Massachusetts Department of Revenue
Division of Local Services

LOCAL EMPLOYEES

Compensation, Benefit and Employment Issues

2008

Workshop C

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www.mass.gov/dls

Workshop C

Compensation, Benefit and Employment Issues

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Case Study 1

Senior Work-off Abatement Issues

The town of Seniorville recently adopted GL c. 59, §5K, a local option statute otherwise known as the senior work-off abatement. Pursuant to this statute, Seniorville has established a program to allow persons over the age of 60 to volunteer their services to the municipality in exchange for which Seniorville will reduce their real property tax bills. Under Chapter 59 Section 5K, the maximum hourly rate of compensation is the State minimum wage which is $8.00 per hour in 2008. Federal minimum wage is currently $6.55. The maximum allowable abatement that may be earned under GL c. 59, §5K is $750.

Ann, who is 61, works full-time as a librarian in Seniorville's public library. She owns a home in Seniorville with Bob, who is the same age and on short-term disability from his job at a construction company. They live next door to Carmen, who is 83 and unable to work. Ann's and Bob's adult son, Dave, is living at home while he attends graduate school.

1. Is Ann eligible to work in Seniorville's senior work-off abatement program?
2. Is Bob eligible to work in Seniorville's senior work-off abatement program?
3. Seniorville wants to pay an hourly rate of $6.50 per hour as compensation to eligible persons who participate in the senior work-off abatement program. Can Seniorville do this?
4. Is the compensation participants earn in the senior work-off abatement program subject to income tax?
5. Can Dave perform the volunteer work as Bob's proxy?
6. Can Ann transfer her abatement to Carmen's tax bill?
7. If Ann provides volunteer services in the current fiscal year, but after the actual bills are issued, can they be credited toward this fiscal year's tax bill?
8. Can Seniorville provide any other type of work-off program besides the senior work-off abatement provided under GL c. 59, §5K?

Case Study 2

Compensatory Time Issues

The City of Swapsit has an overtime and comp time ordinance which provides that non-managerial employees are entitled to overtime at time and one half for authorized hours worked in excess of 40 in any given week, or, such employees may opt to receive compensation time on an hour for hour basis, with no cap or limitation specified as to when the time must be taken, except that comp time taken must be approved by the department head. No special purpose article or operating year budget item includes this accruing liability. The city has traditionally put extra money in the salary accounts to cover anticipated unused comp time for employees it knows will retire in that year. John Jones, a supervisory employee of the DPW, has submitted his resignation and has accumulated 300 hours of unused comp time according to his records. He claims that his time was approved by a former DPW Director. Neither the DPW nor the City Auditor has any record of the time earned, and no money was budgeted for this expense.

The City Council appoints and has negotiated a contract with the City Auditor under GL c. 41, §108N, which does not provide for overtime or comp time. The City Manager has allowed the City Auditor to earn and take comp time in accordance with the ordinance and the City Auditor has officially accumulated 450 hours of unused comp time to date, with the express approval of the City Manager. The City Council has learned of this arrangement and the City Solicitor has notified the City Auditor that the comp time agreement was not authorized under the ordinance, the personal services contract or by vote of the City Council and that she must forfeit vacation or otherwise repay the city for the time already taken and forfeit the remaining hours of unused time.

School department employees are specifically excluded from the ordinance. The school committee of Swapsit has not adopted an overtime or comp time policy by any formal vote. The Principal of the high school has worked out an arrangement with the Superintendent to receive comp time on an hour for hour basis for hours in excess of 35 per week worked during the school year. The Principal has accumulated 600 hours of comp time under this arrangement, and has not taken any comp time days off with pay. He is retiring at the end of the school year and has advised the superintendent of his request to be paid the time in a lump sum based on his current salary. No provision was made in the budget for covering this liability.

1. Is the city protected from liability to pay unused comp time to Jones under GL c. 44, §31, which prohibits a city department from incurring a liability in excess of appropriation, or for any other legal reason?

2. What legal arguments does the City Auditor have that his comp time arrangement is a binding obligation of the city?

3. Must the School Committee honor the agreement between the Superintendent and the Principal? May the School Committee Honor the agreement? Where can the school committee get the money if there are insufficient unencumbered funds in its budget to pay for it?

Case Study 3

Police and Fire Injury Leave Issues

Firefighter Erwin suffered a 3rd degree burn on his arm and severe smoke inhalation in the course of responding to a 2-alarm fire negligently started by a contractor installing a central air conditioning system in a single-family residence in the town of Swelterburg. He was taken to the hospital emergency room for evaluation and treatment and was later admitted to the hospital's trauma unit. He was hospitalized for 17 days and out of work for a total of 123 days.

GL 41, §100 authorizes the reimbursement of an injured firefighter or police officer's medical costs. GL 41, §111F requires that an injured firefighter or police officer be paid his regular salary while out on injury leave. Swelterburg has a disability insurance policy to cover it for losses due to payment of medical costs and compensation under GL 41, §§100 and 111F. In addition, two years ago, Swelterburg established a stabilization fund under GL c. 40, §5B, the purpose of which is to pay medical expenses and compensation of firefighters and police officers on paid injury leave.

1. Are payments to Firefighter Erwin under GL 41, §111F subject to income tax?
2. Can Swelterburg structure its disability insurance policy to pay benefits directly to Firefighter Erwin?
3. Can Swelterburg apply its disability insurance policy payments to reimburse the fire department's salary account?
4. Will Firefighter Erwin accumulate sick and vacation time while on paid injury leave?
5. Could the Swelterburg fire department have hired a replacement employee for Firefighter Erwin and paid that employee out of the departmental salary account?
6. Can Swelterburg or Firefighter Erwin recover tort claim damages from the contractor who caused the fire?
7. Who would pay the attorneys fees if Firefighter Erwin filed suit to recover damages from the contractor who caused the fire?
8. Can Swelterburg pay the attorney it hires to represent it in recovering tort claim damages from any settlement or judgment proceeds it receives?

Case Study 4

Special Detail Issues

The town of Bilkam has a police force of 5 full-time officers and 10 part-time officers. It regularly has 2 or 3 road excavation projects underway at any given time and requires that a road crew use a police officer or officers on a special detail to direct traffic at the work site. The police collective bargaining agreement provides that full time officers will be offered special details on a rotating basis, and if no full-time officer is available, part-time officers will be offered them in the same manner. The contract calls for paid details at a fixed rate, which is usually more than 1.5 times the officer's salary, with a minimum of 4 hours guaranteed.

The contract is silent on the procedure if no town officer is available, but the consistent practice of the police department has been to contact neighboring towns to obtain the use of an off-duty officer to perform the detail. The town collects a fee from the governmental or private party doing the excavation, which includes the special detail rate plus a 10% administrative fee for the town. When a detail is performed by another town's officer, the fee is deposited by the Bilkam treasurer into an escrow account and a town of Bilkam check for that amount is forwarded to that town, which pays the officer from that town's special detail revolving fund, under GL c. 44, §53C. When the town's own officer performs the detail, the fee is deposited into the town's account and paid from Bilkham's special detail fund.

Recently the new accountant for a neighboring town refused to process payment through its revolving fund claiming that since the services were performed in Bilkam payment of the officers should be Bilkam's responsibility. The neighboring town has a higher special detail rate and its officers were claiming they were entitled to its paid detail rate when performing details in Bilkam. In addition, the Commonwealth has refused to pay the 10% administrative fee for details at excavation jobs performed by its private contractors.

1. Which town should be paying the out of town officers performing special details in Bilkam?

2. What is the proper rate for paying the out of town officers performing special details in Bilkam?

3. Can the Bilkam police chief require its police officers to perform the special details as mandatory overtime, even if the town continues to accept the fee from the excavating parties?

4. What town is responsible for injuries suffered when an out of town officer is performing a special detail for Bilkam?

5. Can the town charge the special detail fee, including the 10% administrative fee, to the private contractor performing an excavation job in Bilkam for the Commonwealth?

Case Study 5

Special Personal Services Contract Issues

The town of Richland is negotiating many new employment contracts. It is in the process of hiring a director of its department of public works who wants an employment contract for a term of 5 years and an arrangement whereby the town will pay for repairs, insurance and gas for his personal vehicle which he will use on town business. The town is also in the process of hiring the former building inspector from the town of Brokefolk who was eliminated abruptly last year and would now like to negotiate severance pay and a termination clause into his employment contract to avoid a repeat situation.

The town also just received a grant from the Department of Conservation and Recreation and is interviewing to hire a conservation agent. Its most qualified applicant wants a 3-year contract and reimbursement for the cost of attending a program on environmental management run by the EPA each summer. A member of the board of assessors was recently re-elected to her 5th term and wants longevity pay that recognizes her years of service to Richland.

The Board of Selectmen just hired a new executive secretary who wants reimbursement for the expense of renewing her status as a notary public. The Board of Selectmen is also about to appoint a temporary collector to fill the vacancy created when the elected collector died suddenly at the beginning of the fiscal year. The appointed temporary collector wants a salary increase over that provided to the elected collector. And, finally, the town has recently agreed to extend the employment contract for its chief of police to June 30, 2011.

1. Can Richland agree to a multi-year employment contract with the director of the department of public works and arrange to pay for repairs, insurance and gas for his personal vehicle which he will use for town business?
2. Can Richland add severance pay and a termination clause to the building inspector's employment contract?
3. Can Richland agree to the conservation agent's multi-year contract and reimbursement requests?
4. Can Richland agree to reimburse the executive secretary for the expense of renewing her status as a notary public?
5. Can Richland accommodate the board member's request for longevity pay?
6. Can Richland accommodate the appointed temporary collector's request for a salary increase over that given to the former, elected collector?
7. Can Richland extend the police chief's employment contract for 3 years?

Case Study 1

Senior Work-off Abatement Issues Reference Materials

Mass. GL Chapter 59: Section 5K. Property tax liability reduced in exchange for volunteer services; persons over age 60

Section 5K. In any city or town which accepts the provisions of this section, the board of selectmen of a town or in a municipality having a town council form of government, the town council or the mayor with the approval of the city council in a city may establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person over the age of 60 on his tax bills and any reduction so provided shall be in addition to any exemption or abatement to which any such person is otherwise entitled and no such person shall receive a rate of, or be credited with, more than the current minimum wage of the commonwealth per hour for services provided pursuant to such reduction nor shall the reduction of the real property tax bill exceed $750 in a given tax year. It shall be the responsibility of the city or town to maintain a record for each taxpayer including, but not limited to, the number of hours of service and the total amount by which the real property tax has been reduced and to provide a copy of such record to the assessor in order that the actual tax bill reflect the reduced rate. A copy of such record shall also be provided to the taxpayer prior to the issuance of the actual tax bill. Such cities and towns shall have the power to create local rules and procedures for implementing this section in any way consistent with the intent of this section.

In no instance shall the amount by which a person's property tax liability is reduced in exchange for the provision of services be considered income, wages, or employment for purposes of taxation as provided in chapter 62, for the purposes of withholding taxes as provided in chapter 62B, for the purposes of workers' compensation as provided in chapter 152 or any other applicable provisions of the General Laws, but such person while providing such services shall be considered a public employee for the purposes of chapter 258, but such services shall be deemed employment for the purposes of unemployment insurance as provided in chapter 151A.

Informational Guideline Release (IGR) No. 02-210
September 2002
(Supersedes IGR 00-201)
SENIOR CITIZEN PROPERTY TAX WORK-OFF ABATEMENT
Chapter 184 §52 of the Acts of 2002
(Amending G.L. Ch. 59 §5K)

SUMMARY:
The board of selectmen, town council or mayor with the approval of the city council in a community that has accepted G.L. Ch. 59 §5K may establish a property tax work-off program for taxpayers over 60 years old. Under the program, participating taxpayers volunteer their services to the municipality in exchange for a reduction in their tax bills. A recent amendment

to the local acceptance statute increases the maximum abatement a senior may earn each fiscal year under these programs to $750. The previous limit was $500 per year.
The amendment is now in effect. A community that has accepted the statute may now grant abatements up to $750, but any local by-laws, ordinances or rules adopted for the program that expressly limit the abatement to $500 must first be amended before taxpayers can earn a higher abatement.
These guidelines supersede the guidelines issued when G.L. Ch. 59 §5K was enacted. See Property Tax Bureau Informational Guideline Release No. 00-201, Senior Citizen Property Tax Work-off Abatement (January 2000). They reflect the recent amendment and address eligibility and other issues that have arisen since that time.

GUIDELINES:

A. LOCAL ACCEPTANCE OF STATUTE

1. Acceptance
Acceptance of the statute is by a vote of the town meeting, town council, or city council with the mayor's approval where required by law.

2. Effective Date
The acceptance vote should explicitly state the fiscal year in which the program will first be available.

3. Revocation
Acceptance of the statute may be revoked, but the city or town must wait until at least three years after the statute was accepted to do so. Revocation is also by town meeting, town council or city council vote. G.L. Ch. 4 §4B.

B. SCOPE OF ABATEMENT

1. Age
Taxpayers must be over 60 years of age to earn a property tax abatement under the program.

2. Ownership
Taxpayers must be the assessed owner of the property on which the tax to be abated is assessed, or have acquired ownership before the work is performed and the abatement applied. If the property is subject to a trust, the senior must have legal title, i.e., be one of the trustees, on the applicable January 1 assessment date, or at the time the work is performed.
More than one qualifying owner of the parcel may earn an abatement, unless local program rules limit multiple abatements on a parcel. See Section C below.

3. Maximum Abatement and Hourly Rate
The maximum abatement taxpayers may earn is $750 per fiscal year. In addition, they cannot receive credit for their services at an hourly rate higher than the state's minimum wage. As of January 1, 2001, that rate is $6.75 an hour.

Communities should also set the rate no lower than the federal minimum wage unless advised by the Wages and Hours Division of the United States Department of Labor that the federal fair labor standards act does not apply to the program. The federal minimum wage is currently $5.15 an hour.

4. Personal Exemptions and Deferrals

Taxpayers may earn abatements under the work-off program in addition to any property tax exemptions they may be eligible for under other statutes, such as personal exemptions under G.L. Ch. 59 §5 or residential exemptions under G.L. Ch. 59 §5C. They may also defer the balance of their taxes under G.L. Ch. 59 §5(41A) if they are eligible to do so.

C. ADOPTION OF LOCAL PROGRAM RULES

After acceptance of the statute, the selectmen, town council or mayor with approval of the city council may establish a senior work-off program consistent with any local rules and procedures the municipality may adopt by by-law or ordinance. Those officials should coordinate the assignment of program participants to the various municipal departments where they will perform their volunteer services.

A municipality accepting the new law should adopt rules to determine:

- The hourly rate at which the tax reduction is to be computed;
- An eligibility date;
- Any income asset limitations on eligibility;
- Any limitation of eligibility to a tax reduction on a volunteer's domicile;
- Any limitations on the number of volunteers or the types of work they may do;
- Any other restrictions or regulations consistent with the intent of the law.

D. CERTIFICATION OF SERVICE

The board, officer or department supervising the taxpayer's volunteer services must certify to the assessors the hours of services performed by the taxpayer before the actual tax for the fiscal year is committed. The certification must state the amount actually earned as of that time. Services performed after that date are credited toward the next fiscal year's actual tax bill to the extent consistent with the program rules established by the municipality.

A copy of the certification must also be given to the taxpayer before the actual tax bill is issued. (See attached model that may be adapted to suit local needs).

E. TREATMENT OF "EARNED" AMOUNT

The amount of the property tax reduction earned by the taxpayer under this program is not considered income or wages for purposes of **state** income tax withholding, unemployment compensation or workmen's compensation.

The United States Internal Revenue Service (IRS) has ruled that under current federal law the abatement amount is included in the taxpayer's gross income for both federal income tax and Federal Insurance Contribution Act (FICA) tax purposes, however. In addition, if the community pays the taxpayer's share of FICA taxes, that amount is also income subject to federal income tax. Communities should verify with the IRS that their procedures comply with all applicable federal laws regarding income, Social Security and Medicare tax withholding on abatements earned under this program.

F. ACCOUNTING FOR ABATEMENTS

Earned reductions must be applied to the **actual** tax bills for the fiscal year. The assessors must commit the full tax for the year and process the **gross** amount earned as certified by the board, officer or department supervising the taxpayer's volunteer services as an abatement to be charged against the overlay account. See Section D above. **The taxpayer's actual tax bill, however, should only show a credit for the amount earned net of any federal withholdings.** The municipal share of federal Social Security and Medicare taxes may also be charged to the overlay unless the community has otherwise provided.

G. STATUS OF VOLUNTEERS

Taxpayers performing services in return for property tax reductions are employees for purposes of municipal tort liability. Municipalities will therefore be liable for damages for injuries to third parties and for indemnification of the volunteers to the same extent as they are in the case of injuries caused by regular municipal employees.

(MODEL)

(Copy must be given to the taxpayer before the actual tax bill is mailed)

City/Town of _____
Certificate of Completion of Volunteer Services
(G.L. Ch.59 §5K)

To: Board of Assessors
_____ the owner of a parcel at _____ has completed
(Taxpayer's name) (Property address)
_____ hours of volunteer work to be credited toward the fiscal year _____ tax assessed on the parcel at the address listed above at the rate of $_____ per hour.

_____
(Signature of Person Certifying Work)

_____
(Board or Department)
(Date)

Commonwealth of Massachusetts
State Ethics Commission

CONFLICT OF INTEREST OPINION
EC-COI- 04-4*

INTRODUCTION

You are the Tax Collector-Treasurer in the Town of Groton ("Town"). The Town has accepted the provisions of General Laws chapter 59, § 5K[1] pursuant to which it established a Senior Citizen Property Tax Work-Off Abatement Program ("Abatement Program"). Pursuant to the Abatement Program, an individual over the age of sixty (60) may volunteer to work a number of hours in various Town departments in return for which he will receive an abatement on his real estate tax bill. You supervise the Assistant Tax Collector-Treasurer who is the administrator of the Town's Abatement Program. You have asked whether Town employees may participate in the Abatement Program.

QUESTIONS

1. May Town employees participate in the Abatement Program if they are otherwise qualified?

2. Is an individual who participates in the Abatement Program considered a municipal employee for purposes of the conflict of interest law?

ANSWERS

1. Otherwise qualified Town employees may participate in the Abatement Program as long as they are able to secure an exemption to § 20 of G.L. c. 268A. With limited exceptions, full-time Town employees will be eligible for a § 20(b) exemption. Special municipal employees in Town will be eligible for either the § 20(c) or § 20(d) exemption depending on which Town agency employs them.

2. Every participant in the Abatement Program whether or not they are already a Town employee will be considered a municipal employee for purposes of the conflict of interest law during the time they participate in the Abatement Program. All Abatement Program participants must comply with the restrictions of the conflict of interest law applicable to municipal employees. Finally, Abatement Program participants are eligible to be designated as special municipal employees by their Board of Selectmen, Town Council or City Council.

FACTS

A. The Statute

In G.L. c. 59, § 5K,[2] the Legislature enacted a local option statute that allows the board of selectmen, town council or the mayor with the approval of the city council, to establish a program to allow persons over the age of sixty (60) to volunteer to provide services to the municipality in exchange for a reduction in their real estate tax bills. Participants in such

programs may earn a maximum reduction of $750 per tax year, based on a rate per hour of service that cannot exceed the Commonwealth's minimum wage.[3] The reduction under the program is in addition to any exemption or abatement to which the person is otherwise entitled.[4]

The municipality is responsible for maintaining a record of each taxpayer participating in the program including, but not limited to, the number of hours of service and the total amount by which the real property tax has been reduced.[5] The municipality is also responsible for providing a copy of that record to the assessor to ensure that the actual tax bill reflects the reduced rate as well as to the taxpayer.[6] A municipality accepting § 5K shall have the power to create local rules and procedures for implementing § 5K in any way consistent with the intent of that section.[7]

B. The Town's Abatement Program

At the Town Meeting on October 16, 2000, the Town voted to accept G.L. c. 59, § 5K to allow the Town to establish an Abatement Program with abatements to begin in fiscal year 2002. The Assistant Tax Collector-Treasurer is the administrator of the Abatement Program.

