
Massachusetts Department of Revenue
Division of Local Services

Current Developments
in
Municipal Law



2009

Supreme Judicial Court and Appeals Court Cases

Book 2

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Court Decisions

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ASSOCIATION OF WESTON ACTIVE AND RETIRED EMPLOYEES &
others ¹ vs. TOWN OF WESTON.

¹ Susan Majors and Jay Majors.

07-P-1196

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

2009 Mass. App. Unpub. LEXIS 647

July 30, 2009, Entered

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

DISPOSITION: [*1] Judgment affirmed.

JUDGES: Katzmann, Meade & Sikora, JJ.

OPINION

The Association of Weston Active and Retired Employees (association), Susan Majors, and Jay Majors (collectively, plaintiffs), appeal from a decision of a Superior Court judge denying their motion for summary judgment and allowing the defendant town of Weston's (town) cross motion for summary judgment. For the following reasons we affirm.

1. *Background.* The following undisputed facts emerge from the summary judgment record. In June of 2002, Susan Majors retired from her position as a teacher in the town. She and her husband Jay Majors continued their enrollment in Blue Cross-Blue Choice (Blue Cross), a town-offered health insur-

ance plan. In May, 2002, the town had formally accepted the optional provision of *G.L. c.32B, § 18*, enabling municipalities to utilize Medicare ² benefits for retirees. When a municipality adopts the insurance program of G. L. c. 32B, retirees eligible for enrollment in Medicare Part A are required to transfer from their municipality-offered health plan to the Medicare extension plan ³ *provided that* the benefits are of "comparable actuarial value" to the retiree's existing coverage.

2 Medicare is the Federal government's [*2] health insurance program for the elderly and the disabled. The Medicare program consists of two basic components of coverage, Part A and Part B, as defined, *infra*.

3 Medicare extension coverage is defined in *G. L. c. 32B, § 2*, as amended by St. 1975, c. 806, § 2, as "a program of hospital, surgical, medical, dental and other health insurance for such active employees and their dependents and such retired employees and their dependents . . . as are eligible or insured under the federal health insurance for the aged act [Medicare]."

In November of 2003, the town notified Mr. Majors and others similarly situated that, pursuant to *G.L. c.32B, § 18*, they had to enroll in the town's Medicare extension plan. ⁴ The Majorses informed the town that they wished to continue their Blue Cross coverage, but on July 1, 2004, the town required them, and other similarly situated retirees and their spouses, to change to Medicare. Under the new plan, the town made available Medicare Parts A ⁵ and B ⁶ coverage, and a privately administered extension plan. The town has paid the Medicare

Part A premiums, but the retirees have paid the Medicare Part B premiums.

4 Mrs. Majors was similarly notified when she became [*3] eligible in May, 2004.

5 Medicare Part A, 42 U.S.C. § 1395c (2000), provides for the payment of inpatient hospital and related posthospital benefits on behalf of eligible individuals.

6 Medicare Part B, 42 U.S.C. § 1395j (2000), establishes a voluntary, supplemental insurance program intended for the payment of physicians and certain other outpatient services.

The gravamen of the plaintiffs' claims is that the town's nonpayment of Medicare Part B premiums and Medicare extension plan premiums imposes on active and retired employees burdens greater than, and not actuarially comparable to, their responsibilities and benefits under their preexisting enrollment in the Blue Cross plan. Affidavits from three retired married couples (members of the association) detailed their monthly aggregate premiums for similar coverages ranging from \$ 233 to \$ 293 more than their preexisting payments.⁷ As relief, the plaintiffs seek a declaration of invalidity of the town's Medicare-related program for lack of the statutorily required actuarial comparability, and injunctive orders against its enforcement until the town achieves actuarial comparability.

7 The three couples do not include the named plaintiffs, [*4] Susan and Jay Majors. Nor do we have any financial data from the Majorses. We assume that their position is categorically similar to those of the three couples.

2. *Standard of review.* With the same record as the motion judge, we review de novo the allowance of summary judgment. *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 123 n.1, 686 N.E.2d 1303 (1997). We assess the factual materials in the light most favorable to the nonmoving or opposing party and then determine whether all material facts are established and whether the applicable law entitles the movant to judgment. *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991).

We agree with the result reached by the motion judge and with his reasoning. He correctly ruled that the town was entitled to summary judgment because (1) a literal analysis of G.L. c. 32B, §§ 11C and 18, supports its position that it has the option, but not the duty, to pay the Medicare Part B premiums; and (2) the plaintiffs did not present sufficient evidence to create the necessary genuine issue of material fact that the new plan failed the test of "actuarial comparability."

3. *Discussion.* a. *Interpretation of G.L. c. 32B.* The judge viewed the issue as one [*5] of statutory construction of provisions in G.L. c. 32B.⁸ The interpretation of a statute is a matter of law typically suitable for disposition by summary judgment. *Middleborough Gas & Elec. Dept. v. Middleborough*, 48 Mass. App. Ct. 427, 431, 721 N.E.2d 936 (2000). The long-standing Massachusetts canon is that "a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Yeretsky v. Attleboro*, 424 Mass. 315, 319, 676 N.E.2d 1118 (1997), quoting from *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513, 333 N.E.2d 450 (1975).

8 General Laws c. 32B addresses the subject of insurance for employees of municipalities.

The statutory framework of G.L. c. 32B authorizes a municipality to convert from an entirely private insurer health coverage system to a program containing Federal Medicare coverage. This conversion transfers a portion of the premium burden from financially strapped municipalities onto the Medicare system and the [*6] broad support of Federal payroll taxes.

General Laws c. 32B is a local option chapter. See G.L. c.32B, § 10. Section 11C of G.L. c. 32B, discussed *infra*, specifically addresses the subject of Medicare extension coverage. Towns must adopt separately several sections of c.32B, including § 18, by a town vote. Once accepted, § 18 requires retirees eligible for enrollment in Medicare Part A "to transfer to a medicare extension plan offered by the governmental unit under section eleven C or section

sixteen; provided, that benefits under said plan and Medicare part A and part B together shall be of comparable actuarial value to those under the retiree's [pre]existing coverage." *G.L. c. 32B, § 18*, inserted by St. 1991, c. 138, § 122.

Here, the dispute centers on language in *G. L. c. 32B, §§ 11C, 11C(e)*, and 18. First, § 11C(e)⁹ mandates that municipal employees and retirees carry Medicare supplemental or extension coverage. Next, the first paragraph of § 11C¹⁰ states that the municipality *may* pay the premiums for these Medicare extension coverage benefits. And lastly, § 18 of *c. 32B* provides the final critical segment of language: "benefits under . . . medicare part A and part B together shall [*7] be of comparable actuarial value to those under the retiree's [pre]existing coverage." *G. L. c.32B, § 18*.

9 "The medicare extension coverage permitted by this section shall be mandatory, rather than optional, for any governmental unit that accepts section eighteen." *G. L. c. 32B, § 11C(e)*, inserted by St. 1991, c. 138, § 121.

10 *General Laws c. 32B, § 11C*, first par., as amended through St. 1996, c. 366, § 9, provides that, "Upon acceptance of this chapter . . . [a governmental unit shall provide to retirees] who are eligible for coverage under the federal health insurance for the aged act, . . . a policy or policies of group general or blanket insurance providing . . . health insurance, to be known as optional medicare extension. Said policy or policies shall consist of one or more schedules of benefits which, as determined by the appropriate public authority, . . . *may* include on behalf of any person insured under this section the payment of any premium which may be required by the federal health insurance for the aged act, to be paid by any enrollee thereof" (emphasis supplied).

The plaintiffs contend that an integrated, harmonious interpretation of *G. L. c. 32B, §§ 11C(e)* and 18, changes [*8] the optional benefit payment language in § 11C to a mandatory obligation requiring the town to pay the plaintiffs' Medicare Part B premiums. This interpretation does not comport with the statute's plain language. *Subsection (e) of §*

11C requires municipalities to make available Medicare extension coverage, but not to pay the premiums of Medicare Part B coverage. See notes 9 and 10, *supra*. The language does not merge a municipality's duty to make coverage available with a duty to pay the premiums for that coverage.

Therefore, we interpret the language of *G. L. c. 32B, § 11C*, to mean that the governmental unit *may* pay premiums on behalf of retirees. This view comports with our interpretation of *c. 32B* as "a comprehensive statute" allowing municipalities to obtain "a volume of purchasing power sufficient to assure that their employees will receive the highest possible level of benefits at the lowest possible net cost." *Middleborough Gas & Elec. Dept. v. Middleborough*, 48 *Mass. App. Ct. at 429-430*, quoting from *Connors v. Boston*, 430 *Mass. 31, 37, 39, 714 N.E.2d 335 (1999)*.

b. "*Comparable actuarial value.*" Alternatively, the plaintiffs argue that we must apply *G. L. c. 32B, § 11C(e)*, in conjunction with [*9] *G.L. c.32B, § 18*, in order to render their current coverage comparable to their former coverage, as mandated by § 18. They assert that the required premiums under the new system are not "of comparable actuarial value to those under the retiree's [pre]existing coverage." See *G.L. c.32B, § 18*. Therefore, they contend, to achieve the required actuarial comparability, the town must assume payment of their Medicare Part B coverage.

However, as the motion judge observed, the plaintiffs did not factually support this argument at the summary judgment stage. The plaintiffs had the burden of furnishing a specific working definition of "actuarial comparability" and did not do so. Unfortunately the definitions provision of *c. 32B (§ 2)* does not give us a specific meaning of actuarial comparability. Upon a motion for summary judgment, plaintiffs cannot rely on allegations in the complaint, but must present concrete evidence to support their claims. See *Kourouvacilis v. General Motors Corp.*, 410 *Mass. 706, 711-712, 575 N.E.2d 734 (1991)*.

The affidavits of the three retired couples attesting to monthly premiums of \$ 233 to \$ 293 greater than those required for preexisting similar coverage are not sufficient to generate [*10] a genuine issue of material fact of a lack of actuarial comparability.

Conspicuously absent is an expert's definition of that term in the circumstances of the municipal adoption of a Medicare-anchored program. The judge weighed the affidavits, but concluded that the plaintiffs had "failed to present any evidence that their current coverage is not of comparable actuarial value to their [former] Blue Cross benefits -- other than the fact that now they must pay medicare part B premiums." He went on to observe that municipal retiree premiums remained variable according to "statutory requirements and the local political process."

In support of its summary judgment motion, the town submitted an affidavit from its manager, recounting his efforts to assure compliance with the provisions of § 18 for actuarial comparability of the aggregate coverage of Part A, Part B, and any supplemental plan. That information also does not furnish a clear and systematic explanation of actuarial comparability for the present circumstances.

As of the hearing of the parties' cross motions for summary judgment on March 19, 2007, discovery had been closed for almost seven months, and the parties showed no intentions [*11] of introduc-

ing additional factual support for their contentions. Without the offer of expert explanation of the application of actuarial comparability to the circumstances of the association members, the plaintiffs had "no reasonable expectation of proving an essential element" of their case: the lack of actuarial comparability of aggregate Part A, Part B, and supplemental coverages under the old and new programs; consequently the town was entitled to the entry of summary judgment. *Id. at 716.*¹¹

11 We do not rule that the town's retirees could not assert a claim as a matter of law. We do conclude that the present record fails to present a workable meaning of the necessary standard of actuarial comparability. We do not, and cannot, express any view of the merits possible from a fully developed record.

Judgment affirmed.

By the Court (Katzmann, Meade & Sikora, JJ.)

Entered: July 30, 2009.

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

No. 08-P-1114.

APPEALS COURT OF MASSACHUSETTS

74 Mass. App. Ct. 379; 907 N.E.2d 241; 2009 Mass. App. LEXIS 723

March 12, 2009, Argued

June 5, 2009, Decided

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on May 4, 2007. The case was heard by Thomas E. Connolly, J.

City of Boston v. Boston Police Patrolmen's Ass'n, 2008 Mass. Super. LEXIS 66 (Mass. Super. Ct., 2008)

COUNSEL: John M. Becker, for the defendant.

Nicole I. Taub, for the plaintiff.

JUDGES: Present: Green, Brown, & Wolohojian, JJ.

OPINION BY: BROWN

OPINION

[**242] [*379] BROWN, J. This appeal by the Boston Police Patrolman's Association (union) challenges a judgment of the Superior Court that vacated an arbitration award to Officer Noel Docanto of the Boston police department. We affirm the judgment.

The Superior Court judge's decision focused on the following findings of the arbitrator. On the night of December 20, 2003, Docanto, his girlfriend, his younger brother, and a friend of the brother went out in Docanto's car. After parking in the Prudential Center garage, they went to a nightclub. They returned to the car with another of Docanto's brothers and two of that brother's friends around 2:00 A.M.. Docanto's younger brother was driving the car when the following events transpired.

[*380] Docanto's car approached a closed cashier's lane at the garage exit, then backed up and

attempted to cut in front of a red car in an adjacent lane. After an exchange of words between the occupants of the two cars, the driver of the red [***2] car, Michael Faysal, and the occupants of Docanto's car left their respective vehicles. The initial verbal confrontation suddenly escalated into a physical altercation when Faysal took a boxing stance, apparently provoking Docanto's companions. As Faysal was outnumbered, he suffered numerous blows from his assailants. Security guards eventually called police, but Docanto and his group had left before they arrived. Before Docanto's group left, Docanto folded up the license plate of his car, in an attempt to conceal the identity of the car's owner.¹

¹ Both the arbitrator and the Superior Court judge highlighted this fact as an aggravating factor in evaluating Docanto's conduct.

In 2004, Docanto was charged with assault by means of a dangerous weapon (shod foot) in Boston Municipal Court. He admitted to sufficient facts on February 25, 2005, and the case was continued without a finding for one year. On October 5, 2004, the Boston police department brought internal administrative charges against Docanto relating to the same incident; Docanto was terminated on March 3, 2005, because the administrative charges had been sustained.

The union grieved the termination decision pursuant to the provisions [***3] of its collective bargaining agreement with the city. The arbitrator concluded that Docanto's conduct in the Prudential Center garage was "offensive, way out-of-line and worthy of substantial discipline." The arbitrator reduced the termination to a six-month suspension and ordered reinstatement with back pay and benefits. The city appealed pursuant to *G. L. c. 150C*, §

11(a)(3), inserted by St. 1959, c. 546, § 1, which explicitly states that the Superior Court "shall" vacate an arbitration award where "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law."

A reviewing court usually accords great weight to the parties' election, particularly from collective bargaining agreements, to submit a dispute to arbitration. See *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 818, 824 N.E.2d 855 (2005) (*Boston*), and [*381] cases cited. *General Laws c. 150C § 11*, enumerates narrow grounds upon which a court may vacate an arbitration award. [**243] The Supreme Judicial Court mandates the following three-part de novo analysis to ascertain whether the order to vacate the arbitration award adheres to § 11(a)(3) requirements. [***4] See *Boston, supra* at 818-819. "First, the public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 68 Mass. App. Ct. 903, 904, 860 N.E.2d 963 (2007), S.C., 451 Mass. 698, 888 N.E.2d 945 (2008) (quotations omitted). Second, the conduct involved cannot be "disfavored conduct, in the abstract." *Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 17, 648 N.E.2d 430 (1995) (quotations omitted). Third, "the arbitrator's award reinstating the employee [must violate] public policy to such an extent that the employee's conduct would have required dismissal. Merely showing that the conduct is disfavored by public policy is not sufficient." *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 605, 722 N.E.2d 441 (2000) (quotation and citation omitted).

The question of public policy is ultimately one for resolution by courts, not arbitrators. See *id.* at 603; *Boston, supra* at 818; *Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County*, 451 Mass. 698, 700, 888 N.E.2d 945 (2008). That [***5] said, given the "strong public policy favoring arbitration . . . the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy." *Bureau of Spe-*

cial Investigations v. Coalition of Pub. Safety, supra at 603-604 (quotations omitted).

The union concedes that the instant case presents facts that meet the first two parts of the aforementioned test. Its principal argument seems to hinge on whether Docanto's conduct was such that would have required termination, as he neither pleaded guilty to, nor was convicted of, the contemporaneous criminal charge. But cf. *Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 613, 724 N.E.2d 336 (2000). This argument is off the mark.

"For an arbitration award to violate public policy, it need not violate the letter of a statute"; rather, felonious misconduct sufficiently meets the standard. *Boston*, 443 Mass. at 820. See [*382] *Bureau of Special Investigations v. Coalition of Pub. Safety, supra* at 604-605. "The Legislature has forbidden persons found to have engaged in such [felonious] conduct from becoming police officers and, by implication, from remaining police officers." *Boston, supra* at 821. The union's lawyer conceded at oral [***6] argument that Docanto's termination would have been required had he been convicted of assault by means of a dangerous weapon. The fact that the charge did not result in a conviction does not alter the equation. "It is the felonious misconduct, not a conviction of it, that is determinative." *Id.* at 820.

We recognize that the nature of the felonious conduct in the present case may be viewed in some respects as less egregious than that involved in *Boston*. However, the critical factor is that the conduct was felonious -- not the degree or nature of the felony. As stated in *Boston, supra* at 821, and the union itself acknowledges, persons who have engaged in felonious conduct may not be police officers. Moreover, for us to engage in a particularized evaluation of the relative seriousness of the felonious conduct involved [**244] in one case as compared to another would derogate from the value of clarity and predictability in applying the narrow public policy exception to the general rule favoring finality of arbitration.

Based on the foregoing, we affirm the Superior Court's judgment vacating the arbitration award.

So ordered.

CITY OF BOSTON vs. COMMONWEALTH EMPLOYMENT RELATIONS BOARD & another.¹

1 Boston Police Patrolmen's Association, intervener.

SJC-10216

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 389; 902 N.E.2d 410; 2009 Mass. LEXIS 41; 186 L.R.R.M. 2097

December 1, 2008, Argued

March 16, 2009, Decided

PRIOR HISTORY: [***1]

Suffolk. Appeal from a decision of the Labor Relations Commission. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Robert J. Boyle, Jr. (John Foskett with him), for the plaintiff.

