmap for his decision. I would therefore [\*131] leave intact the reinstatement award here.<sup>9</sup>

9 Whether the arbitrator exceeded his authority in reinstating Zagaeski is the central issue that the parties dispute in the case, and, as I have explained, I would hold that he did not. Because, however, as discussed *supra*, I do not believe that the statute empowers arbitrators to [\*\*\*61] impose alternative discipline short of dismissal, I would hold that the arbitrator lacked authority

to order two days of unpaid suspension, and remand to the Superior Court for entry of an order that the arbitrator's decision be revised accordingly.

3. *Arbitrator's consideration of "best interests of the pupils in the district and the need to elevate performance standards"*. *General Laws c. 71, § 42*, fifth par., instructs arbitrators to "consider the best interests of the pupils in the district and the need for elevation of performance standards" in determining whether the school district has proved grounds for dismissal. The court decouples this consideration into two separate criteria, applicable to different enumerated grounds for dismissal, in a manner that I believe is not supported by the statutory language and will prove unworkable in practice.

The court breaks the six enumerated grounds warranting dismissal, set forth in *G. L. c. 71, § 42*, third par., into two categories of misconduct, namely, "performance-based" misconduct on the one hand, and misconduct that "jeopardize[s] the safety or self-esteem of students in the classroom setting" on the other. *Ante* at 120-121. The category [\*\*\*62] of misconduct at issue, the court holds, determines whether the arbitrator is to consider "the need to raise performance standards," or "the best interests of the pupils primarily in light of the pupils' interest in a safe learning environment" in determining whether the school district has proved grounds for dismissal. *Ante* at 121. The court concludes that the arbitrator here exceeded his authority by applying the former criterion, where the conduct at issue fell into a category demanding application of the latter.

By dividing the six enumerated grounds into two classes of misconduct, the court creates an artificial distinction that is not borne out by the statute. The statute simply enumerates the grounds warranting dismissal in one unbroken list, and provides generally that "the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards." See *G. L. c. 71, § 42*, third & fifth pars.

It does not direct arbitrators to cabin their consideration [\*\*\*406] of these factors depending on the type of misconduct determined to have occurred. [\*132]

Moreover, it is far from clear that, in practice, "performance-based" conduct is readily distinguishable [\*\*\*63] from misconduct that "has jeopardized the safety or self-esteem of students in the classroom setting." Neither is it evident that misconduct grouped in the latter category, including misconduct bearing the somewhat indeterminate label of "conduct unbecoming a teacher," will in fact jeopardize students in such a manner.<sup>10</sup>

10 Indeed, it is difficult to see how the conduct at issue in *MacKenzie v. School Comm. of Ipswich*, 342 Mass. 612, 616, 174 N.E.2d 657 (1961), which the court cites, *ante* at 114 n.10, 117-- a teacher's muttering the words "son of a bitch" to the superintendent at a meeting of school personnel -- "jeopardized the safety or self-esteem of students in the classroom setting." In cases such as *MacKenzie v. School Comm. of Ipswich*, *supra*, it is not clear whether the court's formulation directs arbitrators to consider "the need to raise performance standards" or "the best interests of the pupils primarily in light of the pupils' interest in a safe learning environment."

In any event, *MacKenzie v. School Comm. of Ipswich*, *supra*, was decided prior to the Legislature's enactment of the Reform Act in 1993, which amended the statutory scheme governing the dismissal of teachers. See St. 1993, c. 71, § 44. Under [\*\*\*64] the old version of the statute, teacher dismissal was measured against a "good cause" standard, rather than the "just cause" benchmark that currently prevails. Compare *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44, with *G. L. c. 71, § 42*, as amended through St. 1988, c. 153, §§ 4-6. The court cites

this case as providing an example of "conduct unbecoming a teacher" that has persisted through the amendment. *Ante* at 114 n.10. To my mind, however, the question whether the conduct at issue in the pre-amendment case of *MacKenzie v. School Comm. of Ipswich*, *supra*, would constitute "just cause" for dismissal under the amended version of *G. L. c. 71, § 42*, is not free from doubt. See *Geller, supra* at 233 n.9 (Cordy, J., concurring) (Legislature's substitution of "just cause" for "good cause" demonstrates intent to restrict conduct justifying dismissal to "serious misconduct").

In any event, the court's conclusion that the arbitrator here put undue weight on "the pupils' interest in the academic success of their school" simply misconstrues the arbitrator's findings. *Ante* at 121. As an initial matter, the arbitrator's weighing of the mandatory student-interest and performance criteria was [\*\*\*65] not necessary to his decision, as he found that the school district had not sustained its burden of proving an enumerated ground for dismissal because the misconduct at issue was minor, not serious. After so finding, the arbitrator went on to state that, "[e]ven if Dr. Zagaeski's words toward [the student] were characterized as serious rather than a minor act of conduct unbecoming a teacher (which is not the view of this arbitrator), ... the district has not proven grounds for dismissal because the best interests of the pupils in the district and the need for elevation of performance [\*133] standards warrant the retention of Dr. Zagaeski."

Instead of "permitt[ing] the pupils' interest in the academic success of their school to override their interest in a safe, supportive classroom environment," as the court suggests, the arbitrator properly treated the statutory criteria as interconnected. The arbitrator noted the "rapport" that Zagaeski had developed with his students over the course of the school year, as well as the atmosphere of "mutual respect" that he had cultivated in

his classroom, in part through the use of humor and a less hierarchical approach to teaching. Zagaeski "tried to [\*\*\*66] create a culture of comfort in which the students would feel safe and at ease" and "developed a teaching style designed to meet the students at the level [\*\*407] they understood, in an environment that made them comfortable and helped them to achieve academically." This teaching style contributed to Zagaeski's "record of impressive accomplishment in helping a relatively challenged group of students to achieve success."

Therefore, in light of Zagaeski's "proven excellence as a teacher over the course of his decade of work in the Lexington Public Schools," the arbitrator concluded that "the best interests of the pupils and the need for elevation of performance standards warrant

the retention of Dr. Zagaeski." In so doing, the arbitrator acted within his authority by considering in an integrated manner the two factors that *G. L. c. 71, § 42*, fifth par., mandates be taken into account.

In sum, I would hold that the arbitrator was authorized to conclude, as he did, that Zagaeski had not engaged in the serious misconduct necessary in the first instance to establish the statutory ground of conduct unbecoming to a teacher, that consideration of the mandatory best-interest and performance factors led [\*\*\*67] to the same result, and that the school district had therefore failed to carry its burden of proving a ground warranting dismissal. For these reasons, I respectfully dissent.

**SCHOOL COMMITTEE OF MARSHFIELD vs. MARSHFIELD EDUCATION ASSOCIATION**

**No. 12-P-1737**

**APPEALS COURT OF MASSACHUSETTS**

*84 Mass. App. Ct. 743; 3 N.E.3d 602; 2014 Mass. App. LEXIS 7; 198 L.R.R.M. 2282*

**October 8, 2013, Argued  
January 28, 2014, Decided**

**PRIOR HISTORY:** [\*\*\*1]

Plymouth. Civil action commenced in the Superior Court Department on October 14, 2010. The case was heard by Robert C. Cosgrove, J., on motions for summary judgment.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES**

Contract, School teacher, Collective bargaining contract, Arbitration. Public Employment, Collective bargaining, Termination. School and School Committee, Collective bargaining, Termination of employment, Arbitration, Waiver. Labor, Public employment, Collective bargaining, Arbitration. Arbitra-

tion, School committee, Collective bargaining, Authority of arbitrator, Award. Waiver. License. Public Policy.

**COUNSEL:** James A. Toomey (Tami L. Fay with him) for the plaintiff.

John M. Becker for the defendant.

Stephen J. Finnegan, for Massachusetts Association of School Committees, Inc., amicus curiae, submitted a brief.

Michael J. Long, for Massachusetts Association of School Superintendents, amicus curiae, submitted a brief.

**JUDGES:** Present: Kafker, Vuono, & Carhart, JJ.

**OPINION BY:** KAFKER, J.

### OPINION

[\*744] [\*\*604] KAFKER, J. Review of the arbitration award here requires us to examine the teacher licensing and termination provisions in the Education Reform Act of 1994, St. 1993, c. 71, as well as various provisions in a collective bargaining agreement, and explain their interrelationship. Gerard O'Sullivan was employed as a teacher by the Marshfield public school district (district) for almost eight years. O'Sullivan was terminated in 2008 when the school committee of Marshfield (school committee) took the position that his employment automatically ended by operation of law when his teaching license was not renewed by the Commissioner of Education (commissioner) [\*\*\*2] and the commissioner denied the district superintendent's request for a waiver of the license requirement. The school committee took no steps to terminate O'Sullivan in accordance with the terms of his teaching contract and the collective bargaining agreement (CBA) between the school committee and the Marshfield Education Association (association), to which O'Sullivan belonged. Nor did the school committee follow the teacher termination process set out in *G. L. c. 71, § 42*. Rather, the school committee asserted that without a license or waiver, O'Sullivan ceased to be employed as a matter of law, and as a result, was not entitled to any rights afforded a professional teacher under § 42, or under the CBA, including the one-year unpaid leave of absence O'Sullivan had requested so that he could fulfil the requirements necessary for licensure. Thereafter the association, "pursuant to the parties' collective [\*\*605] bargaining agreement," filed a demand for arbitration.

In this unusual procedural posture, without O'Sullivan proceeding to arbitration pursuant to *G. L. c. 71, § 42*, and with the school committee relying exclusively on *G. L. c. 71, § 38G*, the teacher licensing statute, for the

elimination [\*\*\*3] of O'Sullivan's contractual rights, the arbitrator determined that O'Sullivan's employment did not cease as a matter of law despite the lack of a license or waiver, and that he was still an employee and entitled to the resultant contractual rights, including the one-year unpaid leave of absence he had requested. A judge of the Superior Court confirmed the arbitrator's award. On appeal, the school committee asks us to vacate the arbitrator's decision and award. [\*745] We decline and affirm the award, concluding that O'Sullivan's unlicensed status alone did not automatically eliminate his rights, and that absent termination pursuant to § 42, he retained certain collective bargaining rights, including the right to file a grievance and request an unpaid leave of absence. We also conclude that the arbitrator did not exceed her authority in deciding that O'Sullivan was entitled under the CBA to the one-year unpaid leave of absence to try to fulfil his licensing requirements. Finally, the decision was not contrary to law or in violation of public policy.

Background. 1. Relevant teacher licensing and termination statutes and regulations. The statute governing teacher licensure, *G. L. c. 71, § 38G*, as [\*\*\*4] amended through St. 1993, c. 495, § 26, states that "[n]o person shall be eligible for employment as a teacher . . . unless he has been granted by the commissioner a provisional, or standard certificate with respect to the type of position for which he seeks employment." The statute also provides the following exception: "[A] superintendent may upon request be exempt by the commissioner for any one school year from the requirement in this section to employ certified personnel when compliance therewith would in the opinion of the commissioner constitute a great hardship in securing teachers for that school district." *Id.*

Regulations promulgated by the Board of Education, *603 Code Mass. Regs. §§ 7.03, 7.04* (2005), further clarify the different types of licenses -- preliminary, initial, and professional -- and the prerequisites for each, with the preliminary being the first license that a prospective teacher can obtain, followed by

the initial, and then the professional. Both the preliminary and initial licenses are valid for five years and may be renewed for an additional five years. See *603 Code Mass. Regs. § 7.02* (2005). As explained below, O'Sullivan received a five-year preliminary [\*\*\*5] license, and the superintendent received two waivers allowing O'Sullivan to teach in two subsequent years, with one of those waivers applying retroactively.

*General Laws c. 71, § 38G*, does not address termination of a teacher. The termination process is set out in *G. L. c. 71, § 42*, as appearing in *St. 1993, c. 71, § 44*, which provides in relevant part as follows:

[\*746] "A teacher who has been teaching in a school system for at least ninety calendar days shall not be dismissed unless he has been furnished with written notice of intent to dismiss and with an explanation of the grounds for the dismissal in sufficient detail to permit the teacher to respond and documents relating to the grounds for dismissal, and, if he so requests, has been given a reasonable opportunity within ten school days after receiving such written notice to review the decision with the principal or superintendent, as the case may be, and to present information pertaining to the [\*\*606] basis for the decision and to the teacher's status. . . . Teachers without professional teacher status shall otherwise be deemed employees at will.

"A teacher with professional teacher status, pursuant to section forty-one, shall not be dismissed [\*\*\*6] except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section

thirty-eight of this chapter or other just cause."

A teacher "who has served in the public schools of a school district for the three previous consecutive school years shall be considered a teacher, and shall be entitled to professional teacher status as provided in [§ 42]." *G. L. c. 71, § 41*, as amended by *St. 1996, c. 99*. As explained *infra*, O'Sullivan had achieved professional teacher status. There was no attempt by the superintendent to terminate him pursuant to § 42.

*Section 42 of G. L. c. 71* further provides that a teacher may seek review of a dismissal decision through arbitration. With respect to the arbitrator's decision, the statute states that "[u]pon a finding that the dismissal was improper under the standards set forth in this section, the arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof." *G. L. c. 71, § 42*. The arbitration here was not undertaken pursuant to § 42, but rather, pursuant to [\*\*\*7] the CBA.

2. Relevant CBA provisions. The CBA, in place between 2007 and 2010, also contains a number of relevant provisions. Regarding the contracts between the school district and its [\*747] teachers, the CBA contains both a teacher's initial contract and a long-term contract.<sup>1</sup>

1 The initial contract governs the relationship between the school district and a teacher without professional teacher status, and provides that the contract "shall be renewed annually by operation of law during the period of [the teacher's] first three (3) years of continuous employment unless the teacher has been notified in writing prior to June [15] . . . that the contract will not be renewed for the following year." The initial contract also provides that it may be terminated by mutual consent at any time, and that the teacher may resign for good reason as long as certain requirements are met.

The long-term contract, which governs the relationship between the school district and teachers with professional teacher status, provides that the contract "shall continue in force from year to year." The long-term contract also provides that "[e]mployment may be terminated by mutual consent at any time," that the "teacher [\*\*\*8] may resign for good reason" as long as certain requirements are met, and that "[t]he Superintendent/Principal may suspend said teacher or terminate this contract at any time for cause as provided in the General Laws of the Commonwealth of Massachusetts, particularly, *Massachusetts General Law Chapter 71, Section 42* and/or *42D*, as said laws may be amended from time to time."

Article 12.7 of the CBA, regarding teacher evaluation, provides that "[n]o teacher will be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause."

Finally, article 17.10 of the CBA, governing extended leaves of absence, provides as follows:

"A teacher with six (6) or more continuous years of service in the Marshfield Public Schools may be granted an Extended Leave of Absence of up to two (2) years without pay for personal reasons. At its discretion, the School Committee [\*\*607] may grant such leave to a teacher with less than six (6) or more continuous years of service in the Marshfield Public Schools. Any such leave shall commence on September 1st of the school year in which taken and terminate on June 30th of the same or subsequent school year(s), depending [\*\*\*9] upon the length of the leave granted."

3. Facts as found by the arbitrator. O'Sullivan was hired in [\*748] December, 2000, by the district to teach students with disabilities in the alternative high school program. This job required an "MA Certification in Moderate

Special Needs." O'Sullivan did not have any State teaching licenses when he was hired, but he obtained his preliminary license to teach English on March 21, 2001.

O'Sullivan's preliminary license to teach English was set to expire in March, 2006. In December, 2005, he applied for an initial license to teach English and an initial license as a teacher of students with moderate disabilities (SPED license). Eventually, O'Sullivan and the district determined that O'Sullivan needed to prove his competency in three areas to receive a SPED license: (1) knowledge of Federal and State special education laws; (2) knowledge of individualized education program development and preparation; and (3) knowledge of services provided by other agencies. According to the Department of Elementary and Secondary Education (DESE), knowledge of these three areas could be demonstrated by course work for college or university credit, seminars or workshops, [\*\*\*10] or experience. After working with his school supervisor, O'Sullivan determined that the best way for him to demonstrate his competency in these areas was through experience.

What followed was a great deal of miscommunication among O'Sullivan, DESE, and the district's personnel secretary, Linda Ochiltree. There were several exchanges regarding the adequacy of O'Sullivan's proof that he satisfied the competencies, including some confusion regarding whether O'Sullivan's chosen route of demonstrating proof of competency through experience was appropriate. In particular, O'Sullivan was confused as to whether his application was pending, or whether the license had been denied because more information or materials were required by DESE. In February, 2007, O'Sullivan informed the district, via Ochiltree, that his application for a preliminary SPED license may have been denied.

On May 8, 2007, the superintendent wrote a letter to O'Sullivan informing him that the district had obtained a waiver from DESE allowing him to teach without a license for the 2006-2007 school year. The letter also in-

formed him that the superintendent wished to discuss O'Sullivan's licensing status for the [\*749] 2007-2008 school [\*\*\*11] year. O'Sullivan responded by letter on May 17, conveying his confusion regarding the status of his licensing application and whether it was pending or had been denied. The superintendent did not respond.

The district's waiver to employ O'Sullivan without a license expired in June, 2007. At that time, O'Sullivan still did not possess a teaching license. However, he resumed his employment as a Marshfield teacher in September, 2007. In November, 2007, the school district submitted another request to waive the license requirement for O'Sullivan for the 2007-2008 school year. Later that month, DESE denied the request and notified the superintendent by letter. O'Sullivan, however, continued to teach.

In April, 2008, O'Sullivan realized that in order to successfully demonstrate that he met the required competencies through experience, he needed a "district letter" -- on [\*\*608] district letterhead -- attesting to his experience. O'Sullivan requested the letter, and after some additional back-and-forth with DESE, the superintendent wrote to O'Sullivan in May, 2008, stating that he would not provide such a letter because he did not view direct field experience ("i.e., being a teaching member of the [\*\*\*12] Marshfield Public Schools Special Education Department"), without more, as sufficient to demonstrate the necessary competencies. On June 24, 2008, the superintendent nevertheless contacted the school principal, the school's special education director, and the department head, requesting that one of them send the letter for O'Sullivan instead. None of them provided the letter.

In July, 2008, O'Sullivan started exploring whether he had enough practicum or professional development point (PDP) credits to satisfy the competency requirement, as an alternative to demonstrating competency through his experience.<sup>2</sup> Although [\*750] O'Sullivan wrote to both Ochiltree and to the assistant superintendent, there was no evidence that either responded to his questions

regarding whether he could satisfy DESE's requirements in this way.

2 During the relevant time period, "practicum/practicum equivalent" was defined in *603 Code Mass. Regs. § 7.02*, as "[a] field-based experience within an approved program in the role and at the level of the license sought, during which a candidate's performance is supervised jointly by the sponsoring organization and the supervising practitioner and evaluated in a Performance Assessment [\*\*\*13] for Initial License." A "PDP" is a professional development point, "a unit of measurement of professional development activities. One clock hour is equivalent to one professional development point." *603 Code Mass. Regs. § 44.02* (2000). Teachers are required to obtain a prescribed number of PDPs as part of the license renewal process.

On June 30, 2008, the district had received notice that the waiver for the 2007-2008 school year, which had previously been denied, was approved retroactively. On July 1, 2008, the district applied for a third waiver to employ O'Sullivan without a license, this time for the 2008-2009 school year. DESE denied the request on July 29, 2008, and the superintendent received the denial letter on August 6, 2008. Except for the date and reference number, this letter was identical to the letter that the superintendent received in November, 2007, denying the waiver for the 2007-2008 school year, which DESE later approved retroactively.

On August 12, 2008, the superintendent sent a letter to O'Sullivan stating that because O'Sullivan did not have a license and the waiver had been denied, O'Sullivan was no longer eligible for employment and no position would be available [\*\*\*14] to him for the 2008-2009 school year. O'Sullivan responded on August 28, 2008, requesting a personal, unpaid leave of absence for the 2008-2009 school year to complete the licensing requirements. The superintendent denied this

request on September 29, 2008, again citing his position that O'Sullivan was no longer eligible for employment. Thus, in effect, the employment relationship between the district and O'Sullivan ended.

4. Arbitration decision and award. The association grieved the decisions to terminate O'Sullivan and to deny his request for a personal leave of absence, and the arbitrator heard the grievances on September 14, 2009, and April 20, 2010. The arbitrator framed the issues before her as follows:

"Are the grievances . . . substantively arbitrable?

"If yes, did the Superintendent of Marshfield Schools violate Section 17.10 or Section 12.7 of the parties' collective bargaining agreement when he denied [\*\*609] Gerard F. O'Sullivan's request for a leave of absence on September 29, 2008?

[\*751] "If so, what shall the remedy be?

"Did the Superintendent of Marshfield Schools violate the parties' collective bargaining agreement when Gerard F. O'Sullivan's employment was not continued for the 2008-2009 [\*\*\*15] school year?

"If so, what shall the remedy be?"

The arbitrator found the grievance to be substantively arbitrable.<sup>3</sup> She determined that the lack of a license or waiver did not, in and of itself, extinguish O'Sullivan's professional status or his collective bargaining rights, including his right to pursue a grievance. Although she found the school committee could have taken steps pursuant to *G. L. c. 71, § 42*, and article 12.7 of the CBA to terminate O'Sullivan's employment on these grounds, it chose not to do so. In reaching her determination that O'Sullivan retained professional

teacher status and associated rights under the CBA, the arbitrator relied in part on the parties' past practices. She found the school committee provided no evidence as to "how or why the district was able to continue Mr. O'Sullivan's employment without any license or waiver in 2006 and 2007, but in 2008, the same circumstances resulted in the immediate dissolution of the employment relationship without any action on the part of the Superintendent, the School Committee, or the employee."

3 No issue has been raised regarding the timeliness of the grievance.

The arbitrator then interpreted article 17.10 of the CBA [\*\*\*16] (the leave of absence provision) to provide O'Sullivan with the right to an unpaid leave of absence, concluding that the "motivating and principal reason for denying the leave request was the claim [which she rejected] that Mr. O'Sullivan was not an employee and not entitled to benefits under the [CBA]."

Acknowledging that she could not order a remedy contrary to law, and that the lack of a license or waiver rendered O'Sullivan ineligible to be employed as a teacher, the arbitrator determined that the school committee had not established that the "law prohibits a school district from employing unlicensed educators who are on an unpaid leave of absence, who are not employed [\*752] as a teacher, who are not teaching, and who are not serving in a role covered by the statute." The arbitrator found in O'Sullivan's favor, concluded that he had not been terminated and thus remained an employee, and ordered his reinstatement for a one-year unpaid leave of absence for the 2008-2009 school year. She "further ordered [that he be made] whole for the loss of any back wages, benefits, or seniority he would have received but for the improper decisions to end his employment and to deny his request for leave [\*\*\*17] without pay, which back wages and benefits must be reduced by any wages or benefits he would not have received but for those improper decisions."

Discussion. 1. Standard of review. The power of a court to review an arbitration decision and award is extremely limited. See *School Dist. of Beverly v. Geller*, 435 Mass. 223, 228, 755 N.E.2d 1241 (2001) (Cordy, J., concurring). The narrow grounds on which a court may vacate an arbitral award are set forth in *G. L. c. 150C*, § 11, and include, in pertinent part, that "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law." *G. L. c. 150C*, § 11(a)(3), inserted by St. 1959, c. 546, § 1. See *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 759, 784 N.E.2d 11 (2003), quoting from *Duxbury v. Duxbury Permanent Firefighters Assn., Local 2167*, [\*\*610] 50 Mass. App. Ct. 461, 464, 737 N.E.2d 1271 (2000) ("[W]e look only to determine if the arbitrator here exceeded his scope of reference, acted against clearly defined public policy, or ordered conduct prohibited by State or Federal law"). "In determining whether an arbitrator exceeded [her] authority . . . judicial review of the award [\*\*\*18] is independent." *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Authy.*, 392 Mass. 407, 411, 467 N.E.2d 87 (1984). Absent proof of one of these prohibited grounds, however, "a reviewing court is 'strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error.'" *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660, 925 N.E.2d 803 (2010), quoting from *School Comm. of Pittsfield v. United Educators of Pittsfield*, *supra* at 758.