In order to participate in the Town's Abatement Program, volunteers must meet two criteria. First, they must be sixty (60) years of age by July 1st of the fiscal year in which the abatement would be granted. Second, they must own and reside in the domicile to which the abatement will be applied.

The rate of volunteer compensation is $6.75 an hour. The maximum number of hours that may be worked by any volunteer is 74.07 for a total work abatement credit of $500 per year.[8] The hours must be worked between January 1 and December 1. The Abatement Program is limited to forty (40) people on a first come, first served basis.[9]

A volunteer must fill out a Work Credit Program Abatement Application ("Application") and submit it to the Assessors Office. The Assessors Office date stamps and logs the Application upon receipt. It then reviews the Application and either approves or rejects it. An Application is rejected only if the individual does not meet the age requirement or does not own and live in the property that is the subject of the real estate tax bill.

The Assessors Office gives the Tax Collector-Treasurer's Office a copy of the Application and approval form. The Tax Collector-Treasurer's Office makes a file for the volunteer and sends out a Volunteer Questionnaire form to be completed and returned. The Volunteer Questionnaire provides the information necessary to match the volunteers with the jobs that best fit their preferences and abilities.

Participating Town Department Heads fill out a Departmental Job Request Form for each task. Based on the information provided by the Department Head and the volunteers, the Assistant Tax Collector-Treasurer tentatively matches volunteers with jobs.[10] The type of work that a volunteer may do includes the following: covering and shelving books; answering telephones; filing; clerical work; copying; organizing; alphabetizing census forms; parking

attendant at the beach; raking; sorting recyclables; grounds cleaning; maintenance; mailing; data entry; repairs; carpentry; and painting.

The Assistant Tax Collector-Treasurer then contacts the Department Head to discuss the prospective match. The Department Heads do not generally interview candidates and are not responsible for matching volunteers, although they may request a different volunteer better suited to their needs. Once the volunteer and the Department have been matched, the Assistant Tax Collector-Treasurer contacts the volunteer with the details about reporting to work.

Time sheets are completed for the hours that are worked by the volunteers. The hours are recorded daily by the volunteer and initialed by the supervisor. Completed time sheets must be signed by the Department Head and the volunteer. Time sheets must be turned into the Tax Collector-Treasurer's office when ten (10) days have been worked or when the job is finished, whichever is sooner.

The Tax Collector-Treasurer's Office keeps a running total of all volunteers and their hours worked. After all time sheets have been recorded, the Tax Collector-Treasurer's Office submits a Work Completion Report to the Assessors Office. The Assessors then process the abatement equivalent to the number of hours worked by $6.75.

DISCUSSION

A. Town Employees Participating in the Abatement Program

Section 20 of G.L. c. 268A, the conflict of interest law, prohibits a municipal employee[11] from having a "financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party." Any individual participating in the Abatement Program, including a Town employee, has an obvious financial interest under § 20 in their participation because the amount of their tax liability to the Town is reduced based on the number of hours they work. In order to determine whether Town employees may participate in the Abatement Program, it is necessary to determine whether the work-for-tax abatement exchange under the Abatement Program constitutes a "contract" for purposes of § 20.

"A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended."[12] The term includes any type of arrangement between two or more parties under which one party undertakes certain obligations in consideration of the promises made by the other party.[13]

The Commission, as well as the courts, "have given the term 'contract' a broad meaning to cover any arrangement in which goods or services are to be provided in exchange for something of value."[14] The elements of a contract are offer and acceptance, consideration and mutual assent to essential terms.[15] Consideration is "[t]he cause, motive, price, or impelling influence which induces a . . . party to enter into a contract."[16] The requirement of consideration is satisfied if there is either a benefit to the promisor or a detriment to the promisee.[17]

Based on these facts, we conclude that the work-for-tax abatement exchange under the Abatement Program is a contract for purposes of § 20. There is an offer and acceptance. The Town makes an offer to qualified residents to work in return for a reduction in their property tax bills. A resident may accept the offer by submitting an Application and working in the Abatement Program. The element of consideration is also present. In exchange for providing services to a Town department or agency, a participant receives something of value, a reduction in the amount owed on his property tax bill that corresponds to the number of hours worked multiplied by the hourly rate for such work. As such, there is a benefit to the participant, a reduction in his property tax bill, and a cost to the Town, a reduction in the property tax revenue that it would otherwise receive.

Further, we do not consider the Abatement Program to be the type of government benefit program that we have said does not constitute a contract. In the Commission's prior opinions that reviewed state benefit programs and discussed whether there was a contract for purposes of § 7, the state employee counterpart to § 20, the Commission found that cash grant public assistance program benefits as then existing[18] that were administered by state or federal government agencies were not contracts.[19] The Commission relied on the fact that none of the program benefits at issue were supported by consideration and each was made available pursuant to statutorily defined criteria and eligibility guidelines.[20]

A recipient of the benefit programs reviewed by the Commission received only what they qualified for by statute. In other words, a recipient was not required to work or otherwise provide any bargained-for exchange in order to receive the benefit to which they were entitled. In that situation, there was no consideration and, therefore, no contract. Although the Abatement Program is similar in one way to such programs because it does involve statutorily defined eligibility guidelines, it is markedly different in that it is supported by consideration in the form of work in return for the benefit received. The benefit of the abatement is not available simply to those who qualify, but rather only those who qualify and who actually provide services to the Town. There is also an additional bargained-for exchange because the amount of the reduction in a participant's property tax bill is based on the number of hours that a participant works.

Having determined that the work-for-tax abatement exchange under the Abatement Program is a contract, any qualified Town employee who wants to participate, must secure an exemption to § 20.

1. Exemption Available to Full-Time Municipal Employees and Certain Part-Time Municipal Employees

In general, full-time employees of the Town who do not work for the Tax Collector-Treasurer's Office or an agency that regulates the activities of the Tax Collector-Treasurer's Office, may rely upon an exemption under § 20(b) to participate in the Abatement Program provided that they satisfy all of the requirements of that exemption. This exemption is also available to part-time municipal employees whose positions have not been designated as special municipal employee positions.[21] In each instance, the Town employee must be able to satisfy all of the requirements of the § 20(b) exemption as follows.

As a Town employee, he must not participate[22] in or have official responsibility[23] for any of the activities of the contracting agency for the Abatement Program. Based on the facts presented, we conclude that the contracting agency in Town for purposes of the Abatement Program is the Tax Collector-Treasurer's Office.[24] The Town employee may not be employed by the Tax Collector-Treasurer's Office. In addition, the Town agency for which the employee works must not regulate[25] the activities of the Tax Collector-Treasurer's Office. The Abatement Program must be publicly advertised.[26] The Town employee must file a written disclosure with the Town Clerk describing his interest in the Abatement Program.

In addition, because a Town employee participating in the Abatement Program will be providing personal services to a Town department, he must comply with the following additional restrictions. The services for the Abatement Program must be provided outside of his normal working hours as a Town employee. The services may not be required as part of his regular municipal duties. He may not be compensated for his work in the Abatement Program for more than 500 hours during a calendar year. The head of the contracting agency, the Tax Collector-Treasurer's Office, must make and file with the Town Clerk a written certification that no current employee of the Town department in which the participant is working is available to perform the work as part of their regular duties.[27] Finally, the Board of Selectmen must approve the § 20(b) exemption.

Any full-time Town employee or part-time employee whose position has not been designated as a special municipal employee position, who satisfies all of the requirements for a § 20(b) exemption, may participate in the Abatement Program at the same time that he is holding a job with the Town. If he fails to satisfy any of these requirements, he may not participate.[28]

For example, a full-time employee of the Town's Public Library may participate in the Abatement Program using the § 20(b) exemption. In addition, a part-time assistant in the Town Clerk's office or a School Committee member whose positions have not been designated as a special municipal employee positions, may participate using the § 20(b) exemption.

2. Exemptions Available to Special Municipal Employees

Two exemptions are available for special municipal employees. A special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency, in this instance, the Tax Collector-Treasurer's Office, may use the § 20(c) exemption. Section 20(c) provides that § 20 does not apply to a special municipal employee who does not participate in or have official responsibility for any of the activities of the contracting agency and who files with the city or town clerk, a full disclosure of his interests in the contract. A special municipal employee in Town who wants to participate in the Abatement Program and who qualifies for the § 20(c) exemption, must file a written disclosure of his financial interest in the Abatement Program with the Town Clerk. He may then participate in the Abatement Program. For example, if the members of the Town's Board of Health have been designated as special municipal employees by the Board of Selectmen, they may participate in the Abatement Program by using the § 20(c) exemption because they do not participate in or have official responsibility for any of the activities of the Tax Collector-Treasurer's Office, the contracting agency.

In contrast, a special municipal employee in Town who participates in or has official responsibility for any of the activities of the Tax Collector-Treasurer's Office, must obtain a § 20(d) exemption. That exemption requires the special municipal employee to file a written disclosure of his interest in the Abatement Program with the Town Clerk. In addition, the Board of Selectmen must approve the exemption. If he does not obtain the Board's approval, he may not participate in the Abatement Program. For example, a part-time employee in the Tax Collector-Treasurer's Office whose position has been designated as a special municipal employee position, may participate in the Abatement Program only by using the § 20(d) exemption.

If an employee who holds more than one position or office in Town also wants to participate in the Abatement Program, he needs to secure an exemption to § 20 to cover each of his positions. We suggest that an employee in this situation contact the Commission for further advice on how to comply with § 20 before participating in the Abatement Program.

B. Non-Town Employees Participating in the Abatement Program

You have inquired only whether Town employees may participate in the Abatement Program. We note, however, that every participant in the Abatement Program, including those who do not hold a Town position or office, will be considered a municipal employee for purposes of the conflict of interest law during the time that they participate in the Abatement Program.[29]

The conflict of interest law defines the term municipal employee broadly. It provides in relevant part that a municipal employee is any "person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis."[30]

A participant in the Abatement Program will be providing services to, and on behalf of, a Town department or agency. As such, every participant in the Abatement Program will be considered a municipal employee for purposes of G.L. c. 268A. This includes Town employees who participate as well as Town residents who do not already hold a Town position or office. Because of the limited hours that participants may work, the Abatement Program participant positions are eligible to be designated as special municipal employee positions by the Board of Selectmen.[31]

Our conclusion that all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A is consistent with the purpose of the statute. The purpose of G.L. c. 268A "'was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.'"[32] To effectuate this purpose, the Legislature adopted a broad definition of municipal employee that includes not only the traditional employment relationship, such as a "contract of hire." The definition also includes individuals who perform services for or hold an office or position in a municipal agency who serve without compensation or who serve on a part-time or intermittent basis. The plain meaning of the definition of municipal employee in the conflict of interest law includes individuals who participate in the Abatement Program.

Further, § 5K of G.L. c. 59 provides that participants in the Abatement Program will be public employees for certain purposes. The statute provides that any participant in an Abatement Program while providing such services shall be considered a public employee for purposes of G.L. c. 258, the Tort Claims Act.[33] As such, the Town is liable for damages for injuries to third parties and for indemnification of participants to the same extent as it is in the case of injuries caused by regular municipal employees.

We note that G.L. c. 59, § 5K also provides that

> [i]n no instance shall the amount by which a person's property tax liability is reduced in exchange for the provision of services be considered income, wages or employment for the purposes of taxation as provided in chapter 62, for the purposes of withholding taxes as provided in chapter 62B, for the purposes of unemployment compensation as provided in chapter 151, for the purposes of workers' compensation as provided in chapter 152 or any other applicable provisions of the General Laws.

However, this language reflects different purposes than G.L. c. 268A.

In each of these instances, § 5K provides that participants will not be Town employees for certain taxation and insurance purposes that are part of the traditional employment relationship. These provisions, in effect, preserve the benefit of the bargain for both parties. Participants in an Abatement Program will not lose the benefit of their bargain of a reduction of their property taxes with a rise in other taxes on the amount of that reduction. In addition, the Town limits its financial exposure if the participants were considered municipal employees for the purposes of workers' compensation.

Finally, § 5K is silent as to whether participants will be considered municipal employees for purposes of the conflict of interest law. In light of this silence combined with the explicit statutory language in the definition of "municipal employee" in G.L. c. 268A, we will consider Abatement Program Participants to be municipal employees for purposes of the conflict of interest law.

CONCLUSION

Town employees may participate in the Abatement Program as long as they can comply with § 20(b), (c) or (d) of G.L. c. 268A as applicable. In addition, all participants in the Abatement Program will be municipal employees for purposes of G.L. c. 268A and they will be subject to the restrictions of that statute applicable to municipal employees.[34] However, the Town may reduce some of the restrictions on Abatement Program participants under G.L. c. 268A by designating them as special municipal employees.[35]

DATE AUTHORIZED: June 15, 2004

*Pursuant to G.L. c. 268B, § 3(g), the requesting person has consented to the publication of this opinion with identifying information

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1/ Section 5K allows a municipality accepting its provisions to "establish a program to allow persons over the age of 60 to volunteer to provide services to such city or town. In exchange for such volunteer services, the city or town shall reduce the real property tax obligations of such person over the age of 60 on his tax bills . . . . "

2/ G.L. c. 59, § 5K was added by Chapter 127, § 59 of the Acts and Resolves of 1999.

3/ *Id.* § 5K.

4/ *Id. See, e.g.,* G.L. c. 59, §§ 5 & 5C.

5/ *Id.* § 5K.

6/ *Id.*

7/ *Id.*

8/ In the case of multiple owners of a parcel, all owners may earn an abatement as long as the total abatement per parcel does not exceed $500 per year.

9/ Preference is given to individuals who have never participated in the Abatement Program before.

10/ If a Department Head has already discussed a particular job with a volunteer, he is required to include that information on the Job Request Form.

11/ Municipal employee is defined as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution." G.L. c. 268A, § 1(g).

12/ 17 *C.J.S. Contracts § 2 (1999) (footnote omitted). See Restatement (Second) of Contracts § 1 (1981)* ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

13/ *EC-COI-95-07.*

14/ *EC-COI-92-35; Quinn v. State Ethics Commission*, 401 Mass. 210, 215-16 (1987). *See EC-COI-89-14* (agreement need not be formalized in writing to be a contract for G.L. c. 268A, § 7 purposes); *EC-COI-81-64* (state grant is a contract).

15/ *17 C.J.S. Contracts § 2 (1999).*

16/ *Black's Law Dictionary 306* (6th ed. 1990).

17/ *Marine Contractors Co., Inc. v. Hurley*, 365 Mass. 280, 286 (1974); *Fall River Housing Joint Tenants Council, Inc. v. Fall River Housing Authority*, 15 Mass. App. 992, 993 (1983).

18/ *EC-COI-92-35* (Aid to Families with Dependent Children; Emergency Aid to the Elderly, Disabled and Children; Supplemental Security Income).

19/ *Id.*

20/ *Id.*

21/ Special municipal employee is defined as "a municipal employee who is not a mayor, a member of the board of aldermen, a member of a city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of [G.L. c. 268A]; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified

as a 'special municipal employee' unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be 'municipal employees' and shall be subject to all the provisions of [G.L. c. 268A] with respect thereto without exception." G.L. c. 268A, § 1(n).
22/ Participate is defined as "participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise." G. L. c. 268A, § 1(j).

23/ Official responsibility is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action." G. L. c. 268A, § 1(i).

24/ We note that the contracting agency for a similar program in another municipality may be different. If so, full-time employees of the Tax Collector-Treasurer's Offices or those part-time positions that have not been designated as special municipal employees in those municipalities may be able to participate in an abatement program if they can otherwise comply with the requirements of § 20(b).

25/ *See EC-COI-03-02* (discussing meaning of term regulate).

26/ The § 20(b) requirement that the contract be made after public notice may be satisfied by advertisement in a newspaper of general circulation or multiple public postings in such places as the Town Hall, Senior Center and Town website. *See EC-COI-95-07; 87-24.*

27/ As Tax Collector-Treasurer, you may make the certification based on information provided by the Town's Department Heads.

28/ We note that in a municipality with a population of less than 3,500, a full-time appointed municipal employee may participate in an abatement program using the "small town exemption" in § 20. The small town exemption provides that in municipalities having a population of less than 3,500, a municipal employee may hold more than one appointed position with the town provided that the board of selectmen approves the exemption. This exemption does not apply, however, if a municipal employee holds an elected position and one or more appointed positions.

29/ A Town resident who is not a Town employee and does not have a financial interest in another contract with the Town does not need an exemption under § 20 of G.L. c. 268A in order to participate in the Abatement Program. However, if he wants to take on another municipal employee position or contract with the Town while participating in the Abatement Program, he will need to comply with § 20.

30/ G.L. c. 268A, § 1(g). The term municipal employee does not include elected members of a town meeting and members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. *Id.*

31/ *Id.* § 1(n).

32/ *Scaccia v. State Ethics Commission,* 431 Mass. 351, 359 (2000) *quoting Selectmen of Avon v. Linder*, 352 Mass. 581, 583 (1967).

33/ G.L. c. 59, § 5K.

34/ *See* G.L. c. 268A, §§ 2, 3, 8, 17, 18, 19, 20, 21A and 23. Anyone interested in participating in the Abatement Program may seek further advice from Town Counsel or the Commission as to the application of these other provisions of the conflict of interest law.

35/ *See, e.g.,* G.L. c. 268A, § 17.

Property Tax Bureau Opinion 2001-705 October 25, 2001

Philip V. Kicelemos
307 Picnic Street
Boxboro, MA 01719

Re: Senior Work Program
Our File No. 2001-705

Dear Mr. Kicelemos:

You wrote to us about the Senior Citizen Property Tax Work-Off Abatement program, made available pursuant to G.L. Ch. 59 §5K. This statute is a local acceptance law, and we understand from your letter that the Town of Boxboro has accepted its provisions.

As you know, the Senior Citizen Property Tax Work-Off Abatement program is one of a number of property tax relief initiatives recently enacted to provide assistance to low and moderate income senior persons. Under G.L. Ch. 59 §5K, the selectmen in a town "may establish a program to allow persons over the age of 60 to volunteer to provide services." In return, the town reduces the property tax obligations of those persons who perform the services.

You included with your correspondence a copy of a letter, dated September 24, 2001, which you wrote to the Boxboro Selectmen. In this letter you expressed your desire to participate in the senior work program and your impatience that the program has not yet been implemented in the town.

In January of 2000 the Division of Local Services promulgated an Informational Guideline Release (IGR No. 00-201) to assist city and town officials in administering the senior work program. I enclose with this letter a copy of this document, as well as a copy of G.L. Ch. 59 §5K, the statute which authorized the program.

You will note that in Section A.2. of our guideline, we stated that the vote whereby a town meeting accepts G.L. Ch. 59 §5K "should explicitly state the fiscal year in which the program will first be available." We do not know the details of the Boxboro vote. In any case, in any fiscal year, the amount of the work program abatement to which a participant is entitled is based upon the work performed prior to the committal of the first actual tax bill for that fiscal year. Work performed after that date is credited toward the next fiscal year's actual bill. See Section E of our IGR.