Bryan C. Decker (Patrick Bryant with him), for the intervener.

Cynthia A. Spahl, for the defendant, submitted a brief.

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

Philip Collins, Tim D. Norris, & Daniel C. Brown, for Massachusetts Municipal Association, amicus curiae, submitted a brief.

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

OPINION BY: COWIN

OPINION

[**412] [*390] COWIN, J. The city of Boston (city) appeals from a decision of the Labor Relations Commission (commission)² that held that the city had committed unfair labor practices in its dealings with the Boston Police Patrolmen's Association (union), the exclusive bargaining representa-

tive for the city's uniformed police employees.³ Specifically, the commission concluded that the city's unilateral decision to adopt the partial public safety exemption under the Federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (2000) (Act), for the purpose of computing future overtime compensation [***2] owed to city police officers constituted a breach of the city's duty to bargain with the union in good faith under *G. L. c. 150E, § 10 (a)*. See 29 U.S.C. § 207(k) (2000). The commission further determined that the city failed to share, in a timely fashion, information related to this decision that was reasonably necessary for the union to carry out its role as bargaining agent, thus committing an unfair labor practice in violation of *G. L. c. 150E* in that respect as well. The commission ordered the city to bargain and ordered monetary relief to compensate for economic losses incurred by the employees as a result of the city's unilateral adoption of the exemption.

2 The commission's name was subsequently changed to the Commonwealth Employment Relations Board. See St. 2007, c. 145, § 5. We refer to it as the commission for purposes of this decision.

3 As its name suggests, the union represents uniformed patrol officers on the city's police force, excluding detectives.

The city claims that the commission's decision was erroneous because the partial public safety exemption constitutes a federally protected right which preempts what would otherwise be the city's State law obligation to bargain [***3] collectively on the subject. [*391] Like the commission, we

conclude that the Act does not preempt the city's State law obligation to bargain in good faith regarding its decision whether and in what manner it will take advantage of the exemption, and that the city committed a breach of its duty to bargain with the union. Therefore, we uphold the commission's decision that the city engaged in an unfair labor practice by refusing to bargain. We also uphold the commission's **413** decision that the city's failure to share information with the union in a timely fashion constituted an unfair labor practice. Finally, we conclude that the commission acted within its reasonable discretion in authorizing monetary damages as a remedy for the city's violation.

Statutory and regulatory framework. The Act establishes "a comprehensive remedial scheme requiring a minimum wage and limiting the maximum number of hours worked, absent payment of an overtime wage for all hours worked in excess of the specified maximum number." *Lamon v. Shawnee*, 972 F.2d 1145, 1149 (10th Cir. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993). Section 207(a) of the Act generally requires employers to compensate employees at a premium rate of 1.5 **4** times the "regular rate" of hourly compensation for all hours worked in excess of forty hours in a seven-day work period. See 29 U.S.C. § 207(a)(1) (2000).

Public agencies, including municipal employers, however, are allowed a partial exemption from § 207(a)'s requirements for "employee[s] in fire protection activities or . . . law enforcement activities." See 29 U.S.C. § 207(k). A municipality may take advantage of this partial exemption by adopting a longer work period⁴ for the purpose of calculating overtime, provided that the work period is at least seven but no more than twenty-eight days long. See *id.* at § 207(k)(2). Such employers must compensate employees at the premium, time-and-one-half rate **392** only if employees work a greater number of hours than that prescribed by the United States Department of Labor's regulations for the particular work period the employer has chosen. See *id.* at § 207(k)(1) & (2). See also 29 C.F.R. § 553.230 (2006). As the United States Court of Appeals for the First Circuit has explained, "[t]he effect of the § 207(k) partial exemption is to soften the impact of the [Act's] overtime provisions on public employers . . ." *O'Brien v. Agawam*, 350

F.3d 279, 290 (1st Cir. 2003). **5** The statute and its accompanying regulations achieve this effect in two ways. First, the exemption "raises the average number of hours the employer can require law enforcement and fire protection personnel to work without triggering the overtime requirement." *Id.* Second, the availability of a longer work period "accommodates the inherently unpredictable nature of firefighting and police work," because generally speaking, "[t]he longer the work period, the more likely it is that days of calm will offset the inevitable emergencies, resulting in decreased overtime liability." *Id.*

4 Title 29 C.F.R. § 553.224(a) (2006) explains that:

"As used in [29 U.S.C. § 207(k) (2000)], the term 'work period' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. . . ."

Facts and proceedings. We summarize the commission's factual findings, each of which is supported by substantial evidence. **6** See *Trustees of Forbes Library v. Labor Relations Comm'n*, 384 Mass. 559, 568, 428 N.E.2d 124 (1981). As mentioned, the union is the exclusive collective bargaining representative for a bargaining unit of uniformed police patrol officers employed by the city's police department. The city and the union have been parties to a series of collective bargaining agreements (CBAs), the most recent of which covered a period **414** from July 1, 1996, to June 30, 2002.⁵ Article IX, § 3, of the CBA defines "[o]vertime [s]ervice" as "[a]ll assigned, authorized or approved service outside or out of turn of an employee's regular scheduled tour of duty . . .

including service on an employee's scheduled day off, or during his vacation, and service performed prior to the scheduled starting time for his regular tour of duty, and service performed subsequent to the scheduled time for conclusion of his regular tour of duty." Overtime service is compensated at a premium rate [*393] compared with ordinary officer service. Article IX, § 4, of the CBA provides that an officer who "performs overtime service . . . shall receive, in addition to his regular weekly compensation, time-and-one-half his straight-time hourly rate for each hour [***7] of overtime service." The "straight-time hourly rate" is defined as "one fortieth of an employee's regular weekly compensation."

5 Although the record does not indicate whether a successor CBA has been reached, counsel informed us at oral argument that a successor CBA was negotiated and agreed to in July, 2004, and that this more recent agreement has not changed any provisions of the prior agreement relevant to this dispute.

Beginning in late March of 2002, the city conducted a series of internal meetings, without the presence of a union representative, wherein it decided to adopt a "28-day/171-hour" work period under the Act. See 29 U.S.C. § 207(k); 29 C.F.R. § 553.230. This work period generally will result in bargaining unit members receiving less overtime pay than they would receive in four distinct "7-day/40-hour" work periods under 29 U.S.C. § 207(a). See *O'Brien v. Agawam*, *supra* at 290.

After it received notice of the city's decision to adopt the new work period, the union demanded that the city submit the issue for bargaining at forthcoming negotiations concerning the renewal of the 1996-2002 CBA, which would soon expire. The city refused to submit its decision for bargaining at [***8] negotiations regarding the successor CBA, viewing the issue as "clearly not bargainable." The city did, however, offer to meet with the union to bargain "over the impacts of the decision on [the union's] membership,"⁶ but the union insisted that the issue be part of the successor CBA negotiations. The union also requested that the city provide it with certain information so that the union could prepare to bargain the city's choice to adopt the twenty-eight day work period under § 207(k). The city's police commissioner subsequently issued a

special order implementing the adoption of the twenty-eight day work period, without further negotiation with the union. The city did not respond to the union's information request for approximately six months. When it appeared before the commission, the city cited the administrative disruption caused by the resignation of its director of labor relations as the reason for the delay.

6 "Impact bargaining" refers to bargaining concerning the way in which a particular management decision is implemented, and is distinct from bargaining about whether management will make the decision at all. See, e.g., *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557, 563-564, 447 N.E.2d 1201 (1983).

Subsequently, [***9] the union filed a charge of prohibited practice [*394] with the commission. The charge alleged that the city had committed unfair labor practices in violation of *G. L. c. 150E*, § 10 (a) (1) & (5),⁷ by [***415] refusing to bargain in good faith over its decision to adopt the new work period and by failing to share reasonably necessary information in a timely manner with the union. The commission investigated and issued a complaint of prohibited practice. After considering the parties' arguments and evidence, a hearing officer issued recommended findings of fact, which the commission later adopted in its decision with variations suggested by the parties.

7 *General Laws c. 150E*, § 10 (a), provides, in relevant part:

"It shall be a prohibited practice for a public employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under [G. L. c. 150E];

". . .

"(5) Refuse to bargain collectively in good faith with the exclusive representative as required in [G. L. c. 150E, § 6]."

Although *G. L. c. 150E, § 10 (a) (1) & (5)*, "protect different interests," it has been observed that the two provisions "often travel in each other's company," and that **[***10]** "[v]iolation of the latter provision is almost invariably a violation of the former." *Sheriff of Worcester County v. Labor Relations Comm'n*, 60 Mass. App. Ct. 632, 636, 805 N.E.2d 46 (2004).

In its decision, the commission rejected the city's claim that the adoption of the partial public safety exemption under the Act was not a mandatory subject of bargaining under *G. L. c. 150E*. The commission held that the Act did not preempt the city's State law obligation "to give the [u]nion prior notice and an opportunity to bargain to resolution or impasse about [the city's] decision to adopt a 28-day work period and the impacts of that decision." It concluded that, by refusing to bargain with the union on the subject as part of negotiations regarding the successor CBA, the city had committed an unfair labor practice in violation of *G. L. c. 150E, § 10 (a) (1) & (5)*. It also determined that the city had committed an unfair labor practice in violation of *§ 10 (a) (1) & (5)* by failing to provide "relevant and reasonably necessary" information in a timely manner. The commission declined to excuse the city's delay.

[*395] As a remedy, the commission ordered the city to "bargain collectively in good faith to resolution **[***11]** or impasse over the length of the work period used to calculate overtime pay under the [Act]," and further ordered the city to "[m]ake whole affected employees for the economic losses they may have suffered as a result of the [c]ity's decision to adopt a 28-day work period." The city appealed from the commission's decision. See *G. L. c. 150E, § 11*. We transferred the case here from the Appeals Court on our own initiative. As mentioned, we affirm the commission's decision.⁸

8 We acknowledge the amicus briefs of the Massachusetts Municipal Association and the Massachusetts Teachers Association.

Discussion. 1. *Standard of review.* Our review of the commission's decision is governed by the

principles of *G. L. c. 30A, § 14*. See *G. L. c. 150E, § 11*. See also *Worcester v. Labor Relations Comm'n*, 438 Mass. 177, 180, 779 N.E.2d 630 (2002). Therefore, we "accord deference to the commission's specialized knowledge and expertise, and to its interpretation of the applicable statutory provisions." *Id.* We will set the commission's decision aside only if it is "[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *G. L. c. 30A, § 14 (7) (g)*.

2. *Duty to bargain under G. L. c. 150E.* **[***12]** We consider whether the city committed an unfair labor practice by failing to fulfil its obligation under State law to bargain with the union prior to implementing a unilateral change in employee working conditions. Under *G. L. c. 150E, § 6*, both the city and the union must "negotiate in good faith with respect to wages, hours . . . and any other terms and conditions of employment." See *Commonwealth v. Labor Relations Comm'n*, 404 Mass. 124, 127, 533 N.E.2d 1326 (1989) ("A **[**416]** public employer has a duty to bargain in good faith and, short of impasse, it may not unilaterally implement changes to a mandatory subject of bargaining without negotiation").

The city's main argument in support of its position that it need not bargain with the union, notwithstanding the requirements of *G. L. c. 150E*, is that *29 U.S.C. § 207(k)* gives it a federally protected right that preempts any State law obligation to bargain. The city argues in this regard that the enforcement of State collective bargaining law in this case improperly encumbers the city's decision to take advantage of the Federal **[*396]** partial public safety exemption, thereby frustrating the purpose behind Congress's enactment of *§ 207(k)*.

In support of its position, **[***13]** the city points to legislative history indicating that Congress deleted language from the final version of the bill enacting *§ 207(k)* that would have made adoption of the exemption conditional upon collective bargaining, and observes that similar language was included in other provisions of the Act. See S. Conf. Rep. No. 93-758, 93d Cong., 2d Session 26-27 (1974). Compare *29 U.S.C. §§ 203(o), 207(b)(1) & (2), 207(f)*, and *207(o)(2)* (2000), with *29 U.S.C. § 207(k)* (2000). The city relies also on an interpretation of *§ 207(k)* by the United States Department of Labor that concludes that municipalities are not re-

quired by the Act to engage in collective bargaining before adopting the § 207(k) exemption. See 52 Fed. Reg. 2025 (Jan. 16, 1987). Finally, the city cites a number of Federal cases, arguing that in these cases "[S]tate collective bargaining obligations played no role and presented no hurdles" to the public employer's decision to adopt a § 207(k) work period. See *Franklin v. Kettering*, 246 F.3d 531, 535-536 (6th Cir. 2001); *Lamon v. Shawnee*, 972 F.2d 1145, 1151-1154 (10th Cir. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993); *Ball v. Dodge City*, 842 F. Supp. 473, 474-475 (D. Kan. 1994), [***14] aff'd, 67 F.3d 897 (10th Cir. 1995).

A Federal statute may preempt State law when it explicitly or by implication defines such an intent, or when a State statute actually conflicts with Federal law or stands as an obstacle to the accomplishment of Federal objectives. See *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 314, 553 N.E.2d 894 (1990). Whether a Federal statute preempts State law is ultimately a question of Congress's intent. See *Commonwealth v. College Pro Painters (U.S.) Ltd.*, 418 Mass. 726, 728, 640 N.E.2d 777 (1994); *Archambault v. Archambault*, 407 Mass. 559, 565, 555 N.E.2d 201 (1990). Unless Congress's intent to do so is clearly manifested, a court does not presume that Congress intended to displace State law on a particular subject, and will not so conclude. See *Sawash v. Suburban Welders Supply Co.*, *supra* at 315.

We are not persuaded that Congress intended § 207(k) to abrogate a municipality's obligation under State law to bargain collectively with its employees regarding the calculation of [*397] employee overtime compensation. Unlike other Federal statutes, the Act does not contain an express preemption provision. Nor has Congress shown an intent that the Act occupy completely the field of labor standards, displacing [***15] all State law on the subject. See 29 U.S.C. § 218(a) (2000) ("[n]o provision of [the Act] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the Act] or a maximum work week lower than [**417] the maximum work week established under [the Act]").⁹

9 Indeed, the language of 29 U.S.C. § 218(a) (2000) makes clear that the labor standards mandated by the Act are merely a floor below which State law may not fall, not a ceiling above which it may not rise. Although the language of § 218(a) does not control the resolution of the question before us, it is an indication of Congress's intent regarding the role to be played by State law and by the Act in ameliorating the working conditions of employees. See *Commonwealth v. College Pro Painters (U.S.) Ltd.*, 418 Mass. 726, 728, 640 N.E.2d 777 (1994) ("The touchstone of preemption is congressional intent").

Contrary to the city's contentions, we are unable to identify any "conflict" between Federal law and State law in the present case, given that the city may make an election under § 207(k) while still complying with its State law collective [***16] bargaining obligations under G. L. c. 150E. By its terms, § 207(k)'s language is permissive, not mandatory. The provision does not require the city to do anything. Rather, the statute merely gives the city an opportunity to select a work period for its law enforcement employees different from the typical seven-day, forty-hour period prescribed in § 207(a). At most, § 207(k) allows the city to choose from a greater range of permissible overtime calculation formulas than would otherwise be available under the Act. However, Congress has demonstrated no preference regarding a municipality's choice to avail itself of this greater flexibility. Indeed, a municipality may choose not to avail itself of the partial exemption at all. Even if it does take advantage of § 207(k), a municipality may choose among twenty-two different work period options specified in United States Department of Labor regulations, see 29 C.F.R. § 553.230 (2006), each of which subjects the municipality to a greater or lesser amount of potential overtime liability. *O'Brien v. Agawam*, 350 F.3d 279, 290 (1st Cir. 2003).

Nor does the enforcement of the city's State law collective [*398] bargaining obligation "stand[] as an obstacle [***17] to the accomplishment and execution of the full purposes and objectives of Congress." *Sawash v. Suburban Welders Supply Co.*, *supra*, quoting *Michigan Cannery & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467

U.S. 461, 469, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984). The Act's express purpose is to improve the working conditions of employees. See *29 U.S.C. § 202(b) (2000)*. The State law obligation to bargain collectively regarding a management decision that has a direct and significant effect on the amount of employees' overtime compensation, see *O'Brien v. Agawam, supra*, is consistent with this purpose. It follows that a State law requirement that the city must bargain with the union regarding the § 207(k) work period to be adopted does not pose an "obstacle" to accomplishing the purposes Congress sought to achieve in enacting the Act. Cf. *Cranford v. Slidell, 25 F. Supp. 2d 727, 728-729 (E.D. La. 1998)* (concluding that overtime compensation formula mandated by State law controlled over § 207[k] exemption pursuant to provision of Act providing that employers must abide by other laws that mandate higher minimum wages or lower maximum work weeks); *Karr v. Beaumont, 950 F. Supp. 1317, 1324 (E.D. Tex. 1997)* (same); [***18] *Pijanowski v. Yuma County, 202 Ariz. 260, 265, 43 P.3d 208 (Ariz. Ct. App. 2002)* (same); *Marie v. New Orleans, 612 So. 2d 244, 245-246 (La. Ct. App. 1992)* (concluding that § 207[k] does not preempt State constitutional requirement for city to adopt uniform pay plan for police officers).