2. Preclusive effect of *G. L. c. 71*, § 38G. The school committee contends that the arbitrator exceeded her authority and that the award violates *G. L. c. 71*, § 38G, and the public policy [\*753] it embodies. The committee contends that "[p]roper certification (or waiver) [under § 38G] is a precondition upon which access to any and all subsequent benefits of teacher employment is predicated," including the procedural termination protections of *G. L. c. 71*, § 42, and collective bargaining rights. According to the school committee, the

lack of a license or waiver extinguishes these other statutory and collective bargaining rights as a matter of law, and the arbitrator's decision rejecting this preclusive effect and finding that O'Sullivan retained [\*\*\*19] certain collective bargaining rights was in excess of the arbitrator's powers and violated public policy.

The preclusive effect of *G. L. c. 71*, § 38G, is a question of law for this court. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"). We interpret the different provisions here as serving different purposes. *Section 38G* expressly governs the State's teacher licensing process. It defines the relationship "between individual teachers and the Commonwealth," not "the employment relationship between teachers and their school districts." *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 782, 767 N.E.2d 549 (2002). In contrast, *G. L. c. 71*, § 42, expressly governs the dismissal of a "teacher who has been teaching in a school system" and achieved professional teacher status. Cf. *Lutz v. School Comm. of Lowell*, 366 Mass. 845, 845, 313 N.E.2d 925 (1974) (explaining that teacher who never received license or achieved professional teacher status lacked *G. L. c. 71*, § 42, rights). Although § 38G defines eligibility requirements for employment as a teacher in the public [\*\*\*20] schools, it does not in any way define the requirements for termination of employment and the associated rights of employment for those who have been previously licensed and achieved professional teacher status. Those requirements are addressed in § 42, and in collective bargaining agreements. *Section 38G* expressly states: "Except as otherwise specifically provided in this section, no rights of employees of a school district under the provisions of this chapter shall be impaired by the provisions of this section." Moreover, it is not just the statutory language, but also the practical workings of the licensing scheme, particularly the [\*754] availability of retroactive waivers, that preclude the conflation of the

State licensing and school district termination processes.

This is not to say that the processes are not interrelated. As the arbitrator found, [\*\*611] the absence of a license or waiver provides substantive grounds for termination in the *G. L. c. 71, § 42*, process. *Section 42* specifically references incapacity as grounds for terminating a teacher with professional teacher status. See *G. L. c. 71, § 42*, third par. Likewise, absence of a license or waiver would provide substantive grounds [\*\*\*21] to be considered for termination under the "for cause" provisions of the CBA, but it does not automatically extinguish all of the employee's rights.<sup>4</sup> Thus, *G. L. c. 71, § 38G*, can and should be read in harmony with the procedural termination provisions set out in § 42, and the continued existence of collective bargaining rights of affected employees. See *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. at 783 ("[T]here is no conflict between the challenged regulations, which govern State teacher recertification, and collective bargaining law, which governs specific terms and conditions of employment"); *School Comm. of Newton v. Newton School Custodians Assn., Local 454, SEIU*, 438 Mass. 739, 747, 751, 784 N.E.2d 598 (2003); *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. at 761-762 ("Nor did the Legislature's commitment to school reform trump the Commonwealth's strong public policy favoring collective bargaining between the public employers and employees over the conditions and terms of employment"). Cf. *Dedham v. Labor Relations Commn.*, 365 Mass. 392, 402, 312 N.E.2d 548 (1974); *Fall River v. AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 410, 810 N.E.2d 1259 (2004) [\*\*\*22] (collective bargaining agreement and civil service statute can be read harmoniously).

4 We need not decide whether the just cause provisions and procedures in the CBA have been superseded by the just cause provisions and procedures in *G. L. c. 71, § 42*, because O'Sullivan was not

terminated pursuant to either process. See generally *School Comm. of Chicopee v. Chicopee Educ. Assn.*, 80 Mass. App. Ct. 357, 953 N.E.2d 236 (2011). Moreover, even if the just cause provisions in the contract are superseded by § 42, other provisions in the contract, such as the leave of absence provision, remain in effect and enforceable absent a § 42 termination.

The arbitrator also did not exceed her authority in finding that in the absence of termination proceedings pursuant to *G. L. c. 71, § 42*, [\*755] the employment relationship between O'Sullivan and the district continued, even though O'Sullivan no longer held a teaching license and DESE had denied the district a waiver. The continuing employment relationship afforded O'Sullivan standing to grieve his claims and the right to request an unpaid leave of absence pursuant to article 17.10 of the CBA. The arbitrator also properly relied on past practices of the parties in determining [\*\*\*23] that the lack of license or waiver did not automatically end the employment relationship, and the associated employment rights. Cf. *Duxbury v. Duxbury Permanent Firefighters Assn., Local 2167, 50 Mass. App. Ct. 461, 465, 737 N.E.2d 1271* (2000) ("[I]n instances where the provisions of an agreement are not clear and unequivocal, the arbitrator may rightly look to past practice to resolve ambiguities").

The arbitrator further determined that the superintendent wrongly denied O'Sullivan's request for a personal leave of absence under the CBA, and we cannot say that she exceeded her powers in reaching this conclusion. The arbitrator found that the superintendent denied the leave request on the ground that O'Sullivan's employment had terminated by operation of law, and he was therefore no longer entitled to the rights, such as personal leave, provided by the CBA. Having found [\*\*612] that O'Sullivan's contractual rights had not automatically terminated, the arbitrator concluded that the superintendent's stated basis for denying the requested leave was unreasonable based on the terms of the CBA and long-term

teacher's contract. The arbitrator also relied on the express terms of article 17.10 of the agreement as a [\*\*\*24] basis for awarding the leave. As her award "draws its essence from the collective bargaining agreement" and the parties past practices, we cannot conclude that she exceeded her powers in this regard. *School Dist. of Beverly v. Geller*, 435 Mass. at 229 (Cordy, J., concurring), quoting from *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). *Duxbury v. Duxbury Permanent Firefighters Assn., Local 2167*, 50 Mass. App. Ct. at 465. Furthermore, even if her interpretations of article 17.10 and the past practices were erroneous, we are bound by those interpretations. See *School Comm. of Lowell v. Robishaw*, 456 Mass. at 660-661.

3. Award in violation of law or public policy. Under *G. L. c. 150C, § 11(a)(3)*, [\*756] an arbitrator's award must be vacated if the award requires a party to commit an act or engage in conduct prohibited by law or in violation of public policy. Thus, "[a]lthough the scope of review under *G. L. c. 150C, § 11*, is 'restrictive in not permitting reversal based on an arbitrator's legal errors,' a reviewing court may reverse an arbitrator's decision where the arbitrator exceeds his authority by disregarding the governing law." *School Comm. of Lowell v. Robishaw*, 456 Mass. at 662, [\*\*\*25] quoting from *Goncalo v. School Comm. of Fall River*, 55 Mass. App. Ct. 7, 10, 769 N.E.2d 293 (2002). See *Plymouth--Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990); *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 818, 824 N.E.2d 855 (2005) ("[E]xtreme deference to the parties' choice of arbitration does not require us to turn a blind eye to an arbitration decision that itself violates the law. We do not permit an arbitrator to order a party to engage in an action that offends strong public policy"); *Massachusetts Bay Transp. Authy. v. Boston Carmen's Union, Local 589, Amalgamated Transit Union*, 454 Mass. 19, 25, 907 N.E.2d 200 (2009) (award that violates public policy is award that must be vacated under *G. L. c. 150C, § 11(a)[3]*, because ar-

bitrator exceeded her powers). We are not bound by the arbitrator's interpretation of the relevant statutes or public policy in making this determination. See *Massachusetts Bay Transp. Authy. v. Local 589, Amalgamated Transit Union*, 406 Mass. 36, 40, 546 N.E.2d 135 (1989) (appellate court "need not defer to arbitrator's interpretation of relevant statutes").

The school committee argues that the award must be vacated because it violates *G. L. c. 71, § 38G*, and 603 Code Mass. Regs. [\*\*\*26] § 7.14(9)(a) (2005)<sup>5</sup> and the policy contained therein. It contends that the district could not legally continue to employ O'Sullivan as of August, 2008, when O'Sullivan still had not obtained a teaching license and DESE had denied the superintendent's waiver request for the 2008-2009 school year. According to the school committee, the arbitrator's award must therefore be vacated because it requires the school committee to continue an illegal relationship with O'Sullivan by reinstating [\*\*613] him and granting his request for a leave of absence.

5 Title 603 Code Mass. Regs. § 7.14(9)(a) has since become 603 Code Mass. Regs. § 7.15(9)(a) (2012).

[\*757] As we have previously explained, *G. L. c. 71, § 38G*, governs the licensing of public teachers in the Commonwealth, not the termination of employment and any associated rights of those who had previously been licensed and achieved professional teacher status, which is governed by *G. L. c. 71, § 42*. The arbitrator carefully considered the statutory requirements, recognizing that O'Sullivan retained his professional teacher status and associated employment rights, as no termination process had been undertaken pursuant to § 42. She also recognized that § 38G [\*\*\*27] required him to have a license or a waiver to be eligible for "employment as a teacher." The essence of her award was an unpaid one-year leave of absence, thereby allowing O'Sullivan time to try to satisfy the licensing requirements. It did not return him to the classroom without a license or a waiver. The award does not violate § 38G.<sup>6</sup>

6 The school committee also argues in passing that the award violates *G. L. c. 71, § 59B*, which provides in relevant part that "[p]rincipals . . . shall be responsible, consistent with district personnel policies and budgetary restrictions and subject to the approval of the superintendent, for hiring all teachers . . . and for terminating all such personnel." A principal's powers, however, are to be exercised in accordance with *G. L. c. 71, § 42*, and any collective bargaining agreements. The award did not, therefore, violate *G. L. c. 71, § 59B*, or the policy reflected therein.

Neither does the award violate the public policy requiring licensure of public school teachers in order to further the Commonwealth's goals of ensuring the quality education of children attending public schools. See *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. at 765, [\*\*\*28] quoting from 603 Code Mass. Regs. § 44.01 ("The purpose of the Massachusetts recertification system is to 'enhance education through professional development for educators that meets high standards of quality . . . in order to assist students in meeting state learning standards'"). The standard for determining that an award must be vacated for violating public policy is narrow. See *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. at 819, quoting from *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 19, 648 N.E.2d 430 (1995) ("If an award is permissible, even if not optimal for the furtherance of public policy goals, it must be upheld"). An award may only be vacated on these grounds "where an [\*758] employee's conduct implicates a well-defined, dominant, public policy ascertained by reference to specific law or legal precedent; the conduct is integral to the employee's duties; and such conduct would require an employee's dismissal." *School Comm. of Lowell v. Robishaw*, 456 Mass. at 664. "To prevail, the [employer] must therefore demonstrate that public policy requires that [the employee's] conduct, as found by the

arbitrator, is grounds for dismissal, [\*\*\*29] and that a lesser sanction would frustrate public policy. . . . "The question to be answered is not whether [the employee's conduct] itself violates public policy, but whether the agreement to reinstate him does so." *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. at 819, quoting from *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62-63, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000). See *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. at 19 ("Arbitration awards reinstating [\*\*614] employees are therefore upheld if the public policy, while disfavoring the employees' conduct, does not require dismissal").

Even if the first two requirements were met here, the third one is not: the arbitrator's narrowly tailored remedy reinstating O'Sullivan to a one-year unpaid leave of absence, during which he would not hold a teaching position or engage in the act of teaching, but rather work or study toward achieving his license, does not violate public policy.<sup>7</sup>

7 We also do not interpret the arbitrator's award of back pay to entitle O'Sullivan to any such pay unless he did in fact successfully perform the work or study necessary to satisfy the licensing requirements [\*\*\*30] during that one-year unpaid leave of absence. As the Superior Court judge noted, "[i]f at the end of that year, O'Sullivan lacks a valid license and the Superintendent chooses not to seek a waiver the [school] committee may dismiss him under the CBA."

Conclusion. We conclude that the arbitrator did not exceed her authority in determining that O'Sullivan, who had previously been licensed and achieved professional teacher status, and who had not been terminated pursuant to *G. L. c. 71, § 42*, was still an employee under the CBA and was entitled to a one-year unpaid leave of absence under that agreement to work towards his licensing requirement. We also conclude that the award of a one-year

unpaid leave of absence does not require [\*759] the school committee to violate *G. L. c. 71, § 38G*, or the public policy reflected therein.

Judgment affirmed.

**SDCO ST. MARTIN, INC., Plaintiff, v. CITY OF MARLBOROUGH, Defendant**

**CIVIL ACTION NO. 12-11659-GAO**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

*2014 U.S. Dist. LEXIS 36750*

**March 20, 2014, Decided**

**March 20, 2014, Filed**

**COUNSEL:** [\*1] For SDCO St. Martin, Inc., Plaintiff, Counter Defendant, ThirdParty Defendant: Christopher F. Robertson, Dawn M. Mertineit, Seyfarth Shaw, LLP, Boston, MA.

For City of Marlborough, Defendant, Counter Claimant, Third-Party Defendant, Third-Party Plaintiff: Donald V. Rider, Jr., LEAD ATTORNEY, City of Marlborough Legal Department, Marlborough, MA.

For Access Northeast, Inc., ThirdParty Plaintiff: Kevin T. Peters, LEAD ATTORNEY, Arrowood Peters LLP, Boston, MA; James A. Schuh, Holtz & Reed LLP, Boston, MA.

**JUDGES:** George A. O'Toole, Jr., United States District Judge.

**OPINION BY:** George A. O'Toole, Jr.

**OPINION**

**OPINION AND ORDER**

O'TOOLE, D.J.

**I. Introduction**

The plaintiff, SDCO St. Martin ("St. Martin"), owns a building that is located

partly in the City of Marlborough (the "City") and partly in the Town of Southborough, straddling the border between those municipalities. For a number of years, St. Martin has made payments to the City under an agreement made between the City and a prior owner of the parcel on which the building sits that were characterized then (and still are by the City) as "payments in lieu of taxes" ("PILOT"). St. Martin by this action seeks a declaratory judgment that the payments are an illegal tax under [\*2] Massachusetts law. The City has counterclaimed for breach of the PILOT agreement, seeking to recover what it claims are past underpayments. The parties have filed cross-motions for summary judgment as a matter of law on the basis of a record of undisputed facts.

**II. Factual Background**

The relevant undisputed facts are these: In the 1980s, Paul Maggiore owned land that straddled the border between Marlborough and Southborough. In 1987, Maggiore decided to build a building on the property that would be mostly in Southborough, but partly in Marlborough. As part of the development process, he negotiated with the City about connecting the building to the City's water and sewer system. Southborough does not provide sewer services to its residents.

Maggiore and the City signed an agreement in May 1987 (the "1987 Agreement"). The key provisions of that agreement, as relevant here, were as follows:

3. Upon certification that the "Maggiore Group" has acquired all of the preliminary approvals, including the industrial user sewer permit, the City shall allow the connection from the within-described property to the City sewer system.

4. In consideration for the connection to the City sewer system, the [\*3] "Maggiore Group" shall make an annual payment in "lieu of taxes" in accordance with the following schedule.

The "Maggiore Group" shall pay the sum of Fifty Thousand (\$50,000.) Dollars to the City on the date that the first (1st) phase is connected to the City sewer system. The annual payment shall be increased to One Hundred Thousand (\$100,000.) on the date the second (2nd) phase is tied to the first phase or otherwise connected to the City sewer system or on the first legal day of January 1990, whichever is sooner. . . .

On the first legal day in January on the eleventh year of this contract, the annual payment in lieu of taxes shall be increased to One Hundred Fifty Thousand (\$150,000.) Dollars; thereafter, the annual payment shall be increased each year in accordance with the Boston Consumer Price Index.

Mertineit Aff., Ex. 5 at 2.

The 1987 Agreement further provided:

All successors in title to the "Maggiore Group" shall be subject to this Agreement to be recorded at the Middlesex South District Registry of Deeds.

It is undisputed that the 1987 Agreement was not recorded at the registry of deeds.

Maggiore connected sewer lines from the new building to a pre-existing public sewer at his [\*4] own expense, with no expense to the City. The connection is located entirely within the City, running across easements granted to the plaintiff's property.<sup>1</sup> The cost of the connection was \$2,000.

1 The City contests the validity of the easements. This dispute is immaterial.

In 1998, the property was sold by the Maggiore trust to Taurus-495 West Technology Partnership, and four years later St. Martin acquired it from Taurus-495. Neither the deed from the Maggiore trust to Taurus-495 nor the deed from Taurus-495 to St. Martin made any reference to the 1987 Agreement. Since it was not recorded, a title search would not have revealed its existence. Nonetheless, both Taurus-495 and St. Martin continued to make the annual payment to the City in addition to regular water and sewer fees and regular real estate property taxes assessed on the portion of the property (including part of the building) located within the City. There is no evidence that St. Martin knew of the 1987 Agreement; it appears that it (like Taurus-495) simply continued making payments that its predecessor had been making. St. Martin's records referred to the payments generally as a "water/sewer fee" or "w/s fee." When received [\*5] by the City, the PILOT payments were deposited in the City's general fund. It is undisputed that the amounts to be paid under the 1987 Agreement were calculated to approximate what the Maggiore (and successors) would hypothetically have owed the City in real estate taxes if the building had been located entirely

in Marlborough, rather than partly in Marlborough but mostly in Southborough.

In 2012, after a change of management companies, a representative of St. Martin became curious about the annual payment and made inquiry of the City. The City then furnished a copy of the 1987 Agreement. The City also asserted that recent years' payments had not been upwardly adjusted according to the CPI and demanded that St. Martin make up close to half a million dollars in what the City claimed were overdue past obligations. When St. Martin refused the demand, the City threatened to cut off the sewer connection. This suit followed.

### **III. Discussion**

The dispute is governed by Massachusetts municipal law.<sup>2</sup> It turns in part upon the scope of a municipality's lawful power to tax, and in part upon the distinction between a tax and a fee.

2 This Court's jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

It [\*6] is a first principle that in Massachusetts "[c]ities and towns have no independent power of taxation." *Opinion of the Justices*, 378 Mass. 802, 393 N.E.2d 306, 310 (Mass. 1979). "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. City of Attleboro*, 454 Mass. 165, 908 N.E.2d 722, 725 (Mass. 2009). Marlborough has and exercises the same power granted to other municipalities to tax real property within its city limits, and St. Martin, like its predecessor owners of the property at issue, has paid regularly assessed real estate taxes to the City. As noted above, the PILOT amount was calculated to reflect what the municipal real estate tax might be if the building in question, instead of being only partly in Marlborough, were hypothetically located entirely within the City. It should go without saying (or ci-

tation) that the City lacks authority to tax hypothetical property.<sup>3</sup>

3 Calling the payments under the 1987 Agreement "payments in lieu of taxes" is unreal. St. Martin has paid and continues to pay the actual taxes assessed. The payments under the agreement are actually payments "in lieu of" taxes that are [\*7] not actually owed.

In addition to general taxes, a municipality may also charge fees for the use of specific municipally-provided services or as an exercise of police power. See *Denver St. LLC v. Town of Saugus*, 462 Mass. 651, 970 N.E.2d 273, 274 (Mass. 2012). "There are two kinds of fees, 'user fees based on the rights of the entity as proprietor of the instrumentalities used' and 'regulatory fees,' 'founded on police power to regulate particular businesses or activities.'" *Id.* (quoting *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (Mass. 1984)). Sewer charges would be an example of a lawful user fee. See *Town of Winthrop v. Winthrop Housing Authority*, 27 Mass. App. Ct. 645, 541 N.E.2d 582, 583-84 (Mass. App. Ct. 1989).

Whether a charge is a lawful fee or an unlawful tax "must be determined by its operation rather than its specially descriptive phrase." *Denver Street*, 970 N.E.2d at 275. In *Emerson College*, the Supreme Judicial Court identified the three traits that distinguish fees from taxes.

Fees "[1.] are charged in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society' [;] ... [2.] are paid by choice, in that the party paying [\*8] the fee has the option of not utilizing the governmental service and thereby avoiding the charge"[;] ... "and" [3.] ... are collected not to raise revenues

but to compensate the governmental entity providing the services for its expenses.

*Denver St.*, 970 N.E.2d at 275 (alteration in original) (quoting *Emerson College*, 462 N.E.2d at 1105).<sup>4</sup>

4 The City relying on *Anderson St. Assocs. v. City of Boston*, 442 Mass. 812, 817 N.E.2d 759 (Mass. 2004), argues that the Court need not delve into the fee versus tax debate because the payment is made pursuant to a voluntary contract to which the plaintiffs are successors. *Anderson St.* is easily distinguishable from the current case. In *Anderson St.*, the developers were exempted from an obligation to pay real estate property taxes to Boston pursuant to a specific statutory scheme granting benefits to developers of blighted urban areas. The scheme encouraged "payments in lieu of taxes." See *Mass. Gen. Laws ch. 121A, §§ 6A, 10*. The payments involved in this case have no such statutory provenance. What mattered in *Anderson St.* [\*9] was not simply the voluntariness of the contractual payment, as the City suggests, but rather that the scheme was authorized by the legislature.

The City provides sewer services to residents<sup>5</sup> of Marlborough, including of course St. Martin, and charges them for the use. St. Martin has paid the sewer usage fees charged by Marlborough. Accordingly, the payments under the 1987 Agreement cannot be justified as user fees for the use of the Marlborough sewer system. The parties to that agreement, in paragraph 15, acknowledged that Maggiore would be responsible for "all user fees for City services." *Mertineit Aff.*, Ex. 5 at 4.

5 And non-residents. The record indicates that Marlborough permits certain residents of the neighboring Town of Hudson to use its sewer system,

charging them the same use fees as residents of Marlborough.

So if payments under the 1987 Agreement are not actual municipal real estate taxes (or legitimate payments "in lieu" of such) and are not the regular user fees charged Marlborough residents for use of the sewer system (or legitimate payments "in lieu" of such), what are they? According to the agreement they are "[i]n [\*10] consideration for the connection to the City sewer system." *Id.* at 2. Put that way, they could be considered a "connection fee." But that is not an available option in this case. In the first place, Maggiore separately paid a connection fee (as well as the construction costs of connection) when the connection was first made. Moreover, any legitimate municipal service fee must not only be imposed on all users on common terms, see *Berry v. Town of Danvers*, 34 Mass. App. Ct. 507, 613 N.E.2d 108, 110 (Mass. App. Ct. 1993), but also must bear some reasonable relation to the costs to the municipality of providing that service. See *Denver St.*, 970 N.E.2d at 275. A multi-million dollar fee collected in perpetuity, as the City would apparently have it, could not conceivably be regarded as a legitimate service fee reasonably related to the service provided.

Moreover, the payments cannot be regarded as a legitimate fee, as opposed to a tax, under the so-called *Emerson College* test. The *Emerson College* factors weigh heavily in St. Martin's favor. The first factor is whether St. Martin is receiving a particularized service in exchange for the payments. In *Denver St.*, the SJC upheld a fee for new connections to the sewer [\*11] system in Saugus during a time when a moratorium was placed on new connections due to environmental issues. 970 N.E.2d at 280. The SJC found that "access to the sewer system for new connections was not a benefit shared by anyone other than those who paid the [fee]." *Id.* Unlike in *Denver St.*, here the plaintiff's building was connected to the sewer system when there were no limitations on connections. The record indicates that the

City has never denied a connection to a building located in Marlborough and has even permitted the connection of buildings completely outside of the City without additional charge. St. Martin is being charged for a service that is generally provided to the public without any charge additional to normal usage charges. It is not receiving a particularized benefit in exchange for its payments.