Your correspondence to us intimated a belief that every senior over 60 years of age in a community which accepts G.L. Ch. 59 §5K possesses an absolute right to participate in the senior work program. We do not agree. As we set out in Section C of our IGR, we believe a community, after acceptance of the statute, should, by bylaw, establish rules and procedures for administering the program. These rules should determine, among other things, whether the community will place any limitations on the income of participants or on the number of volunteers or types of work they may do.

We hope you find this information useful.

Very truly yours,
Bruce H. Stanford, Chief
Property Tax Bureau

Enc: 2

From: Crowley, James F on behalf of DOR DLS Law
Sent: Thursday, August 23, 2007 1:52 PM
To: 'Jacqueline cuomo'
Subject: EM2007-809 RE: IGR No. 02-210

Under Chapter 59 Section 5K, the maximum hourly rate of compensation is the State minimum wage. We agree, therefore, that the town could set a rate at some figure between the lower federal minimum wage and the higher State minimum wage amount.

James F. Crowley, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Mass. Department of Revenue
P.O. Box 9569
Boston, MA 02114-9569
(P) 617-626-2400
(F) 617-626-2379
dlslaw@dor.state.ma.us

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

From: Jacqueline cuomo [mailto:jcuomo@georgetownma.gov]
Sent: Tuesday, August 21, 2007 3:48 PM
To: DOR DLS Law
Subject: IGR No. 02-210

Hello,

We are seeking clarification regarding the Senior Citizen Property Tax Work-Off Abatement Program, specifically the hourly rate requirement.

According to Section B, number 3, the hourly rate cannot be a higher rate than the state's minimum wage. The IGR also indicates the community should set the rate no lower than the federal minimum wage. Since the state minimum wage has been increased, we want to make sure we are in compliance.

Therefore, is it appropriate to set our hourly rate in the range of the rates set between the State and Federal per the IGR guidelines?

Thank you.

Jackie Cuomo
Treasurer/Collector
Town of Georgetown

From: Crowley, James F on behalf of DOR DLS Law
Sent: Thursday, May 03, 2007 10:18 AM
To: Juszkiewicz, Lisa J.
Subject: EM2007-483 RE: Public Information Request

Senior Work Program income is not subject to state income tax but is subject to federal income tax. The federal government considers amounts paid under this program to be earned income which requires the issuance of a W-2 and the community must also follow federal withholding guidelines. The gross amount paid to a senior citizen is charged to the overlay account under Chapter 59 Section 5K. The actual amount credited to the taxpayer's real estate tax is the net amount. The difference attributable to federal income tax withholdings is transferred to the agency account for federal taxes. The employer's share for FICA ordinarily would be paid out of an appropriation account for that purpose. However, if the community did not budget the FICA expense for the Senior Work Program, the Department has advised local officials to charge that amount as well to the overlay account. More information can be found in our Informational Guideline Release which is available on our website. It is IGR 02-210.

James F. Crowley, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Mass. Department of Revenue
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From: Juszkiewicz, Lisa J.
Sent: Wednesday, May 02, 2007 10:59 AM
To: DOR DLS Law
Subject: Public Information Request
Sensitivity: Private

Have there been changes to the Senior Property Tax Relief program where the seniors are required to file a w-4? And does this make it taxable income?

Thanks.
Lisa

Property Tax Bureau Opinion 2001-29

January 17, 2001

Cortney A. Keegan
Treasurer/Collector
Town Hall, 21 South Main St.
Uxbridge, MA 01569-1899

Re: Senior Work-off Exemption by Proxy
Our File No.2001-29

Dear Ms. Keegan:

This is in reply to your letter asking whether the senior citizens work-off exemption under G.L. Ch.59 §5K could be adapted to allow someone other than the eligible senior citizen - a proxy - to perform the services for the town in return for which the abatement is granted.

We do not think that such an adaptation would be legal under §5K. Municipalities have no powers under the Home Rule Amendment with respect to taxation, except what is expressly given them by the legislature. See Massachusetts Constitution, Art.89 §7 of the Articles of Amendment. Statutory exemptions are strictly construed. *Board of Assessors of Wilmington v. Avco Corp.*, 357 Mass 704. The statute (G.L. Ch.59 §5K) that authorizes cities and towns to grant such exemptions specifies certain constraints or limitations with which the town's program must comply. Only persons over sixty may receive the exemption; the person receiving the exemption must provide services to the town; the exemption credit cannot exceed $500 per year, nor can it be credited at a rate higher than the minimum wage for each hour of service provided, and so on. We do not believe that a town can vary or waive any of these express statutory requirements.

Please do not hesitate to contact us again if we may be of further assistance.

Very truly yours,

Bruce H. Stanford, Chief
Property Tax Bureau

Excerpt from Bureau of Municipal Finance Law Email Response 2008-297

HANDLED BY PHONE 6/20/2008. No written response required.
Owner of property qualifying for senior work-off program is 97 years old and not capable of working. Daughter or granddaughter may not work her 100 hours for senior under 59:5K abatement program.

From: John Sanguinet [jsanguinet@wareham.ma.us]
Sent: Monday, June 30, 2008 8:53 AM
To: DOR DLS Law
Subject: Town of Wareham
...
Second Question: the Daughter or granddaughter of a 97 year old property owner would like to provide 100 hours of service for their Grandmother/mother is unable to yes/no. The woman is home bound.

Please respond
John Sanguinet
Interim Town Administrator

Excerpt from EM2007-457

From: Crowley, James F on behalf of DOR DLS Law
Sent: Tuesday, April 24, 2007 1:56 PM
To: 'Robin Nolan'
Subject: RE: EM2007-457 Clause 41D

... The senior work-off program is available only to qualified seniors. In addition, a program participant cannot transfer "credit" to another taxpayer's tax bill.

James F. Crowley, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Mass. Department of Revenue
P.O. Box 9569
Boston, MA 02114-9569
(P) 617-626-2400
(F) 617-626-2379
dlslaw@dor.state.ma.us

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From: Robin Nolan [mailto:rnolan@hamiltonma.gov]
Sent: Monday, April 23, 2007 10:45 AM
To: DOR DLS Law
Subject:

... Also, Some high school students would like to volunteer for the Senior work program and donate their earnings to a needy senior that may not be able to get around. is this possible?
Thank you
Robin Nolan

Case Study 2

Compensatory Time Issues Reference Materials

Mass. GL Chapter 44: Section 31. Liabilities in excess of appropriations forbidden; exceptions

Section 31. No department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department, each item recommended by the mayor and voted by the council in cities, and each item voted by the town meeting in towns, being considered as a separate appropriation, except in cases of major disaster, including, but not limited to, flood, drought, fire, hurricane, earthquake, storm or other catastrophe, whether natural or otherwise, which poses an immediate threat to the health or safety of persons or property, and then only by a vote in a city of two-thirds of the members of the city council, and in a town by a majority vote of all the selectmen. Payments of liabilities incurred under authority of this section may be made, with the written approval of the director, from any available funds in the treasury, and the amounts of such liabilities incurred shall be reported by the auditor or accountant or other officer having similar duties, or by the treasurer if there be no such officer, to the assessors who shall include the amounts so reported in the aggregate appropriations assessed in the determination of the next subsequent annual tax rate, unless the city or town has appropriated amounts specified to be for such liabilities; provided, that, if proceedings are brought in accordance with provisions of section fifty-three of chapter forty, no payments shall be made and no amounts shall be certified to the assessors until the termination of such proceedings. Payments of final judgments and awards or orders of payment approved by the industrial accident board rendered after the fixing of the tax rate for the current fiscal year may, with the approval of the director of accounts if the amount of the judgment or award is over ten thousand dollars, be made from any available funds in the treasury, and the payments so made shall be reported by the auditor or accountant or other officer having similar duties, or by the treasurer if there be no such officer, to the assessors, who shall include the amount so reported in the aggregate appropriations assessed in the determination of the next subsequent annual tax rate, unless the city or town has otherwise made provision therefor.

The provisions of this section, so far as apt, shall apply to districts, and the prudential committee, if any, otherwise the commissioners, shall act in place of the members of the city council or selectmen.

Lynn Redevelopment Authority v. City of Lynn
Supreme Judicial Court of Massachusetts
360 Mass. 503; 275 N.E.2d 491; 1971 Mass. LEXIS 741

November 4, 1971, Argued
November 15, 1971, Decided

PRIOR HISTORY: **[***1]** Essex.

Contract. Writ in the Superior Court dated September 8, 1970.

The action was heard by *Bennett*, J.

COUNSEL: *Philip L. Sisk* (*John T. Ronan* with him) for the plaintiff.

Charles Ingram for the interveners.

JUDGES: Tauro, C.J., **[***2]** Cutter, Reardon, Braucher, & Hennessey, JJ.

OPINION BY: REARDON

OPINION

[*503] **[**491]** This is an action of contract brought by the Lynn Redevelopment Authority (authority) against the city of Lynn alleging a breach of an express contract by the city and seeking damages in the sum of $ 3,940,931. The defendant answered by way of general denial and that the contract was in violation of *G. L. c. 44, § 31*, as amended through St. 1955, c. 259, in that "at the time of entering into the alleged contract no appropriation had been made for the payment of the obligation incurred." Both parties waived trial by jury and the case comes to us on report by a Superior Court judge. Alice Linda Benson and others were **[*504]** allowed to intervene by leave of court and briefs have been filed by them. The plaintiff, the defendant and the interveners stipulated to certain facts including the following.

The authority and the city entered into a written contract dated December 12, 1967, which was signed by the then mayor after authorization by the city council by a nine to two vote. The plaintiff has substantially performed its obligations under the contract and is in no sense in default. Under **[***3]** the contract the city was due to pay the authority the sum of $ 3,940,931 by January 30, 1969. The city has failed to make any payment although demand for the same was made upon the city on June 22, 1970. The questions raised by the action **[**492]** are (1) whether the interveners have standing, (2) whether *G. L. c. 44, § 31*, applies to the contract of December 12, 1967, and (3) whether a motion for summary judgment filed by the authority pursuant to *G. L. c. 231, § 59*, as amended through St. 1965, c. 491, § 1, should be allowed. It is our view that, notwithstanding a serious question as to the standing of the interveners to move in this matter, we should proceed to a consideration of the principal issue, namely, whether *G. L. c. 44, § 31*, governs the contract between the authority and the city.

We hold that it does not. As has been contended by the authority, *G. L. c. 44, § 31*, on its face is concerned with departmental appropriations. The initial language of the section is, "No department financed by municipal revenue . . . of any city . . . shall incur a liability in excess of the appropriation made for the use of such department, each item recommended by the mayor **[***4]** and voted by the council . . . being considered as a separate appropriation . . . ." We think that the term "department" as used in *§ 31* does not include within its scope a city "council." We agree with the holding in *Audit Co. of N. Y. v. Louisville, 185 F. 349* (6th Cir.). There the court was faced with interpreting a statute not unlike the one before us. A contract with the plaintiff was executed by the mayor of the city with the authorization of the city council. The court at page 355 said the following: "The next criticism is that no appropriation **[*505]** for the expenses involved in the contract had been made before the contract was executed; and to support this objection section 2820 . . . [is] cited. Section 2820 is as follows: 'No executive board, officer or employee thereof shall have the power to bind the city by any contract or agreement or any other way to any extent beyond the amount of money at the time already appropriated for the purpose of the department under the control of said board.' . . . Section 2820 seems plainly to refer only to the act of an executive board or its representatives, and is for the purpose of compelling the boards to keep within **[***5]** their appropriations; it

does not have any reference to the acts of the general council." In the instant case we rule that a city council acting in concert with the mayor is not a department that shall not "incur a liability in excess of the appropriation made for the use of such department." *G. L. c. 44, § 31.*

We move to a consideration of G. L. c. 121, Part VIII, §§ 26WW-26BBB, as appearing in St. 1955, c. 654, § 4, which are concerned with urban renewal projects. There, in § 26BBB, broad authority is given to municipalities operating under the legislative declaration of necessity "to do any and all things necessary to aid and co-operate in the planning and undertaking of an urban renewal project in the area in which such city . . . or public body is authorized to act, including the furnishing of such financial and other assistance as the city . . . is authorized by the housing authority law to furnish for or in connection with a land assembly and redevelopment plan or project." See *Bowker v. Worcester, 334 Mass. 422, 434.*

General Laws c. 121, § 26MM, makes applicable to the law governing land assembly and redevelopment projects certain sections of other parts of c. **[***6]** 121. Among those is § 26Y which provides in part that "[t]he mayor of the city, with the approval of the city council, . . . [is] hereby designated as the governing body of the city . . . for such approval of a project as may be required by federal legislation." Another applicable section is § 26CC, as amended through St. 1966, c. 692, § 2, which states that "[a] city **[*506]** . . . in which a housing or redevelopment authority has been organized may raise and appropriate, or incur debt, or agree with such authority or with the federal government or the commonwealth to raise and appropriate or incur debt, in aid of such authority, such sums as may be necessary for **[**493]** defraying all of the development, acquisition and operating costs of a . . . redevelopment, urban renewal . . . or low rent housing project within such city . . . ."

Of further assistance in our determination is the language of § 26BBB, which provides in part, "Any public body is hereby authorized to enter into agreements, which may extend over any period, notwithstanding any provision or rule of law to the contrary, with any other public body or bodies respecting action to be taken pursuant to **[***7]** any of the powers granted by sections twenty-six YY to twenty-six BBB, inclusive, including the furnishing of funds or other assistance in connection with an urban renewal plan or urban renewal project."

It seems clear to us that the entire scheme of G. L. c. 121, with particular reference to the quoted sections, is designed to place a municipality in a position where it can contract in the very manner in which it did here for necessary urban renewal. It is not common sense in the light of the quoted language to endeavor to apply *G. L. c. 44, § 31*, to this situation and thereby require in a given year an appropriation of approximately $ 4,000,000 for the purpose of an urban renewal contract with the authority. The resulting havoc to the municipal tax rate is obvious. The statutes are clearly designed to allow elbow room to the authority and the city to plan long-range developments so that a long-range payout by the city of its financial obligation will cause a minimum of strain. See relative to similar problems *Salisbury Water Supply Co. v. Salisbury, 341 Mass. 42, 47.* There is no necessity of substantial citation of authority in the face of the plain meaning of the statutes **[***8]** to which we have referred.

The entire record presents no issues other than those resolved in this opinion. It follows that summary judgment **[*507]** is to be entered for the plaintiff in the sum of $ 3,940,931, with interest from June 22, 1970, the date of demand.

So ordered.

Mass. GL Chapter 43B: Section 13. Exercise of powers and functions by municipalities

Section 13. Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter. ... Nothing in this section shall be construed to permit any city or town, by ordinance or by-law, to exercise any power or function which is inconsistent with any general law enacted by the general court before November eighth, nineteen hundred and sixty-six which applies alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. No exercise of a power or function denied to the city or town, expressly or by clear implication, by special laws having the force of a charter under section nine of said Article, and no change in the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager, may be accomplished by by-law or ordinance. Such special laws may be made inapplicable, and such changes may be accomplished, only under procedures for the adoption, revision or amendment of a charter under this chapter.

Constitution of the Commonwealth of Massachusetts, Articles of Amendment, Article LXXXIX.

Article II of the Articles of Amendment to the Constitution of the Commonwealth, as amended by Article LXX of said Articles of Amendment, is hereby annulled and the following is adopted in place thereof: ...

Section 6. Governmental Powers of Cities and Towns. - Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three. ...

Excerpt from Property Tax Bureau Opinion 97-245

June 10, 1997

Doris A. Metivier, Town Accountant
30 Providence Road
Grafton, MA 01519

Re: Warrant Approval, Contracts & Fair Labor Standards Act Issues
Our File No. 97-245

Dear Ms. Metivier:

You have asked several questions on the above described issues for which you would like our legal opinion. In particular you ask: ...

> 3. Are "salaried" town employees entitled to payment of time and one half or comp time for overtime work under the Fair Labor Standards Act [or otherwise]?

...

3. Your final question concerns entitlement of department heads to overtime or compensation time for work over the scheduled 40 or 35 hour work week specified in the position schedule. Municipal employees are not ordinarily entitled to overtime or comp time under state law unless the town has accepted one of several statutes limiting the work week and specifically authorizing overtime payments. However, you have indicated that the town has not accepted **G.L. Ch. 149, §33A, 33B or 33C** which limit the work week and would require overtime payments for certain municipal employees at straight time (33A & 33B) or time and one half (33C) in a declared emergency.

While overtime is often provided pursuant to collective bargaining agreements, you have not indicated that any of the department heads are in a union with such a collective bargaining provision. Without further indication that some other state law or some town bylaw requires overtime pay for such officers, it does not appear that they qualify for overtime under state law.

Your question primarily involves the application of the federal Fair Labor Standards Act. In pertinent part, that act requires payment of overtime wages or substitution of comp time for certain employees who work more than 40 hours in any one week. **29 USC §207**. However, bona fide executive, administrative or professional employees are exempt from the minimum wage and maximum hour (overtime) requirements under **29 USC §213**.

While we must defer to any opinion of the U.S. Department of Labor, it would not appear that the town department heads are subject to the overtime provisions of the Fair Labor Standards Act. Department heads would ordinarily meet the management duties criteria of executive employees and be exempt from the federal overtime provisions if they meet the salary basis test. One of the federal regulations does require that the executive employee be compensated on a "salary basis", which the regulations further define as payment of a regular amount regardless of the hours worked, which amount may not be reduced for absences of less than one day. **29 CFR §541.118**. You state that such "salaried" employees are required to turn in a time sheet at the end of each week with all time accounted for, including sick, vacation and hours worked. It is also your belief that such employees could be docked for hours

less than one day missed during the work week if the employee had no paid leave available to apply to such missed time.

This regulation has led to considerable litigation as well as action by the U.S. Department of Labor to modify the regulation for public employers by adding **29 CFR §541.5(d)**. This regulation provides that an otherwise exempt executive employee of a public employer would not lose the exemption if required to take paid leave or docked for absences of less than a day if no paid leave is available, based on statute, ordinance, regulation, policy or practice of the governmental unit.

You indicate that you have received an opinion verbally from the U.S. Department of Labor that the salary basis test for government employees will not make Grafton's department heads subject to the overtime provisions of the FLSA. Since this federal agency is responsible for enforcing the FLSA and our analysis concurs, it would appear that the "salaried" department heads of the town would not be entitled to overtime or comp time for hours worked in excess of 40 under FLSA. However, if you want a more definite opinion, including a more detailed analysis of the other requirements of being an "executive employee" under FLSA, you should request it from the U.S. Department of Labor.

We hope we have addressed your concerns. If you have any further questions, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

Excerpt from US DOL Fact Sheet 7

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
(Revised July 2008)

Fact Sheet #7: State and Local Governments Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the application of the FLSA to State and local government employees. ...

Coverage
Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.
Requirements
The FLSA requires employers to:

- pay all covered nonexempt employees, for all hours worked, at least the Federal minimum wage of $6.55 per hour effective July 24, 2008 and $7.25 per hour effective July 24, 2009;
- pay at least one and one-half times the employees' regular rates of pay for all hours worked over 40 in the workweek;
- comply with the youth employment standards; and
- comply with the recordkeeping requirements ...

Under certain prescribed conditions, employees of State or local government agencies may receive compensatory time off at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Police and fire fighters, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all others, 240 hours.

Mass. GL Chapter 41: Section 108N. Town manager, administrator, executive secretary, or administrative assistant; employment contract

Section 108N. Notwithstanding the provision of any general or special law to the contrary, any city or town acting through its board of selectmen or city council or mayor with the approval of the city council, as the case may be, may establish an employment contract for a period of time to provide for the salary, fringe benefits, and other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performances of duties or office, liability insurance, and leave for its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or the person performing such duties having a different title.