We have considered the authorities cited by the city, and conclude that they do not advance its position. The legislative history to which the city points fails to persuade [**418] us that Congress intended to grant municipalities the right to choose how they calculate Federal overtime compensation for their public safety employees without regard to State law collective bargaining obligations. At best, the legislative history of § 207(k) and the Federal Department of Labor's interpretation of that provision, see *52 Fed. Reg. 2025 (Jan. 16, 1987)*, demonstrate only that Congress did not intend to impose a Federal requirement that public employers bargain collectively with public safety employees as a prerequisite to claiming the exemption. Moreover, State law does impose such an obligation. See *G. L. c. 150E, § 6*. The city points to nothing which convinces us that Congress intended to [*399] obliterate that obligation with respect [***19] to the election of the method by which overtime pay would be calculated. In addition, although the city cites a number of Federal cases that, it claims, support its position, a close reading of those decisions shows

that they do not address the question before us. Indeed, all of the cases cited by the city involved claims for alleged violations of the Act itself. In contrast, the union's claim in this case alleges that the city has violated *G. L. c. 150E*, not the Act. Furthermore, the issue before the court in each of the cited cases was whether the municipal employer had properly adopted a § 207(k) work period. None of the plaintiffs in any of the cases appeared to argue that their employers' decisions had to be bargained under either State or Federal law. See *Franklin v. Kettering, supra*; *Lamon v. Shawnee, supra*; *Ball v. Dodge City, supra*.

With the conclusion that the city's obligation to bargain with respect to the election under § 207(k) is not preempted by Federal law, it follows that the city's refusal to bargain on the subject violated *G. L. c. 150E*. The city unilaterally adopted a twenty-eight day work period under the Act for the purpose of calculating the overtime compensation [***20] to which employees are entitled, and did so without giving the union prior notice or an opportunity to bargain. As mentioned, Federal law provides the city a wide range of choices regarding the length of the work period it may use for overtime calculations. See *29 C.F.R. §§ 553.224(a), 553.230 (2006)*. The length of the work period will have a significant impact on the amount of overtime pay bargaining unit members are likely to receive. See *O'Brien v. Agawam, supra*. Because the § 207(k) work period affects the "wages" that employees receive, i.e., the amount (if any) of overtime for which they must be paid, we conclude it is a mandatory subject of bargaining under *G. L. c. 150E, § 6*. Therefore, the city was obligated under *G. L. c. 150E* to bargain in good faith with the union regarding the length of the work period it would choose to adopt under § 207 of the Act.¹⁰

10 The city argued to the commission that the union had waived its right to bargain regarding the length of the work period by insisting that the issue be part of negotiations for the successor CBA, rather than accepting the city's invitation to bargain the impacts of the decision to adopt a twenty-eight day work period [***21] apart from such negotiations. Relying on its decision in *Town of South Hadley, 27 M.L.C. 161, 163 (2001)*, the commission held that the union's demand

to bargain the issue as part of the successor CBA negotiations did not constitute a waiver. See *Town of Brookline*, 20 M.L.C. 1570, 1596 n.20 (1996) (public employer may not insist on bargaining individual issues separately during same period when parties historically engaged in bargaining for successor collective bargaining agreement). The city argues that the commission's so-called "*Brookline doctrine*," see *Town of Brookline, supra*, should be overruled because it gives an unfair advantage to public employee unions in their negotiations with public employers. However, because the city never presented this argument to the commission, it is deemed waived and we do not consider it. See *Albert v. Municipal Court of Boston*, 388 Mass. 491, 493-494, 446 N.E.2d 1385 (1983).

[419]** 3. *Delayed disclosure of information.*

The city complains that **[*400]** the commission's decision not to excuse the city's failure to respond to the union's information requests in a timely manner, see *supra*, was arbitrary and capricious. As mentioned, our review of the commission's decision is governed **[***22]** by *G. L. c. 30A, § 14*. See *Sheriff of Worcester County v. Labor Relations Comm'n*, 60 Mass. App. Ct. 632, 636, 805 N.E.2d 46 (2004).

The commission's past decisions have established that the city's obligation to deliver relevant and reasonably necessary information in a timely manner follows logically from its duty to bargain in good faith, and the failure to fulfil this obligation is itself an unfair labor practice under *G. L. c. 150E, § 10 (a)*. See *City of Somerville*, 29 M.L.C. 199, 202 (2003); *City of Boston*, 29 M.L.C. 165, 167 (2002); *Board of Higher Ed.*, 26 M.L.C. 91, 92-93 (2000). The reasonableness of the employer's delay is judged by whether the union's ability to fulfil its role as the exclusive bargaining representative of the bargaining unit is "diminish[ed]." See *Board of Higher Ed., supra* at 93; *Massachusetts State Lottery Comm'n*, 22 M.L.C. 1468, 1472 (1996). The city does not dispute that the information that the union sought was both relevant and reasonably necessary for the union to fulfil its mission. Moreover, the commission made a finding to that effect, and

that finding is amply supported by substantial evidence contained in the record.

The city argues that the commission's decision **[***23]** was arbitrary and capricious in declining to excuse the city's delay because the information the city eventually did produce adequately responded to the union's request; that the city explained the reasons for its delay in producing the requested information; and that the record **[*401]** does not show that the city's delay diminished the union's role as the exclusive representative of its bargaining unit. These contentions are without merit. The fact that the city eventually provided a satisfactory response, of course, does not answer the union's complaint that the requested information was delivered late. Furthermore, the commission acted well within its discretion in rejecting the city's main explanation for its delay, i.e., the fact that the city's labor relations director resigned approximately three months after the union requested the information.

Finally, the commission's conclusion that the city's delay diminished the union's role as bargaining representative is supported by substantial evidence. The harm to the union caused by the city's delay is clear. The union's inability to explain adequately the city's decision to the members of its bargaining unit or to answer their questions **[***24]** about a subject matter that would directly affect their overtime pay "impeded the [u]nion from effectively fulfilling its role as exclusive representative." *Board of Higher Ed., supra*. The union was also entitled to the information so that it could prepare to bargain with the city by formulating reasonable proposals. See *Boston Sch. Comm.*, 25 M.L.C. 181, 196 (1999). The city argues that the union was not stymied in its efforts to formulate proposals because its position "was always crystal clear." However, as the commission observed, much of the reason why the union had no immediate need for the information it requested is because of the city's own refusal to bargain in violation of *G. L. c. 150E*. The city cannot rely on its own unlawful conduct to argue that the union was not harmed.

[420]** 4. *Remedy.* The city complains that the remedy granted by the commission, i.e., ordering the city to "[m]ake whole affected employees for the economic losses they may have suffered as a result of the [c]ity's decision to adopt a 28-day work period," was erroneous. We do not agree.

General Laws c. 150E, § 11, mandates that, "if the commission determines that a prohibited practice has been committed, it shall [***25] order the violator to cease that practice 'and shall take such further affirmative action as will comply with the provisions of [§ 11].'" *School Comm. of Newton v. Labor Relations Comm'n*, 388 Mass. 557, 575, 447 N.E.2d 1201 (1983). "[F]urther affirmative action" may include the award of monetary relief. See *Labor [*402] Relations Comm'n v. Everett*, 7 Mass. App. Ct. 826, 829-831, 391 N.E.2d 694 & n.6 (1979), citing *School Comm. of Stoughton v. Labor Relations Comm'n*, 4 Mass. App. Ct. 262, 270, 346 N.E.2d 129 (1976) ("[O]ne may be 'reinstated' to a former status and awarded back pay even though he has not been discharged"). The award of monetary relief pursuant to *G. L. c. 150E, § 11*, does not "dictat[e] an agreement between the parties," but "rather . . . restores the status quo." *School Comm. of Newton v. Labor Relations Comm'n*, *supra* at 576.

Here, the city assails the commission's award of monetary relief on the ground that it impermissibly creates State law remedies for the violation of the Act.¹¹ See *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) (State law causes of action cannot provide remedies for violations of Federal rights under Act "[b]ecause the [Act's] enforcement scheme is an exclusive one"). The city misses [***26] the point. The commission's order does not attempt to remedy any violation of the Act; indeed, the union has not claimed that such violation occurred. The monetary relief ordered by the commission seeks only to remedy any economic losses incurred by members of the bargaining unit as a result of the city's violation of State law.

11 Before the commission, the city argued that it would be error for the commission to order a remedy seeking to restore the status quo ante because "[t]he status quo ante was an illegal situation in which the [c]ity was in violation of [F]ederal law by not tracking patrol officer hours and determining the amount of premium pay owed, as provided under the [Act]." The city alludes to this ar-

gument in a single footnote in its reply brief, but "[a]rguments relegated to a footnote do not rise to the level of appellate argument." *Commonwealth v. Lydon*, 413 Mass. 309, 317-318, 597 N.E.2d 36 (1992). Pursuant to *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 917 (1975), the argument is waived and we do not consider it.

Having found a prohibited labor practice, the commission has power under *G. L. c. 150E, § 11*, to choose, in its discretion, "to order the employer to make whole" affected [***27] employees in cases where economic harm results. *Labor Relations Comm'n v. Everett*, *supra* at 830. The commission seeks "to restore the situation as nearly as possible to that which would have existed but for the unfair labor practice," *id.* at 831, and to preserve it until bargaining produces either a resolution or an impasse. See *School Comm. of Newton v. Labor Relations Comm'n*, *supra* at 576; *Commonwealth v. Labor Relations Comm'n*, 60 Mass. App. Ct. 831, 835, 806 N.E.2d 457 [*403] (2004). There have been times when the commission has declined to grant such relief. See, e.g., *Commonwealth of Massachusetts (Comm'r of Admin.)*, 4 M.L.C. 1869, 1878 (1978) (no monetary make-whole remedy because "employees would then have to give the [**421] money back in some form," making remedy inconvenient, expensive and futile). However, the fact that the commission has declined to award such relief in some cases does not mean it was wrong to do so here. See *Therrien v. Labor Relations Comm'n*, 390 Mass. 644, 648, 459 N.E.2d 88 (1983).

Conclusion. We affirm the commission's decision that the city has committed prohibited practices under *G. L. c. 150E, § 10 (a) (1) and (5)*, in failing to bargain collectively with the union in good faith and in failing [***28] to share relevant information with the union in a timely manner. We also affirm the remedy ordered, i.e., to "[m]ake whole affected employees for the economic losses they may have suffered as a result of the [c]ity's decision to adopt a 28-day work period."

So ordered.

**CFM BUCKLEY/NORTH, LLC vs. BOARD OF ASSESSORS OF
GREENFIELD. JOHN ADAMS NURSING HOME, LLC vs. BOARD OF
ASSESSORS OF QUINCY. LONGMEADOW OF TAUNTON, LLC vs.
BOARD OF ASSESSORS OF TAUNTON.**

SJC-10174, SJC-10175, SJC-10176

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 404; 902 N.E.2d 381; 2009 Mass. LEXIS 40

**December 4, 2008, Argued
March 16, 2009, Decided**

PRIOR HISTORY: [***1]

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court on its own initiative transferred the cases from the Appeals Court.

DISPOSITION: Decision of the Appellate Tax Board affirmed.

COUNSEL: Daniel E. Will for the taxpayers.

Rosemary Crowley for Board of Assessors of Greenfield & another.

Janet S. Petkun, Assistant City Solicitor, for Board of Assessors of Quincy, was present but did not argue.

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

OPINION BY: MARSHALL

OPINION

[**382] [*404] MARSHALL, C.J. These three appeals from a decision of the Appellate Tax Board (board) denying tax exemptions and abatements of taxes require that we consider whether a limited liability company (LLC) may qualify as a "charitable organization" for purposes of *G. L. c. 59, § 5, Third*.¹ The taxpayers each [*405] operate a nursing home facility, and each claims exemptions from taxes assessed on both realty and personalty for one or more fiscal years. In each case, the municipality refused the taxpayer's application or

applications for exemption and tax abatement, and the taxpayers filed separate petitions challenging those decisions under the board's formal procedure. *G. L. c. 58A, § 7*. The board allowed the municipalities' [***2] motions for judgment [**383] on the pleadings,² and, because the "relevant facts necessary for resolution of this issue are essentially identical and are not in dispute," issued a single report and findings of fact. See *G. L. c. 58A, § 13*. The taxpayers appealed, and we transferred each of the cases here on our own motion. We conclude that an entity organized as a LLC does not come within the definition of a "charitable organization," for purposes of *G. L. c. 59, § 5, Third*, and that a "charitable organization" must occupy real property for the property to be considered for a tax exemption.

1 *General Laws c. 59, § 5, Third*, provides in relevant part:

"The following property shall be exempt from taxation . . .

"Third, Personal property of a charitable organization, which term, as used in this clause, shall mean (1) a . . . charitable or scientific institution . . . incorporated in the commonwealth . . . and real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their offi-

cers for the purposes of such other charitable organization or organizations [***3] . . . provided, however, that:

"(a) If any of the income or profits of the business of the charitable organization is divided among the stockholders, the trustees or the members, or is used or appropriated for other than literary, benevolent, charitable, scientific or temperance purposes or if upon dissolution of such organization a distribution of the profits, income or assets may be made to any stockholder, trustee or member, its property shall not be exempt; and

"(b) A corporation coming within the foregoing description of a charitable organization or trust established by a declaration of trust . . . and coming within said description of a charitable organization shall not be exempt for any year in which it omits to bring in to the assessors the list . . . required by section twenty-nine and a true copy of the report for such year required by section eight F of chapter twelve to be filed with the division of public charities . . ."

2 The board of assessors of Greenfield filed a motion to dismiss, which the board treated as a motion for judgment on the pleadings.

1. *Background.* The board's factual findings are not disputed on appeal and, in any event, are treated as final so long as [***4] the "evidence is sufficient to support the board's findings." *Olympia* [*406] & *York State St. Co. v. Assessors of Boston*, 428 Mass. 236, 240, 700 N.E.2d 533 (1998). Each of the taxpayers, CFM Buckley/North, LLC; Longmeadow of Taunton, LLC; and John Adams

Nursing Home, LLC, operates a facility that provides skilled nursing home care exclusively to indigent elderly and infirm patients on a nonprofit basis. They each are organized as a limited liability company (LLC) under the laws of Delaware, and each has as its sole member ElderTrust of Florida, Inc. (ElderTrust). ElderTrust is a corporation organized under the laws of Tennessee, having as its stated purpose the ownership and operation of elder care facilities, including nursing homes. There is no dispute that ElderTrust is organized for charitable purposes, or that it qualifies for Federal tax exemption, pursuant to 26 U.S.C. § 501(c)(3) (2006). The board found that there were no "impermissible financial benefits flowing to investors."

The certificates of formation for the LLCs, see 6 Del. Code § 18-101 (2005 & Supp. 2008), provide that the entity "shall serve only such purposes and functions and shall engage only in such activities as are consistent with [***5] . . . the charitable purposes and objectives of its sole member." Similarly, the entities' operating agreements provide that ElderTrust "shall have full and complete authority, power, and discretion to manage and control the business affairs, and properties of [the LLCs], to make all decisions regarding those matters and to perform any and all acts or activities customary to the management of [the LLCs] business."

2. *Discussion.* We begin with the premise that "[a]ll property, real and personal, situated within the commonwealth [shall be subject to taxation] . . . unless expressly exempt." *G. L. c. 59*, § 2. The board concluded that neither the real nor the personal property of the taxpayers qualified for a *G. L. c. 59*, § 5, Third, charitable exemption because the taxpayers were not incorporated but were, instead, organized as limited liability companies. It also concluded the taxpayers could not claim exemption based on holding the property "in trust" for a qualifying charitable organization. We attach "some significance to the fact that the Board [is the] State agency charged with administration" of the tax abatement process of the law, and "that we deal here with a clause which exempts [***6] from tax and thus is to be construed without particular generosity toward taxpayers." *Henry Perkins Co. v. Assessors of Bridgewater*, 377 Mass. 117, 121-122, 384 N.E.2d 1241 (1979). See *McCarthy v.*

Commissioner of Revenue, 391 Mass. 630, 632, 462 N.E.2d 1357 (1984). We agree with the board.

[**384] a. *Organizational form.* *General Laws c. 59, § 5, Third*, accords exemption from taxation to a "charitable organization," defined by statute as "(1) a literary, benevolent, charitable or scientific institution or temperance society *incorporated* in the commonwealth, and (2) a trust for literary, benevolent, charitable, scientific or temperance purposes" ³ (emphasis added). As this court noted more than seventy years ago: "It is a familiar principle that no exemption from taxation can be allowed except upon its being fairly shown that it was intended by the terms of the statute. It is impossible to extend by construction the operation of such exemption beyond the plain words of the statute." *William T. Stead Memorial Ctr. of N.Y. v. Wareham*, 299 Mass. 235, 239, 12 N.E.2d 725 (1938). The language plainly limits tax-exempt status to those "charitable organizations" that are incorporated. See, e.g., *Brennan v. Election Comm'rs of Boston*, 310 Mass. 784, 789, 39 N.E.2d 636 (1942) [***7] (court will "construe the statutes as they are written").

³ In *Mary C. Wheeler Sch., Inc. v. Assessors of Seekonk*, 368 Mass. 344, 331 N.E.2d 888 (1975), we concluded that limiting the *G. L. c. 59, § 5, Third*, exemption to domestic corporations violated the *equal protection clause of the Fourteenth Amendment to the Constitution of the United States*. See *Davis v. Commissioner of Revenue*, 390 Mass. 1006, 458 N.E.2d 1195 (1984). Accordingly, that neither the taxpayers nor their sole member were organized in Massachusetts is not relevant to our analysis. In addition, there is no contention that the taxpayers were declared trusts, and therefore, we do not discuss that provision of the statute.