The third Emerson College factor calls for a determination whether the fees are collected to compensate the City for a service rendered or rather are a means of raising revenue. There is no question that this factor weighs heavily in favor of the plaintiff. The funds received are not designated to the maintenance or operation of the sewer system but rather are deposited [\*12] in the City's general fund, just like tax revenues. This is a strong indicator that the payment is meant to raise revenue. Cf. *Emerson College*, 462 N.E.2d at 1106; *Silva v. City of Fall River*, 59 Mass. App. Ct. 798, 798 N.E.2d 297, 304 (Mass. App. Ct. 2003) ("Here, however, with uncontradicted evidence that the funds are deposited to Fall River's general account and nothing in the record to indicate the basis on which the charge was calculated or how the funds are used to defray expenses, we cannot conclude that the money collected is not used to subsidize general governmental operations."); *Berry*, 613 N.E.2d at 112.

The second Emerson College factor is the voluntariness of the payment. The importance of voluntariness factor has been limited by the SJC. See *Silva v. City of Attleboro*, 908 N.E.2d at 728 ("Massachusetts cases decided since Emerson College . . . have consistently given less weight to the voluntariness factor. Other jurisdictions have abandoned it as unhelpful in determining whether a charge is a fee or a tax.").

In any event, even if the payments were voluntarily agreed to by *Maggiore*, it cannot seriously be contended that the payments the City now seeks would be made voluntarily by *St. Martin*. [\*13] This whole controversy

arises because the City seeks to *compel* St. Martin (under threat of disconnection from the public sewer system) to make payments it does not agree to on the ground that *Maggiore* did agree to them a couple of decades ago.

Put aside the question whether *Maggiore's* agreement to make the payments "in lieu of taxes" was truly voluntary; it can be assumed so for present purposes. From the record before the Court there appear to be only two possible ways that St. Martin can now be involuntarily bound to that agreement: the 1987 Agreement could be deemed to "run with the land" so that St. Martin acquired the payment obligation under the agreement when it acquired title to the real estate, or St. Martin could be deemed to have assented to the contract by making the called-for payments from 2002 to 2012.

Neither theory can succeed for the same reason. The undisputed evidence in the record is that St. Martin did not know of the existence of the 1987 Agreement until 2012. As to the real estate theory, it is not disputed that the 1987 Agreement was never made of record as originally contemplated. It was not therefore discoverable (and not discovered) in a title examination.

Similarly, [\*14] St. Martin's payments over the years are not enough standing alone to amount to an implied in fact contract. A contract may be implied in fact "if a person knowingly receives services and other benefits, and there is no evidence that those services and benefits were being furnished gratuitously." *Popponeset Beach Ass'n, Inc. v. Marchillo*, 39 Mass. App. Ct. 586, 658 N.E.2d 983, 987 (Mass. App. Ct. 1996). The problem is that St. Martin over the last decade has not been receiving *any* services beyond what other property owners connected to the City sewer system receive. Like those other property owners, St. Martin has paid the regularly assessed water and sewer charges. Unlike those other property owners, it has made PILOT payments for no additional service or benefit. What has been

gratuitous has not been the provision of services, but the payment of substantial sums for no services. Under these circumstances, it would be absurd to hold St. Martin contractually responsible to continue paying a considerable something for absolutely nothing in return. The very essence of a contract, implied or otherwise, is mutuality, and that is wholly lacking. Moreover, with the connection already in place, St. Martin has [\*15] no choice but to remain connected to the City sewer system. *248 C.M.R. 10.05(16), Berry, 613 N.E.2d at 111*. At the most, the pattern of payments may provide a reason why St. Martin cannot recoup past payments made with what may have been its own negligent inattention.

To summarize the Emerson College factors: the payment under the 1987 Agreement does not confer a particularized benefit on St. Martin which is not shared by the general public; the amount bears no relationship to the City's cost to maintain the connection to or operation of the sewer system; it is not a

voluntary payment; and the payment does not reimburse the City for the actual or reasonably estimated costs but rather is deposited in the City's general fund, just like tax revenues. The payments under the 1987 Agreement are not, therefore, legitimate municipal fees for particularized service rendered. They are an illegal exaction and cannot be enforced.

#### **IV. Conclusion**

For the reasons stated herein, the plaintiff's Motion for Summary Judgment (dkt. no. 56) is GRANTED, the City's Motion for Summary Judgment is DENIED (dkt. no. 69).

St. Martin is directed to propose a form of judgment within 14 days of the entry of this Order.

It [\*16] is SO ORDERED.

/s/ George A. O'Toole, Jr.

United States District Judge

### **CITY OF SPRINGFIELD vs. CIVIL SERVICE COMMISSION & another<sup>1</sup>**

1 Joseph McDowell.

**SJC-11540**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***469 Mass. 370; 2014 Mass. LEXIS 596***

**April 8, 2014, Argued  
August 18, 2014, Decided**

**NOTICE:** THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE MASSACHUSETTS REPORTER USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

**PRIOR HISTORY:** [\*\*1]

Hampden. Civil Action commenced in the Superior Court Department on July 29, 2010.

The case was heard by *Bertha D. Josephson, J.* on motions for judgment on the pleadings.

[\*371] The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

## HEADNOTES

### MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

*Civil Service*, Provisional promotion, Termination of employment, Notice. *Labor*, Civil service. *Employment*, Termination. *Jurisdiction*, Civil Service Commission. *Administrative Law*, Evidence. *Notice*, Termination of employment, Administrative hearing. *Waiver*.

In a civil action challenging a determination of the Civil Service Commission (commission) regarding the termination of a city employee from his employment in a position to which he had been appointed only provisionally and in which he was not tenured, the commission's conclusion that the employee, who previously had held tenure in his original, appointed position was a "tenured employee" who retained the right to appeal from his termination to the commission was reasonable, consistent with the statutory language and purposes, and appropriate.

In a civil action challenging a determination of the Civil Service Commission (commission) regarding the termination of a city employee from his employment, the commission erred in concluding that *G. L. c. 268A*, § 25, authorized the city to suspend him upon his indictment for filing false tax returns regarding off-duty conduct, where the indicted conduct did not constitute misconduct in office, and where the position from which the employee had been suspended was not one that holds a higher expectation of trust, such that the employee's off-duty conduct could not be separated from his on-duty conduct.

In a civil action challenging a determination of the Civil Service Commission (commission) regarding the termination of a city employee from his employment, the employee waived any claim of deprivation of due process rights due to the city's failure to comply with necessary procedural requirements when it sought to suspend and subsequently terminate the employee based on his conviction of filing false tax returns, where the employee

failed to raise this issue before the commission or the trial judge.

**COUNSEL:** *Maurice M. Cahillane, Jr.* (*William E. Mahoney* with him) for city of Springfield.

*Andrew M. Batchelor*, Assistant Attorney General, for Civil Service Commission.

*Bart W. Heemskerk* for Joseph McDowell.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.<sup>2</sup>

2 Chief Justice Ireland participated in the deliberation on this case prior to his retirement.

### OPINION BY: BOTSFORD

#### OPINION

BOTSFORD, J. Joseph McDowell was hired by the city of Springfield (city) in 1987 as a skilled laborer, and soon thereafter achieved the status of a permanent, tenured civil service employee of the city. In 1993, he received the first of two provisional promotions;<sup>3</sup> he worked in the second of these provisional positions until 2005, when the city terminated his employment. One issue we consider in this appeal is whether, despite being terminated from his provisional position, McDowell was entitled to appeal from his termination pursuant to the relevant provisions of [\*\*2] the civil service statute, *G. L. c. 31*, §§ 41-45; agreeing with the Civil Service Commission (commission), we conclude that he was. We also consider whether the commission, in deciding McDowell's appeal, permissibly could consider that subsequent to the city's discharge of McDowell, he had been indicted and then pleaded guilty to the crime of filing false tax returns. We decide that in the particular circumstances of this case, the commission was permitted to take the criminal proceeding against McDowell and its disposition into account, but that McDowell's indictment for filing false tax returns did not qualify as an in-

dictment "for misconduct in [McDowell's] ... employment" within the meaning of *G. L. c. 268A, § 25*, and thus a suspension based on the indictment would not have been valid.

3 A provisional employee is an employee in a civil service position who does not hold the position on a permanent basis, i.e., without any restrictions on duration of the employment. See *G. L. c. 31, § 1* (§ 1) (defining "[p]rovisional employee" and "[p]ermanent employee"). A civil service employee may receive a provisional promotion pursuant to *c. 31, § 15*. Like a provisional employee, a provisionally [\*\*3] promoted employee is not appointed on a permanent basis, and does not have tenure in the provisional promotion. See *G. L. c. 31, § 1* (defining "[t]enured employee").

1. *Background.* McDowell began working as a skilled laborer for the city in 1987. In 1989, he was promoted to the position of carpenter within the city's civil service system. After completing his probationary period, McDowell became a tenured employee in this position on a permanent basis, and served as such until [\*372] 1993. That year, McDowell was provisionally promoted to the position of assistant deputy of maintenance, and the next year, 1994, he was again provisionally promoted to become the deputy director of maintenance (deputy director) within the then-named facilities management department of the city. The position of deputy director included responsibility for assigning work to approximately forty tradesmen and skilled laborers, interacting with private vendors, and responding to emergencies.

On January 25, 2005, the city sent McDowell a notice of suspension, informing him that he was being suspended without pay from his duties as deputy director for five days, for inappropriate personal use of city property and for [\*\*4] conducting private business during working hours.<sup>4</sup> The city held a two-day disciplinary hearing and on April 15, 2005, issued a letter to McDowell notifying

him that his employment with the city had been terminated. On April 22, McDowell filed an appeal with the commission. The commission referred the case to the division of administrative law appeals (DALA), and a DALA magistrate conducted a full evidentiary hearing on December 18, 2006. At the hearing, the city made an oral motion to dismiss McDowell's appeal, arguing that because McDowell was appointed provisionally to his position as deputy director, the commission did not have jurisdiction to hear the appeal. The magistrate ultimately agreed and on August 17, 2007, recommended to the commission that McDowell's appeal be dismissed for lack of jurisdiction. Almost two and one-half years later, on February 12, 2010, the commission issued an interim decision rejecting the magistrate's recommendation to dismiss the appeal and concluding that an employee who held a tenured civil service position and who, while in such tenured position, is provisionally promoted to a different position from which he is later terminated, has the right [\*\*5] to appeal to the commission to challenge the just cause for his termination under *G. L. c. 31, § 41*.<sup>5</sup> On May 6, 2010, the commission issued a final decision on McDowell's appeal and concluded that although the [\*373] city was justified in disciplining McDowell on account of the use of city property in connection with his private business, there was not just cause to terminate his employment. The commission modified the termination, reducing it to a nineteen-month suspension to run from April 15, 2005, to November 15, 2006;<sup>6</sup> thereafter, McDowell was to be deemed reinstated to his permanent civil service position of carpenter.

4 Since 1994, McDowell was the sole proprietor of a company named McDowell and Sons, and in that capacity worked as a contractor, designing and installing kitchens.

5 In the same decision, the Civil Service Commission (commission) also determined that the one-year contract between McDowell and the city of Springfield (city), dated July 1, 2001, in which McDowell purported to agree that

the provisional position he held was not subject to the civil service law or any collective bargaining agreement, was unenforceable because against public policy. The city wisely does not challenge [\*\*6] this determination on appeal, and we do not discuss it further.

6 The commission's final decision contained a typographical or scrivener's error with respect to the end date of McDowell's suspension, which the commission subsequently corrected. There is no disagreement that the end date was to be November 15, 2006.

On April 13, 2007, while McDowell's appeal from his termination was pending before the commission but before it had been decided, McDowell was indicted for violation of 26 U.S.C. § 7206(1) (2006) (filing false return under oath),<sup>7</sup> and subsequently pleaded guilty on November 27, 2007.<sup>8</sup> Eight days after the issuance of the commission's final decision of May 6, 2010, the city filed a motion for reconsideration, requesting the commission to consider McDowell's indictment and conviction.<sup>9</sup> The city argued that if McDowell had still been working for the city at the time of his April, 2007, indictment -- which he would have been pursuant to the commission's subsequent decision imposing a nineteen-month suspension that would have ended November 15, 2006 -- the city would have suspended McDowell pursuant to *G. L. c. 268A, § 25*, upon his indictment, and would have terminated him under *G. L. c. 31, § 50*, [\*\*7] upon his conviction.<sup>10</sup> McDowell opposed the motion. On March 24, 2011, the commission allowed the city's motion in part, concluding that the city would have suspended McDowell without pay on April 13, 2007; would have terminated him effective November 27, 2007; and [\*374] would have had just cause to take both actions. The commission also modified its original determination that a nineteen-month suspension was to be imposed, ruling that the suspension should have been for six months. As a consequence of this modification, the commission's decision created a

reinstatement period for McDowell between October 16, 2005, and April 13, 2007.

7 The city and the commission refer to the statute under which McDowell was indicted as 26 U.S.C. § 2706(1). There is no statute designated as 26 U.S.C. § 2706. We assume the reference is intended to refer to 26 U.S.C. § 7206(1).

8 The indictment charged McDowell with filing false income tax returns for the years 2001 through 2005.

9 The city apparently raised the issue of including evidence of McDowell's indictment for and subsequent conviction of tax fraud at a prehearing conference in the case, but was instructed not to raise this issue before the commission issued [\*\*8] its final decision, but, if necessary, to raise it through a motion for reconsideration.

10 We discuss both of the cited statutes *infra*.

Both the city and McDowell sought judicial review of the commission's decision pursuant to *G. L. c. 30A, § 14*. In May, 2012, a judge in the Superior Court denied both parties' motions for judgment on the pleadings and affirmed the decision of the commission. The judge ruled that (1) the commission had reasonably interpreted *G. L. c. 31, § 41*, to permit an employee such as McDowell, who held a tenured civil service position but then accepted a provisional promotion, to appeal from his termination to the commission; and (2) the city was entitled to suspend McDowell under *G. L. c. 268A, § 25*, upon his indictment on April 13, 2007, and thereafter entitled to discharge him pursuant to *G. L. c. 31, § 50*, upon his conviction on November 27, 2007. McDowell and the city both appealed from the judge's decision to the Appeals Court, and we transferred the case to this court on our own motion.

2. *Discussion.* The city's appeal raises a single issue, the correctness of the commission's, and the judge's, determination that although McDowell was terminated from his

employment [\*\*9] in a position to which he was appointed only provisionally and in which he was not tenured, nonetheless he was entitled to appeal from his termination to the commission. McDowell agrees with the commission on this issue and raises separate issues in his appeal: (1) the commission should not have considered his 2007 indictment and conviction at all in connection with his appeal from the city's 2005 termination decision because these events occurred long after the city terminated him; (2) in any event, the commission erred in concluding the city permissibly could suspend him pursuant to *G. L. c. 268A, § 25*, on account of his indictment; and (3) his termination based on his conviction was improper and should be deemed void because the city, in violation of his statutory due process rights set out in *G. L. c. 31, § 41*, never gave him proper notice of this alleged basis for termination, or an opportunity for a hearing on it. We consider the city's and McDowell's claims separately, and in turn.

a. *Effect of a provisional promotion on a tenured civil service employee's right to appeal to the commission.* The city contends [\*\*375] that McDowell was not entitled to appeal from the termination of his employment [\*\*10] as deputy director to the commission under *G. L. c. 31, §§ 41-45*. We disagree.

Pursuant to *G. L. c. 31, §§ 41 (§ 41) and 43 (§ 43)*,<sup>11</sup> a civil service "tenured employee" may be terminated only for just cause and in accordance with certain procedural protections including written notice, a hearing, and an opportunity to appeal to the commission. A "tenured employee" is defined as one "who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2), [\*\*376] a promotional appointment on a permanent basis." *G. L. c. 31, § 1 (§ 1)*.

11 *General Laws c. 31, § 41 (§ 41)*, provides in pertinent part:

"Except for just cause and except in accordance

with the provisions of this paragraph, a tenured employee shall not be discharged, removed, [or] suspended for a period of more than five days . . . Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of [ *G. L. c. 31, §§ 41-45* ], and shall be given a full hearing concerning such [\*\*11] reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. . . .

" . . .

"If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first . . . paragraph[ ] of this section, such person may appeal to the commission as provided in [ *G. L. c. 31, § 43* ]."

*General Laws c. 31, § 43 (§ 43)*, in turn, provides in relevant part:

"If a person aggrieved by a decision of an appointing authority made pursuant to [ *§ 41* ] shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated

by the chairman of the commission. ...

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of the evidence, establishes [\*\*12] that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

The city reads this definition as indicating that McDowell, who had been promoted provisionally to the position of deputy director, held a "promotional appointment" but not on a permanent basis, and therefore was not a "tenured employee" at the time the city terminated him. Therefore, it argues, the protections that §§ 41 and 43 afford tenured employees, including the right to appeal to the commission, were not available to McDowell. The commission advances a different inter-

pretation, contending that the definition of "tenured employee" in § 1 describes two separate and independent categories of tenured civil service employees, and if a person (such as McDowell) meets the qualifications of the first category -- i.e., he [\*\*13] receives "an original appointment to a [civil service] position on a permanent basis" and completes the probationary period -- nothing in the language or structure of § 1 suggests that he loses the "tenured employee" status if he is later provisionally promoted. Rather, the commission states, as a "tenured employee," such a person is entitled to the procedural protections of §§ 41 and 43, including the right to appeal from an appointing authority's termination decision to the commission. In the commission's view, interpreting the statute in this manner is necessary to protect the loss of an employee's tenured status through no fault of his own.

Great weight is given to a "reasonable construction of a regulatory statute adopted by the agency charged with ... [its] enforcement." *School Comm. of Springfield v. Board of Educ.*, 362 Mass. 417, 441 n.22, 287 N.E.2d 438 (1972), quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-627, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1970). A reviewing court "must apply all rational presumptions in favor of validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Middleborough v. Housing* [\*\*14] *Appeals Comm.*, 449 Mass. 514, 524, 870 N.E.2d 67 (2007), quoting *Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 654, 433 N.E.2d 873 (1982). However, an administrative interpretation will not be followed if it is contrary to the "plain and unambiguous terms ... [in] a statute." *School Comm. of Springfield, supra*, quoting *Bolster v. Commissioner of Corps. & Taxation*, 319 Mass. 81, 86, 64 N.E.2d 645 (1946). The burden of proving the invalidity of an administrative action rests with the party challenging that action. *Middleborough, supra*. [\*377]

As the commission argues, its interpretation is consistent with the language used by the Legislature in the statutory provisions at issue: an individual who holds a tenured, permanent civil service position and is then provisionally promoted is still "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis." *G. L. c. 31, § 1*. See *Andrews v. Civil Serv. Comm'n*, 446 Mass. 611, 613, 846 N.E.2d 1126 (2006) ("A tenured employee in the civil service system is one who initially occupied a position by original appointment ... and has completed the probationary period, or one who has received a 'promotional appointment' on a permanent [\*\*15] basis ..."). Moreover, and importantly, the commission's construction of §§ 1 and 41 to permit a discharged provisional employee who previously held tenured employee status to appeal from his discharge to the commission is reasonably related to and furthers the purpose of the civil service law, which is "to free public servants from political pressure and arbitrary separation from the public service" while providing for removal of those that are incompetent or unworthy. See *Cullen v. Mayor of Newton*, 308 Mass. 578, 581, 32 N.E.2d 201 (1941).<sup>12</sup>

12 The commission stated that due to a lack of civil service examination administration, there was an over-use of provisional appointments and promotions, and that in these circumstances, providing the protections of §§ 41 and 43 to a provisionally promoted employee who initially held a tenured civil service position on a permanent basis would best promote the legislative intent of the civil service laws. We note that McDowell held his provisional appointment as deputy director for over ten years.

Because the commission's reading of the relevant statutory provisions is "reasonable, consistent with the statutory language and purposes, and appropriate," *Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 762, 933 N.E.2d 74

(2010), we accept it. Accordingly, McDowell, as a provisionally promoted civil service employee who previously held tenure in his original, appointed position of carpenter, was a "tenured employee" who retained the right to appeal from the termination of his employment with the city to the commission.<sup>13</sup>

13 The city suggests that this interpretation of §§ 1 and 41 of the civil service statute will require appointing authorities always to permit provisionally promoted employees who are terminated from employment "through their own fault" to return to and remain in their original, tenured civil service positions. The city is not correct. Although such a civil service employee has the right to appeal from his or her termination to the commission, if the commission finds just cause for the appointing authority's decision to terminate, the commission must affirm that decision. See *G. L. c. 31, § 43*. In such a case, the employee must leave his or her municipal employment altogether and has no right to return to the original, tenured position. A return to the original position may only occur if, pursuant to its authority under § 43, [\*\*17] the commission reverses the appointing authority's penalty of termination or, as in this case, modifies it.

We turn to McDowell's appeal. [\*378]

b. *Suspension for "misconduct in office"*.<sup>14</sup> The commission determined that the city, pursuant to *G. L. c. 268A, § 25* (§ 25), would have suspended McDowell without pay effective April 13, 2007, on account of his indictment for filing false tax returns. The city agrees with the commission's decision in this respect, but McDowell argues that the commission committed an error of law in ruling that § 25 authorized the city to suspend him upon his indictment. We agree with McDowell.

14 As previously indicated, the first issue McDowell raises in his appeal is

that it was error for the commission to have considered his 2007 indictment and conviction at all in this case, because they took place two years after the city terminated him, and as such, they cannot qualify as "after-acquired evidence" as the city suggested to the commission. The after-acquired evidence principle permits an employer to show that later-discovered but legitimate reasons for taking adverse employment action against an employee, if they had been known at the time, would have justified or mitigated [\*\*18] the employer's otherwise impermissibly discriminatory action (e.g., discharge) relating to that employee, and can serve to limit the employee's recovery. See, e.g., *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 815-816, 575 N.E.2d 1107 (1991). We agree with McDowell that his criminal indictment and conviction are not "after-acquired evidence" because they did not occur before the city terminated McDowell in 2005. Nevertheless, the fact that the criminal charges do not so qualify is of no import in this case because, as the judge concluded, at issue here are two separate terminations by the city: (1) the April 15, 2005, termination for misuse of city property; and (2) the November 27, 2007, termination based on McDowell's criminal conviction. The city asked the commission to consider McDowell's indictment for and conviction of filing false tax returns as a basis for the second termination only, and accordingly, the after-acquired evidence principle does not come into play. We consider the issue of two terminations *infra*.

A public employer may suspend an employee without pay pursuant to § 25 during any period the employee is under indictment for "misconduct in such office or employment."<sup>15</sup> [\*\*19] The applicability of § 25 in each case is "controlled by the duties and [\*379] obligations accompanying the particular employ-

ment," *Perryman v. School Comm. of Boston*, 17 Mass. App. Ct. 346, 349, 458 N.E.2d 748 (1983), and there must be a direct relationship between the employee's misconduct and the office held. *Id.* at 348. In general, a criminal indictment arising out of an employee's off-duty activities is not considered to be one implicating misconduct in office. *Dupree v. School Comm. of Boston*, 15 Mass. App. Ct. 535, 537, 446 N.E.2d 1099 (1983). "There are, however, circumstances where the crime charged, no matter where or when performed, is so inimical to the duties inherent in the employment that an indictment for that crime is for misconduct in office." *Id.* In addition, "[t]here are certain forms of employment which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of the employment." *Perryman*, *supra* at 349. Police officers fall into such a category; in order to perform their jobs, they "voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens," must "comport [\*\*20] themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel." *Attorney Gen. v. McHatton*, 428 Mass. 790, 793-794, 705 N.E.2d 252 (1999), quoting *Police Comm'r of Boston v. Civil Service Comm'n*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27 (1986). See *Dupree*, *supra* at 538, and cases cited. School teachers do as well, because they have an "extensive and peculiar opportunity to impress [their] attitude and views" on their students. *Dupree*, *supra*, quoting *Faxon v. School Comm. of Boston*, 331 Mass. 531, 534, 120 N.E.2d 772 (1954).