Said contract shall be in accordance with and subject to the provisions of the city or town charter and shall prevail over any conflicting provision of any local personnel by-law, ordinance, rule, or regulation. In addition to the benefits provided municipal employees under chapters thirty-two and thirty-two B, said contract may provide for supplemental retirement and insurance benefits.

Nothing contained in this section shall affect the appointment or removal powers of any city or town over its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or such person performing such duties with a different title, nor shall it grant tenure to such officer, nor shall it abridge the provisions of section sixty-seven of chapter forty-four.

Bureau of Municipal Finance Law Opinion 2008-56

July 7, 2008

Michael J. Ward
Town Administrator
242 Church Street
Clinton, MA 01510

Re: Compensatory Time
Our File No. 2008-56

Dear Mr. Ward:

You have requested an opinion concerning the legal sufficiency of a potential claim for almost 500 hours of accumulated compensatory time for a town building custodian. You have indicated that you have no written documentation of any special contract with the employee, but the employee claims that he had an agreement with a former town administrator to receive compensatory time in lieu of overtime pay for hours he worked over 40 per week. He also claims that he was advised by a former town accountant to keep his own log documenting his time worked. No one in the current administration has any memory of any such agreement. We assume the employee is not in a collective bargaining unit, since all special compensation provisions would likely have been memorialized in a written agreement. The employee was apparently allowed to determine the hours he worked and allegedly came into the workplace when he felt additional work had to be done, such as to check on the heating system.

You have further indicated that until 1995 leave time and compensatory time was managed by each appointing authority or department head according to the needs of their offices. No formal written policies or enactments were provided until the April 1994 Annual Town Meeting enacted a by-law specifically authorizing compensatory time, under bylaw 3.3.1, beginning January 1995. The by-law provides:

> The town shall pay overtime after 40 hours, excluding lunch and break periods, which is in conformance with the Fair Labor Standards Act (FLSA). Department heads shall be responsible for the control and authorization of overtime. At the option of a department head compensatory time may be provided in conformance with the FLSA. All compensatory time must be approved by the Department head. Salaried Department heads shall not be entitled to compensatory time.

The custodian's claim arises out of records the employee kept for 1990-2001. You indicate that the board of selectmen has ended the practice of compensatory time,

but you do not indicate when this occurred. You have not indicated whether any compensatory time was ever taken by the employee during or after that period. That information may be critical in the establishment of employer knowledge of the practice.

As a matter of state law, very little is provided with respect to the practice of compensatory time or even overtime. Except for police and fire employees, no state provisions for compensatory time apply to municipal employees. The minimum and overtime wage provisions of M.G.L. c. 151, §§1 et seq do not apply to municipal employees. Grenier v. Hubbardston, 7 Mass. App. Ct. 911 (1979); See also Newton v. Commissioner of the Department of Youth Services, 62 Mass. App. Ct. 343, 350 (2004) (M.G.L. c. 151, §1A overtime provision does not apply to state employees). Three local acceptance provisions limit the work week to 40 hours or work day to 8 hours and prohibit working in excess of that time except in the case of a declared emergency. M.G.L. c. 149, §§33A, 33B & 33C. Overtime payments in the case of authorized work in excess of the limitation period in a declared emergency would be at straight time under Sections 33A or 33B or at time and one-half under Section 33C.

Under municipal finance law, overtime payments and payment in lieu of taking compensatory time off, would ordinarily be payable only to the extent an appropriation has been made to the department for the purpose. M.G.L. c. 44, §31. However, towns sometimes provide certain benefits by by-law or collective bargaining agreement for which no specific annual appropriation may have been made. For example, sick leave and vacation leave are ordinarily paid from the salary and wage line item of a departmental budget. When all or a portion of the vacation or sick leave is not taken in any given year, some towns provide for allowing accumulation of such benefits, in whole or in part, in subsequent years, usually without providing a specific appropriation to cover the liability. If the town has provided such benefits by by-law or collective bargaining agreement, there is an argument that the town has incurred the liability, not the department, and it may be binding, notwithstanding M.G.L. c. 44, §31. Similarly, the town by by-law or collective bargaining could provide for compensatory time and payment in lieu of compensatory time, which is arguably binding.

Under state law we don't believe a town administrator or even a board of selectmen could bind the town to provide compensatory time in lieu of overtime pay or to make payments for compensatory time not taken, without a town meeting appropriation, by-law, or approved collective bargaining agreement so providing. Thus, for the period of time prior to the 1995 effective date of the town by-law, we do not think the town has any legal liability for any agreements that may have been made by previous town officers to provide compensatory time benefits. Even during the 1995-2001 period when compensatory time hours may have been documented by the

custodian, there is no indication that the department head or appointing authority was monitoring and authorizing the overtime work which the employee claims to have accumulated. You may also wish to consult with town counsel on the effect of the town's by-law on the responsibilities of the town.

We cannot say the same for applicable federal law, however. Under the federal Fair Labor Standards Act (FLSA), which applies to municipalities, certain town employees would be entitled to overtime, or, compensatory time in lieu of overtime. 29 USC §207. We understand that there is a two-year statute of limitations on enforcing back pay provisions of the FLSA. See FLSA Handy Reference Guide at http://www.dol.gov/esa/whd/regs/compliance/hrg.htm. However, the US Department of Labor, Wage and Hour Division, oversees that law. You may check that department's website at http://www.dol.gov/esa/whd/flsa/ for assistance in reaching that department and getting questions about the FLSA answered. It may be that the limitation period is tolled if the employee is led to believe the benefit will be paid at a later time, such as upon termination of employment or retirement.

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

Very truly yours,

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:GAB

Excerpt from Mass. GL Chapter 71: Section 41. Tenure of teachers and superintendents; persons entitled to professional teacher status; dismissal; review

Section 41. ...

School principals, by whatever title their position may be known, shall not be represented in collective bargaining, but every principal shall have the opportunity to meet and discuss individually the terms and conditions of his employment in his school district with such district's superintendent and may be represented by an attorney or other representative, and shall be employed under written contracts of employment. Such contracts shall be for terms of up to three years in length. Failure of the superintendent to notify a principal of the proposed nonrenewal of his contract at least sixty days prior to the expiration date of such contract shall automatically renew the contract for an additional one year period. ...

Chapter 314 of the Acts of 2008 AN ACT FURTHER REGULATING EMPLOYMENT CONTRACTS FOR SCHOOL PRINCIPALS.

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

SECTION 1. Section 41 of chapter 71 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by striking out, in lines 19 to 21, inclusive, the words ", and shall be employed under written contracts of employment. Such contracts shall be for terms of up to three years in length" and inserting in place thereof the following words:- . School principals shall enter into individual employment contracts with their employing districts concerning the terms and conditions of employment. The initial contract with each individual school district shall be for not less than 1 year nor more than 3 years. The second and subsequent contracts shall be for not less than 3 nor more than 5 years unless: (i) said contract is a 1 year contract based on the failure of the superintendent to notify the principal of the proposed nonrenewal of his contract pursuant to this section; or (ii) both parties agree to a shorter term of employment. Notwithstanding the past employment conditions of a school principal, the conditions established by this paragraph shall apply to the initial contract of each school principal.

SECTION 2. Notwithstanding any general or special law to the contrary, a principal entering into a second subsequent contract with an employing school district on or after the effective date of this act shall be treated as a school principal entering into his second contract period and shall be subject to all further terms and conditions established by the second paragraph of section 41 of chapter 71 of the General Laws.

Approved August 14 , 2008

Property Tax Bureau Opinion 95-378

May 2, 1995

Robert V. Pasquale
Clerk of the Board of Health
242 Church Street
Clinton, MA 01510

Re: Former Health Clerk Vacation Request
Our File No. 95-378

Dear Mr. Pasquale:

The former board of health clerk whose employment was terminated prior to July 1, 1994 has filed a citizens petition for inclusion in town meeting warrant of an article requesting payment of vacation monies for FY93. The petition states:

To see if the Town of Clinton will vote to authorize and enpower (sic) the Town Treasurer to grant vacation monies in the amount of 809.04 (sic) to Nancy J. Gerlach for fiscal year 92/93.

To raise and appropriate a sum of money for this purpose - or act in any manner relating thereto.

You are concerned whether the town may legally vote to comply with this request. You indicate that in the opinion of the board of health, the former employee was not entitled to any further vacation under the town policy, and that the former employee may even have taken additional vacation to which she was not entitled.

Unless the town has some colorable liability to pay this former employee, we believe the town has no authority, even by town meeting vote, to grant her such a gratuity. However, if there is any viable contractual claim of entitlement to vacation pay, a vote to grant an amount to settle it would be a valid exercise of town meeting power. We have been provided with no information which would suggest that such a contractual claim has any merit in this case.

The only document submitted concerning the town vacation policy is a July 26, 1950 statement on Board of Selectmen stationery which provides as follows:

> Excerpts From Chapter 41 Section 111
>
> All permanent civil service employees as well as persons classified as common laborers, skilled laborers, mechanics or craftsmen shall be granted without loss of pay in every year in which their employment begins, a vacation based on their services in the preceeding (sic) year. Such vacations shall be granted by the heads of their respective departments at such time as in their opinion will cause the least interference with the performance of the regular work of the town. Not less than one day's vacation shall be granted for each five weeks of service in the preceeding (sic) year. The word "year" as used in this section means the year beginning with July 1 and ending with the following June thirtieth. (emphasis added)

It does not appear that the town has ever accepted **G.L. Ch. 41, §111** to which this statement refers. However, even if accepted by the town, this employee would not seem to be covered by the statute or that statement, not being a permanent civil service employee, nor classified as a common laborer, skilled laborer, mechanic or craftsman. Nor has it been suggested that this employee had some special contract with the town to receive some specific vacation entitlement.

Nevertheless, we have been informed that town practice is to offer vacation with pay to employees, such as the one at issue, in accordance with the statement. In that case, given that the employee was not employed on July 1, 1994, she would not be entitled to additional vacation in FY94. She appears to be claiming payment for unused FY93 vacation, which you have indicated was entirely used during that year. If that is the case, it would appear that this claim has no merit and that town meeting would have no authority to grant such a gift to the former employee. Jones v. Natick, 267 Mass. 567, 569-70 (1929).

Without further information concerning the basis of the former employee's claim, we cannot rule out the possibility that she has a some viable legal claim against the town. If there is such a

claim, the town may vote to appropriate a sum as part of a genuine compromise of that claim. Jones, supra, and cases cited therein.

We hope this addresses your concerns. If you have any further questions, do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

Mass. GL Chapter 71: Section 34. Support of schools; appropriations; recommendations

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

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

Case Study 3

Police and Fire Injury Leave Issues Reference Materials

Mass. GL Chapter 41: Section 111F. Leave with pay for incapacitated employees

Section 111F. Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section 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. This section shall also apply to any member of a fire department who is subject to the provisions of chapter one hundred and fifty-two if he is injured at a fire and if he waives the provisions of said chapter. The provisions of this section shall also apply in all respects to any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, and for the purposes of this section the Massachusetts Port Authority shall be deemed to be a fire district.

Where the injury causing the incapacity of a firefighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section, was caused under circumstances creating a legal liability in some person to pay damages in respect thereof, either the person so injured or the city, town or fire or water district paying such compensation may proceed to enforce the liability of such person in any court of competent jurisdiction. The sum recovered shall be for the benefit of the city, town or fire or water district paying such compensation, unless the sum is greater than the compensation paid to the person so injured, in which event the excess shall be retained by or paid to the person so injured. For the purposes of this section, "excess" shall mean the amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section as compensation to the person so injured. The party bringing the action shall be entitled to any costs recovered by him. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively, inclusive of interest and costs. The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively.

Whoever intentionally or negligently injures a firefighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section shall be liable in tort to the city, town or fire or water district paying such compensation for all costs incurred by such city, town or fire or water district in replacing such injured police officer or firefighter which are in excess of the amount of compensation so paid.

Mass. GL Chapter 41: Section 100. Indemnification of police officers, firemen and persons aiding them; actions for intentional or negligent injuries inflicted upon same

Section 100. Upon application by a fire fighter or police officer of a city, town or fire or water district, or in the event of the physical or mental incapacity or death of such fire fighter or police officer, by someone in his behalf, the board or officer of such city, town or district authorized to appoint fire fighters or police officers, as the case may be, shall determine whether it is appropriate under all the circumstances for such city, town or district to indemnify such fire fighter or police officer for his reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own. If such board or officer determines that indemnification is appropriate, such board or officer shall certify for payment, either directly or by way of reimbursement, by such city, town or district, in the same manner as a bill lawfully incurred by such board or officer but out of an appropriation for the purposes of clause (32) of section five of chapter forty, such of said expenses as may be specified in such certificate. Whenever such board or officer denies an application in whole or in part, such board or officer shall set forth in writing its or his reasons for such denial and cause a copy thereof to be delivered to the applicant. At any time within two years after the filing of an application as aforesaid, an applicant aggrieved by any denial of his application or by the failure of such board or officer to act thereon within six months from the filing thereof may petition the superior court in equity to determine whether such board or officer has without good cause failed to act on such an application or, in denying the application, in whole or in part, has committed error of law or has been arbitrary or capricious, or has abused its or his discretion, or otherwise has acted not in accordance with law. After due notice and hearing, such court may order such board or officer to act on such application or to consider, or further consider, and determine the same in conformity with law.

Notwithstanding the provisions of section one hundred A or section one hundred D or any contrary provisions of any other general or special law, a city or town shall indemnify a police officer or fire fighter, to the extent and in the manner herein provided and subject to the same limitations, for expenses or damages incurred by him in the defence or settlement of a claim against him for acts done by him while operating a motor vehicle as such police officer or fire fighter.

For the purposes of this section, call firemen and volunteer firemen shall be considered fire fighters. This section shall be construed to require a city, town or district to indemnify, in the manner and to the extent herein provided, any fire fighter or police officer who is assigned to special duty by a superior officer for expenses or damages sustained by such fire fighter or police officer in the performance of such duty, whether or not he is paid for such special duty by the city, town or district, or otherwise. This section shall also be construed to require a city, town or fire or water district to pay compensation, in the manner herein provided, for damages, including loss of pay, for personal injuries, whether or not death results, and for property damage sustained by a person while assisting a police officer thereof in the discharge of his duty upon his requirement, and to require a city, town or fire or water district to indemnity in the manner herein provided a person required to assist a police officer in the performance of his duty for expenses or damages incurred by such

person in the defence or settlement of an action against him for acts done by him while so assisting such police officer.

In any city which by ordinance shall so provide, the powers vested, and duties imposed, by this section upon the board or officer authorized to appoint police officers, firemen or members of the fire department of such city shall be exercised and performed by a majority of the members of a panel consisting of (a) such officer or the chairman of such board, (b) the city solicitor or other officer having similar duties or a person designated in writing by such solicitor or officer to act for him, and (c) such physician as the city manager or, if there is none, the mayor shall in writing appoint.

In any town which by by-law shall so provide, the powers vested, and duties imposed, by this section upon the board or officer authorized to appoint fire fighters in such town shall be exercised and performed by a majority of the members of a panel consisting of (a) such officer or the chairman of such board, (b) the town counsel or other officer having similar duties or a person designated in writing by such counsel or officer to act for him, and (c) such physician as the board of selectmen shall in writing appoint.

Where the injury for which any payment is made under the provisions of this section by a city, town or fire or water district for reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) was caused under circumstances creating a legal liability in some person to pay damages in respect thereof, either the person so injured or the city, town or fire or water district making such payment may proceed to enforce the liability of such person in any court of competent jurisdiction. The sum recovered shall be for the benefit of the city, town or fire or water district making such payment, unless the sum is greater than such payment, in the event the excess shall be retained by or paid to the person so injured. For the purposes of this section, "excess" shall mean the amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section. The party bringing the action shall be entitled to any costs recovered by him. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively, exclusive of interest and costs. The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively.

Whoever intentionally or negligently injures a firefighter or police officer for which he is paid indemnification under this section shall be liable in tort to the city, town or fire or water district for the amount of indemnification so paid.

Massachusetts Department of Revenue Letter Ruling 80-32

Letter Ruling 80-32: Compensation Paid to Injured Personnel Pursuant to G.L. c. 41, s. 111F

June 3, 1980

You request a ruling regarding the Massachusetts income tax treatment of payments made to police and fire personnel who are absent from duty due to an injury sustained in the line of duty. These payments, which are authorized by

Massachusetts General Laws Chapter 41, Section 111F, are distributed at the same time and rate as the employee's regular compensation and for all purposes are deemed to be the employee's regular compensation.

Police and fire personnel of a city, town, or fire or water district are not employees within the meaning of the Commonwealth's workmen's compensation laws and therefore do not qualify for payments under the workmen's compensation laws. (See Massachusetts General Laws Chapter 152, Section 69).

Massachusettsgross income is federal gross income with certain modifications. (General Laws Chapter 62, Section 2). Unless specifically stated in Chapter 62, an item of income which is not included in federal gross income for a taxable year is not included in Massachusetts gross income.

Section 104(a)(1) of the Internal Revenue Code states that in general, gross income does not include amounts received under workmen's compensation acts as compensation for personal injuries or sickness. Federal income tax regulations interpreting this section exclude from gross income amounts which are received by an employee under a workmen's compensation act or under a statute in the nature of a workmen's compensation act which provides for compensation to employees for personal injuries or sickness incurred in the course of employment. (Treasury Regulation 1.104-1(b)).

Moreover, federal revenue rulings concerning this issue have held that the continuation of salary to policemen and firemen, as compensation for personal injuries or sickness incurred in the course of employment, is excluded from federal gross income.

Income is subject to withholding taxes under Chapter 62B if it is taxable under Massachusetts personal income tax law and if it constitutes wages for federal withholding purposes.

Based on the foregoing it is ruled that compensation paid pursuant to Massachusetts General Laws Chapter 41, Section 111F to police, fire, and public safety personnel who are granted leave of absence because of injuries sustained in the performance of their duties, is not subject to income taxation under Chapter 62 and does not constitute wages subject to withholding under Chapter 62B.

Very truly yours,

/s/L. Joyce Hampers

L. Joyce Hampers
Commissioner of Revenue

LJH/RSF/jmcd

Property Tax Bureau Opinion 92-941

MITCHELL ADAMS
Commissioner

617) 727-2300
FAX (617) 727-6432

LESLIE A. KIRWAN

Deputy Commissioner

March 2, 1993

Ed Denton
14 Holland Road
Falmouth, MA 02540

Re: Police & Fire Disability Payments
Our File No. 92-941

Dear Mr. Denton:

You have inquired about a relatively recent opinion to the town of Hatfield concerning the ability of the town to purchase disability insurance for call or intermittent police officers and firefighters. In that opinion we concluded that given the ambiguity surrounding the interpretation of the pertinent statutes, it might be advisable to seek special legislation to provide disability insurance to such employees in excess of the amount provided in G.L. Ch. 32, S. 85H.

However, we also indicated that the statute might very well be interpreted as prescribing merely a minimum mandatory amount of coverage. That arguably would not prohibit a town from purchasing coverage with larger benefits more closely approximating the actual loss of income of these employees from their primary employment. Given the risks such employees may take on behalf of the town, such an expenditure by the town could be considered in the public interest of attracting such employees who otherwise might be reluctant to accept such risks. We cannot conclude unequivocally that the town is prohibited from making such an expenditure, even in the absence of special legislation.