A limited liability company is not a corporation. Indeed, *G. L. c. 156C, § 2 (5)*, specifically defines a LLC as "an unincorporated organization formed under [*G. L. c. 156C*] and having 1 or more members." For purposes of *G. L. c. 59, § 5, Third*, a LLC lacks the legal form necessary to qualify for tax exemption. See *RCN-BecoCom, LLC v. Commissioner of Revenue*, 443 Mass. 198, 206-207, 820 N.E.2d 208 (2005) (*RCN*). In *RCN*, we considered

whether a LLC was entitled to a property tax exemption under *G. L. c. 59, § 5, Sixteenth*, which applies to "corporations" [***8] and banks. We concluded that "[t]he Board determined, and we agree, that § 5, Sixteenth, is not ambiguous. By its plain language, it applies to corporations, not limited liability [*408] companies." *Id. at 207*. While *RCN* involved a telecommunications services provider, and the taxpayers here contend that different considerations should apply to nonprofit corporations, "[a] word used in one part of a statute in a definite sense should be given the same meaning elsewhere in the statute, barring some plain contrary indication." *Connolly v. Division of Pub. Employee Retirement Admin.*, 415 Mass. 800, 802-803, 616 N.E.2d 59 (1993). We conclude that the taxpayers failed to demonstrate "clearly and unequivocally that [they] come[] within the terms of the exemption." *Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 102, 747 N.E.2d 97 (2001), quoting *Boston Symphony Orchestra, Inc. v. Assessors of Boston*, 294 Mass. 248, 257, 1 N.E.2d 6 (1936) ("Any doubt must operate against the one claiming tax exemption . . ."). See *Harvard Community Health Plan, Inc. v. Assessors of Cambridge*, 384 Mass. 536, 543, 427 N.E.2d 1159 (1981) ("party claiming exemption bears a grave burden of proving the claim").

We acknowledge the taxpayers' suggestion that [***9] the "functional test" used to evaluate whether a particular organization is entitled to a charitable exemption under *G. L. c. 59, § 5, Third*, requires that the substance of the charitable activity, rather than the form of organization, should determine [**385] application of the exemption. See *H-C Health Servs., Inc. v. Assessors of S. Hadley*, 42 Mass. App. Ct. 596, 678 N.E.2d 1339 (1997). The functional test, however, cannot be used to supplant the express statutory requirement of incorporation. In the *H-C Health Servs.* case, for example, a taxpayer was granted an exemption under § 5, Third, notwithstanding that it was organized as a business corporation pursuant to *G. L. c. 156B*, rather than a nonprofit corporation pursuant to *G. L. c. 180*. As the Appeals Court noted, the clause does not require that a taxpayer be incorporated under a specific chapter. *Id. at 598-599*. The statute does, however, require that the taxpayer be incorporated.

Similarly, in *Brown, Rudnick, Freed & Gesmer v. Assessors of Boston*, 389 Mass. 298, 302, 450 N.E.2d 162 (1983), this court noted that "bare statutory compliance" does not necessarily warrant a tax benefit, and that, when "a corporation has claimed an exemption as a charitable institution [***10] under *G. L. c. 59, § 5*, Third, we have refused to allow form to control. Instead, we have looked to the declared purposes of and the actual work performed by [*409] the corporation to determine whether it was in fact operated for charitable purposes." *Id.* at 303. Our cases teach that, while "bare compliance" with statutory requirements is minimally necessary, the nature of the activities performed by the organization also is relevant. *Id.* See *Fisher Sch. v. Assessors of Boston*, 325 Mass. 529, 533, 91 N.E.2d 657 (1950), quoting *Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket*, 320 Mass. 311, 313, 69 N.E.2d 463 (1946) ("[T]o obtain an exemption it is not enough for a corporation to show merely that the purposes for which it was incorporated were charitable. It must also 'prove that it is in fact so conducted that in actual operation it is a public charity'"). As the board noted in these cases, while the nature of the functions performed by an organization is a factor in determining whether a tax exemption is available, it is not the only relevant consideration; "[i]f it were, real estate owned and occupied by partnerships or individuals for charitable purposes would be exempt from local taxation, a result clearly [***11] not contemplated by the statute." See *Kirby v. Assessors of Medford*, 350 Mass. 386, 390-391, 215 N.E.2d 99 (1966) (where statute provided exemption from property taxes for certain elderly property owners, exemption did not apply to trust that held property for benefit of elderly resident).

There is no dispute that these taxpayers have certain charitable characteristics -- they each operate a skilled nursing home facility providing skilled nursing home care exclusively to indigent elderly and infirm patients covered by Medicaid and Medicare on a nonprofit basis. Nonetheless, the statute plainly requires that an organization be incorporated, and "[w]e cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction." *Pielech v. Massasoit Greyhound, Inc.*, 423 Mass. 534, 539, 668 N.E.2d 1298 (1996), cert. denied, 520 U.S. 1131, 117 S. Ct. 1280, 137 L. Ed. 2d

356 (1997), quoting *Rosenbloom v. Kokofsky*, 373 Mass. 778, 780-781, 369 N.E.2d 1142 (1977). See *Kirby v. Assessors of Medford*, *supra*. Where the taxpayers opted not to incorporate, and are entitled to whatever advantages may flow from the business form they selected, they are not entitled to benefits as a corporation. That their choice may [***12] have tax consequences does not require a different result. See *RCN-BecoCom, LLC v. Commissioner of Revenue*, 443 Mass. 198, 207, 820 N.E.2d 208 (2005) (taxpayer's "voluntary election [***386] to do business in [*410] Massachusetts as a limited liability company, rendering itself ineligible for the corporate exemption").

b. *Taxpayers as trustees.* While the taxpayers do not qualify as "charitable organizations" for purposes of *G. L. c. 59, § 5*, Third, because they are not incorporated, they suggest the real property⁴ at issue nonetheless is exempt from taxation because it is "real estate owned by or held in trust for a charitable organization *and* occupied by it or its officers for the purposes for which it is organized"⁵ (emphasis added). *G. L. c. 59, § 5*, Third. The taxpayers contend that they hold the nursing home facilities "in trust" for a qualifying "charitable organization," namely their sole member, ElderTrust of Florida, Inc.⁶ Like the board, we reject that contention.

4 The statute contains no similar provision for personal property.

5 The board likewise noted that "[t]he charitable organization that owns the real estate, or another charitable organization, must also occupy the real estate in furtherance of the [***13] charitable purposes of the owner or occupant. This requirement [of charitable purposes] is not at issue in these appeals."

6 Organized under Tennessee law, ElderTrust is a nonprofit corporation, exempt from taxation under § 501(a) of the *Internal Revenue Code*. Nothing in the record suggests that ElderTrust submitted annual filings identified in *G. L. c. 59, § 5, Third (b)*.

A tax exemption "is a matter of special favor or grace," available "only where the property falls clearly and unmistakably within the express words of a legislative command." *Massachusetts Med. Soc'y v. Assessors of Boston*, 340 Mass. 327, 331, 164 N.E.2d 325 (1960), quoting *Boston Chamber of*

Commerce v. Assessors of Boston, 315 Mass. 712, 716, 54 N.E.2d 199 (1944). The "express words" of *G. L. c. 59, § 5, Third*, require both that the real estate be "owned by or held in trust for a charitable organization" as well as that it be "occupied by it or its officers" (emphasis added). While the taxpayers argue that the statute neither requires evidence of any particular type of trust relationship nor specifies the elements necessary to satisfy the "in trust" requirement, they overlook the threshold requirement that property be "occupied" by a qualifying [***14] charitable organization. Regardless whether the "dominant purpose" for the taxpayers' ownership and occupation of the properties is to serve as a "trustee" for a qualifying charitable organization, ElderTrust itself neither owns nor occupies the real property, as the statute requires. See *Children's Hosp. Med. Ctr. v. Assessors of Boston*, 353 Mass. 35, 227 N.E.2d 908 (1967).

[*411] In the *Children's Hosp. Med. Ctr.* case, the hospital, a charitable corporation, briefly owned and occupied a parcel of land while it was being developed for use as a hospital laundry. *Id.* at 37. Thereafter, title to the property was transferred to the Hospitals Laundry Association, Inc., organized by five area hospitals and a university dispensary. *Id.* at 37-38. In concluding that the real property was exempt from taxation, we found that "laundry work . . . is an indispensable feature of hospital operation," and that such work was part of the hospital's charitable purpose. *Id.* at 40, 41. It was not material, in that case, whether the hospital owned and occupied the property as a laundry for itself, or whether it held the property as a trustee for the association: either way, the hospital owned and occupied the property in connection [***15] with its charitable purpose, and held the property [***387] in anticipation of the association's taking ownership and occupation of it.

In contrast, while the LLCs have a single member, they are legally distinct entities, and occupation by the taxpayer does not equate to occupation by ElderTrust.⁷ The taxpayers failed to establish that the property is "held in trust of a charitable organization and occupied by it" for charitable purposes.⁸ *G. L. c. 59, § 5, Third*.

⁷ The taxpayers' operating agreements provide that each will "at all times abide by the

separateness covenants" established, including that each will conduct business in its own name, observe organizational formalities, hold itself out as a separate entity, and "correct any known misunderstanding regarding its separate identity."

⁸ We reject the taxpayers' suggestion that the clause's "occupied" requirement does not apply to properties "held in trust." The language of the statute does not support that construction: it requires that property be occupied by a "charitable organization" to qualify for a tax exemption. See *Milton v. Ladd*, 348 Mass. 762, 764-765, 206 N.E.2d 161 (1965) ("exemption is given to land occupied and used by a charity for its charitable [***16] purposes, even though the land is 'held in trust . . . or by another charitable organization.' Thus the statute focuses on the occupation and use rather than the record title as determinative of whether particular real estate should be exempt"). The cases cited by the taxpayers involve whether the property owner satisfied the occupancy requirement, not whether the "occupied" requirement applies to trusts or trustees. In *M.I.T. Student House, Inc. v. Assessors of Boston*, 350 Mass. 539, 542, 215 N.E.2d 788 (1966), for example, the corporate owner was considered to "occupy" a residence it maintained for needy students because the students' presence was consistent with the charitable purpose of the organization. In these cases, the occupation of the nursing home facilities was by the limited liability taxpayers and not by the Tennessee corporation that was their "member." The certificates of formation of the LLCs required that the LLCs hold themselves out as separate entities, and conduct business in their own names.

[*412] We similarly reject the taxpayers' suggestion that, because the Legislature last revised *G. L. c. 59, § 5, Third*, as amended through St. 1985, c. 489, some ten years before limited liability [***17] companies were authorized in the Commonwealth, pursuant to *G. L. c. 156C*, inserted by St. 1995, c. 281, § 18, the Legislature did not intend to exclude such companies from the exemption. We presume the Legislature was aware of various organizational forms and taxing mechanisms when it enacted *G. L.*

c. 156C. Condon v. Haitzma, 325 Mass. 371, 373, 90 N.E.2d 549 (1950) ("Legislature must be presumed to have meant what the words plainly say, and it also must be presumed that the Legislature knew preexisting law and the decisions of this court"). Thus, for example, partnerships, which share some tax attributes with LLCs, long have been recognized in Massachusetts, and there is no suggestion that this exemption applies to them. *Nashoba Communications Ltd. Partnership v. Assessors of Danvers, 429 Mass. 126, 129, 706 N.E.2d 653 (1999)* ("both the Federal and Massachusetts

taxing schemes treat corporations and partnerships differently"; "if any inequality exists in this treatment, it can be avoided because it is the taxpayer's option to operate as a partnership or to do business as a corporation"). See *State Tax Comm'n v. Fine, 356 Mass. 51, 56 n.8, 247 N.E.2d 701 (1969)* ("trusts with transferable shares are not corporations and cannot be [***18] treated as such for some tax purposes").

Decision of the Appellate Tax Board affirmed.

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

1 Division of Administrative Law Appeals (DALA).

SJC-10260

SUPREME JUDICIAL COURT OF MASSACHUSETTS

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

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

PRIOR HISTORY: [***1]

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

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

DISPOSITION: Judgment affirmed.

COUNSEL: Robert P. Morris, for the plaintiff.

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

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

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

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

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

OPINION BY: BOTSFORD

OPINION

[**636] [*63] BOTSFORD, J. In this case we return to the question whether the written vacation pay policy of the plaintiff, Electronic Data Systems Corporation (EDS), violates *G. L. c. 149, § 148* (Wage Act, or § 148), when applied to an employee who is involuntarily [*64] terminated. See *Electronic Data Sys. Corp. v. Attorney Gen., 440 Mass. 1020, 798 N.E.2d 273 (2003) (EDS I)*. Giving deference to the Attorney General's reasonable [***2] interpretation of the Wage Act and in agreement with the Superior Court [**637] judge and the division of administrative law appeals (DALA), we conclude that the statute requires such an employee to be paid for unused vacation time remaining at the time of involuntary discharge; and that because the EDS policy does not provide for such payment, it contravenes the Wage Act. We therefore affirm the judgment of the Superior Court.²

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

Background. The facts are not contested. Francis Tessicini was an employee of EDS or one of its predecessor companies for twenty-one years, from

1984 to 2005. On April 8, 2005, EDS eliminated Tessicini's position.

EDS's written vacation pay policy (vacation pay policy, or policy), as updated on July 30, 2004, provides that beyond the first year of employment, the amount of an employee's paid vacation time is based on the number of full calendar [***3] years he or she has worked for EDS or one of its predecessor companies. Under the policy, a person who has been employed for twenty years or more is eligible for five weeks of paid vacation per calendar year, to be used by December 31 of that year or lost.³ [*65] The policy further provides that "va-

cation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

3 In particular, the policy states:

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

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

"...

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

At the time of his discharge on April 8, Tessicini had used only one day of vacation in calendar year 2005. Pursuant to its vacation pay policy, when EDS discharged Tessicini, it did not pay him for any part of his [***4] unused vacation time. On May 5, 2005, Tessicini filed a written complaint with the Attorney General's fair labor division, alleging that EDS owed him vacation payments under the Wage Act.⁴ The Attorney General issued a citation that, as amended, required payment of \$ 1,799.70 to Tessicini, and assessed a civil penalty of \$ 3,490 for intentional failure to make timely payment of wages. EDS appealed from the citation to DALA, which issued a written decision affirming the citation, but calculating the payment owed to Tessicini as \$ 1,970.95.⁵ EDS then [**638] sought review of DALA's order in the Superior Court pursuant to *G. L. c. 30A, § 14*. Ruling on EDS's motion for judgment on the pleadings, a

judge in the Superior Court denied the motion and affirmed DALA's decision. EDS appealed, and we granted its application for direct appellate review.

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

5 The payment to Tessicini was calculated by prorating his five weeks of vacation per year over the fourteen weeks he had worked, and subtracting the day of vacation he actually took, requiring EDS to pay his salary for 5.75 vacation days. EDS does not challenge the [***5] figure arrived at by DALA as to that payment. EDS does argue, in a short footnote and without citation, that there is no basis for the civil penalty assessed. The footnote does not rise to the level of appellate argument, and we deem the argument waived. See *Commonwealth v. Lydon*, 413 Mass. 309, 317-318, 597 N.E.2d 36 (1992), citing *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 921 (1975).

Discussion. Pursuant to *G. L. c. 30A, § 14 (7) (c)*, EDS challenges DALA's decision affirming the Attorney General's citation, and the citation itself,

as being based on an error of law. We review questions of law in administrative decisions de novo. *Belhumeur v. Labor Relations Comm'n*, 432 Mass. 458, 463, 735 N.E.2d 860 (2000), cert. denied, 532 U.S. 904, 121 S. Ct. 1227, 149 L. Ed. 2d 137 (2001).

The Wage Act provides in pertinent part:

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

". . .

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

G. L. c. 149, § 148. The parties offer differing interpretations of these statutory provisions. EDS argues that because "vacation payments" under the Wage Act's partial definition of "wages" are only those "due" under the terms of an oral or written employment agreement, the agreement may restrict or limit an employee's right to those payments without violating the Act's "special contracts" clause. Applying that interpretation to this case, EDS claims that under the language of § 148, no payment is "due" Tessicini "under [the] written agreement," *id.*, where its policy explicitly provides that employees leaving EDS on a voluntary or involuntary basis will not be paid for unused vacation time. The Attorney General, in turn, argues that, once Tessicini had accumulated vacation time according to the vacation pay policy, it became "due" under the definition of "wages," and therefore constituted "wages earned," which § 148 mandates

must be paid in full on the day of his discharge; the Attorney [***7] General considers the portion of EDS's vacation pay policy denying payment for unused vacation time to constitute an unenforceable "special contract" under the "special contracts" clause of the statute.

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

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

these provisions is that paid vacation at EDS is earned.

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

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

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

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

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

"Under such policies, the employer must provide adequate prior notice of the policy to employees and must ensure that employees have a reasonable opportunity to use the accumulated vacation time within the time limits established by the employer. Otherwise, a cap on accrual or a 'use it or lose it' policy may result in an illegal forfeiture of earned wages." *Id.* at 3.

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

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

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

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

When Advisory 99/1 was issued, substantially similar language was codified at G. L.

c. 23, § 1 (b), as appearing in St. 1996, c. 151, § 112.

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

The Wage Act does not require employers to provide their employees with paid vacation. As the advisory reflects, however, the Attorney General interprets the Wage Act to mean that when an employee does provide for paid vacation and an employee is entitled to paid vacation under the terms of an employment agreement, the entitlement is another form of compensation, and becomes "due" day by day as the employee performs his or her duties.⁷ It can be lost by disuse, but if an employee is "discharged from . . . employment," the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be "paid in full on the day of his discharge." *G. L. c. 149, § 148*.

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

[*70] EDS argues that the Attorney General's interpretation of § 148 is unreasonable for several reasons. First, EDS asserts that "the Wage Act is merely the method by which private agreements

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

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

EDS further argues that the Attorney General's position is incompatible with the policy, included within the same advisory, that an employer may require employees to "use all of their accumulated vacation time by a certain period of time or lose all or part of it." Advisory 99/1, at 3. In EDS's view, this position shows that the Attorney General did not consider entitlement to paid vacation time to be the equivalent of earned wages, or else it could not be lost if unused. However, as quoted previously, the advisory permits loss of accrued vacation time only where the employee has a reasonable opportunity to use (and be paid for) that time. *Id.* The Attorney General has therefore adopted a consistent view that an employee earns, by his or her service, the right to take paid vacation; the employee may lose the right through voluntary nonuse, but if an employer interferes with the employee's ability to use it, for example by discharging the employee, the employer must [***16] pay the value of the earned vacation.