15 *General Laws c. 268A, § 25* (§ 25), provides in pertinent part:

"An officer or employee of a county, city, town or district ... may, during any period such officer or employee is under indictment for misconduct in such of-

office or employment ... be suspended by the appointing authority . ...

"Any person so suspended shall not receive any compensation or salary during the period of suspension . ..."

The commission argues that McDowell's indictment for filing false tax returns constitutes misconduct in office because the income from his privately owned business that he failed to report was, [\*21] in part, earned while he was working for the city and using public resources.<sup>16</sup> The commission asserts that because its determination that McDowell's charged tax fraud constituted misconduct in office was reasonable and supported by substantial evidence, that determination is entitled to deference.

16 The commission's decision on the city's motion for reconsideration summarizes the commission's conclusions that McDowell engaged in the following conduct: (1) used his city-owned cellular telephone on eleven occasions for a total of fourteen minutes during regular work hours for his private business; (2) used a city-owned facsimile machine at least twice for private business; (3) asked a city employee for advice about his private business during work hours; and (4) compiled or reviewed private business proposals during work hours. [\*380]

As earlier discussed in another context, deference is due when an agency interprets a statute it is charged with administering. *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481, 852 N.E.2d 1061 (2006). The commission, however, is not specifically charged with administering § 25, which is a statute that applies generally to all officers, employees, and appointing authorities [\*22] of county and local government. Accordingly, the commission's interpretation of this statute, while relevant, is not one to which we pay

special deference. Furthermore, ultimately, "the duty of statutory interpretation rests in the courts." *Commerce Ins. Co.*, *supra*. There is little or no evidence in the record before us linking the false tax returns at issue in McDowell's indictment -- which covered five separate years -- to the private business work the commission found McDowell undertook during the hours of his employment. As a consequence, the record did not provide a basis for the commission reasonably to have concluded that McDowell's indicted conduct represented misconduct in office within the meaning of § 25, rather than conduct qualifying as off-duty.

The city takes a different tack, arguing that the position of deputy director, like that of a police officer or teacher, holds a higher expectation of trust than other public service jobs, and therefore McDowell's off-duty conduct cannot be separated from his on-duty conduct. McDowell counters that at the time of his indictment in April of 2007, he would no longer have been a deputy director. Rather, pursuant to the terms of the [\*23] commission's original decision in this case, he would have returned to his original, tenured civil service position of carpenter following the suspension ordered by the commission. He argues that a carpenter is an ordinary employee "not subject to any special trust inherent in that position." Accordingly, his filing of false tax returns, a crime arising from off-duty conduct (at least based on the record here), was not "misconduct in office" within the meaning of § 25, and therefore the city could not have properly suspended him pursuant to that statute.

Had the commission issued in a more timely manner its decision to modify McDowell's termination to a nineteen-month suspension, it is reasonable to assume, as McDowell does, that at the time he was indicted in April, 2007, he already would have completed his suspension and been employed as a carpenter for [\*381] the city.<sup>17</sup> In these circumstances, the city's contention that McDowell's role as deputy director was one of public trust becomes essentially irrelevant.

The appropriate focus must be on the relationship between the crime charged in the indictment and McDowell's "duties and obligations" as a carpenter. *Perryman*, 17 Mass. App. Ct. at 349.

17 Although [\*\*24] the record does not specify the cause of the delay, the commission does acknowledge that "this appeal was longer than usual" and "it is regrettable that a decision was not issued in a more timely manner." McDowell's nineteen-month suspension would have run from April 15, 2005, to November 15, 2006, at which point presumably he would have returned to his position as a carpenter for the city and would have been serving in that position in April, 2007, when he was indicted for filing false returns. (Even with the commission's later modification of the nineteen-month suspension to a six-month suspension, the result would have been the same: McDowell would have been employed as a carpenter when he was indicted.)

The record is silent on the specific duties of a skilled carpenter in the employ of the city, but certainly the position is not on a par with that of a police officer or school teacher in terms of public trust. There is no suggestion that a carpenter, even one who is a public employee, is sworn to uphold the law as an integral part of his job, nor any contention that a carpenter has any particular opportunity to act as a role model for or impress his attitudes on young students. [\*\*25] Rather, this appears to be a case to which the rule that "[a]n indictment for a crime arising from an employee's off-duty conduct is not generally considered misconduct in office under *G. L. c. 268A, § 25*," squarely applies. *Dupree*, 15 Mass. App. Ct. at 537. The city would not have been entitled to suspend McDowell without pay from his employment as a skilled carpenter as of April 13, 2007, pursuant to § 25, and the commission's contrary ruling was error.

c. *Waiver of right to second termination hearing*.<sup>18</sup> Finally, McDowell argues that even

if the commission permissibly could [\*382] consider his conviction as a separate ground for his termination, McDowell was deprived of his due process rights because the city did not comply with the necessary procedural requirements pursuant to § 41 when, through its motion for reconsideration, it sought respectively to suspend and then terminate McDowell based on his indictment and subsequent conviction.<sup>19</sup> Section 41 requires, in part, that prior to suspending for more than five days or terminating a tenured employee, the appointing authority provide the employee with proper written notice. McDowell contends that he never received such notice as to the [\*\*26] city's intent to suspend and subsequently terminate his employment based on the indictment and conviction, and thus, he was not able to avail himself of his statutory due process rights to a hearing. Accordingly, the commission's decision approving of his termination on this ground should be rendered void and he should be reinstated as a carpenter and awarded back pay and benefits to October 15, 2005. We conclude that because McDowell failed to raise this issue properly before the commission, or the Superior Court, he has waived any claim to defective notice and therefore the commission's decision that he would have been terminated effective November 27, 2007, did not violate the procedural rights and protections that § 41 afforded him.

18 We have discussed in the previous section McDowell's challenge to the substantive legal authority of the city to suspend him based on the indictment for filing false tax returns that was issued on April 13, 2007. McDowell does not challenge on appeal the substantive legal authority of the city to terminate his employment based on his conviction of this crime, which occurred on November 27, 2007. Rather, his challenge to his termination from employment [\*\*27] based on the conviction, which we discuss in this section, is a procedural one. As to substantive authority, the city has stated that it was permitted to terminate

McDowell upon his conviction pursuant to *G. L. c. 31, § 50*, which provides in pertinent part, "No person ... shall ... be appointed to or employed in any ... [civil service] position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of [certain specified crimes not applicable in this case] . ..."

19 This is the second termination decision referred to previously. See note 14, *supra*.

Failure to raise an issue before an appointing authority, an administrative agency, and a reviewing court precludes a party from raising it on appeal. See *Albert v. Municipal Court of Boston*, 388 Mass. 491, 493-494, 446 N.E.2d 1385 (1983). While there may be exceptional circumstances requiring appellate review of an issue not raised before the agency or the court below so as to avoid injustice, the presumption of waiver "has particular force where the other party may be prejudiced by the failure to raise the point below." *Id.* at 494, [\*28] quoting *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 88, 360 N.E.2d 864 (1977). McDowell did not raise the claim of defective notice before the commission, did not appeal from the commission's decision to the Superior Court, and did not raise the issue before the judge in that court when responding to the city's appeal -- despite his knowledge that the city did in fact seek to suspend and terminate him as a result of his criminal conduct. Accordingly, the [\*383] issue is waived.<sup>20</sup>

20 The city and the commission argue that McDowell did receive written notice in the form of the city's motion for reconsideration. In the motion, the city stated that "upon indictment Mr. McDowell would have been suspended under [*G. L. c. 268A*] and upon conviction terminated." This language placed McDowell on notice that, even if the commission's decision modifying his April 15, 2005, termination to a sus-

pension was upheld, McDowell's employment with the city would have ceased upon his indictment and conviction in 2007. It is reasonable to assume that McDowell understood the city's intent to terminate him, as evidenced by his opposition to the city's motion for reconsideration that discussed at length why his criminal activity should not [\*29] be considered. After receiving what McDowell alleges was defective notice, he could have filed a complaint, pursuant to *G. L. c. 31, § 42*, within ten days in order to provide the city the opportunity to correct it, but he did not. McDowell also could have exercised his right to a hearing as provided in the commission's decision, but he declined. Once the commission issued its decision on the city's motion for reconsideration, McDowell could have filed an appeal with the commission contesting the termination, but he did not.

3. *Conclusion.* The judgment of the Superior Court affirming the decision of the commission is affirmed in part and reversed in part. For reasons explained in this opinion, the city did not have the authority to suspend McDowell without pay upon his indictment for filing false tax returns, and therefore the decision of the commission ruling that McDowell would have been suspended as of April 13, 2007, must be reversed in that respect. McDowell does not challenge the city's substantive legal authority to terminate him upon his conviction of the charged crime on November 27, 2007, and the commission's decision affirming McDowell's termination as of that date should [\*30] be affirmed. McDowell was not properly suspended during the period from October 15, 2005, the date on which the six-month suspension ordered by the commission would have been completed, to November 27, 2007, the date of McDowell's conviction. The case is remanded to the Superior Court for entry of an order remanding the case to the commission for further proceedings consistent with this opinion.

So ordered.

**SUPERINTENDENT-DIRECTOR OF ASSABET VALLEY REGIONAL  
VOCATIONAL SCHOOL DISTRICT vs. ANN MARIE SPEICHER**

**SJC-11563**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*2014 Mass. LEXIS 717*

**May 5, 2014, Argued  
September 11, 2014, Decided**

**NOTICE.** THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE MASSACHUSETTS REPORTER USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

**PRIOR HISTORY:** [\*1] Suffolk. Civil Action commenced in the Superior Court Department on May 18, 2011.

The case was heard by *Paul E. Troy, J.*, on motions for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES** *Arbitration*, Authority of arbitrator, Judicial review, Award, School committee. *Education Reform Act. Statute*, Construction. *School and School Committee*, Arbitration, Suspension from employment. *Public Employment*, Suspension.

**COUNSEL:** *Tim D. Norris* for the plaintiff.

*Sheilah F. McCarthy* for the defendant.

*Will Evans & Quesiyah S. Ali*, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

**JUDGES:** Present: Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

**OPINION BY:** SPINA

**OPINION**

SPINA, J. In this case we are asked to decide whether an arbitrator exceeded his authority by reviewing the merits of a twenty-day suspension of a school librarian having professional teacher status. The librarian had been suspended for "conduct unbecoming" the librarian, pursuant to *G. L. c. 71, § 42D*. The arbitrator applied a just cause standard of review and overturned the suspension on the ground that the school district failed to meet its burden of proof. The school district filed an action to vacate the arbitrator's award under *G. L. c. 150C, § 11*, and for declaratory relief under *G. L. c. 231A*. A judge in the Superior Court denied the school district's motion for judgment on the pleadings, and allowed the librarian's cross-motion [\*2] for judgment on the pleadings, thereby confirming the arbitrator's award. The school district appealed, and we transferred the case from the Appeals Court on our own motion. We hold that the arbitrator did not exceed his authority by reviewing the merits of the suspension. We further hold that the proper standard of review is whether the district sustained its burden of proving by a preponderance of the evidence the particular reason cited for the suspension. We affirm the judgment of the Superior Court.<sup>1</sup>

<sup>1</sup> We acknowledge the amicus brief filed by the Massachusetts Teachers Association in support of Ann Marie Speicher.

1. *Background.* The librarian, Ann Marie Speicher, had been employed as a school librarian for at least three consecutive school years by the Assabet Valley Regional School District (district) as of October 29, 2009. As such, she was considered a "teacher" under *G. L. c. 71, § 41*, and entitled to professional teacher status under *G. L. c. 71 § 42*. A district employee with professional teacher status may seek review of a suspension by following the arbitration procedures set forth in § 42. See *G. L. c. 71, § 42D*.

The district superintendent, based on an investigation conducted by Speicher's principal, suspended Speicher without [\*3] pay for twenty days for conduct deemed by the superintendent to be unbecoming a "teacher." The superintendent determined that Speicher had vouched for a student's presence in the library for an amount of time in excess of the time the student actually was in the library -- time that otherwise would have constituted the student's unexcused absence from a classroom. Before being suspended, Speicher was afforded all the procedural steps and safeguards set forth in *G. L. c. 71, § 42D*, including a predisciplinary meeting with the superintendent.

Speicher sought review of the suspension by an arbitrator, pursuant to § 42D.<sup>2</sup> The district maintained at arbitration that the scope of arbitration was limited to the question whether Speicher received the procedural due process safeguards set forth in § 42D, and not a review of the merits of her suspension. Speicher, in contrast, contended that she was entitled to a review of the merits of the suspension decision, and that the standard of review should be "just cause." The arbitrator conducted an evidentiary hearing, and he considered the merits of the suspension. He made findings of fact and rulings of law. He applied a "just cause" standard and concluded that the district [\*4] had failed to sustain its burden of proof as to whether Speicher had in fact vouched for the student, as alleged. He determined that Speicher's twenty-day suspension violated § 42D and must be rescinded, that Speicher should be made whole for all lost wages and

benefits resulting from the suspension, and that all references to the suspension should be removed from her personnel file. In confirming the arbitrator's award, the Superior Court judge concluded that the arbitrator was not shown to have exceeded his authority by reviewing the merits of the suspension, reasoning that nothing in § 42D prohibited the arbitrator from reviewing the superintendent's decision.

2 The arbitration proceeded pursuant to statute, namely, *G. L. c. 71, § 42D*, and not pursuant to a collective bargaining agreement.

2. *Statutory framework.* *General Laws c. 71, § 42D*, the teacher *suspension* statute, states:

"The superintendent may suspend any employee of the school district subject to the provisions of this section. The principal of a school may suspend any teacher or other employee assigned to the school subject to the provisions of this section. Any employee shall have seven days written notice of the intent to suspend and the grounds upon which the suspension is [\*5] to be imposed; provided, however, that the superintendent may, for good cause, require the immediate suspension of any employee, in which case the employee shall receive written notice of the immediate suspension and the cause therefor at the time the suspension is imposed. The employee shall be entitled (i) to review the decision to suspend with the superintendent or principal if said decision to suspend was made by the principal; (ii) to be represented by counsel in such meetings; [and](iii) to provide information pertinent to the decision and to the employee's status.

"No teacher or other employee shall be suspended for a period exceeding one month, except with the consent of the teacher or other employee, and no teacher or other employee shall receive compensation for any period of lawful suspension.

"No teacher shall be interrogated prior to any notice given to him relative to the suspension unless the teacher or other employee is notified of his right to be represented by counsel during any such investigation. A suspended teacher or other employee may seek review of the suspension by following the arbitration procedures set forth in [§ 42, the teacher dismissal statute]. Nothing in [\*6] this section shall be construed as limiting any provision of a collective bargaining agreement with respect to suspension of teachers or other employees." (Emphasis added.)

*General Laws c. 71, § 42, the teacher dismissal statute, states:*

"A principal may dismiss or demote any teacher or other person assigned full-time to the school, subject to the review and approval of the superintendent; and subject to the provisions of this section, the superintendent may dismiss any employee of the school district. ...

"A teacher with professional teacher status, pursuant to [§ 41], shall not be dismissed except for inefficiency, incompetency, incapacity, *conduct unbecoming a teacher*, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to [§ 38] of this chapter *or other just cause*.

"A teacher with professional teacher status may seek *review of a dismissal decision* within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. ...

*"At the arbitral hearing, the teacher and the school district may be represented by an attorney or other representative, present evidence, and call witnesses and the school district shall [\*7] have the burden of proof. In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards. ...*

"The arbitral decision shall be subject to judicial review as provided in [c. 150C]." (Emphases added.)

*Sections 42 and 42D* as quoted above reflect amendments made by the Education Reform Act of 1993 (act) to provide for arbitration of dismissals and suspensions, among the many other features of the act. See St. 1993, c. 71, §§ 44, 47.

3. *Discussion.* The district contends that the plain language of *G. L. c. 71, § 42D*, which contains no standard of review, contemplates only arbitral review of the procedures followed by the superintendent in cases of teacher suspension, and not arbitral review of the merits of the suspension. Speicher argues that notwithstanding the absence of a standard of review in § 42D, the language of that statute that affords suspended employees "review of the suspension" means that she was entitled to arbitral review of the merits of her suspension. Speicher further contends that the arbitrator correctly employed a "just cause" standard of review because [\*8] it was reasonable to do so

where § 42D is silent as to the standard of review.

"Absent proof of one of the grounds specified in *G. L. c. 150C*, § 11, a reviewing court is 'strictly bound by the arbitrator's factual findings and conclusions of law, even if they are in error.'" *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 660-661, 925 N.E.2d 803 (2010), quoting *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758, 784 N.E.2d 11 (2003). One such ground for vacating an award is that the arbitrator exceeded his authority. *G. L. c. 150C*, § 11 (a) (3). Where, as here, "the source of authority to arbitrate ... is a statute, and not an agreement, judicial review of an arbitrator's interpretation of the meaning of the authorizing statute ... and the scope of his or her authority thereunder is broader and less deferential than in cases involving judicial review of an arbitrator's decision relating to similar issues arising out of an agreement of the parties." *Atwater v. Commissioner of Educ.*, 460 Mass. 844, 856-857, 957 N.E.2d 1060 (2011). See *School Dist. of Beverly v. Geller*, 435 Mass. 223, 229, 755 N.E.2d 1241 (2001) (Cordy, J., concurring).

We begin our analysis with perhaps two of the most familiar rules of statutory construction. First, "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, [\*9] to the end that the purposes of its frames may be effectuated," *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, 382 Mass. 580, 585, 416 N.E.2d 1373 (1981), quoting *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513, 333 N.E.2d 450 (1975); and second, "[t]he statutory language itself is the principal source of insight into the legislative purpose." *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, *supra*, citing *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37, 364 N.E.2d 1215 (1977).

Turning to the statute, § 42D provides that any employee who has been suspended thereunder may seek "review of the suspension." The statute further specifies that the form of review is "arbitration," and the "procedures" for seeking review are "set forth in [§ 42]." Section 42 contains the phrase "review of a dismissal decision," and no one suggests that a "review" under § 42 means anything but full arbitral review of the merits of the dismissal. The word "review" (by arbitration) was added to both §§ 42 and 42D by the act. Where the word "review" appears in these related sections of the same statutory enactment, it should be given the same meaning in both sections. See *Hallett v. Contributory Retirement Appeal Bd.*, 431 Mass. 66, 69, 725 N.E.2d 222 (2000) ("Where words in a statute are used in one part of a statute in a definite sense, they should be given the same meaning in another part of the statute"). In this context "review of the suspension" means review of the decision to suspend. Stated otherwise, and contrary to the district's argument, it means review of the merits of the suspension as well as the [\*10] procedures followed to reach the decision.

Moreover, we said in *Atwater v. Commissioner of Educ.* that "the changes to the dismissal process for teachers with professional teacher status reflect a legislative judgment that it was in the public interest to 'depoliticize[e] and streamlin[e] the dismissal process by requiring that contested dismissals proceed directly to arbitration.'" 460 Mass. at 856, quoting *Geller*, 435 Mass. at 225 n.1 (Cordy, J., concurring). The same reasoning applies to suspensions, particularly where dismissals and suspensions were addressed at the same time by the Legislature. We note that arbitration of the merits of a suspension would further the legislative goal of depoliticizing the disciplinary process, whereas disallowing arbitration of a suspension would have the opposite effect.

Finally, although not as consequential as dismissals, suspensions are nonetheless serious enough to warrant review, as they can have significant future consequences. Here, in addition to her twenty-day suspension, Speicher was warned that any further misconduct would

result in dismissal. For these reasons, we conclude that the arbitrator acted within his authority when he considered the merits of Speicher's suspension.

We next turn to the standard of [\*11] review. The standard of review is a question of law. If the arbitrator applied an incorrect standard of review, that error generally is not reviewable. See *School Comm. of Lowell v. Robishaw*, 456 Mass. at 660. However, because the issue of the correct standard of review has been briefed fully by parties, is a matter of public importance, and is likely to recur, we address it. See *Smith v. McDonald*, 458 Mass. 540, 543 n.4, 941 N.E.2d 1 (2010). The parties have observed correctly that § 42D does not contain a standard of review. However, § 42D has incorporated by specific reference those portions of § 42 that govern the arbitral procedure for reviewing dismissals of school district employees. This is an appropriate legislative procedure. See 1A N.J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22:25 (7th ed. 2012); 2B Singer & Singer, *supra* at §§ 51:7, 51:8. It is not without complication. "A statute of specific reference incorporates provisions as they exist at the time of adoption, without subsequent amendments, unless a legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention, subsequent amendment of the referred statute has no effect on the reference statute." 2B Singer & Singer, *supra* at § 51:8 (footnotes omitted). See *Salem & Beverly Water Supply Bd. v. Commissioner of Revenue*, 26 Mass. App. Ct. 74, 77-78, 523 N.E.2d 473 (1988). Here, the arbitral procedure [\*12] of § 42 was specifically incorporated by reference in § 42D by St. 1993, c. 71, § 47. *Section 42* has since been amended, but the amendment does not relate to the subject matter of this appeal, and the amendment does not take effect until September 1, 2016. See St. 2012, c. 131, § 3.

The arbitral procedures of § 42 in turn incorporate the standard of review set forth within that section, which places the burden of

proof on the school district. *Section 42* further provides that when determining whether the district has met its burden of proof, the arbitrator must focus upon the "grounds for dismissal consistent with this section."<sup>3</sup> Thus, the permissible grounds for dismissal under § 42 also are incorporated by reference into the arbitral procedures set forth in § 42, and they apply to suspensions under § 42D. The grounds for discipline enumerated in § 42, are "inefficiency, incompetency, incapacity, *conduct unbecoming a teacher*, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to [§ 38] of this chapter *or other just cause*" (emphases added).<sup>4</sup> In the context of § 42, the enumerated grounds for discipline constitute just cause for discipline, in addition to "other just cause." See *Geller*, 435 Mass. at 233 (Cordy, J., [\*13] concurring). Thus, when reviewing a suspension, the statute requires an arbitrator to determine (1) whether the district sustained its burden of proving that the teacher committed the conduct alleged, and (2) whether the conduct alleged is serious enough to meet an enumerated ground providing just cause for suspension, i.e., not trivial misconduct. See *School Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 117, 12 N.E.3d 384 (2014), citing *Geller*, 435 Mass. at 231 n.7 (Cordy, J., concurring). The statute does not, however, empower an arbitrator to substitute his judgment for that of the superintendent as to the level of discipline that is warranted, according to some generalized notion of "just cause." See *Zagaeski*, *supra* at 115-116; *Geller*, *supra* at 231, 234 (Cordy, J., concurring).

3 *Section 42*, fifth par., states that, "[i]n determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards." Arbitrators also should consider these factors when reviewing suspensions pursuant to § 42D.

4 Although these grounds apply to suspensions as well as dismissals, the

seriousness or egregiousness of the misconduct or omission necessarily will affect the nature and degree of the discipline.

Here, the arbitrator did not [\*14] act in excess of his authority by reviewing the merits

of Speicher's suspension and concluding that the district had not met its burden of proving the alleged just cause for suspension.

Judgment affirmed.