If we may be of further assistance, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman, Chief
Property Tax Bureau
cc: Robert T. Reed

Bureau of Accounts Opinion 92-384

MITCHELL ADAMS (617) 727-2300
Commissioner

LESLIE A. KIRWAN
Deputy Commissioner

April 29, 1992

Claire Smedile
Town Accountant
Whitman, MA 02382

Re: Workmen's Compensation & Disability Insurance Proceeds
Our File No. 92-384

Dear Ms. Smedile:

You have asked whether proceeds from workers, compensation payments to employees or insurance reimbursements for injured police and fire employees are credited to the general fund or to the departmental budgets of the employees. Any sums paid to a town officer is deposited in the general treasury of the town in the custody of the treasurer and cannot later be used without further appropriation, unless a specific statutory provision otherwise applies. G.L. Ch. 44, S. 53. There is no such exception for the workers' compensation and disability proceeds to which you refer. Although an exception is provided in G.L. Ch. 44, S. 53(2) for insurance proceeds in cases of fire or physical damage to property, that exception does not apply to personal injury insurance proceeds.

Except for payments from available sick and vacation leave, employees should not be paid regular salary when a determination has been made that they are eligible for workers, compensation, under G.L. Ch. 152, S. 69. To the extent that such payments are made prior to a determination of eligibility for workers compensation, workers, compensation payments to the employee are often endorsed over to the town. However, these amounts must be deposited into the general fund under G.L. Ch. 44, S. 53 and there is no statutory authority to reimburse the salary account of the department paying the sick or vacation leave.

Under G.L. Ch. 41, S. 111F police and fire employees injured in the line of duty must be paid 100% of their regular compensation from the salary account. If the town has insurance to cover the employee for such town loss, proceeds from that insurance must be paid to the general fund under G.L. Ch. 44, S. 53 and cannot be expended without further appropriation. There is nothing in G.L. Ch. 41, S. 111F or any other Massachusetts statute which provides for reimbursement of the salary account from the insurance proceeds.

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

Very truly yours,

Mariellen P. Murphy
Director of Accounts

Property Tax Bureau Opinion 95-128

MITCHELL ADAMS
Commissioner

LESLIE A. KIRWAN
Deputy Commissioner

May 9, 1995

Allan C. Klepper
Executive Secretary
Board of Selectmen
148R Peck Street
Rehoboth, MA 02769

Re: Direct Insurance Payments to Injured Police Officers
Our File No. 95-128

Dear Mr. Klepper:

You ask whether the town can enter into an agreement with an insurer to pay injury leave benefits directly to police officers injured in the line of duty. The intent is to offset the town's obligations under **G.L. Ch. 41, §111F**. The purpose of this arrangement is to eliminate the need to pay such officers from the salary appropriation, to the extent of the insurance benefit, and to free up amounts in the salary account to provide replacement services.

In our opinion **G.L. Ch. 41, §111F** seems to require payment by the town to the injured police officer from the salary account. Thus, any insurance reimbursement would be for the town's benefit and would have to be deposited to the general fund. The proceeds could not be used again without a subsequent appropriation. **G.L. Ch. 44, §53**.

The injury leave statute specifically provides:

> Whenever a police officer ... is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own ... he shall be granted <u>leave without loss of pay</u> for the period of said incapacity ... All amounts payable under this section <u>shall be paid at the same times and in the same manner as</u>, and for all purposes shall be deemed to be, <u>the regular compensation</u> of such police officer ..." **G.L. Ch. 41, §111F** (emphasis added).

The emphasized language implies an intention to continue payment of wages of the police officer from the salary account and there is no provision in that section for insurance coverage. Nor can we find any other section specifically authorizing procurement of wage continuation insurance for a police officer by the town. Compare former **G.L. Ch. 40, §5(1)** prior to **St. 1989, Ch. 687, §12**(authorizing the purchase of insurance to indemnify the town for medical expenses of injured police officers under **G.L. Ch. 41, §100** and for purchase of workers compensation insurance).

Nevertheless, as currently amended, **G.L. Ch. 40, §5** permits the town to appropriate funds for exercise of any of its corporate powers. Presumably procurement of insurance to indemnify the town for its obligation to pay wages under **G.L. Ch. 41, §111F** would be considered an appropriate municipal purpose. The town's authority to procure such insurance for its own benefit does not appear to extend to providing coverage directly for the employee, even if the net result might be that the employee receives the same benefit as if the town had paid the salary and the town has met its obligation. We point out that the town would be giving up a significant degree of control of the payments and could be subject to separate liability if the insurer fails or refuses to make payments in a timely manner. We think a legislative change or special legislation would be necessary to authorize the system you propose.

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

Very truly yours,
Harry M. Grossman
Chief, Property Tax Bureau

Property Tax Bureau Opinion 2001-776

Massachusetts Department of Revenue *Division of Local Services*
Alan L. LeBovidge, Commissioner *Bruce H. Stanford, Chief, Property Tax Bureau*

March 13, 2002

MaryAnne M. Gibbs
Treasurer/Tax Collector
16 Great Neck Road North
Mashpee, MA 02649

Re: Accumulation of Sick & Vacation Time While Officer on Injury Leave
Our File No. 2001-776

Dear Ms. Gibbs:

You have asked for an opinion concerning the payment upon retirement of sick and vacation leave accumulated by a police officer while the officer is injured in the line of duty and receiving benefits under G.L. c. 41, §111F. In particular, you would like to know whether the town must pay such benefits and if so, whether it should be treated as earned income for purposes of reporting the information to state and federal tax authorities and withholding taxes from the payment.

Sick leave and vacation benefits are not accumulated as a matter of law when a police officer or firefighter is receiving injury leave pay under G.L. c. 41, §111F. Rein v. Marshfield, 16 Mass. App. Ct. 519 (1983). The court in that case suggested that such benefits might be made cumulative if the parties to a collective bargaining agreement specifically so provided in writing. Id at 524.

More recently, the appeals court ruled in two cases relating to police officers and firefighters on precisely this issue. The court in both held that a past practice of paying such accumulated vacation and sick leave upon retirement could be considered binding on the town, if so determined by an arbitrator in the context of an arbitration proceeding. Duxbury v. Duxbury Permanent Firefighters Association, Local 2167, 50 Mass. App. Ct. 461 (2000) (evidence of payment of such accumulated leave to 16 firefighters for a total of 53 injured on duty leaves under the statute was sufficient for arbitrator to find binding past practice, despite failure to bargain on the issue); Reading v. Reading Patrolmen's Association, Local 191, 50 Mass. App. Ct. 468 (2000) (parties agreed that police officers entitled to accumulate vacation and sick benefits while on injury leave, and single instance of police officer being paid for 34 days vacation accrual, despite limitation of one week carryover rule, was sufficient to establish binding past practice).

Thus, if the police officer collective bargaining agreement specifically calls for such accumulation of benefits, or as you indicate, the town has a significant past practice of paying such benefits, in all likelihood the town will be obligated to continue the practice as a part of the agreement. In order to change the practice the town will likely have to bargain with the union to specifically eliminate the practice.

With respect to your second question, we have posed the question to our Rulings and Regulations Bureau. The conclusion reached by counsel in that bureau is that all unused sick and vacation lump sum payments made upon retirement are considered taxable income subject to withholding under Section 104 of the Internal Revenue Code, and would apply equally to Massachusetts income tax. This would apply whether the days were accumulated while the employee was working or on 111F. However, he points out that Massachusetts income depends on the federal definition of income in this case, and that the Department would likely defer to the opinion of the IRS in such a case. The past practice of not withholding taxes cannot controvert a specific legal obligation to do so on earned income under federal or state income tax laws.

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

Very truly yours,

Bruce H. Stanford, Chief
Property Tax Bureau

From: Hinchey, Christopher M on behalf of DOR DLS Law
Sent: Wednesday, November 28, 2007 8:46 AM
To: 'Nightingale, Wendy'
Subject: em2007-1098 RE: self insured claims trust for 111F IOD medical expenses

There are two separate statutes governing payments to police officers and firefighters injured in the line of duty – Ch.41 §111F, which requires that they continue to be paid their regular salary, and Ch.41 §100, which authorizes the reimbursement of their medical costs. No statute authorizes a fund to provide for either of these expenses, although the injured employee's salary is normally charged to the departmental salary line item.

We see no reason why a town could not create a special purpose stabilization fund under Ch.40 §5B to provide for either (or both) of these categories of expense. Money could be appropriated from the fund to a line-item in the annual budget for reimbursements of medical expenses; to the extent it was not used, it would revert at year-end to the special-purpose stabilization fund. If an employee were on an extended disability leave, money from the fund could also be appropriated to the departmental salary line-item to allow the hiring of a replacement employee, if the town made that one of the purposes for which the stabilization fund could be appropriated.

Chris Hinchey Tax Counsel
Bureau of Municipal Finance Law
PO Box 9569
Boston, MA 02114-9569
617-626-2400
dlslaw@dor.state.ma.us

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

From: Nightingale, Wendy [mailto:WNightingale@easton.ma.us]
Sent: Tuesday, November 27, 2007 1:58 PM
To: DOR DLS Law
Subject: self insured claims trust for 111F IOD medical expenses

I am checking to see if we (Town of Easton) can establish a claims trust or other special fund to pay police and fire medical expenses that qualify under MGL 41, 111F. I did read that chapter 40, 13C allows the establishment of claims reserve funds for Worker's compensation, but would that include 111F medical expense claims? We are currently insured for worker's compensation on a premium basis. Right now we only have catastrophic coverage for police & fire medical expenses and would like to put money aside on an annual basis to pay the other claims.

Your assistance is greatly appreciated.

Thank you,

Wendy Nightingale
Town Accountant
Town of Easton
(508) 230-0563

Property Tax Bureau Opinion 91-943

MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES
200 Portland Street
Boston 02114-1715

MITCHELL ADAMS
Commissioner
LESLIE A. KIRWAN
Deputy Commissioner

(617) 727-2300

November 22, 1991

Ralph L. Atkins, Esq.

95 State Street, 6th Floor
Springfield, MA 01103

Re: Payment for Legal Services
G.L. Ch. 41, SS. 100 & 111F
Our File No. 91-943

Dear Mr. Atkins:

You have requested the Division's legal opinion of clauses in G.L. Ch. 41, SS. 100 & 111F relating to the payment of attorney fees in the recovery of specific tort claim damages on behalf of municipalities. Those statutes specifically authorize a city or town to recover, from third party tortfeasors responsible for injuries to police officers and firefighters, payments made to such employees as indemnification for medical bills incurred and compensation lost due to disability. The statutes authorize either the employee or the municipality to seek tort damages and provide that the municipalities indemnification expenses be paid first from the proceeds recovered. Any overage is paid to the employee.

In particular, both statutes specifically provide that:

> The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively.

You suggest that this language authorizes payment of the employee's attorney or the employer's attorney out of the settlement or judgment proceeds. However, for reasons which I will elaborate upon in the balance of this opinion, I conclude that payment of a municipal attorney hired by the town for services rendered in such a recovery must be made from an appropriation and pursuant to a contractual agreement.

As a legal focal point we must look to G.L. Ch. 44, S. 53 which requires in pertinent part that:

> All moneys received by any ... town ... officer or department, except as otherwise provided by special acts and except fees provided for by statute, shall be paid by such officers or department upon their receipt into the ... town ... treasury. Any sums so paid into the ... treasury shall not later be used by such officer or department without specific appropriation thereof; provided, however, that ... (2) sums not in excess of ten thousand dollars recovered under the terms of fire or physical damage insurance policy and sums not in excess of ten thousand dollars received in restitution for damage done to such ... town ... property for the restoration or replacement of such property without specific appropriation ...

This statute requires that any proceeds payable to the town for tort claim settlements be deposited in the town treasury. It also prohibits expenditure of such proceeds without further appropriation, unless there is superseding legislation. one such superseding provision is contained in Section 53 itself; i.e., property damage recoveries "not in excess of $10,000".

We have interpreted that clause as limited strictly to its express provisions for property damage claims and have not extended it to recovery of sums for indemnity claims for personal

injuries under G.L. Ch. 41, SS. 100 & 111F. Thus, no revolving fund is established for payment of future medical bills or compensation from the proceeds of the settlement in this case. Payment of those costs must come from appropriations.

Your attorney fee question raises two issues with respect to the applicability of G.L. Ch. 44, S. 53. The first issue is whether payment of insurance proceeds to the town's attorney is the receipt of funds by a "town officer or department". If so, the second issue is whether the attorney fee clauses of G.L. Ch. 41, SS. 100 & 111F specifically authorize payment of attorney fees from the proceeds without further appropriation.

I can find no specific provision in the two indemnification statutes which authorize payment of settlement proceeds to the attorney representing the town. Indeed, the statutes specifically allocate recovery between the town and the employee, giving the town first priority in recovering its payments and requiring payment to the employee of any overage. The attorney fee provision merely allocates payment between the parties of any fee actually incurred but does not establish the fee nor any payment source or agreement.

You cite the attorney lien statute, G.L. Ch. 221, S. 50 and McInerney v. Massasoit Greyhound Association, Inc., 359 Mass. 339 (1971) as support or your position that attorneys have the authority to retain funds for fees in tort recovery cases, whether or not the client is a municipality. I first note that the attorney lien statute applies only to cases where actions have been commenced in court or in an administrative proceeding before a state or federal department, board or commission. It does not appear to apply in the circumstances of this case where settlement was reached without the necessity of commencing an action. There is no common law attorney lien in Massachusetts. Getchell v. Clark, 5 Mass. 309 (1809).

Also, the statute specifically does not apply to cases where the method of the "determination" of attorneys' fees is otherwise expressly provided by statute. It is not clear what the legislature meant by the use of the word "determination", but certainly G.L. Ch. 41, SS. 100 & 111F specifically provide for the allocation of such fees between the parties. Thus, it is not clear whether the statute would apply.

In addition, although the lien statute does not limit itself to private clients, it does not specifically apply to towns, either. To authorize a lien against town proceeds, a more specific reference would be required. Note, for example, G.L. Ch. 221, S. 50A which makes municipalities and the commonwealth liable for payment of a plaintiff's attorney fees where recovery is obtained against the governmental entity only if the treasurer is given specific notice of the lien by the attorney claiming it under Section 50. I conclude that the statute does not apply to attorneys representing municipalities.

Nor can I find anything in the McInerney case which has any relationship to attorney liens or tort cases. The attorney in that case had entered into a contingent fee arrangement with his client in a domestic relations case and the court ruled that the transfer of stock portion of the fee was unreasonable; null and void.

Returning to the municipal finance law, an attorney hired by the town to pursue a claim becomes an agent of the town. It is not reasonable to assume that the legislature by its vague reference in G.L. Ch. 41, SS- 100 & 111F intended to grant an attorney representing the town greater power or authority than its town counsel or other officer of the town to retain funds of the town. There is clearly no provision in the statutes that the tortfeasor pay the attorney fees of the town or

employee in addition to the usual tort damages- Nor does the statute specifically require payment of the attorney fees out of the proceeds. Thus, any settlement check received by the town's attorney should be made out to the town only and tendered by the attorney to the town treasurer for deposit in the treasury.

The second issue concerns the ability of the town to pay the fees of the attorney from the proceeds, after deposit in the treasury, without further appropriation. We have generally required specific language in a statute authorizing payment without further appropriation in order to determine that it supersedes the provisions of G.L. Ch. 44, S. 53. Language deemed sufficient for this purpose includes (a) "notwithstanding the provisions of section fifty-three of chapter forty-four" and (b) "without further appropriation". Neither clause, nor any similar clause appears in G.L. Ch. 41, SS. 100 & 111F.

Ordinarily any contract between a town and a third party, including an attorney, must be authorized by town meeting vote which includes an appropriation. Town officials may not enter into contracts in excess of appropriation unless specifically authorized by law. G.L. Ch. 44, S. 31. Contracts performed by attorneys hired by town officers in the absence of appropriation are unenforceable by the attorney. Jenney v. Mattapoisett, 335 Mass. 673 (1957); Lavelle v. Beverly , 330 Mass. 72 (1953); Peters v. Medford, 295 Mass. 588 (1936). I can see nothing in G.L. Ch. 41, SS. 100 & 111F which changes this long-standing principle.

Your question may have been prompted by what appears to be the common practice in tort recoveries in the private sector which has been used in the recovery in these police and fire injury cases. ordinarily the employee's attorney handles the claim, as specifically authorized by the statute. The fee arrangement the attorney has with the private client determines the amount of the fee, which is often on a contingency basis. The attorney receives power of attorney from the client, including the power to receive settlement checks and to deduct his fee from the proceeds.

The injury leave statutes modify this arrangement by creating a right of recovery by the municipality for amounts paid to the officer for medical bills and compensation. It also specifically provides a legal obligation on the town to pay a share of the employee's attorney fees based on the town's pro-rata recovery of damages. Prior to distributing the proceeds to the client or deducting his fee, the attorney should satisfy the town that it is receiving the appropriate amount or risk possible liability to the town for its statutory right. Often the recovery by the parties is subject to negotiation because the amount recovered is insufficient to pay all costs already incurred or to be incurred by the town. Releases from the town are often obtained to protect the third party tortfeasor, the employee and the attorney from further liability.

In practice, the employee's attorney often deposits the settlement check to an escrow account and distributes the proceeds to his client, the town and himself in accordance with the agreement reached. However, the employee's attorney is not a contractual agent of the town and the funds have not been received by a town officer or agent. Thus, there is no requirement to deposit the funds in the treasury until the attorney has tendered the town's share of the proceeds. The town, due to the statutory obligation to pay its share of the fee, has no claim to that portion of the recovery, even though otherwise it is entitled to payment of its out of pocket expenses. The town may still be able to contest any fee retained if it was improperly calculated or is unreasonable in amount.

Finally, you have indicated your intent to inquire about the payment of future medical bills from the attorney's "trustee" account. As previously stated in this opinion, payment of medical bills under G.L. Ch. 41, S. 100 must come from an appropriation. There is nothing in the statutory scheme which would allow

payment of amounts due under the injury leave statutes from proceeds in third party claims. Those proceeds may be certified as part of free cash or updated free cash under G.L. Ch. 59, S. 23 and may then be appropriated for any purpose, including payment of such benefits.

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

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

cc: Joanne Lukowski, Town Accountant
Reid S. Charles, Town Administrator

Case Study 4

Special Detail Issues Reference Materials

Property Tax Bureau Opinion 95-681 August 24, 1995

Patricia F. Eager
Town Accountant
300 Main Street
Wellfleet, MA 02667

Re: Payment to Eastham for Police Officers
Our File No. 95-681

Dear Ms. Eager:

You seek our opinion concerning the propriety of paying $12.80 to the town of Eastham to cover Medicare and unemployment expenses of that town when two of its officers perform-ed police duties in Wellfleet. You further wish our opinion on the method of payment of these officers as an off-duty or special detail under **G.L. Ch. 44, §53C**.

On the weekend of May 13-15, 1995 two Eastham police officers, with permission of their chief, performed regular police duties for Wellfleet. It is to be noted that both officers had been sworn in as special police officers for Wellfleet in July, 1994. By agreement of the two chiefs, the officers were to be paid at the Eastham overtime rate of $28.56 per hour since they had worked their full shifts in Eastham. It is also to be noted that the special detail rate in Eastham is $26.00 per hour and the special police officer rate for Wellfleet is $10.83 per hour.