The Attorney General's interpretation is not the only meaning that could be attached to the phrase

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

Judgment affirmed.

SAMUEL A. FORESTA, JR. vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another.¹

1 Massachusetts Turnpike Authority Employees' Retirement Board (retirement board).

SJC-10288

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 669; 904 N.E.2d 755; 2009 Mass. LEXIS 61

**February 3, 2009, Argued
April 24, 2009, Decided**

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on June 30, 2006. The case was heard by Linda E. Giles, J., on a motion for judgment on the pleadings. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Judgment affirmed.

COUNSEL: James W. Stone (Bernard J. Mulholland with him), for the plaintiff.

Walter M. Foster (Holly A. Ditchfield with him), for Massachusetts Turnpike Authority Employees' Retirement Board.

Jennifer Grace Miller, Assistant Attorney General, for Contributory Retirement Appeal Board.

The following submitted briefs for amici curiae: Scott C. Merrill, for Lynn Retirement Board.

Mary Jane McKenna, J. Michael Conley, & Deborah G. Kohl, for The Massachusetts Academy of Trial Attorneys.

John M. Becker, for Boston Police Patrolmen's Association & another.

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

OPINION BY: GANTS

OPINION

[**757] [*670] GANTS, J. The plaintiff, a former safety inspector in the occupational safety department of the Massachusetts Turnpike Authority (MTA), appeals from a judgment of the Superior Court affirming the denial by the Contributory Retirement Appeal Board (CRAB) of his application for accidental disability retirement benefits [***2] pursuant to *G. L. c. 32, § 7 (1)*, as amended through St. 1996, c. 306, § 14. We allowed an application for direct appellate review filed by the Massachusetts Turnpike Authority Employees' Retirement Board (retirement board) to consider a question of significance to employers and employees of the Commonwealth and its political subdivisions: whether *G. L. c. 32, § 7 (1)*, permits an employer to modify an injured employee's work-related responsibilities in order to accommodate the injury, thereby revising the "essential duties of his job," and, as a result, limiting the retirement system's liability for accidental disability benefits. We answer the question in the affirmative when, as in this case, the essential duties of the job as modified are similar in responsibility and purpose to those performed by the employee at the time of injury, and result in no loss of pay or other benefits. We also conclude that CRAB properly determined that the plaintiff was able to perform the "essential duties" of his position of safety inspector as modified at the time of his application for accidental disability benefits. Accordingly, we affirm the judgment.

Background. We set forth the background of this [***3] case in some detail, relying on facts established at a hearing before the division of ad-

ministrative law appeals (DALA) and other uncontroverted evidence in the record. In the spring of 2001, the plaintiff had been a section safety inspector for the MTA for twelve years. As a safety inspector, the plaintiff was required to maintain various licenses and certifications in safety. He was the only MTA employee with a fire equipment certificate of competency. His job responsibilities included conducting MTA training sessions on [*671] cardiopulmonary resuscitation (CPR), first aid, fire extinguisher safety, and other aspects of safety awareness; internal safety audits; and industrial accident investigations. One of the plaintiff's primary responsibilities was to conduct weekly inspections of fire extinguishers along the Massachusetts Turnpike and MTA tunnels. This task required the plaintiff to lift fire extinguishers weighing over twenty, and up to fifty, pounds. Fire extinguishers needing maintenance or repair were transported by the plaintiff to an MTA facility in Weston and, after being repaired by others, were transported by the plaintiff back to the assigned locations. The plaintiff performed [***4] similar inspection and maintenance tasks, on a monthly basis, on first aid equipment at various MTA sites. Between August, 1999, and August, 2001, the plaintiff traveled an average of 1,500 miles per month in the performance of his job. By his own calculation, only twenty per cent of his work day was spent in the office.

On March 19, 2001, while on duty at an MTA facility in Chicopee, the plaintiff injured his lower back while attempting to lift a fire extinguisher onto an MTA transport van. The plaintiff's lower back injury did not cause him to miss any work, but he experienced low back pain for roughly three weeks. On September 4, 2001, the plaintiff again injured his lower back while attempting to lift boxes of first aid equipment at the MTA's Weston facility. He sought medical treatment and returned to work intermittently during the next year [**758] as his medical condition permitted.² He received, and continues to receive, workers' compensation benefits. On June 10, 2002, the plaintiff's orthopedic surgeon approved his return to work full time, provided that accommodations for certain medical restrictions could be made. The MTA agreed to accommodate all of the restrictions and advised [***5] the plaintiff that his failure to return to the workplace could result in the suspension of his workers' compensation benefits.

2 According to the record, the plaintiff twice underwent back surgery, once on April 5, 2002, and again on March 19, 2003. The plaintiff also received multiple epidural steroid injections and participated in several courses of physical therapy. Neither surgery nor injections nor physical therapy was effective in easing discomfort in his lower back, left leg and ankle, and numbness in his left foot.

The plaintiff returned to work full time later that month. He was provided with a "stand-up computer" and was allowed to [*672] take as many breaks as needed to reduce his discomfort. The physical duties connected with fire extinguisher safety were assigned to another employee, and facility safety audits were eliminated from the plaintiff's job responsibilities. The plaintiff was responsible for classroom instruction, inspections, investigations, data entry, course development, and report writing. Despite these modifications to his workload, the plaintiff continued to experience back pain. He left work again in July.

On September 23, 2002, the MTA acknowledged that the plaintiff [***6] was unable to return to the work duties he had performed before his back injury on September 4, 2001, and expressed its willingness to make every accommodation to ensure his successful return to work "in a modified capacity." On November 1, the plaintiff attempted to return to work on a light duty basis, i.e., working only a few days a week. He was permitted to lift only objects weighing no more than twenty pounds and was allowed to stand or sit, and take breaks from his work as his comfort level allowed. By this time, the plaintiff's responsibilities consisted almost exclusively of administrative tasks. His prior responsibilities in the field were performed by two other employees in the same department, one of whom had obtained a fire equipment certificate of competency in order to perform fire extinguisher inspections. The plaintiff, however, declared himself unable to continue working. His last day of work was November 12, 2002.

On December 23, 2002, the plaintiff submitted to the retirement board an application for accidental disability retirement benefits, pursuant to *G. L. c. 32, § 7*. The public employment retirement admini-

stration commission (PERAC), authorized under *G. L. c. 7, § 50*, [***7] to oversee, monitor, and promulgate rules and regulations applicable to the work of the Commonwealth's retirement boards, *G. L. c. 7, § 50*, appointed a three-member regional medical panel, as required by *G. L. c. 32, § 6 (3)*, to evaluate the plaintiff's medical condition and to certify to the retirement board in writing whether the plaintiff was likely permanently disabled from further duty.³

3 *General Laws c. 32, § 6 (3)*, also directs the panel to certify in writing whether the claimed injury was the natural result of the workplace accident. The medical panel's conclusion that the plaintiff's injury occurred in the course of his employment is not at issue in this case.

[*673] On April 17, 2003, the medical panel examined the plaintiff and, based on a list of duties and responsibilities of the plaintiff's position submitted by the MTA, set [**759] forth below,⁴ certified that he was physically incapable of performing the essential functions of his job. The panel characterized the plaintiff's incapacity as likely to be permanent and expressed its unanimous support for allowing the plaintiff's application for benefits under *G. L. c. 32, § 7*. Accompanying the panel's certification was a narrative report, [***8] which included a finding that the plaintiff was "unable to perform the prolonged driving and lifting from floor level required of his work."

4 "Inspects facilities and operating practices throughout the [MTA] to verify that safety standards are maintained, and reports his findings to the Supervisor.

"Inspects safety practices by private contractors on [MTA] property to assure that they conform to [MTA] and [Occupational Safety and Health Administration] standards and reports any violations.

"Assists in the investigation of accidents to identify causes and recommends corrective actions, policies, and procedures which would reduce the likelihood of accidents and/or eliminate physical hazards.

"Advises supervisors of procedures to avoid accidents and claims against the [MTA].

"Maintains control records on all fire extinguishers, inspects extinguishers, and ensures that they are recharged as scheduled."

The medical panel's finding that the plaintiff was unable to perform "prolonged driving and lifting" prompted the retirement board to question whether these were among the plaintiff's current job requirements. In a clarification letter dated December 23, 2003, MTA's director of human resources, [***9] Frank McDonough, informed the retirement board that "no such tasks were or are specified in the position description applicable to the MTA job [the plaintiff] most recently held." McDonough's letter documented an "evolution" of the position of section safety inspector since that position was created in 1984. The letter presented the following explanation:

"A fair view of the job today, not as it was created in 1984, would reveal that the position is essentially an office-based administrative job that requires infrequent travel and minimal lifting (virtually all of which can be avoided). It remains, nonetheless, of value to the [MTA] in assisting it in overseeing safety-related data acquisition and review [*674] and providing training, guidance and counsel, at convenient times and readily accessible locations, to supervisors and employees alike. The department's head has necessarily deployed and redeployed her resources in an efficient manner. In doing so, it became apparent quite some time ago that there was less need for [the plaintiff] to drive the Turnpike and more need for office support for those departmental employees and others who fulfill the [MTA's] many safety responsibilities at [***10] its facilities and work sites. This decentralization was well underway well before [the plaintiff's] latest injury, and it has continued. Having conferred with the department

director, there is no question that [the plaintiff] will be assigned to full administrative responsibilities with virtually no driving obligation and absolutely no lifting requirements."⁵

5 In a follow-up letter dated January 13, 2004, Frank McDonough clarified for the panel the job responsibility that called for the plaintiff to "maintain control records on all fire extinguishers" and "inspect extinguishers" and "assure that they are recharged as scheduled." McDonough explained the first as "a pure record keeping function." As for the second, McDonough described at length the methods by which inspecting a fire extinguisher may be accomplished without heavy lifting, and made clear that the plaintiff, who instructed others on safe lifting practices, was fully aware of the basic rule that no one is to lift an object without assistance in any case where the lifting might cause an injury. The process of recharging a fire extinguisher, McDonough continued, is not a current responsibility of the plaintiff's job.

[**760] Based [***11] on this revised description of the plaintiff's job, the medical panel reversed its earlier decision and withdrew its certificate. In a report dated February 26, 2004, the medical panel concluded unanimously that the plaintiff was able to perform the essential duties of his job.

On April 28, 2004, the retirement board voted to approve the plaintiff's application for benefits and, pursuant to *G. L. c. 32, § 21 (1)*, forwarded its decision to PERAC. PERAC remanded the decision to the retirement board with written instructions directing that, in the absence of a positive certification by the medical panel, the approval of the plaintiff's application was not in accordance with *840 Code Mass. Regs. § 10.11(3)* (1998), and, therefore, was unlawful.⁶ PERAC advised the retirement [**675] board that it should either deny the application or, alternatively, petition for a new medical panel, and state the reasons why a new panel should

be convened. On July 1, 2004, the retirement board denied the plaintiff's application for disability retirement benefits. The plaintiff filed an appeal from the retirement board's decision with CRAB, which referred the case to DALA. See *G. L. c. 32, § 16 (4)*.

6 Section 10.11(3) of 840 Mass. Code Regs. (1998) provides as follows: [***12]

"If the medical panel findings preclude retirement for the disability claimed, the retirement board shall either deny the application or, if it determines that further examination by a medical panel may be warranted, the retirement board shall petition the [public employment retirement administration commission (PERAC)] to schedule a new examination by a medical panel, stating the circumstances warranting a new examination."

An evidentiary hearing was held before a DALA administrative magistrate, who made findings of fact and remanded the case to the retirement board for the purpose of granting the plaintiff's application, on the ground that a public employee is entitled to disability retirement benefits under *G. L. c. 32, § 7*, if he is no longer able to perform the essential duties of his *original* job, i.e., the job he held at the time of injury. CRAB adopted the DALA factual findings in their entirety but rejected its legal conclusion that the plaintiff is entitled to benefits. CRAB reasoned that *G. L. c. 32* permits an employer wide latitude to modify an employee's work responsibilities to accommodate an injury to keep him on the [***13] job, and § 7 entitles an injured employee to disability retirement benefits only if the employee is unable to perform the essential duties of the modified job. CRAB concluded that, because the plaintiff was able to perform the sedentary tasks required of him by the MTA as of December, 2002 (the time of his application for benefits), the plaintiff was not permanently disabled as required by § 7. The plaintiff sought administra-

tive review in the Superior Court, pursuant to *G. L. c. 30A, § 14*, and, as indicated above, a judge in the Superior Court affirmed CRAB's decision.

The plaintiff concedes that a public employer, such as the MTA, has the right to define the duties that it considers essential for a position within its authority. The plaintiff maintains, however, that because he is unable to perform the "essential duties" of the job he held on the day he was injured, he is entitled to disability retirement benefits under *G. L. c. 32, § 7*. He claims that CRAB erred, as a matter of law and of fact, in concluding [*676] otherwise. We review CRAB's decision under a deferential standard and will reverse only if its decision was based on an erroneous interpretation of law or is unsupported by substantial [***14] evidence. See *G. L. c. 30A, § 14 (7)*; *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 82, 803 N.E.2d 325 (2004) [**761] ("Where an agency's interpretation of a statute is reasonable, the court should not supplant it with its own judgment"); *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420, 589 N.E.2d 1224 (1992); *Massachusetts Med. Soc'y v. Commissioner of Ins.*, 402 Mass. 44, 62, 520 N.E.2d 1288 (1988).

Discussion. The first issue before us concerns the proper interpretation of *G. L. c. 32, § 7 (1)*, which conditions entitlement to accidental disability retirement benefits on the certification by a regional medical panel that the applicant is "unable to perform the essential duties of his job and that such inability is likely to be permanent."⁷

7 The permanency of the plaintiff's injuries is not an issue in this case.

In 1996, apparently in response to a series of newspaper articles investigating abuses of the then-current law, the Legislature enacted St. 1996, c. 306, to reform the law governing retirement benefits for public employees. See *White v. Boston*, 428 Mass. 250, 253, 700 N.E.2d 526 & n.4 (1998). The new statute made three significant changes in the law relevant to this decision.

First, it tightened the standard [***15] governing eligibility for accidental disability retirement. See *Houde v. Contributory Retirement Appeal Bd.*, 57 Mass. App. Ct. 842, 849, 787 N.E.2d 581 (2003). Prior to 1996, the statute required that an applicant

be "totally and permanently incapacitated for further duty." St. 1996, c. 306, § 14. Under that version of the statute, a public employee was entitled to accidental disability retirement benefits if he could demonstrate a "substantial inability . . . to perform the duties of his particular job or work of a similar nature for which his training and qualifications fit him." *Quincy Retirement Bd. v. Contributory Retirement Appeal Bd.*, 340 Mass. 56, 60, 162 N.E.2d 802 (1959). As interpreted by the Appeals Court in 1992, a public employee was entitled to these benefits if he could not perform the "full range of duties generally required" in the position. *Retirement Bd. of Brookline v. Contributory Retirement Appeal Bd.*, 33 Mass. App. Ct. 478, 483, 601 N.E.2d 481 (1992). Consequently, under the pre-1996 statute, a [*677] public employee who could perform all the essential duties of his position, but not the full range of his duties, would be entitled to retirement disability benefits. See *Houde v. Contributory Retirement Appeal Bd.*, *supra* [***16] ("A person can be 'substantially incapable of performing [her] particular job,' taking into account all of the job's core and peripheral functions and responsibilities, routine and occasional, and nonetheless able to perform that job's 'essential duties'"). Under the new statute, that same public employee would be entitled to retirement disability benefits only if he could not perform "the essential duties of his job."⁸

8 The phrase "essential duties of his job" is defined nowhere in the statute. PERAC has provided practical guidance for employers and retirement boards called on to determine an applicant's ability to perform the "essential duties of his job" for purposes of *G. L. c. 32, § 7*, by means of a regulation enacted pursuant to its authority under *G. L. c. 7, § 50*. Section 10.20 of 840 Code Mass. Regs. (2004) lists the following factors that may (but do not have to) be considered in the determination whether a function or duty is essential:

"(a) The nature of the employer's operation and the organizational structure of the employer;

"(b) Current written job descriptions;

"(c) Whether the employer requires all employees in a particular position to be prepared to perform a specific [***17] duty;

"(d) The number of employees available, if any, among whom the performance of the job function can be distributed;

"(e) The amount of time that employees spend performing the function;

"(f) Whether the function is so highly specialized that the person in the position was hired for his or her special ability to perform the function;

"(g) The consequences of not requiring the employee to perform the function;

"(h) The actual experience of those persons who hold and have held the position or similar position; and

"(i) Collective bargaining agreements."

[**762] Second, St. 1996, c. 306, § 10, established an early intervention plan to ensure the "continued employment of injured members through medical and vocational rehabilitation, reasonable accommodation of injured workers, and a safer workplace." *G. L. c. 32, § 5B (a)*, as appearing in St. 1998, c. 252, § 1. Under § 5B (b), the early intervention plan "shall be implemented" when a public employee has been absent from work for thirty [*678] workdays or more as the result of a work-related injury, and his return to work is not imminent.⁹ *G. L. c. 32, § 5B*. If, following the completion of a rehabilitation plan, the employee is "able to perform the essential [***18] duties of the position in which he was employed prior to his absence

from work," the employee must return to work in his former position. *G. L. c. 32, § 5B (f)*. An employee who fails to participate in either the assessment to determine the need for a medical or vocational rehabilitation program or the rehabilitation program determined to be appropriate "shall be deemed to have waived his rights to benefits pursuant to [§] 7."¹⁰ *G. L. c. 32, § 5B (e)*.