**GAIL E. TWOMEY & others<sup>1</sup> vs. TOWN OF MIDDLEBOROUGH & others<sup>2</sup>  
(and a consolidated case<sup>3</sup>)**

1 Alice L. Carey, Margaret Y. Chace, Jane E. Guimares, and John R. Hilsabeck, Jr. For ease of reference, we refer to these plaintiffs collectively as the Twomey plaintiffs.

2 The board of selectmen and the town manager of Middleborough.

3 Charles Armanetti & others vs. Town of Middleborough & others. For ease of reference, we refer to these plaintiffs collectively as the Armanetti plaintiffs.

**SJC-11435**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*468 Mass. 260; 10 N.E.3d 618; 2014 Mass. LEXIS 395*

**February 6, 2014, Argued  
June 2, 2014, Decided**

**PRIOR HISTORY:** [\*\*\*1]

Plymouth. Civil actions commenced in the Superior Court Department on October 30, 2009, and June 1, 2010. After consolidation, the case was heard by Jeffrey A. Locke, J., on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**HEADNOTES**

*Municipal Corporations, Home rule, Group insurance, Selectmen, Town meeting, Insurance, Group. Retirement. Middleborough.*

**COUNSEL:** Sandra C. Quinn for Gail E. Twomey & others.

Thomas J. Burns, III, for Charles Armanetti & others.

Leo J. Peloquin for the defendants.

**JUDGES:** Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

**OPINION BY:** SPINA

**OPINION**

[\*260] [\*\*619] SPINA, J. In this case, we consider which municipal entity, the board of selectmen or the town meeting, has the authority to establish the percentage of the total monthly premium for insurance coverage by a health maintenance organization (HMO) that is to be paid by a town's retired employees. We conclude [\*261] that, pursuant to *G. L. c. 32B, § 16*, the board of selectmen has such authority.

1. Statutory framework. Under the Home Rule Amendment, art. 89, § 6, of the Amendments to the Massachusetts Constitution, municipalities of the Commonwealth may choose to provide health insurance coverage to their employees. See *Cioch v. Treas-*

urer of Ludlow, 449 Mass. 690, 695, 871 N.E.2d 469 (2007). *General Laws c. 32B* [\*\*\*2] is a so-called "local option" statute that governs the provision of group insurance (medical and certain other coverages) once a municipality has voted to accept the terms of the statute.<sup>4</sup> See *Connors v. Boston*, 430 Mass. 31, 37, 714 N.E.2d 335 (1999); *Yeretsky v. Attleboro*, 424 Mass. 315, 316-317, 676 N.E.2d 1118 (1997). Recognizing that various municipalities may have different priorities, we have said that "a municipality is permitted to adopt 'only those provisions of the statute that best accommodate its needs and budget.'" *Cioch*, *supra* at 697, quoting *Yeretsky*, *supra* at 317. Where the municipality at issue is a town, acceptance of many, but not all, of the provisions of *G. L. c. 32B* is "by vote of the inhabitants at a town meeting." *Yeretsky*, *supra* at 317 n.5. See *G. L. c. 32B*, § 10.

4 For the sake of simplicity, we use the term "municipality" in this opinion to refer to the counties, cities, towns, and districts covered by *G. L. c. 32B*.

When it was enacted, *G. L. c. 32B*, inserted by St. 1956, c. 730, § 1, authorized municipalities to offer certain employees and their dependents group indemnity health insurance coverage. See *G. L. c. 32B*, §§ 1, 3. Beginning in 1971, municipalities were given the option of making [\*\*\*3] available to such individuals the services of an HMO by accepting *G. L. c. 32B*, § 16, inserted by St. 1971, c. 946, § 5.<sup>5</sup> See *Yeretsky*, 424 Mass. at 317 [\*\*620] (statutory language governing traditional indemnity group health insurance programs differs from language governing HMOs). *Section 16* takes effect in a town when it is accepted "by vote of the board of selectmen." *G. L. c. 32B*, § 16.

5 *General Laws c. 32B*, § 16, uses the term "health care organization," as defined in *G. L. c. 32B*, § 2. Throughout this opinion, we shall use the more common term, "health maintenance organization" (HMO). See *Yeretsky v. At-*

*tleboro*, 424 Mass. 315, 317 n.6, 676 N.E.2d 1118 (1997).

*General Laws c. 32B*, § 16, states, in pertinent part:

"Upon acceptance of this section . . . , the appropriate [\*262] public authority of the governmental unit shall enter into a contract . . . to make available the services of [an HMO] to certain eligible and retired employees and dependents . . . , 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 . . . . The appropriate public authority shall negotiate such a contract of insurance for and on behalf and in the name of [\*\*\*4] the governmental unit for such a period of time not exceeding five years as it may in its discretion, deem to be the most advantageous to the governmental unit and the persons insured hereunder. . . . Eligible persons . . . shall pay a minimum of ten percent of the total monthly premium cost or rate for coverage under this section, . . . provided . . . that such eligible persons shall in no event be required to pay more than fifty percent of such total monthly premium cost or rate. . . . The appropriate public authority may adopt such rules and regulations as may be necessary for the administration of this section" (emphasis added).

The term "governmental unit" is defined as "any political subdivision of the [C]ommonwealth." *G. L. c. 32B*, § 2. With respect to a town, the "appropriate public authority" that shall contract for the services of an HMO is "the selectmen." *Id.*

2. Factual and procedural background. The facts are taken from the parties' joint statement of material facts, which we have supplemented with undisputed facts from the record. The Twomey plaintiffs are retired public school employees in the town of Middleborough (town), and each receives a retirement allowance from [\*\*\*5] the Massachusetts Teachers' Retirement System (MTRS) pursuant to *G. L. c. 32*. The Armanetti plaintiffs are retired town employees, including former teachers, police officers, fire fighters, and other public servants. Those individuals who are retired teachers receive a retirement allowance from the MTRS, and the other retired employees receive an allowance from the Plymouth County Retirement System pursuant to *G. L. c. 32*. The Armanetti plaintiffs also include the Middleborough Retirees Insurance Group (MRIG), a voluntary association of individuals comprised of retired town employees.

The town is a municipal corporation and a political subdivision of the Commonwealth. It operates under an open town meeting [\*263] form of government. The town meeting is a legislative body,<sup>6</sup> and it makes appropriations with respect to the town's budget. Registered voters are authorized to place matters necessitating action on a town meeting warrant pursuant to *G. L. c. 39, § 10*.<sup>7</sup> A board of selectmen acts as [\*\*621] the chief executive officer of the town,<sup>8</sup> and it appoints a town manager to handle the town's affairs. See generally D.A. Randall & D.E. Franklin, *Municipal Law and Practice* § 6.13 (5th ed. 2006).

6 *General Laws c. 4, § 7, [\*\*\*6] Eighteenth B*, provides that the term "legislative body," when used in connection with the operation of municipal government, "shall include that agency of the municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled a city council, board of aldermen, town council, town meeting or by any other title."

7 The purpose of a town meeting warrant and the articles contained therein is to inform the town's residents of the time and place of a meeting, as well as the subjects that will be discussed and acted on during such meeting. See *G. L. c. 39, § 10*; *Wolf v. Mansfield*, 67 *Mass. App. Ct.* 56, 59, 851 *N.E.2d* 1115 (2006).

8 *General Laws c. 4, § 7, Fifth B*, provides that the term "chief executive officer," when used in connection with the operation of municipal government, "shall include the mayor in a city and the board of selectmen in a town unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter."

The town offers group health insurance coverage to both its active and retired employees pursuant to [\*\*\*7] *G. L. c. 32B*.<sup>9</sup> One of the insurance plans that the town offers to retirees pursuant to *G. L. c. 32B, § 16*, is HMO Blue New England (HMO Blue).<sup>10</sup> At all relevant times, the Twomey plaintiffs and the Armanetti plaintiffs were enrolled in this plan. The portion of the premium [\*264] cost for which they were responsible was deducted from their retirement allowances and transferred to the town pursuant to *G. L. c. 32*. At the time each plaintiff retired, the town paid ninety per cent of that retiree's insurance premium for HMO Blue coverage, and the retiree paid the remaining ten per cent.<sup>11</sup>

9 Because the Twomey plaintiffs and the Armanetti plaintiffs are retired employees of the town, they are not represented by an employee organization under *G. L. c. 150E*. Prior to their retirements, however, all of the Twomey plaintiffs and some of the Armanetti plaintiffs were members of collective bargaining units. The collective bargaining agreements (CBA) in effect at the time they retired did not include express language about future contributions from the town toward the cost of their health insurance premiums.

Nonetheless, when they retired, the town continued to pay the same percentage of their health [\*\*\*8] insurance premiums as it then was paying for active employees under the CBAs. The remaining Armanetti plaintiffs were not members of any collective bargaining unit during the tenure of their employment with the town. When they retired, the town continued to pay the same percentage of their health insurance premiums as it then was paying for nonunionized active employees.

10 It is not contested that *G. L. c. 32B, § 16*, was accepted "by vote of the board of selectmen." *Id.*

11 It appears from the record that sometime during the spring of 2009, the town's contribution to the HMO premiums of active employees was reduced to eighty per cent.

On April 16, 2009, MRIG submitted a written request to the board of selectmen, in accordance with *G. L. c. 39, § 10*, to include an article in a town meeting warrant (article 9), pertaining to "freezing" the percentage of the town's contribution to the health insurance premiums for retired employees at ninety per cent.<sup>12</sup> Article 9 was certified for inclusion on the warrant for a special town meeting to be held on May 26, 2009. On May 7, 2009, the warrant was published in the Middleboro Gazette, a local newspaper.

12 The warrant provided notice that the special [\*\*\*9] town meeting would act on the following: "ARTICLE 9. To see if the Town will vote to raise and appropriate and/or transfer a sum of money from the Town's Employee Fringe Benefits, Health and Life Insurance account, Taxation, free cash, another specific available fund or Stabilization Fund, an existing appropriation or account or other available source or by borrowing to continue to contribute the same monetary percentage of the premium of a retired Town of Middleborough employee's contributory group,

general or blanket hospital, surgical, dental and other health insurance, that the Town contributed for the retired Town of Middleborough employee at the date of the Town of Middleborough retiree's retirement from the Town of Middleborough, but in no case less than in effect in fiscal year 2007, or act anything thereon." For the 2007 fiscal year, the town continued to pay ninety per cent of the retirees' insurance premiums for HMO coverage, and the retirees paid the remaining ten per cent.

[\*\*622] On May 11, 2009, the board of selectmen voted that "the contribution to be put in by retirees be the same as the general government employees, including the end of co-pay reimbursements effective July [\*\*\*10] 1, 2009."<sup>13</sup> The effect of this vote was to increase the portion of the premium paid by retired employees for HMO Blue coverage from ten per cent to twenty per cent. At the time of this vote, the board of selectmen was aware that a special town meeting had been scheduled for May 26, and [\*265] that article 9 would be considered by registered voters. The town's treasurer proceeded to mail letters to retired employees, including the Twomey plaintiffs and the Armanetti plaintiffs, informing them that the portion of the HMO premium for which they were responsible had increased to twenty per cent of the total premium, effective July 1, 2009.

13 The town meeting has not adopted any charter, bylaw, rule, or ordinance expressly delegating to either the board of selectmen or the town manager the responsibility for determining how the HMO premium should be apportioned between the town and its retired employees.

On May 26, 2009, the special town meeting was held. A quorum was present to conduct business, and article 9 was approved.<sup>14</sup> However, the town never implemented it. Since July 1, 2009, retired employees have been paying twenty per cent of the premium

for their HMO coverage in accordance with the [\*\*\*11] vote of the board of selectmen.

14 Prior to the vote at the special town meeting, town counsel advised voters that article 9 only could serve as a recommendation to the board of selectmen regarding the town's contribution to the retirees' health insurance premiums.

On October 30, 2009, the Twomey plaintiffs filed an action in the Superior Court against the town, the board of selectmen, and the town manager (collectively, the defendants), challenging their refusal to comply with the vote of the May 26, 2009, special town meeting to pay ninety per cent of the HMO premiums for retired employees. Count I of the second amended complaint, filed on July 15, 2010, sought a declaratory judgment pursuant to *G. L. c. 231A*, stating that the proper and lawful vote of the special town meeting could not be set aside by a vote of the board of selectmen. Count II of the second amended complaint requested relief in the nature of mandamus. The Twomey plaintiffs sought an order, retroactive to July 1, 2009, requiring the defendants to implement the vote of the special town meeting and to make the Twomey plaintiffs whole for the premium payments that they had made in excess of the amount authorized by the [\*\*\*12] special town meeting.

On June 1, 2010, the Armanetti plaintiffs filed a complaint for declaratory relief pursuant to *G. L. c. 231A* in the Superior Court. They presented the same claim that had been raised by the Twomey plaintiffs, namely, that the board of selectmen did not have the authority to ignore the vote of the special town meeting and raise the HMO premium contribution percentage for retired town employees from ten per cent to twenty per cent.<sup>15</sup> The Twomey plaintiffs and the defendants subsequently [\*266] filed a motion pursuant to *Mass. R. Civ. P. 42 (a)*, as amended, 423 Mass. 1402 (1996), to consolidate the two civil actions for the purpose of deciding the town meeting claims. The Armanetti plaintiffs op-

posed the motion. Nonetheless, on January 5, 2011, the motion was allowed.

15 The action filed by the Armanetti plaintiffs raised several additional grounds for declaratory relief. Because those grounds are not relevant to these proceedings, we do not discuss them further. See note 17, *infra*.

[\*\*623] On June 3, 2011, the Twomey plaintiffs and the Armanetti plaintiffs filed separate motions for summary judgment pursuant to *Mass. R. Civ. P. 56*, 365 Mass. 824 (1974).<sup>16</sup> They asserted that the May [\*\*\*13] 26, 2009, vote of the special town meeting was lawful, that the town meeting acted within its authority to freeze the HMO premium contribution rate for the town's retired employees at ten per cent, and that the defendants did not have the discretion to refuse to implement the special town meeting vote. The defendants filed a cross motion for summary judgment. They argued that the board of selectmen had the legal authority to determine the premium apportionment for town retirees pursuant to its May 11, 2009, vote.

16 The Armanetti plaintiffs only moved for summary judgment on Count I of their complaint for declaratory relief, which pertained to the town meeting claim.

Following a hearing, a judge allowed the defendants' motion and denied the motions filed by the Twomey plaintiffs and the Armanetti plaintiffs. The judge ordered that a declaration enter stating that under *G. L. c. 32B, § 16*, the board of selectmen had the authority to determine the health insurance premium contribution rate for town retirees, and the town meeting could not override this decision. Therefore, the defendants were not required to comply with the May 26, 2009, vote of the special town meeting that approved article [\*\*\*14] 9 because the board of selectmen's May 11, 2009, vote controlled the matter. The judge denied the Twomey plaintiffs' request for an order in the nature of mandamus. Judgment entered for the defendants.<sup>17</sup>

The Twomey plaintiffs and the Armanetti plaintiffs appealed the judge's [\*267] decision, the case was entered in the Appeals Court, and we transferred it to this court on our own motion.

17 Summary judgment against the Armanetti plaintiffs was inadvertently entered with respect to all of the claims raised in their complaint, rather than solely with respect to their town meeting claim. In order to preserve their other claims, they filed a motion for entry of a separate and final judgment pursuant to *Mass. R. Civ. P. 54 (b)*, 365 Mass. 820 (1974), that would dispose only of their town meeting claim. The Armanetti plaintiffs subsequently decided to dismiss the remainder of their claims, with the assent of the defendants, and to pursue an appeal only on the town meeting claim. Consequently, the Armanetti plaintiffs, the Twomey plaintiffs, and the defendants filed a joint motion for entry of final judgment on Count I of the Armanetti plaintiffs' complaint and for dismissal of all of the remaining [\*\*\*15] counts in that complaint. On July 31, 2012, a judge allowed the joint motion.

3. Standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991); *Mass. R. Civ. P. 56 (c)*, as amended, 436 Mass. 1404 (2002). We review a decision to grant summary judgment de novo. See *Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 215, 786 N.E.2d 817 (2003). "In a case like this one where both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment is to enter." *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 n.4, 921 N.E.2d 121 (2010). See *DiLiddo v. Oxford St. Realty, Inc.*, 450 Mass. 66, 70, 876 N.E.2d 421 (2007).

4. Discussion. The thrust of the arguments by the Twomey plaintiffs and the Armanetti plaintiffs is that *G. L. c. 32B*, § 16, does not confer authority on the board of selectmen to set the HMO premium contribution rate that is to be paid by the town's retired employees. Rather, [\*\*624] they contend that it is solely the province of the town meeting, which serves as the town's [\*\*\*16] legislative body, to act on matters of municipal finance. These matters include establishing the HMO contribution rate for retirees at ninety per cent, not eighty per cent. In the view of the Twomey plaintiffs and the Armanetti plaintiffs, because the Legislature did not expressly delegate this responsibility to the board of selectmen, that entity functions exclusively to carry out those measures enacted by the town meeting. We disagree.

Our analysis of *G. L. c. 32B*, § 16, is guided by the familiar principle 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, [\*268] to the end that the purpose of its framers may be effectuated." *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). See *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001), and cases cited. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant [\*\*\*17] with sound reason and common sense. See *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996); *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233, 240, 475 N.E.2d 1201 (1985); *Tilton v. Haverhill*, 311 Mass. 572, 577-578, 42 N.E.2d 588 (1942).

The broad purpose of *G. L. c. 32B* is to allow municipalities to provide group insurance (medical and certain other coverages) to their active and retired employees and their employees' dependents. *G. L. c. 32B*, § 1. See

*Yeretsky*, 424 Mass. at 316. Where, as here, the municipality at issue is a town, *G. L. c. 32B*, § 16, explicitly confers authority on the board of selectmen to make available "to certain eligible and retired employees and dependents" the services of an HMO. *G. L. c. 32B*, § 16. This particular statutory section takes effect upon its acceptance by the board of selectmen, thereby rendering its provisions applicable to the town. *Id.* It is the board of selectmen that is empowered to negotiate and enter into a contract for health insurance that the board deems to be "in the best interest of" and "the most advantageous to" the town and the persons insured thereunder. *Id.* Moreover, it is the board of selectmen that is authorized to adopt rules and [\*\*\*18] regulations that may be necessary to the administration of § 16. *Id.* The plain language of this statutory section indicates that once § 16 has been accepted by a town, the board of selectmen is the municipal entity designated by the Legislature to implement its various provisions. One of those provisions states that eligible persons shall pay between ten per cent and fifty per cent of the total monthly premium for HMO coverage. *Id.*

We recognize, and the parties acknowledge, that *G. L. c. 32B*, § 16, is silent with respect to exactly how the total monthly premium should be apportioned between a town and its retired employees. Nonetheless, given the broad authority conferred on the board of selectmen by the Legislature with respect to the [\*269] implementation of § 16, and given the complete absence of any reference to the town meeting in that same statutory section, it is reasonable to conclude that it is the province of the board of selectmen to determine what portion of the total monthly premium for HMO coverage should be borne by the town's retired employees. Had the Legislature intended to confer on the town [\*\*625] meeting the authority to set HMO premium contribution rates for town retirees, it [\*\*\*19] would have included language to that effect in § 16. See, e.g., *G. L. c. 32B*, § 9A (town shall contribute one-half of premium to be paid by retired employees for group indemnity insurance when approved by vote of

town at town meeting). We will not read into a statute, here § 16, a provision that the Legislature did not put there. See *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 803, 711 N.E.2d 589 (1999).

We find instructive the 2011 amendments to *G. L. c. 32B* wherein the Legislature authorized municipalities to implement health insurance plan design changes outside the collective bargaining process. St. 2011, c. 69, § 3. As part of this reform, the Legislature prohibited a "public authority" -- with regard to a town, the board of selectmen -- from increasing before July 1, 2014, "the percentage contributed by retirees . . . to their health insurance premiums from the percentage that was approved by the public authority prior to and in effect on July 1, 2011" (emphasis added). *G. L. c. 32B*, § 22 (e). See *G. L. c. 32B*, § 2 (defining "[a]ppropriate public authority"). Although the 2011 amendments to *G. L. c. 32B* are not applicable to the actions filed by the Twomey plaintiffs [\*\*\*20] and the Armanetti plaintiffs, the language of § 22 (e) provides important insight into the Legislature's understanding of the operation of § 16. The Legislature is presumed to be aware of existing statutes when it enacts a new one. See *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 582-583, 631 N.E.2d 555 (1994). The language of *G. L. c. 32B*, § 22 (e), clearly reflects the Legislature's understanding that, in a town, the board of selectmen determines the HMO premium contribution rate for retired employees.

Generally speaking, "[a] municipality can exercise no direction or control over one whose duties have been defined by the Legislature." *Breault v. Auburn*, 303 Mass. 424, 428, 22 N.E.2d 46 (1939), quoting *Daddario v. Pittsfield*, 301 Mass. 552, 558, 17 N.E.2d 894 (1938). [\*270] More specifically, a town meeting cannot exercise authority over a board of selectmen when the board is acting in furtherance of a statutory duty. See *Anderson v. Selectmen of Wrentham*, 406 Mass. 508, 512, 548 N.E.2d 1230 (1990) (board of selectmen not bound by town meeting vote to set rate of contribution for group insurance provided to town's employees under *G. L. c. 32B*, § 7A);<sup>18</sup>

*Russell v. Canton*, 361 Mass. 727, 730-731, [\*626] 282 N.E.2d 420 (1972) (where Legislature delegated to board of selectmen [\*\*\*21] right to take land by eminent domain, town meeting could authorize but not command such taking). Here, once the board of selectmen accepted the provisions of *G. L. c. 32B*, § 16, it had a statutory duty to provide HMO coverage to retired town employees, among others, in a manner that was in the best interest of and most advantageous to both the town and its insureds. See *G. L. c. 32B*, § 16. An integral part of this duty was the apportionment of the total monthly premium for HMO coverage between the town and its retired employees in a fiscally responsible way. The town meeting could not usurp the authority given to the board of selectmen by the Legislature in § 16.

18 In *Anderson v. Selectmen of Wrentham*, 406 Mass. 508, 511, 548 N.E.2d 1230 (1990), we said that the selection of a contribution percentage to be paid on behalf of unionized town employees for their group insurance coverage had to be collectively bargained by the employer. See *G. L. c. 150E*, § 6. Because the board of selectmen was the chief executive officer of the town, its duty to collectively bargain the contribution percentage was a function mandated by statute. See *Anderson*, *supra* at 511-512. As a consequence, the town meeting had no direct [\*\*\*22] role in the collective bargaining process. See *id.* We noted that "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[,] . . . put the issue before the town meeting[,] and pack the meeting with voters who supported its position." *Id.* at 512 n.8. The present case, unlike *Anderson*, does not involve collective bargaining. Nonetheless, the board of selectmen is acting in furtherance of its statutory duty under *G. L. c. 32B*, § 16, when it makes available to its

retired employees the services of an HMO. Part and parcel of that duty is the establishment of an appropriate contribution percentage. One of the Legislature's purposes in enacting § 16 was "to enable government employers to gain control over health care costs." *Yeretsky*, 424 Mass. at 321. The concern that was articulated nearly twenty-five years ago in *Anderson* regarding the consequences of having the town meeting decide insurance contribution percentages takes on even greater significance today when the fiscal burdens imposed on municipalities by retiree health care benefits continue to soar. In accordance [\*\*\*23] with the language and intent of *G. L. c. 32B*, § 16, it is the province of the board of selectmen to ensure that the town's HMO program is administered in a fiscally responsible manner.