On May 31, 1995 Eastham submitted a request for payment on an Eastham billing form breaking down the payments by number of hours worked, hourly rate, officer and day worked. The bill directed that payment be made directly to the officers involved. You treated the request as a vendor bill, payable from the Wellfleet police departmental expense account, as off-duty or special detail work for the town of Eastham and made payment in the requested amount to the town of Eastham. Eastham is now looking for an additional payment of $12.80 for Medicare and unemployment taxes paid by the town for its officers. You assert that since this was paid as off-duty or special detail work, no administrative fee may be recovered from Wellfleet under **G.L. Ch. 44, §53C** and Eastham must bear that cost.

Under the off-duty and special detail work statute:

> All money received by a ... town ... as compensation for work performed by one of its employees on an off-duty work detail which is related to such employee's regular employment or for special detail work performed by persons where such detail is not related to regular employment shall be deposited in the treasury and shall be kept in a fund separate from all other monies ... and ... shall be expended without further appropriation in such manner and at such times as shall, in the discretion of the authority authorizing such off-duty work detail or special detail work, compensate the employee or person for such services ...

> ... A ... town ... may establish a fee not to exceed ten per cent of the cost of services authorized under this section, which shall, except in the case of a city, town, district or the commonwealth, be paid by the persons requesting such private detail. ... **G.L. Ch. 44, §53C**.

This statute was enacted in major part to provide an accounting mechanism for payments made by third parties to police and fire officers doing incidental but specific work for private or public entities which had been paying the officers directly for such services. As a consequence of the prior system, officers were able to avoid payment of taxes on the income in some instances.

Section 53C requires the town to account for the services so performed, collect the pay-ments, compensate the officers and withhold income and other related taxes from such pay-ments. The services performed are often related to the usual functions of the officers, but are extraordinary and of specific benefit to particular recipients of the services and are not considered services on behalf of the town which would require payment by the town as its employees. Ordinarily, however, the services are performed in the town where the officers are normally employed, since it is the police or fire enforcement authority in that town which is being purchased.

In this case the Eastham officers were performing specific and similar police duties for the town of Wellfleet, under the authority of the Eastham police chief. The officers were sworn as special police in Wellfleet, so they had the requisite authority to function as such, and the performance of those duties could be characterized as off-duty work of those officers for accounting purposes. Payment by Wellfleet to Eastham at the off-duty work rate would seem to be an appropriate mechanism for handling this expense. Since Wellfleet is a municipality, it could not be charged by Eastham for any administrative fee under the statute.

Alternatively, since these officers were sworn special officers for Wellfleet, they could be paid as employees of Wellfleet, but only at the rate provided in the by-laws for such position, i.e., $10.83 per hour. However, this mechanism was apparently not contemplated at the time the work was arranged and the services performed. In addition, we understand the payment was put through on a vendor warrant, not on a payroll.

A third alternative might be that the services were performed as part of a mutual aid agreement between the towns. After reviewing the Wellfleet - Eastham Mutual Aid Agreement, it would appear that this agreement may not technically be applicable to the circumstances of this case. Section 1.0 c. defines "Mutual Aid" as:

> the provision of manpower and logistical support needed by a law enforcement agency to meet the immediate requirements of such agency <u>when the resources of that agency are not sufficient to cope with law enforcement situations.</u> (emphasis added).

In addition, Section 3.0 states that:

> The provisions of this agreement may be invoked for any situation requiring police action occurring within the jurisdiction of a signatory party, <u>which situation requires the</u>

> use of resources not normally available to that local enforcement agency. (emphasis added).

This seems to address the situation when extraordinary events occur requiring resources beyond those usually available to the town. It would not seem to be applicable when one of the towns essentially needs only regular shift coverage when the usual officers are on vacation.

Nevertheless, we do not conclusively rule out the applicability of the mutual aid agreement in this situation, which is similar in other respects to the emergencies contemplated by the agreement. If the agreement were to govern, ordinarily the town of Eastham would have to cover the cost of the service, under Section 7.0 of the agreement. One exception contained in Section 7.0 a., however, provides that:

> The receiving department shall be liable for the actual salaries of law enforcement personnel from a sending department provided pursuant to this agreement after the officer completes his regular tour or duty for that day. (emphasis added)

This clause seems intended to limit liability of the sending community to payment of officers already scheduled to work during the time the service is provided to the receiving community. We do not believe it requires direct payment of salary to these employees by the receiving town. The sending town may make the payments and bill the receiving town accordingly.

We believe the clause provides that any overtime attributable to the mutual aid service would be the liability of the receiving community. That appears to be the same basis as the agreement between the two chiefs in this case and explains why the officers received the Eastham overtime rate for the services rendered.

Assuming Wellfleet had such liability in this case, it is still not clear that it is liable for the Medicare and social security matching taxes paid by Eastham for these officers. Clearly the agreement calls for the sending community to absorb the costs of providing the service and makes relatively few exceptions. The language of the agreement is that the receiving community is only liable for "actual salaries". It does not specifically call for payment of indirect costs such as matching expenses. However, the general intent of the exception is to transfer non-shift costs to the receiving community. Although we do not believe the contract literally requires payment of such costs, we see no legal prohibition for the receiving community to pay them if the parties were to agree to the interpret the clause in that manner.

We hope this addresses your concerns. If you have any further inquiry, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

cc/ Carolyn C. Gifford, Eastham Town Accountant

Dlslaw e-mail. File 2005-469

-----Original Message-----
From: Blau, Gary [mailto:blau@dor.state.ma.us] On Behalf Of DOR DLS Law
Sent: Friday, December 02, 2005 9:04 AM
To: Liz Gilman (accountant@town.winchendon.ma.us)
Cc: 'cbrooks@gardner-ma.gov'
Subject: RE: Officers Hired By Another Municipality

Liz:

After we spoke on Tuesday I called the Gardner City Auditor, Calvin Brooks and asked why he thought the city could just cut a check to the town for the Winchendon officers Gardner used. He indicated that the city had used that method for years when employing other town officers for paid details, especially for road work details, when it was short staffed. He said that in order to pay the officers from its payroll, the out of town officers would have to pass specific physicals and meet all other personnel requirements and the city was not prepared to do that. He said that when other towns objected to the procedure, Gardner would just institute a policy not to use that town's officers for the work. He was particularly concerned in this case because the objection to the procedure was not raised until after the work was performed and the check was cut. He said they have no mechanism to pay the officers on a payroll. I told him I would communicate this information to you, and suggest that the two of you work it out in this instance.

I still believe that Gardner is the employing entity in this case and must either justify payment of the officers as independent contractors or find some way to include them on its payroll, and pay them from the special detail revolving fund (GL c. 44, §53C). I also still believe it is not appropriate to run this payment through the books of Winchendon, including its special detail revolving fund, as if any services were rendered to or for the town. Ordinarily any funds received by an officer of the town must be deposited to the general fund and be later appropriated prior to expenditures, unless a statute otherwise provides. GL c. 44, §53. We have already concluded that using Winchendon's paid detail revolving fund would not be appropriate. I am aware of no other statutory provision that would authorize Winchendon to process this check through the town's accounts.

Gary A. Blau, Tax Counsel
Property Tax Bureau

-----Original Message-----
From: Liz Gilman [mailto:accountant@town.winchendon.ma.us]
Sent: Tuesday, November 29, 2005 10:24 AM
To: 'DOR DLS Law'
Subject: RE: Officers Hired By Another Municipality

Gary can you send me an email stating that if Gardner contracts with an outside vendor to do detail work and hires Winchendon officers for that detail, that an AP check cut by the City of Gardner to the Town of Winchendon does not legally belong in a revolving account.

Thanks!!!!!!!!
Liz:

To: Liz Gilman (accountant@town.winchendon.ma.us)
From: DLSLAW
Mon 11/28/2005 4:39 PM

Liz:

I have reviewed your e-mail inquiry set forth below. Whether Winchendon officers are considered employees of Winchendon or Gardner while performing "special detail" work is a matter of the specific circumstances of the employment. In our phone conversation you indicated that the city of Gardner approached the officers directly to perform work in that city at Gardner's $32 per hour detail rate. No permission was requested from Winchendon for the use of its officers. In that circumstance, it appears that Gardner would have control over the officers, not Winchendon, whether the work to be performed was special detail for the ultimate benefit of third parties, or was actual police work for the city. In the former case, the city should have a special detail revolving fund (GL c. 44, 53C) from which it can process the payments received by the third parties and pay the Winchendon officers. If the payment is for work for the city of Gardner, the officers should be paid from a Gardner payroll account.

Even if Gardner could justify making payment out of an expense account for services rendered by the officers as independent contractors, the payments should not be made through the Winchendon payroll or special detail account. No work was done for the town of Winchendon or for third parties contracting with the town.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel

-----Original Message-----
From: Liz Gilman (accountant@town.winchendon.ma.us) [
Sent: Monday, November 28, 2005 11:33 AM
To: dlslaw@dor.state.ma.us
Subject: Officers Hired By Another Municipality

The City of Gardner directly hired some of our police officers for special detail work. Gardner wants to cut the Town of Winchendon an AP check for the officers that they hired and have the Town of Winchendon pay the officers through our payroll. I have refused to do this with other towns. Number one, we were not the employer here - Gardner hired and directed their work. Number two, the liability. Number three having our wages increased when work comp and professional liability are determined by that. Number four - medicare tax.

I look at this as the IRS would in determining if someone is an employee. Is there anything under MGL regarding this situation?
Liz Gilman, Town Accountant, Winchendon, Phone: (978) 297-5400, Fax:(978) 297-1616

CITY OF BOSTON vs. BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.

No. 95-P-2069.

APPEALS COURT OF MASSACHUSETTS

41 Mass. App. Ct. 269; 669 N.E.2d 466; 1996 Mass. App. LEXIS 793; 154 L.R.R.M. 3069

June 25, 1996, Argued
September 5, 1996, Decided

PRIOR HISTORY: **[***1]** Suffolk. Civil action commenced in the Superior Court Department on December 30, 1994. The case was heard by Thayer Fremont-Smith, J.

DISPOSITION: Judgment of the Superior Court reversed, and a new judgment entered vacating the award of the arbitrator.

COUNSEL: Michael P. Reagan, Special Assistant Corporation Counsel, for the plaintiff.

Joseph G. Sandulli for the defendant.

JUDGES: Present: Dreben, Gillerman, & Laurence, JJ.

OPINION BY: GILLERMAN

OPINION

[*269] **[**467]** GILLERMAN, J. The certified bargaining representative of certain uniformed police officers of the city of Boston (union) filed a grievance under the procedures described in the collective bargaining agreement (agreement) between the union and the city. The grievance alleged that the police department violated article XII of the agreement by unilaterally converting the so-called Northeastern University detail -- a weekend walking patrol in the East Fenway area -- from a paid detail **[*270]** (which is voluntary) [1] to an **[***2]** overtime detail (which may be made mandatory). The paid detail rate of pay is higher than the overtime rate. [2]

1 Article XII sets forth the "procedure . . . in the assignment and recording of all paying police details." It defines a "paid detail" to include police service performed during off-duty time "which is paid for by the person or persons making the request for such service," and which is related to the performance of regular police duties.

2 The union made no claim before the arbitrator, and makes no claim here, that the police department had adopted a subterfuge to avoid the payment of a higher rate of pay. Contrast *Boston v. Boston Police Superior Officers Fedn., 29 Mass. App. Ct. 907, 909, 556 N.E.2d 1053 (1990).*

The parties, by agreement, submitted the union's grievance to arbitration, including the question whether the grievance was arbitrable. [3] The arbitrator, after concluding that the grievance was arbitrable, entered an award in favor of the union and ordered the city to pay **[***3]** those officers who worked the detail the difference between the overtime rate and the paid detail rate. Thereafter the city commenced an action in the Superior Court seeking to vacate the award, see *G. L. c. 150C, § 11(a)*, on the ground that the police commissioner has the statutory right to assign police officers to overtime duty under the authority of St. 1962, c. 322, § 1, amending, so far as is material to this opinion, §§ 10 and 11 of c. 291 of the acts of 1906 (herein, §§ 10 and 11). [4] The judge confirmed the award of the arbitrator and dismissed the complaint.

3 The fact that the city agreed to arbitrate the grievance is of no legal consequence if the issue is beyond the authority of the

arbitrator. See *Boston v. Boston Police Patrolmen's Assn., Inc., 403 Mass. 680, 684 n.5, 532 N.E.2d 640 (1989).*

4 Sections 10 and 11 of St. 1906, c. 291, described the authority of the police commissioner of the city of Boston. These two sections, as amended by St. 1962, c. 322, § 1, provide, in pertinent part, as follows:

"Section 10 . . . The police commissioner shall have authority to appoint, establish and organize the police of said city . . . ."

"*Section 11* . . . . The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police . . . Officers and members of said police shall, whether on or off duty, be subject to the rules and regulations made under this section."

At oral argument, the union emphasized that there was no basis in the record for any assertion that the police commissioner approved the challenged order to convert the patrol to overtime duty, and that absent a decision by the commissioner, that order is not valid as no one else had the statutory authority to make such an order. It cannot be doubted, however, that the order, which the city seeks to validate in these proceedings, has been approved and adopted by the commissioner.

[*4]** **[*271]** The record contains no testimony at the hearing before the judge, and we assume there was none. Evidently, the parties proceeded solely on the arguments of counsel, the record of which is not before us. It appears from the briefs of both parties that the material facts, which are not many, are undisputed. Essentially, the facts are these.

At the request of various neighborhood groups in September, 1989, Northeastern University agreed to pay the hourly cost of a detail walking patrol for police officers in the East Fenway area of Boston. The agreed **[**468]** purpose was to "quell disturbances in and around the N.U. dorm neighborhood and *identify student perpetrators* for internal administrative sanctions and/or criminal prosecution" (emphasis original). In January, 1992, after the patrol went uncovered from time to time, the then bureau chief (now commissioner) Paul Evans directed that the patrol become a mandatory overtime assignment. It was not until 1993 that a patrolman working the detail was told that Northeastern University had continued to pay for the patrol after the conversion to mandatory overtime, and the grievance followed.

The city argues that §§ 10 and 11, see note 4, **[***5]** *supra,* are applicable to the facts of this case and the award of the arbitrator should not have been confirmed. Further, the city argues, *G. L. c. 150E, § 7(d)*, states that the provisions of a collective bargaining agreement covering public employees prevail over any conflicting provisions of those statutes specifically enumerated in *§ 7(d)*. Sections 10 and 11, the argument continues, are not among the enumerated statutes, and the arbitration of the union's grievance is foreclosed if either of those sections governs the facts of this case. See *School Comm. of Natick v. Education Assn. of Natick, 423 Mass. 34, 39, 666 N.E.2d 486 (1996)* (statutes not enumerated in *§ 7(d)* prevail over conflicting terms in collective bargaining agreements).

We are in substantial agreement with the city. The award should not have been confirmed for several reasons. First, it is by no means clear that the agreement is susceptible to an interpretation that covers the union's grievance. There is nothing in the agreement which prescribes the deployment of the police force as between voluntary paid details and **[*272]** overtime assignments, [5] while article V of the agreement, captioned "MANAGEMENT RIGHTS," effectively **[***6]** reserves to the mayor and the police commissioner "the regular and customary rights and prerogatives of municipal management" -- a reference, no doubt, to the long-standing and overriding authority of §§ 10 and 11. See note 4, *supra.*

5 Article IX, section 2, deals with *scheduling* of overtime, while article XII deals with the *procedure* to "be adhered to in the assignment and recording of all paying police details."

A more fundamental consideration is the scope of §§ 10 and 11. We have discussed the "zone of

managerial authority" reserved to the police commissioner under the provision of these sections. See *Boston v. Boston Police Superior Officers Fedn., 29 Mass. App. Ct. 907, 908-909, 556 N.E.2d 1053 (1990).* There we said that considerations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel. *Ibid.* More generally, the police commissioner's authority **[***7]** under c. 322 "has been recognized to be broad." *Boston v. Boston Police Patrolmen's Assn., Inc., 403 Mass. 680, 684, 532 N.E.2d 640 (1989).* In this last cited case, the court held that an assignment of one officer, rather than two, to a marked patrol vehicle is a management prerogative and beyond an arbitrator's authority. The *Boston Police Patrolmen's Assn. Inc.* case and the *Boston Police Superior Officers Fedn.* case, stand for the proposition that the deployment of officer personnel to meet the tasks and responsibilities of the department is a fundamental and customary prerogative of municipal management which falls squarely within the rights of management referred to in article V of the agreement (mayor and commissioner have customary rights and prerogatives of municipal management), and *§ 11* ("The police commissioner shall have . . . control of the . . . administration [and] disposition . . . of the department . . ."). See cases collected in note 6 to the court's opinion in *Boston v. Boston Police Patrolmen's Assn., Inc., 403 Mass. at 684.* See also *Boston Police Patrolmen's Assn., Inc. v. Police Commr. of Boston, 4 Mass. App. Ct. 673, 674, 357* **[***8]** *N.E.2d 779 (1976)* ("The defendant had authority to organize and administer the police department."). [6] It follows that the award should **[**469]** not have been confirmed. See **[*273]** *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough, 416 Mass. 252, 256, 620 N.E.2d 765 (1993)*, quoting from *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Assn. 372 Mass. 116, 119, 360 N.E.2d 883 (1977).* ("An agreement to arbitrate a dispute which lawfully cannot be the subject of arbitration [is] equivalent to the absence of a controversy covered by the provision for arbitration.").

6 The union refers us to cases decided by the Labor Relations Commission holding that the allocation and assignment of private details among police officers was a mandatory subject of bargaining, the most recent of which is *Town of Falmouth,* 20 MLC 1555 (1994). *Falmouth* did not present the question of the commissioner's power to decide whether a detail was an overtime or paid detail, and is inapposite.

Finally, the union argues **[***9]** that the decision of the bureau chief was "not based upon a matter of public policy or public safety," and therefore the detail was purely private. Quite aside from the fact that we have no record before us upon which we might consider the issue, the union's argument cannot prevail. As noted above, the scope of *§ 11* is sufficiently broad to include decisions made solely to manage the "administration and disposition . . . of the department."

The judgment of the Superior Court must be reversed, and a new judgment shall enter vacating the award of the arbitrator.

So ordered.

Robert F. Yates v. City of Salem

Supreme Judicial Court of Massachusetts

342 Mass. 460; 174 N.E.2d 368; 1961 Mass. LEXIS 764

December 9, 1960, Argued
April 27, 1961, Decided

PRIOR HISTORY: **[***1]** Essex.

Contract. Writ in the First District Court of Essex dated December 1, 1959.

Upon removal to the Superior Court the action was heard on a statement of agreed facts by *Forte,* J., who found for the defendant. The plaintiff alleged exceptions.

DISPOSITION: *Exceptions sustained.*

COUNSEL: *Joseph P. McKay,* for the plaintiff.

Alfred A. Dobrosielski, City Solicitor, for the defendant.

JUDGES: Wilkins, C.J., Spalding, Williams, Cutter, & Kirk, JJ.

OPINION BY: WILLIAMS

OPINION

[*460] **[**368]** The plaintiff, a regular police officer of Salem, brings this action of contract to recover from the city wages alleged to be due from October 18, **[***2]** 1959, to the date of the writ, December 1, 1959. The case was presented to a judge of the Superior Court **[**369]** on a statement of agreed facts. Therein it appeared that on September 16, 1958, his "day off," the plaintiff was assigned by his superior officer to perform traffic duty for a private contractor who was engaged in the relocation of the old Salem depot. Although not required to do so, the plaintiff accepted the assignment and was paid by the contractor. He "worked under the direction of the private contractor, State engineer and/or the City Marshal." While in uniform "performing the work of a police officer" on Washington Street, he was struck by a motor vehicle "without fault of his own" and received an injury which totally incapacitated him for **[*461]** duty. He was granted leave without loss of pay from September 17, 1958, until October 17, 1959, except for a period from January 1 through February 8, 1959. On October 17, 1959, his name was removed from the payroll of the Salem police department and from October 18, 1959, he "continued on leave with loss of pay." As of the date of the statement of agreed facts he remained totally incapacitated for duty because **[***3]** of his injury.