9 The determination that the employee's return to work is not imminent is made by a physician selected by the employee and another selected by the employer. If they disagree, they must select a third physician whose determination shall be conclusive. *G. L. c. 32, § 5B (b)*.

10 The Massachusetts Turnpike Authority (MTA) had not implemented a formal early intervention plan in compliance with *G. L. c. 32, § 5B*, at the time of the plaintiff's injuries, because it had not succeeded in negotiating the requisite modifications to its collective bargaining agreements. The record reflects, however, that the MTA sought to effectuate the goals of § 5B in its various accommodations of the plaintiff's injuries.

Third, a public employee previously found disabled [***19] who is receiving disability retirement benefits is required to participate in periodic evaluations to determine whether, with the passage of time, he is able to perform the "essential duties of the position" from which he retired or a "similar job within the same department for which he is qualified." *G. L. c. 32, § 8 (1) (a)*. See *Sullivan v. Brookline*, 435 Mass. 353, 361, 758 N.E.2d 110 (2001) (purpose of 1996 amendments was to "return formerly disabled employees to work and to prevent 'healthy' retirees from profiting at the expense of the taxpayers").

Together, the 1996 amendments limit the Commonwealth's liability and prevent possible abuses of the system by requiring an injured public employee who is physically capable of performing some of the important duties of his position to do so. See *White v. Boston*, 428 Mass. 250, 253, 700 N.E.2d 526 (1998). Under the 1996 amendments, when an injured public employee has missed thirty workdays due to a work-related injury, the employer is expected to make reasonable accommoda-

tions and, if needed, furnish the employee with a medical and vocational rehabilitation program, to permit the employee to remain on the job. It is only if the [*679] employee still cannot perform the essential [***20] duties of the job that the employee may apply for, and receive, disability retirement benefits. If granted such benefits, the now-retired employee must undergo periodic evaluations to determine whether his medical condition has improved sufficiently to permit him to perform [**763] the "essential duties" of the position from which he retired or a "similar job within the same department."

The plaintiff contends that the "essential duties of the position of his job" under § 7 must be determined as of the date his injury first caused him to miss work, which here was in September, 2001. He argues that the MTA must provide reasonable accommodation to an injured employee, both as part of an early intervention plan under § 5B and to avoid discriminating on the basis of disability under *G. L. c. 151B*, but is not empowered to create a new position in order to deny an employee the retirement benefits to which he otherwise would be entitled. In making this argument, the plaintiff confuses what a public employer *must* do under *G. L. c. 151B* with what it *may* do under *G. L. c. 32*. To be sure, the MTA owed the plaintiff no obligation to reallocate certain job responsibilities to other employees, or to waive [***21] or excuse his inability to perform physical tasks formerly required of his position, as part of a reasonable accommodation under *G. L. c. 151B*. See *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 390, 607 N.E.2d 1035 (1993); *Dziamba v. Warner & Stackpole LLP*, 56 Mass. App. Ct. 397, 405, 778 N.E.2d 927 (2002). There is no language in *G. L. c. 32*, however, that prohibits an employer from providing a greater accommodation than would be required under *G. L. c. 151B*, and modifying an employee's essential duties so that he may remain on the job after a work-related injury. If the plaintiff's interpretation were to prevail, the legislative purpose for the early intervention program in § 5B (a), "to limit the retirement system's liability for disability benefits by ensuring the continued employment of injured members through medical and vocational rehabilitation [and] reasonable accommodation of injured workers," would be poorly served. The Legislature intended that public employers have substantial leeway to

modify the job responsibilities of an injured employee to accommodate the physical limitations imposed by the injury and to keep the employee working at a job he is capable of performing. We therefore conclude that [***22] the "essential [*680] duties of his job" under § 7 must be determined after the employer has had a reasonable opportunity to accommodate the injury and, if appropriate, provide medical or vocational rehabilitation to allow the employee to continue to work, which generally will be the date of the application for disability.¹¹

11 We expect that, in the vast majority of cases, as in this case, the public employer will have time reasonably to accommodate the employee's injury before the employee submits an application for retirement disability benefits. In cases where an application is filed before the employer has had a fair opportunity to consider possible revisions to the employee's essential duties that would allow him to keep working, the employer should do so within a reasonable time, after consultation with the employee, and submit a description of the job responsibilities, as modified, to the regional medical panel appointed by PERAC to examine the employee. The modified job description would then be considered by the medical panel in determining whether, under § 7, the employee is "unable to perform the essential duties of his job and that such inability is likely to be permanent." In [***23] this way, an employee cannot improve his chance of obtaining retirement disability benefits by rushing to apply for the benefits immediately after an injury rather than allowing his employer to take steps to accommodate, if possible, any temporary or permanent limitations caused by the injury.

CRAB properly determined that § 7 permits an employer to accommodate an injured employee's physical disabilities to avoid the award of accidental disability retirement benefits by "assigning the employee to perform a subset of the essential duties applicable to his or her current [**764] position within his or her abilities." We question, however, CRAB's determination that permissible accommodations may include "assigning the employee to

different duties altogether within his or her abilities and with no loss of pay or other benefits." ¹² We caution that there are limits to the extent to which a department head may alter a job description in order to compel an unwilling employee to continue working at a revised job rather than receive disability retirement benefits to which he otherwise would be entitled. The essential duties of the job as modified must be similar in responsibility and purpose to those [***24] performed by the employee at the time of injury, and must result in no loss of pay or other benefits. We draw no bright line to be followed in every case, nor can we, for the determination whether a job is similar in responsibility and purpose [*681] necessarily depends on the particular factual circumstances of the employment.

12 The Contributory Retirement Appeal Board (CRAB) made clear that there was no evidence in the record or any claim by the plaintiff that the modified job assignments violated any relevant collective bargaining agreement or statutory requirement, such as our handicap discrimination laws.

We find support for this limitation in *G. L. c. 32, § 8*, which requires disabled retirees receiving § 7 benefits to participate in regular evaluations to determine whether they can perform the "essential duties of the position" from which they retired, or a "similar job within the same department." *G. L. c. 32, § 8 (1) (a)*. Under this provision, if an employee's physical condition has improved such that he is able to perform a "similar job within the same department," he must return to work to fill the position if it is vacant and he is otherwise qualified, or risk the loss of his disability [***25] benefits. *G. L. c. 32, § 8 (2) (a)*. By directing that a disabled employee may be required to accept a "similar job within the same department" or lose his benefits, the Legislature implicitly recognized that an employer, through a reasonable accommodation designed to allow the employee to continue to work, may modify the job of an injured employee into a "similar job," even if that means modifying his essential duties. If the employer were not given this authority, an employee who could no longer perform his essential duties but could perform a similar job would be granted a § 7 disability retirement but, unless his physical condition had deteriorated, would promptly be ordered back to work under § 8

following his first evaluation because he could still perform a similar job. ¹³

13 We also note that, under our workers' compensation law, an insurer paying weekly compensation benefits may modify or discontinue such benefits if the insurer obtains (1) a medical report from the employee's treating physician or an impartial medical examiner declaring that the employee is capable of returning to the job he held at the time of injury "or other suitable job" consistent with the employee's physical [***26] and mental condition; and (2) a written report from the employer declaring that such "suitable job" is open and has been made available. *G. L. c. 152, § 8 (2) (d)*. A "suitable job" under c. 152 is defined as "any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury." *G. L. c. 152, § 35D (5)*.

We now address the second issue in this case -- whether this court must vacate CRAB's decision because the MTA so transformed the "essential duties of his job" that his job was no longer similar in responsibility and purpose to the job he held [*682] when he suffered his back injury. The plaintiff argues that, even assuming that the MTA was authorized to modify his [**765] essential duties following his injury as part of a reasonable accommodation, it went too far in his case. The plaintiff contends that the "essential duties of his job" never consisted of administrative tasks with infrequent travel and no lifting. The plaintiff points to the finding of DALA [***27] (which is not disputed) that he was "neither hired for, nor did he ever regularly perform, clerical and administrative duties in his role as Section Safety Inspector" and argues that his revised duties bore little or no relationship to the position he held before his injury. ¹⁴ He points out that, in 2004, the MTA hired a new section safety inspector to replace the plaintiff, and this new section safety inspector spends approximately fifty per cent of his time traveling and conducting on-site inspections. The plaintiff asserts that the adminis-

trative tasks submitted by the MTA to the regional medical panel as his job description in December, 2003, were so dissimilar from the physical tasks required of him prior to his injuries that CRAB's decision should be deemed invalid. We do not agree.¹⁵

14 The plaintiff relies on language in *Quincy Retirement Bd. v. Contributory Retirement Appeal Bd.*, 340 Mass. 56, 60, 162 N.E.2d 802 (1959), which interpreted incapacity under *G. L. c. 32, § 7*, to be the "substantial inability of an applicant to perform the duties of his particular job or work of a similar nature or for which his training and qualifications fit him." This reliance is misplaced. The plaintiff in [***28] the *Quincy* case was a former fire fighter who, due to a job-related injury, became unable to climb ladders or engage in other usual duties of a lieutenant in fighting fires. The Quincy fire department reassigned him to desk duty, but this court concluded that the plaintiff was substantially incapacitated from further duty and, therefore, entitled to benefits under § 7. The court's reasoning, however, was based on language contained in the earlier version of § 7, which, as has been discussed, the Legislature altered in 1996 in order to provide employers more flexibility to keep injured employees on the job.

15 We reject the plaintiff's suggestion that CRAB's failure to consider the definition of the "essential duties" contained in *840 Code Mass. Regs. § 10.20* renders its decision invalid. As has been explained in note 8, *supra*, § 10.20 was promulgated by PERAC as a guideline for employers called on to submit a job description in connection with an employee's application for § 7 benefits, and for retirement boards considering whether to allow or deny that application. CRAB was not required to apply the factors contained in the regulation when determining whether to affirm the retirement [***29] board's decision that the plaintiff was not entitled to benefits.

It is true that, by December, 2002, the MTA had gone to great lengths to accommodate the plaintiff's physical limitations by [*683] reassigning and modifying his primary duties as a section safety

inspector, shifting his job responsibilities from what had been primarily physical tasks into primarily sedentary ones.¹⁶ The plaintiff's duties in the department, as modified by the MTA to accommodate his injury, did indeed focus far more than before on data entry for various safety programs, report writing, and record retention.

16 In a memorandum dated October 11, 2002, MTA's director of occupational safety, Diana S. Kilroe, assured MTA's risk and claims administration supervisor that her department would "remain diligent in its efforts to provide [the plaintiff] a productive working position within the department."

The record also reflects, however, that the fire extinguisher inspection program and on-site safety inspections were not the plaintiff's only responsibilities before September, 2001. The plaintiff's job responsibilities before then included classroom instruction, data entry, course development, and report writing, all [***30] of which the plaintiff was able to perform after his injuries. Moreover, after his injuries the plaintiff continued to investigate work-related accidents at MTA facilities (albeit perhaps by telephone) and remained responsible for [***766] CPR training course development and instruction to MTA employees on safety procedures and safety awareness in the workplace. In sum, although his most physically strenuous and time-consuming duties were reassigned to other employees, the plaintiff retained substantial employment responsibilities and the fundamental purpose of his job continued to be safety.¹⁷

17 Kilroe testified at the hearing before the division of administrative law appeals that the plaintiff's pre-September, 2001, responsibilities had included "investigations of injuries and accidents, audits of various facilities, and a very important part of our department [that is] a pro-active training and implementation of programs necessary to reeducate and educate our personnel on an ongoing basis." Kilroe added, "He's a superb instructor." Kilroe explained that she had assigned the plaintiff, and others in the department, clerical duties that "had been piling up" since 2000 due to a shortage of [***31] secretarial help. Kilroe indicated that, because the

members of the department were few (varying from four to two), employees tended to share all safety department responsibilities. She stated, "It may be on paper that it's part of their job skill, but everyone is an inspector because our job is to inspect an injury and find a way to fix it so it doesn't happen again."

Nor were his remaining responsibilities simple to perform or trivial in importance to the MTA's safety mission. The plaintiff has presented no evidence to refute the assessment by MTA's [*684] director of human resources to the retirement board in December, 2003, that the plaintiff in his modified position assisted the MTA in "overseeing safety-related data acquisition and review and providing training, guidance and counsel, at convenient times and readily accessible locations, to supervisors and employees alike." By all accounts, the plaintiff remained a valuable member of the MTA safety team at the time he filed his application for disability retirement benefits.

Having found that the essential duties of the plaintiff's job as modified were similar in responsibility and purpose to those performed by him at the time of injury, [***32] we agree with CRAB that nothing in G. L. c. 32 precludes the type of accommodation that was made in this case.

The regional medical panel, relying on the MTA's description of the plaintiff's essential duties as modified by the date of application, found that the plaintiff could perform these duties and therefore was not disabled. On receipt of a certification

from the panel establishing that an applicant is able to perform his essential duties, in the absence of a reason to remand for clarification, § 7 permits a retirement board no choice but to deny the application for benefits. See *G. L. c. 32, § 7 (1)*; *840 Code Mass. Regs. § 10.11(3)* (1998). Neither the statute nor accompanying PERAC regulations provides for an administrative appeal of a negative certification by a regional medical panel. For all practical purposes, therefore, CRAB's decision to deny the plaintiff's application for benefits was dictated by the medical panel's refusal to certify that the plaintiff was unable to perform the clarified job description submitted by the MTA. See *Kelley v. Contributory Retirement Appeal Bd.*, 341 Mass. 611, 617, 171 N.E.2d 277 (1961) (local retirement board may not ignore regional medical panel's findings, [***33] unless clear that panel used erroneous standard, failed to follow proper procedure, or its decision is "plainly wrong"); *Malden Retirement Bd. v. Contributory Retirement Appeal Bd.*, 1 Mass. App. Ct. 420, 424, 298 N.E.2d 902 (1973) (role of regional medical panel in retirement system is to determine medical questions that are beyond common knowledge of local board).

It follows that CRAB's decision that the plaintiff is able to perform the "essential duties of his job" (as modified by the [*685] [**767] MTA) was supported by substantial evidence in the record. We conclude that CRAB properly denied the plaintiff's application for accidental disability retirement benefits.

Judgment affirmed.

CITY OF LYNN vs. LYNN POLICE ASSOCIATION.

No. 07-P-1090.

APPEALS COURT OF MASSACHUSETTS

73 Mass. App. Ct. 489; 899 N.E.2d 106; 2009 Mass. App. LEXIS 21

**May 15, 2008, Argued
January 9, 2009, Decided**

PRIOR HISTORY: [*1]**

Essex. Civil action commenced in the Superior Court Department on January 13, 2006. The case was heard by Kathe M. Tuttmann, J.

COUNSEL: David F. Grunebaum, for the plaintiff.

John M. Becker, for the defendant.

JUDGES: Present: McHugh, Dreben, & Mills, JJ.

OPINION BY: MCHUGH

OPINION

[**107] [*489] MCHUGH, J. Appealing from a Superior Court judge's decision confirming an arbitrator's award requiring the city of Lynn (city) to pay members of the Lynn Police Association (union) certain back wages, the city asserts that the arbitrator exceeded his authority and committed an error of law. We disagree and affirm.

The dispute between the city and the union is rooted in a statute enacted in 1985 when the city was on the verge of bankruptcy and unable to meet financial obligations, including wage obligations under its collective bargaining agreements. To prevent bankruptcy, the city sought financial relief from the Commonwealth. [*490] In response, the Commonwealth enacted the so-called "Lynn Bailout Act" (bailout bill), see St. 1985, c. 8, under which it loaned the city \$ 3.5 million but required the city to comply with certain financial safeguards to prevent spending in excess of revenues, the practice that had created the city's crisis.

The safeguards are [***2] rigorous. The bailout bill amended the city's charter to require, among

other things, that each department head submit to the city's chief financial officer quarterly spending schedules, or allotments, within ten days after the mayor and city council set the department's annual appropriation. Under the amended charter, no department may overspend a quarterly allotment without the mayor's approval. If the mayor approves [**108] excess spending within a quarter, the department head must adjust the remaining quarterly allotments to ensure that future spending does not exceed the department's annual appropriation. See St. 1985, c. 8, § 3.

Under the charter as amended by the bailout bill, any city official who intentionally causes his or her department to overspend an appropriation is personally liable to the city for the excess. *Ibid.* Of most importance here, the charter, as amended by the bailout bill, provides that

"[n]o personnel expenses earned or accrued, within any department, shall be charged to or paid from such department's . . . [quarterly] allotment of a subsequent period without approval by the mayor, except for subsequently determined retroactive compensation adjustments. Approval of [***3] a payroll for payment of wages, or salaried [sic] or other personnel expenses which would result in an expenditure in excess of the allotment shall be a violation of this section by the department or agency head If the continued payment of wages, salaries or other personnel expenses is not approved in a period where a department has exhausted the . . . allotment or allotments as specified above, or, in any

event, if a department has exceeded its appropriation for a fiscal year, the city shall have no obligation to pay such personnel cost or expense arising after such allotment or appropriation has been exhausted"(emphasis added).

[*491] Ibid. Finally, § 3 of the bailout bill amended the city charter to provide that "every collective bargaining agreement entered into by the city . . . after the effective date of this act shall be subject to and shall expressly incorporate the provisions of this section." Accordingly, § 3 was set forth virtually verbatim in Art. 40 of the collective bargaining agreement (CBA) in effect at the time the present dispute arose.