[\*271] In contrast to the comprehensive authority of the board of selectmen to effectuate the provisions of *G. L. c. 32B*, § 16, the role of the town meeting is substantially more limited. It is undisputed that pursuant to *G. L. c. 40*, § 5, "[a] town may at any town meeting appropriate money for the exercise of any of its corporate powers." However, to the extent that the town meeting fails to appropriate the funds necessary to implement the provisions of *G. L. c. 32B*, the board of selectmen shall certify to the board of assessors the cost to the town of carrying out the provisions of *c. 32B*, and the board of assessors "shall include the amount so certified in the determination of the tax rate of that year." *G. L. c. 32B*, § 3. Ultimately, it is the board of selectmen that ensures the appropriation of funds to pay for the town's contribution to HMO coverage for retirees, emphasizing the board's authority over all aspects of HMO coverage for town employees.

5. Conclusion. The town's board of selectmen has the authority, [\*\*\*24] pursuant to *G. L. c. 32B*, § 16, to establish the percentage of the total monthly premium for HMO coverage that is to be paid by the town's retired employees. Accordingly, the declaratory

judgment entered in the Superior Court is affirmed.

So ordered.

**THE WOODWARD SCHOOL FOR GIRLS, INC. vs. CITY OF QUINCY,<sup>1</sup> trustee,  
& another<sup>2</sup>**

1 Of the Adams Temple and School Fund and the Charles Francis Adams Fund.

2 The Attorney General, as a nominal party.

**SJC-11390**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*469 Mass. 151; 13 N.E.3d 579; 2014 Mass. LEXIS 584*

**December 2, 2013, Argued**

**July 23, 2014, Decided**

**PRIOR HISTORY:** [\*\*1]

Norfolk. Civil Action commenced in the Supreme Judicial Court for the county of Suffolk on July 11, 2007.

After transfer to the Norfolk County Division of the Probate and Family Court Department, the case was heard by *Robert W. Langlois, J.*

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

**HEADNOTES**

**MASSACHUSETTS OFFICIAL REPORTS  
HEADNOTES**

*Trust*, Charitable trust, Investments, Trustee's accounts. *Damages*, Breach of fiduciary duty, Interest. *Interest. Massachusetts Tort Claims Act. Governmental Immunity. Immunity from Suit. Municipal Corporations*, Trusts, Governmental immunity. *Waiver. Laches.*

Discussion of the prudent investor standard governing the conduct of trustees with regard to investment strategy and decision-making.

In a civil action brought by the income beneficiary of a trust against the trustee, a city, although the judge improperly considered

strict compliance with investment advice to be required of a prudent investor, the judge's conclusion that the city had committed a breach of its fiduciary duty of prudent investment of the funds comprising the trust was not clearly erroneous, given that the city's failure to protect the principal of the trust against inflation alone was sufficient to constitute a breach of its fiduciary duty, and given that the city engaged in several shortcomings in its management of the trust's investment portfolio that indicated that the city had failed to perform as a prudent investor would under the circumstances.

In a civil action brought by the income beneficiary of a trust against the trustee, a city, alleging breach of the city's fiduciary duties, the judge did not improperly inject into the case a new theory of liability (i.e., the city's failure to achieve any capital appreciation for one of the funds comprising the trust), where the issue was present from the beginning of the litigation, and where, even if it had not been raised in the complaint, the city could not claim that it was unaware that the issue might arise, and the judge, in raising the theory, afforded the city numerous opportunities to respond.

In a civil action brought by the income beneficiary of a trust against the trustee, a city, the judge, in fashioning an award of damages

for the city's breach of its duty to invest prudently, erred in employing a specific portfolio diversification plan to calculate unrealized gains ; however, the judge did not err in crediting the reasonable opinion proffered by the income beneficiary's expert as to what costs and expenses a trustee using a hypothetical portfolio would have incurred ; further, the judge did not err in awarding interest on each measure of damages from the last date on which the damage had been sustained . [\*152]

There was no merit to a city's assertion that the claims of the income beneficiary of a trust for which the city was trustee were barred on grounds of sovereign immunity, where, although the action sounded in tort, the city impliedly waived the protections of the Massachusetts Torts Claims Act, *G. L. c. 258, §§ 1 et seq.*, in that when the city agreed to serve as trustee, it assumed the fiduciary duties of that role, including the consequences of not fulfilling those duties, and in that several legislative acts specific to the trust further signaled that the city was liable for any breach of the trustee duties it had assumed.

The equitable doctrine of laches did not bar the claims of the income beneficiary of a trust against the trustee, a city, where, although common sense might dictate that the income beneficiary knew that the city was mismanaging one of the two funds comprising the trust, the city failed to establish that the income beneficiary had actual knowledge of the city's breach of its fiduciary duty.

**COUNSEL:** *John S. Leonard* (*James S. Timmins*, City Solicitor, with him) for city of Quincy.

*Sarah G. Kim* (*Josephine M. Deang Chin & Alison K. Eggers* with her) for the plaintiff.

**JUDGES:** Present: Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.

**OPINION BY:** CORDY

**OPINION**

CORDY, J. This dispute arises from a trust established in 1822 by former President John Adams and supplemented by a bequest of his grandson in 1886. The city<sup>3</sup> of Quincy (Quincy) served as trustee of the Adams Temple and School Fund and the Charles Francis Adams Fund (collectively, Funds) through two boards.<sup>4</sup> The Woodward School for Girls, Inc. (Woodward), the income beneficiary of the Funds since 1953, filed suit against Quincy initially seeking an accounting and thereafter asserting that Quincy committed a breach of its fiduciary duties to keep adequate records, invest the trust's assets properly, exercise reason- [\*153] able prudence in [\*\*2] the sales of real estate, and incur only reasonable expenses related to the management of the Funds. We transferred the case here on our own motion following Quincy's appeal and Woodward's cross appeal from a Probate and Family Court judge's ruling removing Quincy as trustee and ordering it to pay a nearly \$3 million judgment.<sup>5</sup>

3 Quincy, originally a town, was incorporated as a city in 1888. See St. 1888, c. 347.

4 For the purposes of this opinion, the city of Quincy, along with the board of supervisors and the board of managers (together, joint boards) of the funds at issue (the Adams Temple and School Fund, or Adams Fund, and the Charles Francis Adams Fund) (collectively, Funds), are referred to collectively as "Quincy," except where differentiation is helpful.

5 The parties have stipulated to the consolidation of the appeals.

On appeal, Quincy asserts that the trial judge erred in finding that Quincy committed a breach of its fiduciary duties to the Funds by failing to invest in growth equities to protect the principal when the Funds have only an income beneficiary to provide for, and by not heeding specific investment advice it received in 1973. In addition, Quincy challenges the award [\*\*3] of damages, alleging that it was based on an improperly introduced and un-

sound portfolio theory hypothesizing unrealized gains; that it failed to exclude reasonable costs and expenses Quincy would have incurred had Quincy followed that portfolio theory; and that it improperly included prejudgment interest dating back to the dates of the various breaches. Finally, Quincy avers that Woodward's claims should have been barred by the Massachusetts Tort Claims Act, *G. L. c. 258, § 4*, and its accompanying protection of sovereign immunity, and by the equitable doctrine of laches.

For the reasons discussed below, we conclude that the claims were not barred, and judgment against Quincy for committing a breach of its fiduciary duties to the Funds was proper, but the award of damages was erroneous in the calculation of unrealized gains on the investment portfolio. Specifically, we conclude that the judge erred in two respects: first in finding that Quincy's failure to heed specific investment advice it had solicited constituted a breach of its duty to act as a prudent investor, and second in calculating as damages the gains that might have been realized had Quincy followed that advice. Nonetheless, [\*\*4] because there was other evidence of Quincy's mismanagement of the Funds, the judge did not err in finding that Quincy had committed a breach of its fiduciary duties with regard to them.

We further conclude that the judge did not err in including prejudgment interest or in declining to speculate as to potential costs or expenses Quincy may have incurred with proper management. However, because the judge's calculation of damages with regard to the unrealized gains on the investment portfolio was based on his incorrect assumption that Quincy was required [\*154] to follow specific investment advice, that calculation was in error. Accordingly, we affirm the judgment as to liability, reverse with respect to the calculation of damages on the unrealized gains, and remand for further proceedings consistent with this opinion.

*Background.* In 1822, former President John Adams executed two deeds of trust,

conveying a portion of his real estate holdings to a trust, thereafter named the Adams Temple and School Fund (Adams Fund), and naming Quincy as the trustee. The first deed executed by President Adams (Deed A) was supplemented by a bequest of his grandson, Charles Francis Adams, in 1886, to support the [\*\*5] objectives of the Adams Fund (Charles Francis Adams Fund, and, collectively with the Adams Fund, Funds). Deed A contained the basic provisions of the trust and directed the trustee to invest earnings from the real estate "in some solid public fund, either of the Commonwealth, or of the United States"; to build a church; and to apply "all future rents, profits, and emoluments, arising from said land" to support a school with particular requirements. The only principal beneficiary identified in the deed was the oldest living male descendant of President Adams, who was to receive the principal only on "gross corruption or mismanagement," or knowing waste, on the part of Quincy. Shortly after the deeds were executed, the inhabitants of Quincy voted to accept the gifts therein, and Quincy became the trustee.

Two acts of the General Court granted Quincy further authority in executing its responsibilities as trustee of the Funds. In 1827, the General Court appointed the treasurer of Quincy as the treasurer of the Adams Fund, incorporated the board of supervisors, and authorized the board of supervisors and the selectmen of Quincy to execute the intentions of President Adams and to receive [\*\*6] and manage gifts from others for the purposes articulated in the deeds. See St. 1826, c. 59, approved on Feb. 3, 1827 (1827 Act). Quincy thereafter established a board of managers for the Adams Fund.<sup>6</sup> In 1898, the General Court authorized Quincy as trustee of the Funds to sell and convey the Funds' real property holdings and to "invest[ ] and re-invest[ ]" the sale proceeds [\*155] "from time to time ... in real estate or in such securities as trustees are authorized to hold in this Commonwealth." See St. 1898, c. 102 (1898 Act).

6 The board of managers of the Adams Fund was comprised of the mayor of Quincy, the president of the city council, the treasurer and collector, and two members elected annually by the city council. See § 2.144.020 of the General Ordinances of the City of Quincy. It appears that whereas the board of supervisors and the board of managers shared responsibility for overseeing the Adams Fund, only the board of supervisors oversaw the Charles Francis Adams Fund.

In 1953, pursuant to an unpublished order of this court, after three prior income beneficiaries, Woodward was designated (and remains) the sole income beneficiary of the Funds.<sup>7</sup>

7 The Woodward School for Girls, Inc. (Woodward), was established [\*\*7] and operated by the Woodward Fund, a trust created by the will of Dr. Ebenezer Woodward, a cousin of President John Adams, in 1894. This fund was also managed by Quincy, but its board of managers was separate from those of the Funds. In 1952, Quincy filed a petition asking that the Funds be used to benefit Woodward, which was experiencing financial troubles. This court granted the petition and ordered that "the net income from the [Funds] ... be paid to and expended by the City of Quincy in its capacity as trustee of the Woodward Fund and Property for the conduct, operation, maintenance, management, and advancement of the Woodward School for Girls." The Woodward Fund was subsequently liquidated. In his findings in the present dispute, the judge noted that the *cy pres* decree "did not ... provide a requirement for any annual, quarterly, or even periodic, income payments from the [Funds] to the Woodward School."

1. *Investment advice and state of Funds.* By the time Woodward became the beneficiary of the Funds, the real estate holdings of the Adams Fund had diminished significantly,

presumably due to sale. At the end of 1952, the assets of the Adams Fund consisted of \$4,474 in cash, [\*\*8] \$253,723.02 in investment assets, and an assessed value of \$102,325 in real estate. The value of the Adams Fund's investment assets in 1973 totaled \$321,932.43, an increase that may have been attributable to the further sale of real estate. In April, 1973, the Adams Fund investment assets were invested in a portfolio consisting of ninety per cent fixed income and ten per cent equity securities. That month, Quincy received investment advice it had requested from the South Shore National Bank (bank) with regard to managing the Funds' investment portfolio. The joint boards of the Funds unanimously voted to adopt an agreement establishing an advisory relationship with the bank and to follow certain diversification investment advice it received from the bank. However, Quincy never implemented the diversification recommendations, and instead, by 1990, nearly one hundred per cent of the Adams Fund's assets were invested in fixed income instruments. In 2008, the value of the investment assets in the Adams Fund was reportedly still the same: \$321,932.43.

The assets of the Charles Francis Adams Fund, which are far smaller than those of the Adams Fund, have diminished some- [\*156] what over time. As of [\*\*9] 1953, the Fund had a value of \$23,428, consisting of \$1,453 in cash and \$21,975 in securities (primarily in corporate bonds). It has since declined to \$19,982 as of 2005, when it consisted of \$2,530 in cash and \$17,452 in investments.<sup>8</sup>

8 As of 1962, the Charles Francis Adams Fund had a value of \$24,323. The Fund hovered in this range until 1977, when it dropped to \$19,542. As of 1984, the Fund contained \$21,975.

Despite the lack of growth in the Funds, between 1953 and 2008, the Funds generated over \$700,000 in income; this income was either paid to Woodward directly or used to pay the Funds' expenses.

2. *Request for accounting and present litigation.* The present dispute began in 2005, when Woodward had, for two consecutive years, received a smaller distribution from the Funds than it had anticipated. In light of these discrepancies, the chair of the Woodward board of trustees requested an accounting of the Funds from Quincy. As of nearly one and one-half years later, the school had received some information from Quincy but not a full accounting, which it again requested.<sup>9</sup> In July, 2007, after still receiving no response, Woodward filed a complaint and petition for an accounting with a [\*10] single justice of this court against Quincy as trustee of the Funds. Woodward asserted that "as beneficiary of the Funds, [it] is entitled to know, the real and financial assets currently in the Funds, information about the Funds' management, and historically what has happened to the Funds' assets and income." The single justice transferred the case to the Norfolk County Division of the Probate and Family Court Department.

9 Quincy had never previously provided an accounting of its stewardship of the Funds to Woodward.

A judge in that court appointed a special master to gather relevant documents regarding the Funds' assets, prepare an accounting for the Funds for the period of 1953 to 2008, inclusive, and issue a report assessing the propriety of the Funds' transactions. See *G. L. c. 206*, § 2; Rule 20 of the Rules of the Probate and Family Court, Massachusetts Rules of Court, at 1051 (Thomson Reuters 2014). Overall, the special master concluded that Quincy had committed a breach of its fiduciary duties in several respects, primarily because it had "not maintained adequate books and records to substantiate its stewardship as Trustee," and it had sold the Funds' real property at less than [\*11] fair [\*157] market value.<sup>10 11</sup>

10 This accounting and report was supplemented by that of a certified public accountant, who was retained to assist the special master. Incorporating the accountant's findings, the special master

made numerous findings, the most relevant of which are summarized here. First, he determined that the return generated by the Funds' investments was "comparable to the market return of similar investments." Second, he concluded that \$85,090 in income from the Adams Fund that was not distributed to Woodward "was maintained in the Fund and reinvested in market rate instruments," and that \$18,864 in income from the Charles Francis Adams Fund was wrongly withheld from Woodward. Third, he concluded that real property sales conducted between 1953 and 1972 were below fair market value, and that the only remaining parcel of real property held by the Funds was leased at less than fair market rent. Fourth, he determined that Quincy's expenses were significant and required justification. Finally, the special master concluded that Quincy committed a breach of its duty of care to Woodward and "may have violated its duty to prudently invest trust assets" with regard to the land sales [\*12] between 1955 and 1972; committed a breach of "its duty of loyalty to Woodward when it engaged in business dealings which caused trust property to be sold for below fair market value"; committed a breach of its duty to furnish information to beneficiaries "by not informing Woodward of the 1972 petition concerning the lease" of real property owned by the Funds, which was not a prudent investment, and by not providing an actual accounting when Woodward requested one until ordered to do so by the court; and committed a breach of its duty to keep accurate records and provide reports. In a supplemental report filed after receipt of additional documentation, the special master concluded that Quincy "did not adhere to the investment mandates" articulated in Deed A and "varied the investment portfolio between equities and bonds" when the deed seemed to limit investments to bonds only. The special master also

noted that the fifty-five year accounting period at issue exceeded the recommended record retention period and therefore questioned the timeliness of Woodward's challenge to Quincy's actions as trustee.

11 The trial judge subsequently gave "presumptive weight" to the special master's findings [\*\*13] and conclusions. See *Mass. R. Civ. P. 53 (h) (1)*, as amended, 386 Mass. 1237 (1982).

Following the report of the special master, the dispute proceeded to a thirteen-day bench trial. In February, 2011, an amended judgment and amended findings entered, with 220 findings of fact.

The judge concluded that Quincy failed to keep accurate records of its financial stewardship of the Funds, to obtain appraisals for real property and to sell parcels at fair market value or greater,<sup>12</sup> to act on professional investment advice it received, and to comport with its duty of loyalty to the Funds. The judge characterized Quincy's management of the Adams Fund specifically as "inattentive, imprudent and neglectful," but not so neglectful as to "rise to the level of gross corruption or gross mismanagement," such that the remainder beneficiary would take the trust property.

12 With regard to Quincy's real estate sales on behalf of the Adams Fund, the judge concluded that Quincy failed to fulfil its duty to sell realty for the best possible price, or at least for fair market value, and instead prioritized its own municipal needs.

With regard to Quincy's investment strategy for the Adams Fund, the judge made several [\*\*14] findings relevant to Quincy's appeal.<sup>13</sup> First, he concluded that Quincy did not commit a breach of its fiduciary duty to the Funds by employing inappropriate investment strategies during the years of 1953 to 1973.<sup>14</sup> Second, with regard to the 1973 investment advice Quincy received from the bank, the judge found that Quincy received and unani-

mously voted to adopt a single portfolio diversification plan, consisting of sixty per cent in equity securities, thirty-five per cent in fixed income, and five per cent in savings (60-35-5 plan). He concluded that Quincy failed to follow this directive, and that it "ignored the terms of its own April 11, 1973, vote, and the competent, professional ... advice contained therein, to the considerable detriment of the [Adams Fund]." Therefore, Quincy acted imprudently and in violation of its fiduciary duties.

13 With regard to the investment strategy for the Charles Francis Adams Fund, the judge concluded that even though the Fund's corpus had declined by nearly fifteen per cent between 1953 and 2005, it appeared that Quincy had made "a modest effort to pay income of this relatively basic trust over to the Woodward School." The judge therefore declined [\*\*15] to speculate as to any loss in income received by Woodward from this Fund.

14 Nonetheless, the judge expressed "serious reservations and concerns" regarding the investment approach employed during this period.

Third, the judge found that it was imprudent for Quincy to permit the Adams Fund to consist almost entirely of fixed income and cash assets by 1990. The judge rejected Quincy's assertion that it maintained the Fund's assets in government securities in order to comport with the explicit directive of the trust instrument; rather, the judge concluded that the Fund had acted in derogation of the 1892 legislation directing Quincy to invest real estate sales proceeds "in real estate or in ... securities," by instead investing "the fungible portion of the trust corpus in corporate bonds as well as in equities/securities."<sup>15</sup>

15 This finding departed from the special master's finding on this issue.

In light of these findings, the judge awarded Woodward a total judgment of \$2,994,868, including prejudgment interest of

\$1,610,826 and approximately \$1.1 million for "[u]nrealized [g]ains [\*159] in portfolio," and removed Quincy as trustee of the Funds.<sup>16</sup>

16 The \$2,994,868 total judgment was calculated [\*\*16] as follows: \$255,566 in miscellaneous damages due to financial mismanagement, including recoupment of funds not received by the Adams Fund as a result of sales of real estate below fair market value, unrealized income from the sale of a particular parcel, the value of "missing" funds from the South Shore National Bank (bank) account where the trust assets were held and from unreported stock gains, and recoupment of an unexplained account deficiency; \$1,135,494 for the unrealized gain in the investment portfolio; and a total of \$1,610,826 in prejudgment interest on these items (\$475,426 on the miscellaneous damages combined, and \$1,135,400 on the unrealized gains); less a credit for disallowed expenses of \$7,018. Quincy's argument on appeal focuses primarily on the unrealized gains and the prejudgment interest portions of the award of damages. It appears to concede that if the Massachusetts Tort Claims Act, *G. L. c. 258, §§ 1 et seq.*, does not bar the award, Quincy would remain responsible for \$119,271 of the \$255,566 miscellaneous damages (the amount attributable to unrealized income from the sale of a particular parcel and the unexplained account deficiency), plus certain prejudgment [\*\*17] interest on that amount. Quincy asserts that the remainder of the \$255,566 (attributable to below-market real estate sales and missing accounts and gains) is barred by laches.

*Discussion.* We will not disturb the findings of the trial judge or the special master unless they are clearly erroneous. *Mass. R. Civ. P. 52 (a)*, as amended, 423 Mass. 1402 (1996). See *Chase v. Pevear*, 383 Mass. 350, 359-360, 419 N.E.2d 1358 (1981); *Matter of*

*Jones*, 379 Mass. 826, 839, 401 N.E.2d 351 (1980). "A finding [of fact] is clearly erroneous ... [if], although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (quotations and citations omitted). *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 509, 677 N.E.2d 159 (1997).

1. *Breach of fiduciary duties.* The primary issue in this case is whether the judge erred in concluding that Quincy committed a breach of its fiduciary duties by failing to invest in growth securities and by failing to heed investment advice it procured from an investment adviser. Because trustees' conduct with regard to investment strategy and decision-making is governed by the prudent investor standard, we begin by articulating [\*\*18] what that standard requires.

a. *Prudent investor standard.* A trustee's obligations with regard to investing and managing a trust's assets are dictated by our common law and by the Massachusetts Prudent Investor Act, *G. L. c. 203C, §§ 1 et seq.* See *Kimball v. Whitney*, 233 Mass. 321, 331, 123 N.E. 665 (1919); *Harvard College v. Amory*, 26 Mass. 446, 9 Pick. 446, 461 [\*160] (1830).<sup>17</sup>

17 Because the Massachusetts Prudent Investor Act, *G. L. c. 203C, §§ 1 et seq.* (Act), applies only "to decisions or actions of a trustee occurring on or after" the 1998 effective date of the Act, we apply the standards of both the common law and the Act and note distinctions where relevant. See St. 1998, c. 398, § 3, inserting *G. L. c. 203C*. In many respects, the Act mirrors the common-law doctrine that has existed since the mid-1800s. See *Harvard College v. Amory*, 26 Mass. 446, 9 Pick. 446, 461 (1830). See also *Chase v. Pevear*, 383 Mass. 350, 363, 419 N.E.2d 1358 (1981). However, the Act introduced two significant changes: permissive delegation of duties, and the modern portfolio theory, which recognizes in-

flation as a factor to be considered in portfolio management decision-making and therefore shifts the assessment of a trustee's actions to the over-all construction of the [\*\*19] portfolio. See Taylor, Massachusetts' Influence in Shaping the Prudent Investor Rule for Trusts, 78 Mass. L. Rev. 51, 51-52 & n.5 (1993). Compare *Chase*, *supra* at 364 (assessing each investment individually, but with some consideration of "the fund as a whole" [citation omitted]).

A trustee has a duty to invest the trust's assets "solely in the interest of the beneficiaries." *G. L. c. 203C*, § 6. In performing this duty, a trustee must "exercise reasonable care, skill, and caution" in "invest[ing] and manag[ing] trust assets as a prudent investor would, considering the purposes, terms, and other circumstances of the trust." *G. L. c. 203C*, § 3 (a). Among those considerations are "the possible effect of inflation or deflation"; "the expected total return from income and the appreciation of capital"; "other resources of the beneficiaries"; and "needs for liquidity, regularity of income, and preservation or appreciation of capital." *G. L. c. 203C*, § 3 (c) (2), (5)-(7). See *O'Brien v. Dwight*, 363 Mass. 256, 294-295, 294 N.E.2d 363 (1973). We assess investment decisions in the context of the over-all investment strategy of the trust.<sup>18</sup> *G. L. c. 203C*, § 3 (b). See *Restatement (Third) of Trusts* § 90 (2007).