General Laws c. 41, § 111F, inserted by St. 1952, c. 419, provides that "Whenever a police officer . . . of a city . . . is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, he shall be granted leave without loss of pay for the period of such incapacity"; but "no such leave shall be granted for any period after such police officer . . . has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers . . . in such city . . . determines that such incapacity no longer exists." It was agreed that this statute applies to Salem and that the plaintiff has not been examined by a physician so designated. The defendant moved that "upon the pleadings, opening and upon all the evidence, a verdict be ordered in its favor." This motion was treated as a motion "for finding" for the defendant and was allowed subject to the plaintiff's exception.

The statement of agreed facts is in effect a case stated. *G. L. c. 231, § 126.* We are free to draw therefrom such inferences and reach such conclusions as we think are warranted. **[***4]** *Hayes v. Lumbermen's Mut. Cas. Co. 310 Mass. 81. Caissie v. Cambridge, 317 Mass. 346, 347.* The parties must have meant by the term "traffic duty" the duty commonly performed by police officers in directing and controlling vehicular traffic. The

plaintiff was a public officer (*Buttrick* v. *Lowell,* 1 Allen, 172; *Hathaway v. Everett, 205 Mass. 246*) obligated to perform this duty in accordance with the "power and authority bestowed by the law." *Attorney Gen. v. Tillinghast, 203 Mass. 539, 543.* See *G. L. c. 41, § 98.* He was injured while in uniform, "performing **[*462]** the work of a police officer," by assignment of his superior officer. He was therefore injured "in the performance of his duty." In its performance he was not acting in the capacity of employee of the contractor. See *Armstrong v. Stair, 217 Mass. 534, 536*; *Perras v. Hi-Hat, Inc. 326 Mass. 78*; *Kidder v. Whitney, 336 Mass. 307, 308-309.* It is irrelevant to the issue of performance that he was "paid for his assignment" by the contractor. Whether this statement means that he was paid to accept the assignment or to compensate him for the work performed, in **[***5]** either case he was engaged in carrying out a public duty. Although it is stated that he "worked under the direction of the private contractor, State engineer and/or the City Marshal" the only direction relating to police work was the general assignment to traffic duty. The defendant raises no issue as to the validity of *§ 111F.* See *Quinlan v. Cambridge, 320 Mass. 124*; *Berube v. Selectmen of Edgartown, 336 Mass. 634.* **[**370]** There was error in finding for the defendant. The plaintiff was entitled to be paid his wages for the period specified in his declaration.

Exceptions sustained.

Property Tax Bureau Opinion 96-1108

November 22, 1996

Sharon M. Andrew
Director of Business
Whitman-Hanson Regional School District
600 Franklin St.
Whitman, MA 02382

Re: Special Detail Revolving Fund - Administrative Charge
Our File No.96-1108

Dear Ms. Andrew:

This is in reply to your letter asking whether a town could impose an administrative surcharge under G.L. Ch.44 §53C for special details at the regional district school. In particular, you asked about cases where the special details were for school athletic events, revenues from which are spent at the school committee's discretion, and for student activities or events, the revenue from which benefits only the student organization or participants, with no discretion in the school committee to spend the money to support other student activities.

G.L. Ch.44 §53C provides that an administrative charge may be added to the actual cost of the special detail, except in the case of the commonwealth, a city, town or district, which includes regional school districts. The point of the prohibition against the surcharge in the case of governmental entities is to protect their revenues and budgets from the burden of such costs. Receipts from attendance at school sponsored athletic events are not part of the general revenue or budget of a regional school district; they are a revolving fund under G.L. Ch.71 §47 that may be spent for purposes such as the cost of running athletic programs. However, many such costs might otherwise have to be funded in district's general budget but for the availability of the revolving fund revenue. Because of the degree of discretion over such funds, burdening them with the surcharge under Ch.44 §53C might ultimately affect the general budget of the district adversely.

By way of contrast, where a school district receives revenues in a quasi-agency or trust capacity for particular groups of students, such as the class of 1997, and will turn over to a representative of that group of students any surplus left after the completion of the activities which the revenue is intended to support, we can see no reason why the surcharge under §53C could not be imposed. What is burdened by the administrative surcharge in such a case is not the district's funds, but the students'; any prohibition on the imposition of the surcharge would benefit them in their private capacity, by increasing the surplus that would be turned over to them.

Please do not hesitate to contact us if we may be of further assistance.

Very truly yours,

Harry M. Grossman
Acting Deputy Commissioner

Mass. GL Chapter 44: Section 53C. Deposit and expenditure of compensation for off-duty or special detail work; appropriation for special fund; fee

Section 53C. All money received by a city, town or district as compensation for work performed by one of its employees on an off-duty work detail which is related to such employee's regular employment or for special detail work performed by persons where such detail is not related to regular employment shall be deposited in the treasury and shall be kept in a fund separate from all other monies of such city, town or district and, notwithstanding the provisions of section fifty-three, shall be expended without further appropriation in such manner and at such times as shall, in the discretion of the authority authorizing such off-duty work detail or special detail work, compensate the employee or person for such services; provided, however, that such compensation shall be paid to such employee or person no later than ten working days after receipt by the city, town or district of payment for such services.

When necessary, a city, town or district may appropriate funds to be placed in the special fund authorized by this section to be used for the purpose for which the fund was established. A city, town or district may establish a fee not to exceed ten per cent of the cost of services authorized under this section, which shall, except in the case of a city, town, district or the commonwealth, be paid by the persons requesting such private detail. Any such fee received shall be credited as general funds of the city, town or district and shall not be used again without further appropriation.

Districts shall include regional school districts.

Case Study 5

Special Personal Services Contract Issues Reference Materials

Mass. GL Chapter 44: Section 31. Liabilities in excess of appropriations forbidden; exceptions

Section 31. No department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department, each item recommended by the mayor and voted by the council in cities, and each item voted by the town meeting in towns, being considered as a separate appropriation, except in cases of major disaster, including, but not limited to, flood, drought, fire, hurricane, earthquake, storm or other catastrophe, whether natural or otherwise, which poses an immediate threat to the health or safety of persons or property, and then only by a vote in a city of two-thirds of the members of the city council, and in a town by a majority vote of all the selectmen. Payments of liabilities incurred under authority of this section may be made, with the written approval of the director, from any available funds in the treasury, and the amounts of such liabilities incurred shall be reported by the auditor or accountant or other officer having similar duties, or by the treasurer if there be no such officer, to the assessors who shall include the amounts so reported in the aggregate appropriations assessed in the determination of the next subsequent annual tax rate, unless the city or town has appropriated amounts specified to be for such liabilities; provided, that, if proceedings are brought in accordance with provisions of section fifty-three of chapter forty, no payments shall be made and no amounts shall be certified to the assessors until the termination of such proceedings. Payments of final judgments and awards or orders of payment approved by the industrial accident board rendered after the fixing of the tax rate for the current fiscal year may, with the approval of the director of accounts if the amount of the judgment or award is over ten thousand dollars, be made from any available funds in the treasury, and the payments so made shall be reported by the auditor or accountant or other officer having similar duties, or by the treasurer if there be no such officer, to the assessors, who shall include the amount so reported in the aggregate appropriations assessed in the determination of the next subsequent annual tax rate, unless the city or town has otherwise made provision therefor.

The provisions of this section, so far as apt, shall apply to districts, and the prudential committee, if any, otherwise the commissioners, shall act in place of the members of the city council or selectmen.

Mass. GL Chapter 41: Section 108N. Town manager, administrator, executive secretary, or administrative assistant; employment contract

Section 108N. Notwithstanding the provision of any general or special law to the contrary, any city or town acting through its board of selectmen or city council or mayor with the approval of the city council, as the case may be, may establish an employment contract for a period of time to provide for the salary, fringe benefits, and other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performances of duties or office, liability insurance, and leave for its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town

accountants, city auditor or city manager, or the person performing such duties having a different title.

Said contract shall be in accordance with and subject to the provisions of the city or town charter and shall prevail over any conflicting provision of any local personnel by-law, ordinance, rule, or regulation. In addition to the benefits provided municipal employees under chapters thirty-two and thirty-two B, said contract may provide for supplemental retirement and insurance benefits.

Nothing contained in this section shall affect the appointment or removal powers of any city or town over its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or such person performing such duties with a different title, nor shall it grant tenure to such officer, nor shall it abridge the provisions of section sixty-seven of chapter forty-four.

Mass. GL Chapter 41: Section 108O. Employment contracts for police chiefs and fire chiefs

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

Said contract shall prevail over any conflicting provision of any local personnel by-law, ordinance, rule or regulation. In addition to the benefits provided municipal employees under chapters thirty-two and thirty-two B, said contract may provide for supplemental retirement and insurance benefits.

Nothing contained in this section shall affect the appointment powers of any city or town over its police chief and fire chief, or such person performing such duties with a different title. In the absence of any conflicting provisions in an employment contract, nothing contained in this section shall affect the removal powers of any city or town over its police chief and fire chief or such person performing such duties with a different title.

Nothing contained in this section shall grant tenure to such officer, nor shall it abridge the provisions of section sixty-seven of chapter forty-four. If there is no employment contract in force, and if the police chief or fire chief has an appointment for a term, the appointing authority shall give such chief at least one year's written notice if it decides not to reappoint said chief.

Excerpt from Mass. GL Chapter 71: Section 41. Tenure of teachers and superintendents; persons entitled to professional teacher status; dismissal; review

Section 41. ...

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

Mass. GL Chapter 41: Section 108. Compensation

Section 108. The salary and compensation of all elected officers of a town shall be fixed annually by vote of the town at an annual town meeting, but said salary or compensation may be revised by a two-thirds vote of any special town meeting called to conduct business later in the same fiscal year for which said salary or compensation was originally fixed; provided, however, that such salary revision occurs prior to the establishment of the tax rate of the town in said fiscal year. Except as provided in section four A and section one hundred and eight A, and except in any city in which salaries and wages are fixed by special law or by ordinance in accordance with the provisions of any general or special law, all boards or heads of departments of a town shall, as soon as may be after the passage of the annual budget, fix the salary or compensation of all officers or employees appointed or employed by them, subject to the provisions of section thirty-one of chapter forty-four. The provisions of this section shall be operative notwithstanding the provisions of sections thirteen and thirty-four of said chapter forty-four. A city may by ordinance prescribe that all fees, charges or commissions allowed by law to any officer thereof shall be paid into the city treasury and belong to the city, and in such case shall pay such officer such compensation as the city council may determine.

Property Tax Bureau Opinion 2000-236

Massachusetts Department of Revenue *Division of Local Services*

Frederick A. Laskey, Commissioner Bruce H. Stanford, Chief, Property Tax Bureau

May 22, 2000
Steven C. Boudreau
Executive Secretary
148R Peck Street
Rehoboth, MA 02769

Re: Personal Services Contracts
Our File No. 2000-236

Dear Mr. Boudreau:

You have asked whether the Board of Selectmen may enter into multi-year personal services contracts with the building inspector, health agent, highway

superintendent, planner and conservation agent. We have generally suggested that employment contracts may be made for one year only, unless a statute otherwise provides. No such statute authorizes a multi-year contract for any of the positions you have listed. In such cases, we believe the compensation for each year is subject to appropriation under **G.L. c. 44, §31.**

The usual rule is that town employment contracts are enforceable for one year, given that an appropriation for such an operating expense is made on an annual basis and no departmental contract can exceed the appropriation therefor, under **G.L. c. 44, §31**. However, exceptions have been made by legislative enactment and court decisions. See **G.L. c. 41, §108N** (authorizes multi-year specialty contracts for town executive officer and accountant); **G.L. c. 150E, §7** (authorizes collective bargaining agreements for up to three years); Boston Teacher's Union, Local 66 v School Committee of Boston, 386 Mass. 197, 212-13 (1982) (school committee bound to pay salary increases in second and third years of three year collective bargaining agreement).

Thus, in the absence of one of these exceptions, municipal employment contracts purporting to be for more than one year would be subject to appropriation in subsequent years of the contract. See also **G.L. c. 41, §108** (appointed officers salary fixed by appointing authority "as soon as may be after the passage of the annual budget" unless salary fixed by a classification by-law). We can find no statute specifically authorizing multi-year contracts for any of the positions described. However, if any of the positions is funded from grants, the terms of the grants may authorize multi-year contracts. In addition, we cannot rule out the possibility that your charter or a special act might provide multi-year contract authority.

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

Very truly yours,

Bruce H. Stanford, Chief
Property Tax Bureau

Division of Local Services Opinion 98-812

Massachusetts Department of Revenue *Division of Local Services*
Bernard F. Crowley, Jr., Acting Commissioner Harry M. Grossman, First Deputy Commissioner

February 24, 1999

Claire Smedile
Town Accountant
Town Hall
Whitman, MA 02382

Re: DPW Superintendent's Car Repairs, Insurance & Gas
Our File No. 98-812

Dear Ms. Smedile:

You have requested a legal opinion concerning the town's payment of repairs, insurance and gas for the personal vehicle of the DPW Superintendent, pursuant to a vote of the DPW Commissioners. Apparently the Superintendent formerly had the use of a town car, but agreed to give up that vehicle in exchange for the use of his own, which the Commissioners agreed to maintain and insure, as well as supply with "all fuel used in the conduct of his position." This arrangement has apparently been used with former superintendents as well.

Your request raises legal issues concerning the propriety of paying for such expenses on a private vehicle, whether the payments would fall within the scope of appropriations available for the use of the Commissioners and whether the cost of the repairs would be considered income subject to withholding. We will address the first two questions. The third is a matter of federal income tax law which is more appropriately raised with the Internal Revenue Service. While we think the expenditure serves a valid municipal purpose, some questions remain concerning the scope and availability of an appropriation to pay for some of the expenses.

As a matter of common law, a municipality may not make payments to or on behalf of an individual for purely private purposes. The payment must primarily or significantly serve a municipal purpose. Matthews v. Westborough, 131 Mass. 521, 522 (1881); Jones v. Natick, 267 Mass. 567, 570 (1929); Quinlan v. Cambridge, 320 Mass. 124, 127 (1946). If the payment is given in the form of a benefit which is part of a compensation package to an employee, it will usually be considered as serving a municipal purpose, provided the benefit is "reasonable." Quinlan, supra (paid sick leave entitlement of 12 weeks at beginning of employment not reasonable, relying on statutes providing for 15 days sick leave per year as indicative of reasonableness). Benefits which are beyond that normally allowed for municipal employees may be provided in a collective bargaining context or where a specific statute authorizes it. Allen v. Sterling, 367 Mass. 844, 847 (1975) (sick leave bank part of over-all package of services and

benefits); See **G.L. c. 41, §108N** (authorizes additional fringe benefits to chief executive, administrative and accounting officers) & **G.L. c. 41, §108O** (authorizes additional benefits for police chiefs). We are aware of no statute providing for additional fringe benefits for DPW Superintendents. See **G.L. c. 41, §§61E & 108** which merely authorize a board of public works to "fix the compensation" of the superintendent, within any available appropriation.

The use of the Superintendent's vehicle for town business would certainly warrant expenditure by the town to reimburse him for the cost of such use. Generally this is done by way of a mileage reimbursement based on the accepted cost of operating a vehicle, including the proportionate cost of insurance, fuel, maintenance and repairs. However, we are aware of no statute which specifically provides for such reimbursement or makes the mileage method exclusive. We also see no specific prohibition, per se, for direct payment of the cost to repair the vehicle, provide insurance or provide fuel, at least to the extent these expenses are attributable to the use of the vehicle for the town's business. In fact, the cost of insurance on a vehicle used in the Superintendent's employment might be considerably higher than insurance for a vehicle used for purely private purposes.

We have had occasion to review mileage reimbursement policies in the past and have generally concluded that while there is no specific statute addressing the issue, towns generally set uniform policies under collective bargaining agreements, by-laws, policies or regulations. We have also concluded that a special law authorizing a board to "fix the compensation" of one of its officers does not generally apply to townwide benefits, such as mileage reimbursements. Thus, whether payment of private vehicle expenses would be appropriate in Whitman would depend on the extent to which reimbursement by-laws, policies or regulations are in place. To the extent such payments have been made consistently in the past, town policy may be considered to have allowed such methods.

By paying cost of repairs on a per claim basis and the total cost of insurance, there is no apparent allocation of expenses between the private use and town business. The policy seems to limit fuel reimbursements to town business, but does not specify how this will be determined or monitored. However, to the extent the payment or benefit is in excess of the amount reasonably attributable to town business, it could still be considered a proper municipal expenditure as part of the compensation of the Superintendent, provided it otherwise complies with applicable law.

This methodology leads to the issue of whether the payments are within the scope of any available appropriation. Payment of the repair has been requested from the general expense item in the departmental budget. It appears that the vote of the board to provide this benefit was not made until July 14, 1998 and was later clarified by vote of November 18, 1998. However, we also understand that this method of reimbursement has been used in the fairly recent past. Thus, the use of the general expense item for this

purpose may have been contemplated. In addition, it would clearly be appropriate to pay for such expenses on the town vehicle or vehicles and the account has also been used to pay mileage reimbursement. Such expenses are the equivalent of this expense, at least to the extent of travel costs related to town business.

A similar issue arises with respect to the payment of insurance and gas for the Superintendent's vehicle from the general expense budget item. If such private insurance and fuel expenses for vehicles used in town business have been paid from that budget item in the recent past, payment of such expenses now could be considered within the scope of the appropriation.

Payment of such expenses attributable to the Superintendent's private use of the vehicle is more problematic. There is no statutory provision authorizing such a special benefit and it could be considered outside the scope of the authority of the board and at variance with the standard policy for reimbursement. However, we note that some of the issues raised by this method of reimbursement occurred even when the Superintendent had the use of a town vehicle. Was he allowed to use the vehicle for his own purposes? If so, was he required to monitor and report on such private use and was he required to pay the town back for such use? If the town vehicle could be used for personal business without such an accounting, is the payment of private costs of the Superintendent's vehicle significantly different? Past practice may be the indicator once again that such payments have been made in accordance with town policy.

We note that all or a portion of the payment may very well be considered additional salary for income tax and withholding purposes. Since this is a matter of federal income tax law, which ordinarily is followed by the state, we recommend that you contact the Internal Revenue Service and the Customer Assistance Bureau of this Department for an answer to that question.

Finally, we note that payment of repairs and insurance directly to the vendors could require compliance with Chapter 30B bid law requirements. Other practical problems could also arise if this method is continued. For example, if the Superintendent were to trade in his vehicle and/or purchase another car, a question would arise whether the town would be responsible for paying for repairs on the newly acquired vehicle.

We hope this addresses your concerns. If you have any further questions, please do not hesitate to contact us again.

Very truly yours,

Harry M. Grossman
First Deputy Commissioner

Commonwealth of Massachusetts
County of Plymouth
The Superior Court

Civil Docket **PLCV2005-00886**

RE: Savino v Walsh, chairman et al

TO: Leo J Peloquin, Esquire
Collins Loughran & Peloquin
320 Norwood Park South
Norwood, MA 02062

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **05/23/2008**:

RE:

is as follows:

After hearing, the motion in limine is ALLOWED to the extent that deft's. evidence of plaintiff's purported misconduct in office shall not be admissible to establish a breach of contract by plaintiff sufficient to excuse defendant's failure to follow termination procedure as set forth in the employment contract; however, motion is DENIED to the extent that defendant shall be permitted to introduce such evidence to show that had it properly sought to terminate the plaintiff according to the employment contract it would have likely succeeded. As noted during the hearing, such evidence would effect the date upon which damages would cease (Locke, J.) cc: 5/29/08

Dated at Plymouth, Massachusetts this 29th day of May, 2008.