In fiscal year (FY) 2004, eighteen years after the bailout bill's enactment, the city was facing cuts in the amount of aid it was [***4] receiving from the Commonwealth and was considering police department personnel layoffs to deal with the shortfall. In October, 2003, to avoid layoffs, the union and the city entered into a "Memorandum of Agreement" (MOA), in which they temporarily modified certain terms of the then-existing CBA to reduce each employee's pay and to reduce certain allowances the CBA provided. Anticipating that financial assistance of some kind might be forthcoming from the Commonwealth or the Federal government, the MOA also provided that

"[i]n the event . . . the City receives additional assistance from the State or Federal governments during FY 04 that improves the City's current financial situation the concessions [made by the union] shall be reconfigured proportionately to repay the officers up to the amount of the concessions. For example, if the concessions of this Agreement equal \$ 300,000 and the City receives an additional \$ 100,000 from the Commonwealth of Massachusetts, the concessions will be reconfigured to be reduced by 1/3."

The MOA saved the city \$ 290,360 and layoffs were averted.

In December, 2003, shortly after the MOA took effect, the department received a community policing grant from [***5] the Massachusetts Executive Office of Public Safety (EOPS) in the amount of \$ 277,815. In a finding not challenged here or in Superior Court, an arbitrator eventually ruled that the Lynn police chief

"had broad discretion how to expend the . . . grant funds. The grant was not restricted to discrete law enforcement [**109] activities or equipment. So long as the funds were used for community policing initiatives, which all sworn personnel [*492] in the Lynn Police Department participate in, there were no restrictions on how the funds could be used. For all practical purposes, the grant was unrestricted."

The arbitrator also found that the EOPS expressly prohibited police departments from using the community policing grant funds to "supplant," rather than "supplement" their budgets. In other words, the grant was designed to add to the funds allocated to the department for the fiscal year and not to replace a portion of the department's allocation so that the city could spend that portion elsewhere. Again, the city did not challenge that finding in the Superior Court and does not challenge it here.

In any event, the city did not use the grant funds to repay the union members for concessions they had made [***6] in the MOA and, instead, used the money for other purposes.¹ In June, 2004, at the end of the fiscal year, \$ 7,000 of the police department's allocation remained and the department used that sum to repay union members for a part of their MOA concessions.

¹ The grant money was spent in the following manner: \$ 240,515 was used to match funds for two Federal community policing grants; \$ 24,304 for overtime; \$ 4,120 to replace personnel; \$ 7,276 for cellular telephone charges; \$ 1,000 for membership in the Massachusetts chiefs of police association; \$ 300 for the police executive research forum; and \$ 300 for the international association of chiefs of police.

The union became aware of the EOPS grant in February, 2004, and began discussions with the city about using the grant funds to end the MOA and restore concessions members had already incurred. The city declined and the union filed a grievance that led to arbitration hearings in August, 2005.² On December 19, 2005, the arbitrator ruled that the city had violated the MOA by failing to use the EOPS grant funds to repay the union members for their concessions and, as a result, was required to repay those concessions from other funds. Rejecting [***7] the city's argument that the bailout bill precluded repayment of the [*493] MOA concessions, the arbitrator ruled that the city was aware of the bill's strictures when it entered into the MOA and was therefore obliged to figure out how to repay the concessions without violating the bailout bill. The arbitrator's award was confirmed by a judgment entered in the Superior Court.

2 The parties designated the arbitrable issues as:

"Did the City of Lynn violate the 2001-2004 Contract and/or the October 1, 2003 Memorandum of Agreement when it failed to repay the concessions of the Memorandum of Agreement after receiving the Commonwealth of Massachusetts Executive Office of Public Safety grant money in Fiscal Year 2004?

"If so, what shall be the remedy?"

On appeal, the city contends that compliance with an award requiring retroactive repayment of the MOA concessions was prohibited by the bailout bill and that the award therefore exceeded the scope of the arbitrator's authority.³ In addressing that contention, we keep in mind several principles. Paramount, perhaps, is that "[t]he role of courts in reviewing an arbitrator's award is limited." [**110] *Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 187, 466 N.E.2d 114 (1984). [***8] "Where an arbitra-

tor has exceeded his authority, however, his conduct is always open to judicial review." *Somerville v. Somerville Mun. Employees Assn.*, 418 Mass. 21, 24, 633 N.E.2d 1047 (1994). "Those portions of an arbitrator's award which exceed the arbitrator's authority are void and may be vacated by a court." *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Authy.*, 392 Mass. 407, 411, 467 N.E.2d 87 (1984).

3 The city urges that the Superior Court judge erred not only by confirming the award but also by failing to address the city's claim for declaratory relief. When a complaint seeks declaratory relief, that relief must be afforded. *Boston v. Massachusetts Bay Transp. Authy.*, 373 Mass. 819, 829, 370 N.E.2d 1359 (1977). We think that the nature of that relief is clear and we address it at the end of this opinion.

At first blush, the city's position seems attractive. The bailout bill's focus on personnel expenses, the firmness with which the bailout bill restricts overspending in that category, and the causes that led to the bailout bill's enactment all suggest a legislative intent to extinguish any governmental obligation to pay any personnel expenses that would exceed the amount of an annual appropriation no matter [***9] when and how the excess occurred.

Nevertheless, two considerations lead us to conclude that the judgment confirming the award was correct. The first focuses on the statutory language, which typically is the surest guide to what the Legislature truly intended. See, e.g., *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37, 364 N.E.2d 1215 (1977) ("the statutory language itself is the principal source of insight into the legislative purpose"); [*494] *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 523, 870 N.E.2d 67 (2007) ("we give paramount importance to the language of the act in order to determine legislative intent").

Here, as noted earlier, the bailout bill's operative language says that "if a department has exceeded its appropriation for a fiscal year, the city shall have no obligation to pay such personnel cost or expense arising after such allotment or appropriation has been exhausted"(emphasis added). St. 1985, c. 8, § 3. The city received the grant funds in December, 2003, midway through FY 2004, and its

obligation to repay the MOA concessions arose at that point. There is no suggestion that the annual allotment had been exhausted, or was even close to exhaustion, when the repayment obligation arose. Accordingly, [***10] the literal terms of the bailout bill provide no defense to the union's claim.

The second consideration focuses on the way we and the Supreme Judicial Court have addressed similar, if slightly less onerous, statutory bars to payment elsewhere. In those cases, we have consistently held that statutory prohibitions on payment were no bar to an award of damages for breach of contract. In *Thomas O'Connor & Co. v. Medford*, 16 Mass. App. Ct. 10, 448 N.E.2d 1276 (1983), for example, the statute at issue, G. L. c. 44, § 31, as appearing in St. 1946, c. 358, § 23, provided in part that "[n]o department financed by municipal revenue, or in whole or in part by taxation, . . . shall incur a liability in excess of the appropriation made for the use of such department." *Id.* at 12. A contractor that had agreed to build a high school brought suit against the city, claiming that deficiencies in the plans and other city actions caused it to incur substantial expenses over and above those anticipated. In appealing a Superior Court award of damages to the contractor, the city urged that the statute prohibited any award in excess of the amount appropriated for the school's construction. We rejected that argument, saying that, [***11] "[w]hile the contractor on a public construction contract must follow the procedures spelled out in the contract and cannot by labeling his claims a breach of contract unilaterally accrue expenses, . . . some claims do fall outside the contract, and because of the municipality's conduct constitute a 'true breach.' . . . [***111] Where that occurs, we do not think the term 'incur a liability' was intended to shield a municipality from liability for its wrongful actions." *Id.* at 13. See [*495] *Worcester v. Granger Bros.*, 19 Mass. App. Ct. 379, 388, 474 N.E.2d 1151 (1985) ("[w]e have interpreted [G. L. c. 44, § 31,] to prohibit an arbitration award which exceeds the appropriation unless the municipality has committed a breach of contract") (emphasis omitted). See also *Glynn v. Gloucester*, 9 Mass. App. Ct. 454, 461, 401 N.E.2d 886 (1980).

The Supreme Judicial Court has drawn a similar distinction. In *Perseus of N.E., MA, Inc. v. Commonwealth*, 429 Mass. 163, 706 N.E.2d 681 (1999), one of the relevant statutes was G. L. c. 35, § 32, which provided that "[n]o county expenditures shall be made or liability incurred, nor shall a bill be paid for any purpose, in excess of the appropriation therefor." *Id.* at 165. Observing that "[t]he purpose of the statute [***12] [] was to keep county finances in check, not to shield the county from liability for its wrongful actions," *id.* at 166, the Supreme Judicial Court held that the statute did not bar claims for breach of contract. *Id.* at 167.

The MOA the city and the union entered into in this case was a contract. The contract required the city to return the MOA concessions to the union members when it received supplemental funds with which to do so. The arbitrator found that the city received those funds but elected to disburse them elsewhere. That was a breach of the city's contractual obligations. The bailout bill does not shield the city from liability for its breach simply because, by the time the arbitrator's award was entered, the city had spent elsewhere the money it was contractually bound to pay the union members.

In addition to seeking vacation of the award, the city sought a declaration that "payment of any funds, in the absence of an appropriation in the Police Department for FY '04 sufficient to fund the Award violates Chapter 8 of the Acts of 1985 and is void" and that the award "requires the City to violate the law, and is void." The judgment contained no declaratory relief, although it [***13] should have, for when a complaint requests declaratory relief, such relief must be granted. See, e.g., *Boston v. Massachusetts Bay Transp. Authy.*, 373 Mass. 819, 829, 370 N.E.2d 1359 (1977). Accordingly, we order that the judgment be modified to declare that the arbitrator's award does not require the city to violate any law, and payment of that award will not violate chapter 8 of the Acts of 1985 because that statute does not prohibit payment [*496] of awards for breach of contract. As so modified, the judgment of the Superior Court is affirmed.

So ordered.

RALPH J. MAHER vs. RETIREMENT BOARD OF QUINCY & others. ¹

1 Justices of the Quincy Division of the District Court Department of the Trial Court, as nominal parties.

SJC-10182

SUPREME JUDICIAL COURT OF MASSACHUSETTS

452 Mass. 517; 895 N.E.2d 1284; 2008 Mass. LEXIS 773

September 4, 2008, Argued
November 6, 2008, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Maher v. Ret. Bd. of Quincy*, 129 S. Ct. 1909, 173 L. Ed. 2d 1058, 2009 U.S. LEXIS 2570 (U.S., Apr. 6, 2009)

US Supreme Court certiorari denied by *Maher v. Ret. Bd. of Quincy*, 129 S. Ct. 1909, 173 L. Ed. 2d 1058, 2009 U.S. LEXIS 2570 (U.S., Apr. 6, 2009)

PRIOR HISTORY: [*1]**

Norfolk. Civil action commenced in the Superior Court Department on August 27, 2004. After review by the Appeals Court, 67 Mass. App. Ct. 612 (2006), further proceedings were had before Mark S. Coven, J., in the Quincy Division of the District Court Department, and questions of law were reported by him to the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, 67 Mass. App. Ct. 612, 855 N.E.2d 1106, 2006 Mass. App. LEXIS 1094 (2006)

COUNSEL: Frank J. McGee, for the plaintiff.

Michael Sacco, for the defendant.

Martha Coakley, Attorney General & Neil P. Olson, Assistant Attorney General, for the Attorney General & another, amici curiae, submitted a brief.

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

OPINION BY: IRELAND

OPINION

[*518] [**1287] IRELAND, J. We transferred this case from the Appeals Court on our own motion to consider whether a decision of the retirement board of Quincy (board) that the plaintiff's entitlement to a retirement allowance (pension) had been forfeited pursuant to *G. L. c. 32, § 15 (4)*, amounted to an excessive fine in violation of the *Eighth Amendment to the United States Constitution*. Because we conclude that the amount of the plaintiff's pension forfeiture is not excessive, we affirm so much [***2] of the District Court judge's ruling as determined that the plaintiff did not meet his burden of establishing that the forfeiture violated his *Eighth Amendment* rights.

1. *Background and procedure.* We recite the background and lengthy procedural history of this case insofar as relevant here, reserving certain details for our discussion of the issue raised.

The plaintiff, Ralph J. Maher, was employed by the city of Quincy (city) as the chief plumbing and gas inspector. In December, 2001, Maher and another city employee broke into and entered the personnel office at city hall. During the break-in, Maher examined his personnel file and stole a portion of it. He sought to remove documents criticizing his job performance, intending that the absence of such documents might improve his chances for reappointment to his position by the mayor-elect of the city. In January, 2002, he retired from his position for superannuation.

In March, 2002, a grand jury returned three indictments against Maher related to the December, 2001, break-in, to which Maher pleaded guilty in

July, 2003: breaking and entering in the daytime with intent to commit a felony, in violation of *G. L. c. 266, § 18*; stealing in [***3] a building, in violation of *G. L. c. 266, § 20*; and wanton destruction of property, in violation of *G. L. c. 266, § 127*.² Maher was sentenced to six months of unsupervised probation on each conviction, to run concurrently, and was ordered to make restitution of \$ 393 and to pay a fine of \$ 500.

2 Maher pleaded guilty only to so much of the indictment alleging wilful and malicious destruction of property in excess of \$ 250 as charged wanton destruction of property.

[*519] The board instituted proceedings against Maher in August, 2003, and notified him that it would hold a hearing to determine whether his convictions required forfeiture of his rights to his retirement allowance pursuant to *G. L. c. 32, § 15 (4)*. In December, 2003, after the [**1288] hearing, the board issued a written decision determining that Maher's convictions involved violation of the laws applicable to his office or position, and therefore, pursuant to *G. L. c. 32, § 15 (4)*, he had forfeited his retirement allowance.

Maher then commenced this action with the filing of a petition in the District Court, seeking review of the board's decision.³ The details of those proceedings are not relevant to our discussion here. The District Court [***4] judge affirmed the board's decision, granting its motion for judgment on the pleadings and dismissing Maher's petition. Maher then sought review of the judgment of the District Court by filing an action in the nature of certiorari in the Superior Court, pursuant to *G. L. c. 249, § 4*.⁴ A Superior Court judge allowed the board's motion for judgment on the pleadings. Maher appealed.

3 *General Laws c. 32, § 16 (3) (a)*, provides, in pertinent part:

"[A]ny member who is aggrieved by any action taken or decision of a board . . . rendered with reference to his dereliction of duty as set forth in section fifteen, may, within thirty days after the certifica-

tion of the decision of the board, bring a petition in the district court . . . praying that such action and decision be reviewed by the court. After such notice as the court deems necessary, it shall review such action and decision, hear any and all evidence and determine whether such action was justified. If the court finds that such action was justified the decision of the board . . . shall be affirmed; otherwise it shall be reversed and of no effect. . . . The decision of the court shall be final."

4 Pursuant to *G. L. c. 249, § 4*, Maher [***5] added to his action in the Superior Court the Justices of the Quincy Division of the District Court Department as nominal defendants. See note 1, *supra*.

On appeal, the Appeals Court held, among other things, that the Superior Court judge erred in ruling that, because Maher had not raised before the board the claim that the forfeiture provision of *G. L. c. 32, § 15 (4)*, as applied to him, constituted an "excessive fine" prohibited by the *Eighth Amendment*, he had waived that claim.⁵ *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 67 *Mass. App. Ct.* 612, 621, 855 *N.E.2d* 1106 (2006). Citing [*520] our decision in *MacLean v. State Bd. of Retirement*, 432 *Mass.* 339, 733 *N.E.2d* 1053 (2000), the Appeals Court concluded that consideration of Maher's *Eighth Amendment* claim would require additional fact finding, in order to determine whether Maher's pension forfeiture was grossly disproportionate to the gravity of the crimes of which he had been convicted. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, *supra* at 620. The Appeals Court vacated the judgment of the Superior Court and remanded the case to the District Court for consideration of Maher's *Eighth Amendment* claim. *Id.* at 621.⁶

5 The Appeals Court also [***6] concluded that the board properly determined

that Maher's convictions involved violation of the laws applicable to his position, *G. L. c. 32, § 15 (4)*, and that a board member did not err in refusing to recuse himself from the board proceedings. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 67 *Mass. App. Ct.* 612, 621, 855 *N.E.2d* 1106 (2006).

6 We denied Maher's application for further appellate review. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 448 *Mass.* 1105, 861 *N.E.2d* 29 (2007).

On remand, the District Court judge issued a written decision in which he made additional findings and concluded that the forfeiture did not violate Maher's *Eighth Amendment* rights. The District Court [**1289] judge did not direct the entry of judgment following his decision; instead, the judge purported to report two questions of law to the Appeals Court.⁷ We transferred the case from the Appeals Court on our own motion.⁸

7 The District Court judge purported to report the following questions:

"1. Does a forfeiture of a pension, pursuant to *G. L. c. 32, § 15 (4)*, implicate the *Excessive Fines Clause of the Eighth Amendment to the United States Constitution*?

"2. If the *Excessive Fines Clause* is implicated, on the [***7] facts of this case, has Maher failed to meet his burden of demonstrating the forfeiture of his pension constitutes an *Excessive Fine*?"

8 We acknowledge the amicus brief filed by the Attorney General and the State Board of Retirement.

2. *Discussion.* a. *Propriety of report.* As a threshold matter, we consider an issue not addressed by either party: the propriety of the report on which this case comes before us. No statute or rule authorizes a District Court judge, in a civil ac-

tion, to report a case or a ruling to the Appeals Court. The judge improperly reported his decision in this case to the Appeals Court; it would have been proper for the judge to report his decision to the Appellate Division of the District Court. See *G. L. c. 231, § 108 [*521]* (providing that District Court judge may report case, after decision, to Appellate Division). See also *Mass. R. Civ. P. 64 (b)*, as appearing in 423 *Mass.* 1410 (1996) (report by District Court judge of case or ruling to Appellate Division governed by *Rule 5 of Dist./Mun. Cts. Rules for Appellate Division Appeal* [2008]). Cf. *Mass. R. Civ. P. 64 (a)*, as appearing in 423 *Mass.* 1410 (1996) (authorizing trial court judge *other* than District Court judge to [***8] report case to Appeals Court after verdict or findings of fact, or to report case without decision where parties agree to all material facts and request report of case, or to report propriety of interlocutory finding or ruling).