18 For actions occurring [\*\*20] prior to 1998, we evaluate each investment individually, but also consider investments in the context of the trust as a whole. See *Chase*, 383 Mass. at 364.

A trustee exercising "reasonable care, skill and caution," *G. L. c. 203C*, § 3 (a), undoubtedly will approach investment decisions with some conservatism. This, however, must be balanced with a degree of risk in order to obtain income for the trust and protect the principal against inflation. See *Restatement (Third) of Trusts*, *supra* at § 90 comment e; *Restatement (Second) of Trusts* § 227 comment e (1959). Diversification of investments

is therefore considered a central component of prudent investment because it both moderates and reduces risks. See *G. L. c. 203C*, § 4; *Chase*, 383 Mass. at 363. Accordingly, trustees are discouraged from [\*161] investing "a disproportionately large part of the trust estate in a particular security or type of security." *Restatement (Second) of Trusts*, *supra* at § 228 comment a. Nonetheless, the standard recognizes that in some circumstances, it may not be prudent to diversify an investment portfolio, particularly where "the objectives of both prudent risk management and impartiality can be satisfied" without [\*\*21] diversification. *Restatement (Third) of Trusts*, *supra* at § 90 comment g. See *G. L. c. 203C*, § 4; *Restatement (Second) of Trusts*, *supra*.

b. *Investment advice.* We turn now to Quincy's first claim of error. Quincy contends that the judge erred in concluding that Quincy was required to follow specific investment advice it requested and received in 1973. In addition, it asserts that the judge misconstrued the investment advice at issue as providing only one recommendation, when the advice actually consisted of several alternatives, one of which Quincy claims to have followed. We agree that the judge improperly considered strict compliance with investment advice to be required of a prudent investor. We do not, however, consider the judge's interpretation of the advice provided to be clearly erroneous.

The investment advice in dispute was provided by the bank in a letter dated March 29, 1973, and reviewed by the joint boards of the Funds at a meeting on April 11.<sup>19</sup> The letter was interpreted by the trial judge as providing a single diversification recommendation of sixty per cent equity securities, thirty-five per cent fixed income, and five per cent savings (60-35-5 plan).<sup>20</sup> This represented [\*\*22] a drastic change from the Adams Fund's portfolio at the time of ninety per cent fixed income and ten per cent equity [\*162] securities. On receiving the investment advice, the joint boards unanimously voted to enter into an advisory relationship with the bank,<sup>21</sup> and to "mak[e] investments and changes of investments in said Funds substantially within the

outline as presented" by the bank in its letter.<sup>22</sup> However, Quincy did not make changes to its portfolio consistent with the advice it received, and instead increased the percentage of investments in fixed income assets so that, by 1990, nearly one hundred per cent of the assets of the Adams Fund were in fixed income investments.<sup>23</sup>

19 Quincy had requested this advice after receiving guidance from its legal counsel that it was permissible to seek professional advice regarding investments, but that Quincy would retain responsibility for making investment decisions.

20 The letter lends itself to several interpretations. It ambiguously refers to three proposals, giving some credence to Quincy's suggestion that the letter did not provide only one directive. We agree with Quincy that one of the proposals included in the letter was for "a modest upgrading [\*\*23] of the balance of the bond portfolio into higher rate bonds," which Quincy purports to have followed. However, we are not persuaded that the recommendations contained in the letter were meant to be alternatives rather than complements to each other. Our own review of the letter suggests that the primary emphasis with regard to the Adams Fund was the adoption of a diversification plan consisting of sixty per cent in equity securities, thirty-five per cent in fixed income, and five per cent in savings (60-35-5 plan). Accordingly, the judge's understanding of the letter as providing this recommendation is plausible and not clearly erroneous.

21 The agreement authorized the bank "to review periodically and to advise or recommend to [Quincy] the retention, sale or exchange of the securities and other property in the [Funds] and to advise or recommend the purchase of stocks, bonds and other securities." The agreement indicated that Quincy would ultimately be responsible for making decisions regarding "the

acquisition or disposition of securities and other property."

22 The trial judge found that the boards adopted the specific 60-35-5 diversification proposal discussed above. However, the meeting [\*\*24] minutes do not reflect such a precise vote. Accordingly, we conclude that the boards did not adopt any specific reading of the investment advice provided in the letter but rather resolved to follow more generally the advice provided.

23 Although Quincy avers that it followed some of the advice in the letter by upgrading the Adams Fund's bond portfolio to higher rate bonds, as noted above we are not persuaded that this was more than a secondary component of the bank's broader diversification recommendation.

Under both the common law and the Prudent Investor Act, a trustee is permitted to consult with and receive advice from accountants and financial advisers. See *G. L. c. 203C, § 10 (a)*; *Milbank v. J.C. Littlefield, Inc.*, 310 Mass. 55, 62, 36 N.E.2d 833 (1941) ("A trustee may avail himself of the services of others"); *Restatement (Third) of Trusts, supra at § 77 comment b & § 80 comment b*. Cf. *Rothwell v. Rothwell*, 283 Mass. 563, 571, 186 N.E. 662 (1933) (trust disbursements paying agents and attorneys who assisted in trust management were appropriate); *Hanscom v. Malden & Melrose Gas Light Co.*, 234 Mass. 374, 381, 125 N.E. 626 (1920) (same).

Indeed, consulting investment advisers may be part of acting prudently and exercising care. [\*\*25] See *Restatement (Third) of Trusts, supra at § 77 comment b*. "After obtaining advice or consultation, the trustee can properly take the information or suggestions into account but then (unlike delegation) must exercise independent, prudent, and impartial fiduciary judgment on the matters involved." *Id.* at § 80 comment b. See *Attorney Gen. v. Olson*, 346 Mass. 190, 197, 191 N.E.2d 132 (1963) (trustee may employ bank as investment agent, as long as trustee gives independent consideration to [\*163] agent's recommendation). In

contrast, were we to require a trustee to follow investment advice it receives, we would in effect mandate delegation of a trustee's fiduciary duties.<sup>24</sup> We decline to require a trustee to abdicate this fundamental function of a trustee to make investment decisions merely because the trustee seeks advice on acting prudently. See *Boston v. Curley*, 276 Mass. 549, 562, 177 N.E. 557 (1931). However prudent the advice may be, a trustee is not required to follow it. To the extent the judge considered the failure to follow specific advice a per se breach of Quincy's fiduciary duty of prudent investment, this was in error.

24 The common law and the Prudent Investor Act take different approaches to delegation of [\*\*26] a trustee's responsibilities. Compare *G. L. c. 203C, § 10 (a)* (permitting trustee to "delegate investment and management functions if it is prudent to do so"), with *Milbank v. J.C. Littlefield, Inc.*, 310 Mass. 55, 62, 36 N.E.2d 833 (1941) (trustee may not "delegate his authority as trustee"), and *Boston v. Curley*, 276 Mass. 549, 562, 177 N.E. 557 (1931). Merely receiving, considering, and adopting investment advice, however, does not constitute delegation under either standard.

Whether a trustee requested and followed specific investment advice is but one factor in the determination of whether the trustee acted prudently. Receipt of sound investment advice and dismissal or wilful ignorance of it, where the advice was at the time prudent and consistent with the trust beneficiary's needs and goals, may be indicative of a lack of prudent investing. But such action or inaction in and of itself does not rise to the level of imprudent investing. The judge's reliance on the 1973 investment advice as a default prudent investment strategy resulted in inadequate consideration of the range of investment strategies that would have been prudent for the Adams Fund.<sup>25</sup>

25 We reserve our discussion of the impact of Quincy's failure [\*\*27] to

follow the bank's investment advice for a more holistic analysis of whether it acted prudently. See part 1.d, *infra*.

c. *Concern for principal of income-only fund.* Quincy also challenges the trial judge's finding that it committed a breach of its fiduciary duty by not investing in growth securities. It asserts that as the trustee of a fund with only an income beneficiary, it had a "duty to maximize income, even at the risk of sacrificing growth," and therefore it was not obligated to invest in growth equities that would protect the principal from inflation. It claims that it acted prudently in structuring the Adams Fund's investment portfolio as it did because the Fund produced income for Woodward, and the investments comported with the trust instrument's direction to invest the majority of the Fund's assets in government-backed bonds. [\*164]

The judge's findings regarding the Adams Fund's investment portfolio demonstrate that the Fund has been primarily invested in fixed income assets since Woodward became the income beneficiary. As a result, the value of the Fund has remained largely unchanged since 1973. Despite this lack of principal growth, between 1973 and 2008, the Funds generated [\*\*28] over \$700,000 in income, benefiting from a 7.54 per cent rate of annual return, which was either paid to Woodward directly or used to pay the Funds' expenses. Nonetheless, the judge found that it was imprudent for Quincy "to permit, by 1990, the [Adams Fund] to consist of essentially 100% fixed income/cash assets," and that this imprudence significantly harmed the Adams Fund.

Where, as here, the current beneficiary of a trust is an income-only beneficiary, courts in at least three other jurisdictions with similar prudent investor standards have concluded that a trustee owes a duty to that beneficiary to prioritize income over growth, and that investing in fixed income assets over equities is not a breach of fiduciary duty where such investments produce income for the beneficiary but may fail to maintain the principal against

inflation. See *Tovrea v. Nolan*, 178 Ariz. 485, 490, 875 P.2d 144 (Ct. App. 1993); *SunTrust Bank v. Merritt*, 272 Ga. App. 485, 488-489, 612 S.E.2d 818 (2005); *In re Trust Created by Martin*, 266 Neb. 353, 359-360, 664 N.W.2d 923 (2003). See also *Shirk v. Walker*, 298 Mass. 251, 257-258, 10 N.E.2d 192 (1937). This comports with the obligation under *G. L. c. 203C*, § 6, to invest for the benefit of the beneficiaries.

Although trustees [\*\*29] in such cases are required to balance the interests of successive beneficiaries, one of whom is to receive the income during his or her lifetime and the other of whom is to take the principal on the income beneficiary's death, these courts have consistently concluded that a trustee does not commit a breach of a fiduciary duty "by investing the trust in such manner as to maximize the income payable to [the income beneficiary] rather than expand the corpus of the trust." *SunTrust Bank*, 272 Ga. App. at 489. See *Tovrea*, 178 Ariz. at 490 ("trustees' duty was [primarily] to invest in such a manner as to produce an income for [income beneficiary] and, secondarily, [to] preserve the principal").

In theory, the case for maximizing income over growth is even stronger here, because the income beneficiary is an institution and the remainder beneficiary takes only upon "gross corruption or mismanagement ... notorious negligence, or any waste knowingly permitted," thereby justifying complete attention to the [\*165] interests of Woodward. See *G. L. c. 203C*, § 6. However, the Adams Fund's status as a charitable trust and Woodward's institutional status make this case distinctly different from those involving [\*\*30] trusts with a lifetime beneficiary.

A charitable trust such as this one is designed to support an income beneficiary in perpetuity. See *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 550 (1867) (charitable trusts exempt from rule against perpetuities). As a result, the trustee must necessarily consider both the generation of income *and* the growth and maintenance of the principal in order to provide income funds to the benefi-

ciary indefinitely. See *Restatement (Third) of Trusts*, *supra* at § 90 comment e ("In balancing the return objectives between flow of income and growth of principal," trustee must consider trust's "purposes and distribution requirements"). In effect, Woodward is equivalent to both the lifetime income beneficiary and all subsequent beneficiaries.

As such, acting prudently in managing a charitable trust that benefits an institutional income beneficiary requires considering the specific needs of the beneficiary in the short and long term and balancing prioritization of income with protection and preservation of the principal. At a minimum, a trustee must consider how best to guard the principal against inflation, if not how to grow the principal while simultaneously generating income [\*\*31] to support the beneficiary. Where the income beneficiary will continue to exist in perpetuity, the mandate of *G. L. c. 203C*, § 3 (a), to act with "caution" necessarily entails considering "the possible effect of inflation or deflation," *G. L. c. 203C*, § 3 (c) (2), and the "preservation or appreciation of capital," *G. L. c. 203C*, § 3 (c) (7). A trustee must accordingly "invest with a view both to safety" -- "seeking to avoid or reduce loss of the trust estate's purchasing power as a result of inflation" -- and "to securing a reasonable return." *Restatement (Third) of Trusts*, *supra* at § 90 comment e.

In this case, a prudent investor would have realized at some point, long before 2008, that a fund value that is unchanged for decades after 1953 has not kept up with inflation and, given the potential perpetuity of the income beneficiary's needs, would have taken or attempted to take steps to protect the principal in order to preserve future income opportunities. If Quincy recognized that the Adams Fund was vulnerable to inflation, likely attributable to its lack of diversification, it had a duty to determine which of its assets could be invested in a manner that would guard against this vulnerability. At [\*\*32] a minimum, Quincy could [\*166] have invested the proceeds from the sale of real estate in investments that would potentially protect the principal. See St. 1898,

c. 102. Instead, Quincy chose to keep the Adams Fund's investment assets exclusively in bonds, which produced a higher rate of return than a more diversified portfolio but resulted in stagnation of the trust principal.<sup>26</sup> Where, in most instances, an increase in principal will lead to an increase in income, this decision not to diversify was imprudent in light of the Adams Fund's need to support Woodward in perpetuity and not merely during a human lifetime. Even without the benefit of hindsight, see *G. L. c. 203C*, § 9, it is clear that Quincy did not take any steps to protect the Adams Fund's principal against inflation. We therefore conclude that Quincy's failure to protect the principal against inflation alone was sufficient to constitute a breach of its fiduciary duty.

26 Quincy asserts that the terms of the trust instrument, Deed A, required it to invest most of the principal, with the exception of real property sales proceeds, in State and Federal bonds. Under the Prudent Investor Act, a trustee may be relieved from the obligations [\*\*33] set forth in the Act where the trust instrument requires the trustee to act otherwise and "the trustee acted in reasonable reliance on the provisions of the trust." *G. L. c. 203C*, § 2 (b). See Restatement (Second) of Trusts § 228 comment f (1959) ("By the terms of the trust the requirement of diversification may be dispensed with"). However, we are not persuaded that Quincy's complete reliance on this particularly restrictive trust provision was reasonable. Quincy failed to keep adequate records reflecting which assets could be invested only in bonds and which assets could be more broadly invested and used to diversify the portfolio and secure the principal against inflation. Instead, Quincy invested nearly all of its assets in bonds, which undoubtedly exceeded the allocation that was required by the trust.

Further, if the express terms of the trust proved too restrictive to achieve the

trust's goals, Quincy could have appealed to the court to revise the trust's terms to better serve its original purpose. See *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 531, 258 N.E.2d 745 (1970) ("courts of equity" have general power "in the administration of charitable trusts to permit deviations short [\*\*34] of cy pres applications"); *Briggs v. Merchants Nat'l Bank of Boston*, 323 Mass. 261, 274-275, 81 N.E.2d 827 (1948) (applying cy pres doctrine because "[equity] will presume that the donor would attach so much more importance to the object of the gift than to the mechanism by which he intended to accomplish it that he would prefer to alter the mechanism to the extent necessary to save the object").

d. *Quincy's over-all performance.* As the above discussions illustrate, Quincy engaged in several shortcomings in its management of the Adams Fund's investment portfolio that indicate that it failed to perform as a prudent investor would under the circumstances. See *G. L. c. 203C*, § 3 (a). Although Quincy sought and received ongoing investment advice from the bank in 1973 [\*167] and thereafter,<sup>27</sup> it does not appear that it ever heeded the most significant, and seemingly prudent, advice the bank provided, construed in even the most general terms: to diversify the Adams Fund's portfolio in such a way that would decrease slightly the annual rate of return but would realize some appreciation for the principal. This factor, while not dispositive, is illustrative of Quincy's general lack of consideration of diversification, [\*\*35] long considered a prudent investment strategy, see *G. L. c. 203C*, § 4; *Chase*, 383 Mass. at 363, and its disregard for both the 1898 legislative directive and the long-term needs of the income beneficiary.

27 The board meeting minutes reflect that an investment representative from the bank attended the board meetings and provided reports to Quincy in the decades following the 1973 advice.

We are not persuaded that Quincy was prohibited from following this advice or from otherwise diversifying the Adams Fund's portfolio by the restrictions in the trust instrument. See note 26, *supra*. Rather, as Quincy's legal counsel observed and as the 1898 Act required, Quincy was in fact directed to invest the real estate sale proceeds "in real estate or in such securities as trustees are authorized to hold in this Commonwealth." St. 1898, c. 102, § 2. The limitation articulated in Deed A of investing in government-issued bonds did not apply to these proceeds. Thus, contrary to Quincy's assertion that it was following the restrictions on the investment of the Adams Fund, its nearly complete investment in bonds suggests that Quincy actually contravened the applicable investment restrictions.

Finally, and [\*\*36] most significantly, Quincy failed to invest with the long-term needs and best interests of the income beneficiary in mind, creating a portfolio that consistently provided income but that left the principal vulnerable to inflation and, as a result, depreciation. See *Harvard College, 9 Pick. at 458*. Accordingly, based on these considerations, the judge's ruling that Quincy committed a breach of its fiduciary duty of prudent investment was not clearly erroneous.

2. *Award of damages.* We turn next to Quincy's allegations of error in the theory and calculation of the award of damages.

a. *Theory of damages.* Quincy contends that the judge improperly devised a new liability theory, that of Quincy's failure to achieve any capital appreciation for the Adams Fund, that had not previously been an issue in the case. Quincy avers that by "in- [\*168] jecting" this issue into the case, enabling Woodward to assert the issue by permitting its expert witness to testify based on the theory, and making a finding based on this testimony, the judge engaged in an inappropriate fact-finding method and denied Quincy an adequate opportunity to prepare to defend against the theory. We agree with Woodward that the issue of [\*\*37] lack of capital appre-

ciation was present from the beginning of the litigation, and further note that even if it were not, a judge has the authority to raise an issue in the case as long as adequate notice is afforded to the parties.

We begin with a brief description of what transpired. On the second day of trial, in the presence of counsel, the judge indicated his disbelief that the Adams Fund's principal would not have grown significantly over the course of nearly sixty years.<sup>28</sup> He then proceeded to ask counsel a number of rhetorical but relevant questions about why the value of the Adams Fund had not appreciated, speculating that perhaps various stock investments had been made that did, at least temporarily, lead to some appreciation, the value of which was then lost through unsuccessful investments, but that such transactions were simply not reflected in the Fund's records. Quincy asserts that these statements "injected" the issue of capital appreciation into the case.

28 Specifically, the judge stated, "It is inconceivable to me that the value of the portfolio has not doubled, tripled, quadrupled over [sixty] years." He observed that there had been no growth in the Adams Fund's portfolio [\*\*38] but that "[t]he investments seemed reasonable" and "didn't seem inappropriate." In encouraging the parties to seek a settlement, the judge noted that he had "no idea what the end result of this case [was] going to be" and that it was "unusual that a trust fund, whereby there would be no invasion of the principal, doesn't grow over [sixty] years of an incredible period of time of growth in the country. ... It is inconceivable that there would not be an increase."

Thereafter, Woodward identified Scott Winslow as an expert witness who would testify that the Adams Fund's investment portfolio, being primarily invested in bonds, was such that it resulted in significant underperformance. Quincy moved to exclude Winslow's testimony, asserting that it "would introduce a new issue in the middle of trial." In

opposition, Woodward contended that Winslow's testimony would "respond to the Court's questions regarding why it was that despite a period of extraordinary growth in the economy, the principal of [the Funds] did not increase in value." Woodward further asserted that capital appreciation had been an issue from the beginning. The judge denied the motion but ultimately limited Winslow's testimony [\*\*39] on [\*169] this issue to whether the investments were consistent with the advice Quincy had received from the bank, and prohibited Winslow from testifying about a theoretical proposal that Quincy could have followed.

Winslow testified that, had Quincy employed the 60-35-5 diversification plan recommended by the bank in 1973, the Adams Fund would have grown in value significantly. Because Quincy did not do so, the Fund's value remained unchanged from 1973 to 2008. The judge credited this testimony and used it to calculate the damages owed to Woodward.

Although the specific calculations employed by Winslow and adopted by the judge were inappropriate for the award of damages, as we discuss *infra*, there was no error in the process by which this liability theory was introduced. The question of capital appreciation was indeed mentioned in Woodward's complaint, in the order appointing a special master, and in Woodward's pretrial memorandum. Given this early introduction of the issue, we are not persuaded that Quincy was denied a meaningful opportunity to prepare to defend against this assertion. Contrast *Harrington-McGill v. Old Mother Hubbard Dog Food Co.*, 22 Mass. App. Ct. 966, 968, 494 N.E.2d 1043 (1986).

Even if [\*\*40] the issue were not raised in the complaint and other documents, the judge may introduce a recovery theory or unpleaded issue at trial if there is "implied consent" of the parties, reflected by evidence "that the parties knew the evidence bearing on the unpleaded issue was in fact aimed at that issue and not some other issue the case involved." *Jensen v. Daniels*, 57 Mass. App. Ct. 811, 816, 786

N.E.2d 1225 (2003). See *Mass. R. Civ. P. 15 (b)*, 365 Mass. 761 (1974); *Harrington-McGill*, 22 Mass. App. Ct. at 968. As the above discussion regarding Quincy's breach of fiduciary duty evinces, the question whether a trust's principal has experienced any capital appreciation is part of the inquiry into whether a trustee has engaged in prudent investments. Accordingly, Quincy cannot claim that, where a breach of fiduciary duty was alleged for improper investment strategies, it was unaware that principal appreciation might be an issue or even unaware of the facts that might be used in support of an argument that there was no appreciation.

Further, in raising the theory, the judge afforded numerous opportunities for Quincy to respond. Quincy was permitted to depose Winslow prior to cross-examination and to retain [\*\*41] an expert and prepare a response to Winslow's testimony, which it [\*170] did. In addition, the judge limited Winslow's testimony on this issue. Thus, Quincy suffered no prejudice in the way the liability theory was introduced, see *Cormier v. Grant*, 14 Mass. App. Ct. 965, 965, 438 N.E.2d 1084 (1982), and there was no issue of "fundamental fairness" in the inclusion of the theory at trial. See *Jensen*, 57 Mass. App. Ct. at 816.

b. *Calculation of damages.* Quincy also alleges that the judge erred in calculating the award of damages award in three respects: first, by basing the award for unrealized gains on what the value of the Adams Fund would have been had Quincy followed the specific investment advice the judge found that Quincy received in 1973; second, in deciding not to subtract from the unrealized gains the costs and expenses Quincy theoretically would have incurred had it followed the diversification plan; and third, in awarding prejudgment interest dating back to the date of each breach.<sup>29</sup> We agree that the formula used to calculate unrealized gains was inappropriate, but reject Quincy's other claims.

29 Quincy also asserts that the judge's findings were inadequate to support the award. While we agree with [\*\*42]

Quincy that the judge is required to make subsidiary findings of fact in support of an award, see *Mass. R. Civ. P. 52 (a)*, as amended, 423 Mass. 1402 (1996), we are not persuaded that the judge did not adequately do so here. See *Willis v. Selectmen of Easton*, 405 Mass. 159, 161-162, 539 N.E.2d 524 (1989) (judge need only "articulate the essential grounds for a decision" and demonstrate that he or she "has dealt fully and properly with all the issues"). Further, to the extent Quincy challenges the judge's crediting of the testimony of Scott Winslow generally, and his discrediting of the testimony of Quincy's expert witness, we note that the judge is entitled to credit any properly admitted expert testimony he or she deems credible, and that the judge here explicitly found that Winslow's opinion was credible. See *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 393 Mass. 666, 682, 473 N.E.2d 1066 (1985).

i. *Basis for unrealized gains.* [\*\*43] Quincy first asserts that the judge's finding that Quincy should have adopted a specific portfolio diversification plan recommended by the bank in 1973, and the judge's employment of this plan by way of Winslow's testimony to calculate the unrealized gains, was clearly erroneous. We agree.