David M. Biggs Acting Clerk of Courts,
Clerk of the Courts

BY:

David M. Biggs
Assistant Clerk

Telephone: (508) 583-8250 ext. 305

Copies mailed 05/29/2008

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Property Tax Bureau Opinion 99-212

Massachusetts Department of Revenue *Division of Local Services*
Frederick A. Laskey, Commissioner Bruce H. Stanford, Chief, Property Tax Bureau

July 30, 1999

Dale C. Kowacki
Town Accountant
P.0. Box 504
Bernardston, MA 01337

Re: Severance Pay
Our File No. 99-212

Dear Mr. Kowacki:

You have asked whether the board of health may grant $500 severance pay to a part-time (25 hour per week) employee whose position at the landfill was eliminated abruptly a few months before the end of the fiscal year. The town entered into a contract with an independent contractor to operate the landfill for the remainder of the fiscal year.

Generally, we believe a town department cannot grant severance pay to an employee without some statute specifically authorizing it because the payment would be in the nature of a gratuity, i.e., a purely private purpose without public benefit. See Quinlan v. Cambridge, 320 Mass. 124 (1946); see also **G. L. c. 41, §108N** (town managers, town administrators & town accountants), **G. L. c. 41, §108O** (police chiefs) and **G. L. c. 71, §41** (school superintendents and business managers), which specifically authorize severance pay in certain personal services contracts. Without such statutory authorization of severance pay, issues arise concerning the validity of the provision based on a potential insufficiency of the appropriation under **G. L. c. 44, §31**. In addition, severance pay is not a usual item to be paid from a general departmental line item if no history of or policy for such payments has existed in the town. At the very least, some specific vote of town meeting appropriating a fixed sum for such purpose would be required.

In this case you have indicated that there is no contractual provision requiring severance pay or any town policy on the issue. We also understand that the decision to grant severance pay arose during the course of the fiscal year. You have indicated that funds remained available in the Board of Health account because the new landfill contract did not require any payments by the town. You also indicated that the employee received unemployment benefits. The employee was compensated for the work performed, and the compensation was fixed at the beginning of the fiscal year under **G. L. c. 41, §108**. In these circumstances severance pay would appear to be a pure gratuity.

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

Very truly yours,

Bruce H. Stanford, Chief
Property Tax Bureau

Property Tax Bureau Opinion 95-961

MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

P.O. Box 9655
Boston, MA 02114

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

MITCHELL ADAMS
Commissioner

ROBERT H. MARSH
Deputy Commissioner

February 14, 1996

Raymond Blair, Chairman
Finance Committee
Town Hall, 6 Main Street, P.O. Box 417
Stockbridge, MA 02162-0417

Re: Selectmen's Authority to Raise Salary of Collector
Our File No. 95-961

Dear Mr. Blair:

You have asked whether the board of selectmen could provide for the annual salary of an appointed temporary collector at $23,000 when the salary of the elected collector (now deceased) was at best $17,411 as voted by annual town meeting in May, 1995. We believe that an elected collector's salary fixed by town meeting is the salary for the position when filled by temporary appointment and that it cannot be increased without a two-thirds town meeting vote prior to the establishment of the tax rate, under **Massachusetts General Laws Chapter 41, §108**. A plausible argument can be made that such a fixed salary for a temporary appointed officer may be reduced by the board of selectmen, but not increased beyond that set by town meeting.

As more fully set forth herein, there is a serious question whether annual town meeting fixed the collector's salary in this case, and if so, in what amount. Given this ambiguity, it is difficult to determine whether the salary negotiated by the board of selectmen with the temporary collector is excessive. In order to avoid the problem in the future, we recommend

that town meeting actually vote a specific amount of salary for each elected official, under the separate warrant article submitted for such purpose. The appropriations for such fixed amounts should be included in the annual budget article, with the amounts fixed for each elected officer's salary included as a line item in the elected officer's departmental budget. No appropriations for elected officer's salaries should be placed in other departmental budgets.

We first look at the general law relating to compensation of elected and appointed officials. **G.L. Ch. 41, §108** provides in pertinent part:

> The salary and compensation of all elected officers of a town shall be fixed annually by vote of the town at an annual town meeting, but said salary or compensation may be revised by a two-thirds vote of any special town meeting called to conduct business later in the same fiscal year for which said salary or compensation was originally fixed; provided, however, that such salary revision occurs prior to the establishment of the tax rate of the town in said fiscal year. [With exceptions for certain members of boards appointed by such boards to other town positions and employees paid under a classification and salary by-law] all boards or heads of departments of a town shall, as soon as may be after the passage of the annual budget, fix the salary or compensation of all officers or employees appointed or employed by them, subject to the provisions of section thirty-one of chapter forty-four. ...

That statute governs the salary of the elected collector, which is to be fixed for the fiscal year by annual town meeting vote, subject to the proviso.

In this case, however, due to the demise of the elected collector, prior to the commence-ment of the fiscal year, the board of selectmen have appointed a temporary collector under the authority of **G.L. Ch. 41, §40**. Although **Section 40** specifically authorizes such a temporary appointment until a successor is elected or appointed and qualified, it makes no mention of any authority of the board of selectmen to fix or change the salary voted at annual town meeting for the position. Without such a statutory provision, we think there is no ability for the board of selectmen to change a fixed salary set by town meeting when a vacancy occurs in the elected office.

It may be urged that the board of selectmen, as the appointing authority, could fix the salary of the appointed temporary collector under the terms of **G.L. Ch. 41, §108** that provide for appointed officers. Even if that were the case, however, the board would still be limited by the amount of the appropriation actually made for the year, under **G.L. Ch. 44, §31**, although it could fix the salary at a lower amount under **G.L. Ch. 41, §108**. That fixed amount would have to be prorated for the remainder of the fiscal year during which the temporary collector is expected to serve. Any amounts of the collector's annual salary unpaid at the beginning of the fiscal year due to a vacancy could not be used to supplement the amount paid the temporary collector for the remainder of the year. Rather, a surplus should accumulate at year's end.

We turn to the issue of what annual salary was voted at town meeting. You indicate that the salary voted for the collector was "$17,411 including compensation from the Water/ Sewer Department and an annual stipend in lieu of fees". From the annual town meeting warrant it is difficult for us to determine whether a salary was actually voted for the collector, and

if so, how much was voted. Although Article 4 purports to fix the salaries of elected officers, including the collector, the article as moved set no specific salaries for any of those officials. Article 5 as voted is also somewhat ambiguous, perhaps requiring an interpretation by town officials and an investigation into prior town practice. In pertinent part it provides:

Article 5. Move the Town vote to raise and appropriate for the following purposes and pass any vote in relation thereto:

APPROPRIATIONS RECOMMENDED FOR 1995-1996
GENERAL GOVERNMENT

				Approved Budget 7/1/94 to 6/30/94	Recommended Budget 7/1/95 to 6/30/95
...					
14	Town Collector-Salaries				
	Collector		13,575		
	Collector	2,000			
	Clerk		14,910		
	Clerk		2,250	27,485	32,735
...					
	PUBLIC WORKS AND FACILITIES				
56	Sewer Department-Salaries			60,060	61,668
...					
58	Water Department-Salaries			45,309	46,552
...					

VOTE: YES - 100; NO - 0

The column of smaller figures under Town Collector-Salaries total 32,735 which appears to be the amount appropriated by town meeting for the salaries in the collector's office; i.e., the collector and the clerk. The two figures associated with the collector total $15,575 which appears to be what the elected collector would have received as salary, together with an amount in lieu of fees.

You also indicate that the former collector ordinarily received a separate amount from the water/sewer department. Without suggesting that it would be proper to consider additional amounts voted from other department budgets as part of the fixed salary of an elected official, in this case no such vote appears to have been taken. Although a detail of the water and sewer budgets indicate special numbered lines for the "Treasurer" out of the water and sewer accounts, there is no similar line for the collector. Nor did the budget article actually voted by town meeting set forth any line item for payment of the collector from water or sewer items. Nevertheless, in the past such an amount was paid, and the amount suggested as intended in FY96 for payment of the collector from water and sewer accounts was $918.14 for each.

When those amounts are added to the $15,575, the total amount would be $17,411.28. This latter amount is the amount you state was voted at annual town meeting for the collector.

However, we think the votes on Article 4 and 5 on their face are subject to other interpretations. By not placing the smaller numbers under the approved or recommended budget lines, the amounts could be considered informative only, but not restrictive. The actual amount voted could be the single item shown in the recommended column. In that case, it is argued by the town accountant, the collector could be paid a larger amount within the total $32,735 voted, set by the board of selectmen.

Another interpretation of the vote is that it fixed the salaries of the elected officials either by amounts shown in the leftmost (untitled) columns (Article 3 Selectmen, Article 10 Assessors, Article 14 Town Collector, Article 18 Town Clerk and Article 63 Board of Health) or by the single sum shown in the rightmost column (Article 1 Moderator, Article 12 Treasurer and Article 42 Tree Warden). Under this interpretation, no amounts from the water or sewer budgets could be used to increase those salaries.

None of the interpretations is completely supported on the face of vote as certified by the town clerk. We tend to favor the third interpretation, which would limit the annual salary of the elected collector to $15,575, because it is consistent with the requirement of fixing the elected officer's salary and does not require looking beyond the face of the budget vote to ascertain additional amounts allegedly voted by town meeting. We also tend to disfavor the second interpretation, which conflicts with the provision about the town meeting fixing the elected officer's salary, and for which there is no statutory authorization for the selectmen to fix the salary. We also tend to disfavor the first interpretation which would require looking at more detailed budget documents in other town departments which may or may not have been provided at annual town meeting.

Nevertheless, we cannot rule out any of the three without a detailed knowledge of prior past practice in the town or minutes of annual town meeting with respect to setting the elected collector's salary. Since we cannot clearly determine the amount of salary voted by town for the elected collector, we cannot determine whether the salary provided for the replacement was in excess of authority.

Again, we suggest that for FY97 specific amounts for payment of elected officers be included in an article specifically to fix the salaries of elected officers. This amount should include compensation for service to other town departments, if desired. Appropriations for those salaries should come from the budget article and should be made directly to the elected officer's salary line item. No appropriation should be made in other department budget accounts to pay an elected officer, although fees set to recover expenses of that department can include the cost attributable to the service of the elected officer.

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

Very truly yours,
Harry M. Grossman
Chief, Property Tax Bureau

Property Tax Bureau Opinion 95-340

MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

P.O. Box 9655
Boston, MA 02114

(617) 626-2300
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MITCHELL ADAMS
Commissioner

ROBERT H. MARSH
Deputy Commissioner

July 7, 1995

Dennis Rindone
75A Grove St., Suite 12
Worcester, MA 01605-2610

Re: Hatfield Assessor's Compensation
Our File No. 95-340

Dear Dennis:

You have requested guidance concerning an issue of payment of the board of assessors on an hourly basis over and above the salaries voted at town meeting. Apparently the board members receive additional pay at $10 per hour to research deeds, wills and administrations, clean up office records and revaluation "detail work", as well as for preparation of ATB cases. These duties are consistent with the duties of assessors and may be done by the assessors themselves. We have s serious concern about the propriety of the practice of paying assessors by the hour for services rendered, for the following reasons. However, it does not appear that town meeting voted to provide such a mechanism.

Salaries and compensation of elected officers, such as these assessors, must be "fixed annually by vote of the town... ." **G.L. Ch. 41, §108**. This requires at least a line item appropriation or other vote, together with a sufficient appropriation, setting a specific annual amount to compensate the officers. In our opinion an hourly rate, at least without some fixed number of hours, is not sufficiently definite to fix the annual salary.

In this case it appears that salaries of the assessors are set in Item 13 of the annual budget; i.e., $4,425 for the chairman and $4,050 each for the other two members. In addition, amounts of $500 for one specifically named assessor and $4500 for another named assessor were also appropriated in Article 22 "for additional compensation ... through December 31, 1995 ... ." Nothing in the latter article, as written, indicates an hourly rate is contemplated or prescribed. We think those votes were sufficiently definite to authorize payment of an annual salary as shown in article 13 plus additional amounts for the first six months of FY96 for two of the three assessors. This would seem to sufficiently "fix" the salary and compensation of the assessors for the fiscal year.

There is no requirement that all assessors receive the same compensation, especially if they are performing functions in a full-time as opposed to part-time capacity. See Teed v. Randolph, 347 Mass. 652 (1964). We see no authority of the board of assessors to limit the compensation under Article 22 to $10 per hour of actual service in specific duties.

Potential issues remain, however. For example, if a vacancy occurs in one of the board offices, prior to December 31, 1995, in which a named officer receives additional compensation, does the replacement receive the additional compensation, may the board vote to give it to another member or does the additional compensation cease to apply? What occurs if a named assessor receiving additional compensation ceases to perform additional work or if the work load is partially or wholly transferred to another assessor? In other words, was the intent to grant specific additional compensation to a specifically named assessor, or merely to grant additional compensation for additional work or to the assessor working longer hours or taking on greater responsibilities? See Teed v. Randolph, supra, in which the town left the decision to the board of assessors which would be the full time assessor, which allowed a change of the designee and a change in the compensation between the board members.

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

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

Bureau of Municipal Finance Law Opinion 2006-376

Massachusetts Department of Revenue *Division of Local Services*

Alan L. LeBovidge, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs

March 15, 2007

Rodney P. Smith
Town Accountant
36 Bartlet Street
Andover, MA 01810

Re: Funding Termination Leave Payments
Our File No. 2006-376

Dear Mr. Smith:

You have asked several questions concerning the funding of termination benefits paid to eligible employees leaving town service. These benefits include accrued vacation balances and a portion of sick leave balances based on formulas within the collective bargaining agreements. You have indicated that the

termination benefit payments are not included within the operating budgets of the individual departments; i.e., they are not budgeted within the personal services or expense line items in those departments. In recent years (since the mid-90's) the town has appropriated sums to a special accumulated employee benefit account to cover these expenses. See our opinion 95-1185 to the town's finance director suggesting such a special purpose appropriation would be a valid method of funding these benefits.

Your specific questions are paraphrased as follows:

1. If town meeting under funds or fails to fund the special article, are the benefits still obligations of the town?

2. If the benefits are legal liabilities of the town, how do the benefits get paid without a sufficient appropriation? Can they be paid from the payroll accounts of the departments from which the employees retire or leave?

3. Can the accountant refuse payment, or, alternatively, charge another account?

The short answer to your questions is that the town may very well be liable to pay these benefits, despite the lack of specifically appropriated funds to cover them. However, the town will be unable to pay the benefits if it has an insufficient appropriation in the proper accounts at the time payment is due. To make such payments the town would need a reserve fund transfer or town meeting transfer to the proper accounts. Alternatively, payment must be made, even in the absence of an appropriation, if a lawsuit is brought and a judgment entered against the town in a court of law. GL c. 44, §31. What account is appropriate to pay the benefits from depends upon the town's intention when it appropriates amounts in the various line items. If the town's intention was to pay all or specific termination benefits from the special appropriation account and it insufficiently funds that account, it may not pay the benefit amount from the salary line that was intended to pay other salary related costs. The town could, however, decide not to fund the benefits from the special purpose account going forward and appropriate those amounts to the salary accounts, as was done in the past.

The following sets forth our legal analysis:

Generally, collective bargaining agreement cost items funded by town meeting in the first year of the contract are legally binding in subsequent years. Boston Teachers Union, Local 66 v. School Committee of Boston, 386 Mass. 197 (1982). Certain future benefits specified in the general laws may be binding on the town whether or not it has appropriated funds to cover the expense at the time the benefit is earned. For example, pension benefits and post-retirement health insurance benefits will be legally binding on the town whether it has appropriated

funds at the time services have been delivered to cover the future benefit. See generally GL c. 32 and c. 32B.

The state has taken steps in the pension reform law to require municipalities to fully fund the various contributory retirement systems by the 2020s. The Governmental Accounting Standards Board (GASB) Statements 43 & 45 will require towns to keep track of and report outstanding accumulating other post-employment benefits (OPEB). Several towns have obtained special legislation to create trust funds to meet those obligations.
However, the vacation accumulation and sick leave balance termination benefits negotiated in collective bargaining agreements or otherwise provided by local employment policies would normally require that appropriations be made at the time services are to be rendered and benefits earned for a particular year. GL c. 150E, §7(b) (requires appropriation of cost items of collective bargaining agreement before contract becomes binding) & GL c. 44, §31 (no department of a municipality may incur an expense in excess of appropriation).

An argument can be made that to the extent the town has authorized the program by by-law, the town may incur an obligation to pay even in the absence of an appropriation. Compare Lynn Redevelopment Authority v. City of Lynn, 360 Mass. 503, 504-5 (1971)(mayor and city council acting together could bind the city beyond the appropriation because mayor and council not a department of the city) with Broadhurst v. Fall River, 278 Mass. 167, 169-70 (1932) (the mayor constitutes the executive department of the city and cannot incur liability without approval of the legislative body). However, we are not aware of any general law authorizing the town to make any such by-law. For example, GL c. 40, §21A authorizes a town by by-law to provide for sick and vacation leave, but does not specifically authorize a by-law providing accumulation of future unfunded benefits. Similarly, GL c. 41, §108A authorizes a town to provide a compensation plan for its employees, but does not specifically authorize plans calling for the payment of future benefits. Nor would we argue that the town could establish such a by-law using its home rule powers, given the normally restrictive municipal finance laws, which comprehensively are intended to prohibit towns from incurring expenses beyond their capabilities.

Nevertheless, cities and towns in practice have offered these termination benefits because at the time they were first negotiated or offered there was little or no obligation to pay them. The necessary amount to cover those with benefits accruing in the early years was generally anticipated and appropriated by the town when the employees retired. The amounts generally were paid from the salary and wages accounts, which usually included sufficient amounts to cover the benefits. Similarly, such benefits provided by by-law were generally provided in the annual budget by estimating the amounts necessary to pay them and including those amounts in the salary and wages line items. That tradition has carried forward in

the vast majority of communities and has led to a growing unfunded future liability and a pay as you go system. Today these termination benefit provisions are common in collective bargaining agreements and by-laws throughout the commonwealth and are widely assumed to be binding obligations.

In the case of Andover, we stated in the 1995 opinion that by establishing the special appropriation account for these liabilities the town may be more clearly creating a liability for such benefit payments. We therefore believe that the termination benefits are legally binding obligations of the town, and that failure to continue to fund them will not eliminate the obligation.

However, while the town may have a legal obligation to pay, it may not make payment if it has no available appropriation from which to pay, absent a lawsuit and judgment against the town. GL c. 44, §31 (each spending article voted by the town creates a line item appropriation for the purpose intended by the vote, but a judgment against the town may be paid without appropriation). If the town did not appropriate sufficient amounts to the special purpose article to cover the entire liability during a particular year, and did not intend to appropriate any funds for such purpose in the annual operating budget for salaries and wages, then the town may only pay current year vacation entitlement and actual sick leave expenses from its operating budget.

The town accountant should not authorize payment in these circumstances, but should advise the appropriate town officials that a reserve fund or town meeting transfer is needed to meet the obligations, since the expenses of a lawsuit may be incurred if significant delay in making payment results.

I hope this addresses your concerns.

Very truly yours,

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC/GAB