In awarding damages, the judge concluded that the Adams Fund was "entitled to a return on monies it would have reasonably realized but for the imprudent actions of the Trustee." Because the judge determined that it was imprudent for Quincy to ignore the bank's investment advice, and interpreted this advice as providing a 60-35-5 diversification plan, the judge calculated the return the Adams Fund would have realized based on this [\*171] recommended portfolio and the five per cent rate of return the bank anticipated that such a portfolio would receive. Using this information, Winslow had testified that, had Quincy employed this diversification plan, given the growth in the equity market between 1973 and 2008, the Adams Fund would have

grown from its 1973 value of \$321,932.43 to a value of \$1,457,426 in 2008.<sup>30</sup> The judge therefore determined that the Fund suffered a loss in value of \$1,135,494, or an average [\*\*44] annual loss of income of \$31,542, from Quincy's failure to act prudently and to employ the bank's portfolio recommendation. Accordingly, he included this amount, plus pre-judgment interest, in the total award.

30 Quincy takes issue with the bond indexes employed by Winslow in calculating these numbers. Because we conclude that the formula used to calculate the unrealized gains was inappropriate, we decline to assess whether the indexes Winslow used were appropriate here.

To the extent the damages here were based on the judge's finding that Quincy ignored the specific investment advice it received in 1973, the finding and calculation were in error.<sup>31</sup> As discussed above, a trustee is not required to follow investment advice strictly but rather must invest prudently. See *G. L. c. 203C*, §§ 1 *et seq.* Therefore, an award of damages cannot be based solely on what the trust's investment portfolio performance would have been had the trustee complied with certain, specific advice. Such reliance on a potential investment portfolio necessarily and improperly employs the benefit of hindsight. See *G. L. c. 203C*, § 9. Unfortunately, this is precisely the formula the trial judge employed here.

31 We disagree with [\*\*45] Woodward's assertion that it was proper for the judge to rely on Winslow's testimony in calculating the award where Quincy did not present any contrary methodology or challenge Winslow's calculations. Were the methodology employed by the judge sound, and simply not the approach most favorable to Quincy, we would uphold the judge's calculation. However, we cannot permit a judge's ruling to stand where it is clearly erroneous, as we conclude it is here. See *Mass. R. Civ. P. 52 (a)*. See

also *Young Men's Christian Ass'n of Quincy v. Sandwich Water Dist.*, 16 Mass. App. Ct. 666, 672-673, 454 N.E.2d 514 (1983).

The award must be based on more than just the unheeded investment advice a trustee received, and should instead consider the totality of the circumstances as they would have informed prudent investment decisions over the relevant time period. See *Quinton v. Galvin*, 64 Mass. App. Ct. 792, 800, 835 N.E.2d 1124 (2005) (judge must reach "approximate estimate of the plaintiffs' damages" in considering variety of factors). Cf. *Bernier v. Bernier*, 449 Mass. [\*172] 774, 785, 873 N.E.2d 216 (2007) (valuation of business for purposes of divorce proceeding must not be "materially [\*\*46] at odds with the totality of the circumstances"). Factors to consider in this case include the state of the relevant bond and equities markets when various investment decisions were made, not just at one point in time decades ago; the terms and limitations of the trust instrument; the specific needs of the income beneficiary in the short and long term; and any risk calculations that may have influenced the trustee's decisions, including subsequent advice from the bank, the Funds' financial advisor. Cf. *Black v. Parker Mfg. Co.*, 329 Mass. 105, 112, 116-117, 106 N.E.2d 544 (1952) (assessment of value of unique services involves consideration of variety of tangible and intangible factors). As another factor, the judge may "take into account his general knowledge of economic conditions during the period of [the trustee's] transgressions." *Quinton*, *supra*. These factors can appropriately guide the judge's determination of "what asset mix a prudent fiduciary would have maintained" for the Adams Fund during the lengthy time frame at issue. See *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 573 (D. Md. 2003).

Because the judge here considered merely one possible investment approach and did not account [\*\*47] for these other factors, we reverse the award for unrealized gains in the portfolio and remand for further proceedings on this measure. On remand, an assessment of what a prudent investor would have done re-

quires expert testimony on the minimum level of growth equities that would have been prudent for an income-only fund, with consideration of the potential shifts over the lengthy period at issue. A prudent investor may well have followed the 60-35-5 plan, or could have chosen a portfolio with a lower allocation to growth equities. At a minimum, the record must be thoroughly developed and findings made regarding the range of prudent strategies, so that the award, particularly with regard to unrealized gains, is calculated with a fuller understanding of the minimum growth equities allocation in mind.<sup>32</sup>

32 Recalculating the unrealized gains on the portfolio also requires careful consideration of the extent of likely stock appreciation and the appropriate rate of return corresponding with the portfolio or portfolios on which the award is based.

ii. *Accounting for costs and expenses.* Quincy also asserts that the judge erred in failing to subtract from the damages related to the return on [\*\*48] investment the costs and expenses the Adams Fund would have incurred in realizing those investment gains. See [\*173] *G. L. c. 203C*, § 8 (trustee may incur "costs that are appropriate and reasonable in relation to the assets, the purpose of the trust, and the skills of the trustee").<sup>33</sup>

33 Although the judge did not exclude any costs or expenses from the calculation of the unrealized return on investments, he did exclude from the total award expenses that he found to be allowable, including reasonable compensation for Quincy's services, despite the fact that Quincy never submitted a bill for this compensation. In fact, the judge found that Quincy would be due a credit against other funds owed to the Adams Fund of \$7,018, given \$157,025 in allowed expenses offset by \$150,007 in disallowed expenses. This credit was factored into the total award.

The plaintiff bears the burden "to introduce evidence proving its damages to a reasonable certainty." See *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 609, 864 N.E.2d 518 (2007). The theory or explanation for the damages requested need not be the soundest one; it need only "provide[ ] a sufficiently (if minimally) rational basis" [\*\*49] for the award. *Id.* at 611. Cf. *Bernier*, 449 Mass. at 785. Woodward met this burden by presenting Winslow's testimony. There is no obligation on the part of the judge to decrease potential damages sua sponte because of costs or expenses not admitted in evidence. In the absence of contrary testimony from Quincy regarding what its costs were or would have been had it implemented the investment strategy on which the award was based, the judge did not err in crediting the reasonable opinion proffered by Woodward's expert as to what costs and expenses a trustee using a hypothetical portfolio would have incurred. Cf. *Bernier*, *supra*.

iii. *Award of prejudgment interest.* Finally, Quincy challenges the judge's award of interest on each measure of damages from the last date on which the damage was sustained, consistent with the judge's findings on these issues.<sup>34</sup> Quincy avers that the judge erred in including this prejudgment interest because, in tort actions, such interest can be awarded only from the date of the filing of the complaint, and not from the date of the breach itself, pursuant to *G. L. c. 231, § 6B*.<sup>35</sup> We conclude that *G. L. c. 231, § 6B*, does not apply here, and affirm the awards [\*\*50] of prejudgment interest.<sup>36</sup>

34 For example, the judge found that 1962 was the year of the Adams Fund's last sale of real estate below fair market value, and thus he included interest from the end of 1962 on the monies not received as a result of these below-market real estate sales. In addition, the judge found that the sale of a property referred to as "Vigoda" should have occurred in 1972 but did not occur at all, and therefore he awarded interest from

January 1, 1972. The judge employed two different rates of return in calculating the prejudgment interest: five per cent for the unrealized gain in the investment portfolio, and 7.54 per cent for all other measures.

35 Quincy also avers that prejudgment interest is barred in claims against municipalities under the Massachusetts Tort Claims Act. See *G. L. c. 258, § 2*. Because, as discussed *infra*, we conclude that Quincy waived its sovereign immunity on these claims and therefore that the Tort Claims Act does not govern here, we decline to address this claim.

36 However, the rate of return the judge employed for the unrealized gain in the investment portfolio may require reconsideration on remand, consistent with our discussion above regarding [\*\*51] the flaws in this particular analysis.

*General Laws c. 231, § 6B*, provides for the addition of interest to the amount of damages awarded in an action involving damage to property and other such tort actions, at a rate of twelve per cent per year from the date of commencement of the action. The statute is intended "to compensate a damaged party for the loss of use or the unlawful detention of money." *McEvoy Travel Bur., Inc. v. Norton Co.*, 408 Mass. 704, 717, 563 N.E.2d 188 (1990), quoting *Conway v. Electro Switch Corp.*, 402 Mass. 385, 390, 523 N.E.2d 255 (1988). The primary goal of this statutory interest award is not to make the aggrieved party whole but, rather, "to compensate for the delay in the plaintiff's obtaining his money." See *Bernier v. Boston Edison Co.*, 380 Mass. 372, 388, 403 N.E.2d 391 (1980). To achieve this goal, § 6B affords a standard return that the aggrieved party "would have had but for the other party's wrongdoing," regardless of what the theory of liability or underlying damages calculation is. See *McEvoy*, *supra*.

In contrast, "[w]hen a breach of trust occurs, the beneficiary of the trust is 'entitled to be put in the position he would have been in if no breach of fiduciary duty had been com-

mitted." *Berish v. Bornstein*, 437 Mass. 252, 270, 770 N.E.2d 961 (2002), [\*\*52] quoting *Fine v. Cohen*, 35 Mass. App. Ct. 610, 616, 623 N.E.2d 1134 (1993). Making the beneficiary whole, particularly where the breach stems from imprudent investment decisions having an impact on the growth of the trust's assets, may require awarding interest beginning from the time of the breach, such that the trust's assets resemble what they would have but for the breach. In such circumstances, the award of prejudgment interest is part and parcel of the award of damages itself, and is not compensation for the delay of litigation in the same sense as interest awarded under *G. L. c. 231, § 6B*. Accordingly, it was not erroneous for the judge here to find that the Adams Fund was entitled to a return on monies that it would have [\*175] reasonably realized but for Quincy's imprudent actions, and to award prejudgment interest stemming from the last date of breach in order to make the Adams Fund whole.<sup>37</sup>

37 There may be circumstances in which it is proper to apply *G. L. c. 231, § 6B*, to tort actions arising from the breach of a fiduciary duty of a trustee. See, e.g., *Lattuca v. Robsham*, 442 Mass. 205, 210, 812 N.E.2d 877 (2004). Where, however, the judge determines that an award of prejudgment interest is necessary to make the [\*\*53] beneficiary whole, the additional award of interest under § 6B would be excessive and improper, as such an award is not punitive in nature. See *McEvoy Travel Bur., Inc. v. Norton Co.*, 408 Mass. 704, 717, 563 N.E.2d 188 (1990).

3. *Claimed bars to recovery.* We discuss briefly Quincy's remaining assertion that Woodward's claims should have been barred on the grounds of sovereign immunity; the Massachusetts Tort Claims Act, *G. L. c. 258, §§ 1 et seq.*; and laches. We conclude that Woodward's claims were not so barred, and recovery against Quincy was proper.

a. *Sovereign immunity and applicability of Tort Claims Act.* Quincy first argues that be-

cause Woodward ultimately brought a breach of fiduciary duty claim, which sounds in tort, Woodward was obligated to follow the requirements of the Tort Claims Act or else Quincy, as a municipality, would be effectively protected against the claim by sovereign immunity. Further, Quincy avers that Woodward failed to satisfy the Tort Claims Act's presentment requirement specifically, and therefore its claim should have been barred. See *G. L. c. 258, § 4*. Woodward, in contrast, asserts that its claim sounds in contract rather than tort, because Quincy's obligations to manage [\*\*54] the Funds arose through a contractual relationship with President Adams, and therefore the Tort Claims Act does not place any conditions on its claim. Alternatively, if its claim does sound in tort rather than contract, Woodward contends that Quincy's sovereign immunity is impliedly waived, due to Quincy's acceptance of the role of trustee and subsequent acts by the Legislature affirming this role, such that Woodward's claim properly survived.

In determining whether a claim arises in tort or contract, we look to "the essential nature of the plaintiff's claim." *Hendrickson v. Sears*, 365 Mass. 83, 85, 310 N.E.2d 131 (1974). When Quincy accepted the responsibility to manage President Adams's property in trust, Quincy and President Adams entered into a contract, see *Dunphy v. Commonwealth*, 368 Mass. 376, 383, 331 N.E.2d 883 (1975), of which Woodward is an intended third-party beneficiary and therefore is entitled to enforce the contract's terms. See *Miller v. Mooney*, 431 [\*\*176] Mass. 57, 61-62, 725 N.E.2d 545 (2000); *Anderson v. Fox Hill Village Homeowners Corp.*, 424 Mass. 365, 366-367, 676 N.E.2d 821 (1997), and cases cited. However, although Woodward initiated this action seeking an accounting, a purely contractual claim, the case evolved into an action [\*\*55] for breach of fiduciary duty, a claim that sounds in tort, see *Doe v. Harbor Schs., Inc.*, 446 Mass. 245, 254, 843 N.E.2d 1058 (2006); *Lattuca v. Robsham*, 442 Mass. 205, 210, 213, 812 N.E.2d 877 (2004), and arises by operation of law rather than by contractual obligation.

See, e.g., *G. L. c. 203C*, §§ 1 et seq. See also *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. 316, 328, 974 N.E.2d 34 (2012) ("Where a contractual relationship creates a duty of care to third parties, the duty rests in tort, not contract"). Accordingly, the present case is a tort action. To the extent Woodward asks us to frame its claim as a contractual one, we decline to do so. See *Anthony's Pier Four, Inc. v. Crandall Dry Dock Eng'rs, Inc.*, 396 Mass. 818, 823, 489 N.E.2d 172 (1986).

As Woodward's claim sounds in tort, Quincy asserts that the Tort Claims Act imposes numerous conditions that Woodward failed to fulfil.<sup>38</sup> See *G. L. c. 258*, §§ 1 et seq.; *Morrissey v. New England Deaconess Ass'n -- Abundant Life Communities, Inc.*, 458 Mass. 580, 587, 940 N.E.2d 391 (2010). The purpose of the conditions imposed by the Tort Claims Act is to limit tort claims against municipalities in order to maintain effective government. See *id.*; *Vasys v. Metropolitan Dist. Comm'n*, 387 Mass. 51, 57, 438 N.E.2d 836 (1982). See also [\*56] *Whitney v. Worcester*, 373 Mass. 208, 217, 366 N.E.2d 1210 (1977). Hence, *G. L. c. 258*, § 10, explicitly excludes certain types of claims that the Legislature clearly decided must give way to sovereign immunity.

38 Among these is the requirement that the plaintiff present its claim to the executive officer of the municipality within two years of when the cause of action arises. See *G. L. c. 258*, § 4; *Richardson v. Dailey*, 424 Mass. 258, 261-262, 675 N.E.2d 787 (1997). The parties do not dispute that Woodward did not comply with this presentment requirement. In addition, the Tort Claims Act places a \$100,000 limit on damages. *G. L. c. 258*, § 2.

Because the *Tort Claims Act* is in effect a mechanism for both limiting and preserving sovereign immunity from certain tort claims,<sup>39</sup> see *Morrissey*, 458 Mass. at 587, and cases cited, its restrictions do not apply where a municipality has waived sov- [\*177] ereign immunity, and thereby implicitly waived the protections afforded by the Tort Claims Act.

Sovereign immunity may be waived expressly by statute or implicitly, where "governmental liability is necessary to effectuate the legislative purpose." *Todino v. Wellfleet*, 448 Mass. 234, 238, 860 N.E.2d 1 (2007). See *Woodbridge v. Worcester State Hosp.*, 384 Mass. 38, 42, 423 N.E.2d 782 (1981), [\*57] and cases cited. We conclude that Quincy's sovereign immunity is impliedly waived here.

39 Indeed, the Tort Claims Act replaced any prior common-law sovereign immunity doctrine with regard to tort claims and was designed to provide "a comprehensive and uniform regime of tort liability for public employers." *Morrissey v. New England Deaconess Ass'n -- Abundant Life Communities, Inc.*, 458 Mass. 580, 588 (2010), quoting *Lafayette Place Assocs. v. Boston Redevel. Auth.*, 427 Mass. 509, 534, 694 N.E.2d 820 (1998), cert. denied, 525 U.S. 1177, 119 S. Ct. 1112, 143 L. Ed. 2d 108 (1999).

First, when Quincy agreed to serve as trustee, it assumed the fiduciary duties of that role, including the consequences for not fulfilling these duties. The policy purposes of sovereign immunity are not served where, as here, a municipality takes on a responsibility beyond its inherent or core government functions and therefore serves in a capacity that could just as easily be accomplished by a nongovernmental entity. See *Morrissey*, 458 Mass. at 587. See also *Minton Constr. Corp. v. Commonwealth*, 397 Mass. 879, 880, 494 N.E.2d 1031 (1986) (where municipality has assumed certain obligations through contract, it has waived sovereign immunity against actions brought to enforce such obligations). [\*58] In essence, by choosing to accept the obligations of trusteeship, Quincy waived any sovereign immunity from claims arising from its duties as a trustee.

A trustee, regardless of whether it is a municipality, a corporation, or a private individual, is accountable to courts for its conduct in fulfilling, or committing a breach of, the fiduciary duties it owes.<sup>40</sup> See *Fox v. Boylston*

*St. Ltd. Partnership v. Mayor of Boston*, 418 Mass. 816, 818, 641 N.E.2d 1311 (1994). Unlike the statute at issue in *Woodbridge*, 384 Mass. at 42, 44-45, where we determined that sovereign immunity was not waived, the Prudent Investor Act creates "a formal system of actionable guaranties," *id.* at 42, and expects the same level of conduct from any trustee. See *G. L. c. 203C*, §§ 1 *et seq.* "[A] natural and ordinary reading" of the Prudent Investor Act indicates that where a municipality accepts the obligations of serving as a trustee, it will be held to the same standards and subject to the same penalties as any other trustee. See *DeRoche v. Massachusetts Comm'n Against Discrimination*, 447 Mass. 1, 14, 848 N.E.2d 1197 (2006).

40 Indeed, Quincy has sought court direction regarding the administration of the Funds previously, and therefore has subjected [\*\*59] itself to court supervision on these matters.

Several legislative acts specific to the Funds further signal that Quincy is liable for any breach of the trustee responsibilities it [\*178] has assumed. The 1827 Act appointed the treasurer of Quincy as treasurer of the Adams Fund and authorized a board of supervisors and the selectmen of Quincy to execute President Adams's intentions. See St. 1826, c. 59. It further required the treasurer to "render an account of his doings, and exhibit a fair and regular statement of the property in his hands." St. 1826, c. 59, § 9. The 1898 Act authorized Quincy, as trustee, to sell and convey the Adams Fund's real property holdings, and in effect confirmed Quincy's legal responsibility to administer the Fund and invest its assets. See St. 1898, c. 102. In neither of these acts did the Legislature indicate that Quincy would be held to standards different from those applicable to other trustees.

To effectuate the purposes of these acts, we must consider sovereign immunity to be impliedly waived. The Legislature could not have intended to enable a municipality to serve as a trustee, by way of the Prudent Investor Act and the 1827 and 1898 Acts, and simultaneously

[\*\*60] relieve it of the fiduciary duties inherent in the role of a trustee. Reading Quincy's obligations otherwise would frustrate the general intent of the Prudent Investor Act that trustees further the interests of trust beneficiaries, by eliminating any recourse for mismanagement, and would be illogical in light of the specific acts of the Legislature empowering Quincy to take on such fiduciary responsibilities on behalf of the Funds. Accordingly, the Tort Claims Act cannot be read to limit tort liability where a municipality has agreed to serve as a trustee.<sup>41</sup>

41 Because we conclude that Quincy waived the provisions of the Tort Claims Act, including its exceptions, we decline to address Quincy's claim that the Probate and Family Court lacked subject matter jurisdiction for the claim under *G. L. c. 258*, § 3.

For the same reason, we need not decide whether Quincy's assertion that it is immune from suit on this claim under *G. L. c. 258*, § 10 (b), is a valid one.

b. *Laches*. Quincy also argues that the equitable doctrine of laches bars Woodward's claim. We agree with Woodward, the trial judge, and the special master that the claim is not barred on this ground.

Quincy avers that Woodward unduly [\*\*61] delayed in bringing this action, and that this delay prejudiced Quincy because several of its key witnesses had died since the alleged breaches occurred. Quincy's primary contention on appeal is that the judge improperly required actual knowledge by Woodward of Quincy's mismanagement of the Funds in order to satisfy the laches standard; instead, Quincy asserts that an opportunity to ascertain such facts [\*179] is all that is required for a laches defense.

At trial, Quincy identified two occasions on which it asserted that Woodward had constructive knowledge of Quincy's failings as a trustee. First, Quincy suggested that Woodward knew of Quincy's inadequacies as early as the 1960s, when the headmistress of

Woodward communicated to Quincy's primary record-keeper that she was disappointed that Quincy had sold at least one parcel owned by the Funds for less than fair market value. Second, Quincy alleged that as a result of litigation in the late 1980s between Woodward and Quincy regarding Quincy's mismanagement of the Woodward Fund, a separate trust, Woodward knew or should have known that Quincy was engaging in similar mismanagement of the Funds at issue here. Quincy contends on appeal that this [\*\*62] constructive notice should have been adequate to satisfy the laches standard.

Both the special master and the trial judge rejected Quincy's laches claim because it had not established that Woodward had actual knowledge of Quincy's breach prior to its seeking of an accounting in 2005.<sup>42</sup> There is no flaw in the legal analysis employed by the trial judge. To establish a laches defense, the asserting party must establish both actual knowledge, see *Lattuca*, 442 Mass. at 213-214; *Demoulas*, 424 Mass. at 518-519; and prejudice. See *Stuck v. Schumm*, 290 Mass. 159, 166, 194 N.E. 895 (1935); *Stewart v. Finkelstone*, 206 Mass. 28, 36, 92 N.E. 37 (1910). "Constructive knowledge is insufficient," *Lattuca*, *supra* at 213, as is "[m]ere suspicion or mere knowledge that the fiduciary has acted improperly." *Doe*, 446 Mass. at 255. This requirement of actual knowledge "protects the beneficiary's legitimate expectation that the fiduciary will act with the utmost probity in all matters concerning the relationship." *Id.* Contrary to Quincy's implication, a

plaintiff is not required to conduct "an independent investigation" to determine if a breach of fiduciary duty has occurred. *Demoulas*, *supra* at 520.

42 The trial judge specifically rejected [\*\*63] Quincy's assertion that Woodward should have known of Quincy's mismanagement as a result of the Woodward Fund litigation and emphasized that the Funds were not parties to that litigation and therefore were not officially on notice of it.

We agree with the special master's characterization that although "[c]ommon sense would dictate that if Woodward knew [Quincy] was mismanaging the Woodward Fund ... , [then Quincy was] engaging in the same practices with regards to the Adams Fund [,] ... common sense and constructive notice are not [\*180] the standards here." As the special master and trial judge properly concluded, the laches standard simply was not satisfied.

*Conclusion.* The further amended judgment of the Probate and Family Court, and the amended judgment incorporated therein, is affirmed as to liability. We affirm the judge's award of damages in part, but remand the case to the Probate and Family Court for recalculation of the damages related to the unrealized investment gains, including prejudgment interest thereon, and for further proceedings consistent with this opinion.

So ordered.