Where a report is not properly before us, we ordinarily discharge it and decline to decide the case. See, e.g., *Heck v. Commonwealth*, 397 *Mass.* 336, 338-339, 491 *N.E.2d* 613 (1986). Because of the particular circumstances of this case, however, we exercise our power of general superintendence, *G. L. c. 211, § 3*, and decide the issue presented.

Here, the Appeals Court vacated the judgment of the Superior Court in Maher's certiorari action, and remanded this case to the District Court for further consideration of the *Eighth Amendment* claim. *General Laws c. 32, § 16 (3) (a)*, expressly provides that "the decision of the [District] [C]ourt [in reviewing the board's decision] shall be final." See note 3, *supra*. "[C]ertiorari is the only way of reviewing decisions declared final by statute." *Doherty v. Retirement Bd. of Medford*, 425 *Mass.* 130, 134, 680 *N.E.2d* 45 (1997), quoting *MacKenzie v. School Comm. of Ipswich*, 342 *Mass.* 612, 614, 174 *N.E.2d* 657 (1967). See *State Bd. of Retirement v. Bulger*, 446 *Mass.* 169, 173, 843 *N.E.2d* 603 (2006) [***9] (*G. L. c. 249, § 4*, provides limited judicial review in nature of certiorari to correct errors of law in administrative proceedings where judicial review otherwise unavailable).

Were we to discharge, as improper, the report in this case, the procedural avenue for the parties to obtain further review following the entry of judgment in the District Court would be the filing of a new certiorari action in the Superior Court. An ap-

peal from a subsequent [**1290] judgment of the Superior Court would then present an appellate court with the same question to be decided here. Maher's *Eighth Amendment* claim is the only issue in this case that remains subject to appeal. Requiring the parties at this [*522] stage to exhaust the proper procedural route to obtain review of this case would not serve the interests of judicial economy.⁹

9 The judge's report, although referring to his decision, nonetheless takes the form of two questions of law. "Although a judge may report specific questions of law in connection with an interlocutory finding or order, the basic issue to be reported is the correctness of [the] finding or order. Reported questions need not be answered in this circumstance except to the extent that it is necessary [***10] to do so in resolving the basic issue." *McStowe v. Bornstein*, 377 Mass. 804, 805 n.2, 388 N.E.2d 674 (1979). We therefore disregard the questions posed by the judge and evaluate the propriety of the ruling. *Barnes v. Metropolitan Hous. Assistance Program*, 425 Mass. 79, 84, 679 N.E.2d 545 (1997).

b. *Excessiveness of fine*. Maher argues that the District Court judge erred in concluding that he had not met his burden of proving that the forfeiture violated the *Eighth Amendment*. The *Eighth Amendment*, applicable to the States through the *due process clause of the Fourteenth Amendment to the United States Constitution*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-434, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001), citing *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), provides: "Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishments inflicted." The *excessive fines clause of the Eighth Amendment* "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), quoting *Austin v. United States*, 509 U.S. 602, 609-610, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). "Forfeitures -- payments in kind -- are thus 'fines' if they constitute punishment [***11] for an offense." *United States v. Bajakajian*, *supra*. "The touchstone of the constitutional inquiry under

the *Excessive Fines Clause* is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334. A court reviewing the proportionality of a forfeiture therefore compares the amount of the forfeiture to the gravity of the underlying offense that triggered it. *Id.* at 336-337. "If the amount of the forfeiture is grossly disproportional to the gravity of the [triggering] offense, it is unconstitutional." *Id.* at 337.

For purposes of this appeal, we assume, without deciding, that (as Maher argues) the District Court judge correctly ruled that the *excessive fines clause* applies to the pension forfeiture provision of *G. L. c. 32, § 15 (4)*. See *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 346, 733 N.E.2d 1053 (2000) (assuming, without deciding, pension forfeiture required by *G. L. c. 32, § 15 [4]*, amounts to punishment and therefore constitutes "fine"). Therefore, we turn to Maher's argument that the District Court judge erred in concluding that Maher had not met his burden of establishing that the forfeiture [***12] of his pension was excessive. The judge found that the total amount that Maher forfeited would be approximately \$ 576,000.¹⁰ A party challenging the constitutionality of a [**1291] forfeiture as being excessive bears the burden of demonstrating excessiveness. *Id.* at 347, citing *United States v. Ahmad*, 213 F.3d 805, 816 (4th Cir. 2000). We review the proportionality determination made by the District Court judge de novo, see *United States v. Bajakajian*, *supra* at 336, and, as mentioned, we determine whether the forfeiture was excessive by drawing the constitutionally required comparison between the magnitude of the forfeiture required by the statute and the gravity of the triggering offenses. See *United States v. Bajakajian*, *supra* at 336-337.

10 Maher conceded the accuracy of this amount at oral argument.

In evaluating the gravity of the underlying offenses that triggered the forfeiture of Maher's pension pursuant to *G. L. c. 32, § 15 (4)*, we gauge the degree of Maher's culpability and consider the harm caused by the underlying offenses. *Id.* at 338-340. To gauge the degree of Maher's culpability, we look to, among other things, the nature and circumstances of his offenses, e.g., whether there was

[**13] a relationship between the crimes that triggered the forfeiture and any other illegal activities, as well as to the maximum penalties authorized by the Legislature as punishment for his offenses. See *id.* at 337-339. See also *MacLean v. State Bd. of Retirement*, *supra* at 346.

By any measure, the crimes to which Maher pleaded guilty are serious in nature.¹¹ "The offense of breaking and entering in the daytime [in violation of *G. L. c. 266, § 18*,] falls within the [*524] definition of a felony." *Commonwealth v. Soares*, 51 *Mass. App. Ct.* 273, 277 n.5, 745 *N.E.2d* 362 (2001), citing *Commonwealth v. Sheeran*, 370 *Mass.* 82, 88, 345 *N.E.2d* 362 (1976). "[L]arceny in a building [in violation of *G. L. c. 266, § 20*,] is a felony regardless of the value of the items stolen." *Commonwealth v. Cruz*, 430 *Mass.* 182, 188, 714 *N.E.2d* 813 (1999), citing *Commonwealth v. Ronchetti*, 333 *Mass.* 78, 82, 128 *N.E.2d* 334 (1955).

11 Maher argues that our analysis should take into account the lack of a nexus between the crimes to which he pleaded guilty and his entitlement to receive a pension. This contention is unavailing. The District Court judge found that Maher intended through his unlawful acts to secure continued employment by means of fraud, i.e., depriving the incoming mayor of [**14] information appearing within Maher's personnel record that would have tended to show that Maher was not a suitable candidate for reappointment to his position. If Maher had succeeded, he would have gained fraudulently obtained income and increased pension benefits. To the extent that Maher's argument goes to the question whether his convictions involved violation of laws applicable to his position, that question is not before us. That determination was made by the board in the first instance, upheld by the District Court and the Superior Court, and affirmed by the Appeals Court. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 67 *Mass. App. Ct.* 612, 621, 855 *N.E.2d* 1106 (2006), *S.C.*, 448 *Mass.* 1105, 861 *N.E.2d* 29 (2007) (further appellate review denied).

In addition, the Legislature has authorized the following maximum penalties as punishment for the crimes to which Maher pleaded guilty: (1) breaking and entering into a building in the daytime with intent to commit a felony, in violation of *G. L. c. 266, § 18*, is punishable by a maximum sentence of up to ten years in State prison; (2) stealing in a building, in violation of *G. L. c. 266, § 20*, is [**1292] punishable by imprisonment in the State prison for up to [**15] five years; and (3) wanton destruction of property (the door of the personnel director's office), in violation of *G. L. c. 266, § 127*, is punishable by imprisonment for up to two and one-half years. These punishments indicate the gravity and seriousness with which the Legislature views these crimes.¹² See *MacLean v. State Bd. of Retirement*, *supra* at 348. See also *United States v. Bajakajian*, *supra* at 336 (determination of appropriate punishment for offense belongs to Legislature in first instance, and any judicial determination of gravity of criminal offense is inherently imprecise).

12 Maher contends that we should consider the relative leniency of the sentence he received in our assessment of his degree of culpability. The sentence imposed as punishment for conviction of a particular offense, however, does not control our analysis; rather, the maximum punishment authorized by the Legislature is the determinative factor. See *MacLean v. State Bd. of Retirement*, *supra* at 348.

Maher argues that the harm he caused was minimal, where he acquired no financial gain from his actions, and where (as he argues) the only pecuniary loss to the city was the cost of repairing the office door damaged [**16] during the break-in. We disagree. It is immaterial that Maher did not achieve the goal of his criminal [*525] enterprise, which was fraudulently to secure continued employment through reappointment to his position. The District Court judge found that had Maher succeeded in obtaining reappointment, he stood to gain approximately \$ 125,000 in salary during the two-year term of the incoming mayor. Furthermore, we view the potential harm to the public trust caused by Maher's actions as equally important to our analysis as any potential harm his actions might have caused to the public fisc. The District Court judge concluded that Maher's crimes could have

undermined public confidence in the selection and appointment of officials to supervisory positions. We agree.

Comparing the total amount of the forfeiture of Maher's pension, approximately \$ 576,000, to the gravity of the underlying offenses to which he pleaded guilty, we cannot say that the forfeiture is grossly disproportional. See *MacLean v. State Bd. of Retirement, supra at 350* (forfeiture of pension totaling approximately \$ 625,000 not excessive where former State employee pleaded guilty to two misdemeanor violations of *G. L. c. 268A, § 7*,

***17] the conflict of interest statute). There was no error.

3. Conclusion. For the reasons stated above, we affirm so much of the District Court judge's ruling as determined that the plaintiff did not meet his burden of establishing that the forfeiture violates his *Eighth Amendment* rights. The case is remanded to the District Court where judgment shall enter for the defendants.

So ordered.

MARY ANN MORSE HEALTHCARE CORP. vs. BOARD OF ASSESSORS OF FRAMINGHAM.

No. 08-P-1717

APPEALS COURT OF MASSACHUSETTS

74 Mass. App. Ct. 701; 910 N.E.2d 394; 2009 Mass. App. LEXIS 1019

May 7, 2009, Argued
July 27, 2009, Decided

PRIOR HISTORY: [**1]

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

HEADNOTES

Taxation, Real estate tax: abatement, charity, exemption.

COUNSEL: George A. Balko, III (Donna M. Truex with him) for the taxpayer.

JUDGES: Present: Grainger, Brown, & Rubin, JJ.

OPINION BY: GRAINGER

OPINION

[*701] GRAINGER, J. In this appeal from a decision of the Appellate Tax Board (board) we are called upon to review the denial of an exemption from real estate taxation pursuant to *G. L. c. 59, § 5, Third*. Mary Ann Morse Healthcare Corp. (Morse) operates an assisted living facility known as Heritage of Framingham (Heritage) on real property located in the town of Framingham (town). After the town's board of assessors denied Morse's application for an abatement of real estate taxes, Morse filed a timely but unsuccessful appeal to the board. Specifically, Morse asserts error in the board's failure to find that: (a) Morse operates as a traditional public charity relieving its residents from the hardships [*702] and constraints that afflict them, (b) Morse serves a sufficiently large and fluid segment of the population to qualify for real estate tax exemption under *G. L. c. 59, § 5, Third*, (c) Morse's charitable purpose and use of the property advance the public good, and thereby lessen the burdens of government, (d) Morse owns and occupies [**2]

the Alzheimer/dementia portion of the property for its charitable purpose, and (e) seventy-one percent of the property (consisting of the Alzheimer's/dementia portion of the property and those portions of the common areas that service Alzheimer's and dementia residents) is exempt from real estate taxation under *G. L. c. 59, § 5, Third*.

The facts appear undisputed.¹ Morse is exempt from Federal income taxation under § 501(c)(3) of the *Internal Revenue Code* and has no shareholders or capital stock. No part of its income is utilized for anything other than its charitable purposes.² At all relevant times, Morse operated Heritage as an assisted living facility at the property. Heritage consists of two buildings: Building A which contains common areas and forty-eight assisted living apartments, and Building B which contains forty assisted living apartments (known as the Homestead apartments) intended for use by individuals with Alzheimer's disease, dementia, and memory impairment. Morse contends that all parts of Heritage used by the Homestead residents are exempt from taxation, including all of Building B and the common areas of Building A, which also serve the Homestead residents.

1 The [**3] town did not file a brief or supplement the record in this appeal.

2 Morse's articles of incorporation list its charitable purposes as follows:

"1. To establish, acquire, operate and maintain nursing homes and long term care facilities within the Commonwealth of Massachusetts . . . and to provide such medical, educational and charitable ser-

vices as may be consistent with any license granted to the corporation by any governmental agency or as may be otherwise lawful.

"2. To advance the knowledge and practice of medicine and nursing through research and education relating to the care, treatment and healing of patients.

"3. To improve public health in cooperation with federal, state, municipal, and other health departments and offices."

Discussion. We review the board's decision for errors of law. See *South St. Nominee Trust v. Assessors of Carlisle*, 70 Mass. App. Ct. 853, 855-856, 878 N.E.2d 931 (2007), and cases cited. The board's [*703] findings of fact must be supported by substantial evidence. The board determined that Morse met neither part of the twofold test for determining whether an organization qualifies for property tax exemption pursuant to *G. L. c. 59, § 5*, Third, and we consider each part in turn.

The [**4] *community benefit test.* The board's decision relies in large part on the Supreme Judicial Court's discussion in *Western Mass. Lifecare Corp. v. Assessors of Springfield*, 434 Mass. 96, 747 N.E.2d 97 (2001), and cases cited therein. *Western Mass. Lifecare* provides detailed guidance on the factors relevant to a determination that an organization provides a public benefit sufficiently broad to justify the public support that tax exemption represents. "An organization 'operated primarily for the benefit of a limited class of persons,' such that 'the public at large benefit[s] only incidentally from [its] activities,' is not charitable." *Id.* at 104, quoting from *Cumington Sch. of the Arts, Inc. v. Assessors of Cumington*, 373 Mass. 597, 600, 369 N.E.2d 457 (1977). "While there is no 'precise number' of persons who must be served in order for an organization to claim charitable status, and 'at any given moment an organization may service only a relatively small number of persons,' membership in the

class served must be 'fluid' and must be 'drawn from a large segment of society or all walks of life.'" *Western Mass. Lifecare*, *supra* at 104, quoting from *New England Legal Foundation v. Boston*, 423 Mass. 602, 612, 670 N.E.2d 152 (1996). "[S]election [**5] requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption." *Western Mass. Lifecare*, *supra* at 104.

The board's decision issued in September, 2007, and Morse requested a report with findings of fact. See *G. L. c. 58A, § 13*. Although the board's report was promulgated on August 19, 2008, some five weeks after the Supreme Judicial Court issued its decision in the case of *New Habitat, Inc. v. Tax Collector of Cambridge*, 451 Mass. 729, 889 N.E.2d 414 (2008), the board's findings and report make no reference to that case. *New Habitat* provides an interpretive lens through which we now view *Western Mass. Lifecare* and its predecessors. Specifically, *New Habitat* emphatically conditions the importance of previously established factors on the extent to which "the dominant purposes and methods of the organization" are traditionally charitable. *Id.* at 733. The [*704] number of individuals receiving services, whether they are from diverse walks of life, the fees charged to those individuals, and the relationship between the service fees and the cost of those services to the provider -- all these are factors that inform a decision under the community [**6] benefit test; where however an organization is found to be traditionally charitable in nature, these factors play "a less significant role in our determination of its charitable status" for purposes of property tax exemption. *Id.* at 737. Applying this approach in *New Habitat*, the Supreme Judicial Court vacated the summary judgment entered below for the tax collector and ordered summary judgment to be entered instead for the taxpayer. *Id.* at 739.

In this context we examine the board's determination that Morse does not qualify as a public charity under the community benefit test. The board found that the fees charged by Morse, combined with the fact that Medicaid is unavailable to cover those fees, placed Morse "beyond the reach of a sufficiently broad cross-section of the elderly population."³ We note, however, that in comparison to the facts analyzed in *New Habitat*, Morse charges much lower fees and provides services to a much

larger group of residents. While the dramatic disparity in these cases⁴ might theoretically be reconciled by an equally dramatic difference in the extent to which the taxpayer in each case performed traditionally charitable functions, the record does not support [**7] such a justification. See, e.g., *H-C Health Servs., Inc. v. Assessors of S. Hadley*, 42 Mass. App. Ct. 596, 599, 678 N.E.2d 1339 (1997) ("operation of a nursing home for the elderly and the infirm is the work of a charitable corporation"); *William B. Rice Eventide Home, Inc. v. Assessors of Quincy*, 69 Mass. App. Ct. 867, 872 N.E.2d 772 (2007) (discussion of proper method and deadline for nursing home to appeal loss of exemption after many years of recognition as a charitable [**705] institution under *G. L. c. 59, § 5, Third*). Moreover, the board has not referred to this consideration in its decision.

3 Conversely, in *New Habitat*, the court held that a taxpayer would "not fail to qualify for charitable status merely because its residents have the means to live elsewhere before they become dependent on the State for care." *New Habitat*, 451 Mass. at 738.

4 The board found that Morse charged monthly fees of between \$ 4,100 and \$ 5,920 for the residential apartments here at issue, serving forty Alzheimer's/dementia patients. *New Habitat's* monthly fees ranged from \$ 17,000 to \$ 18,000 in a facility able to accommodate four residents suffering from brain damage, and housing but two at the time of the appeal in that case. 451 Mass. at 730.

Considering [**8] Morse's indisputable performance of a traditional public charitable function, the record before us, and the guidance of *New Habitat*, we conclude that the board's determination that Morse is not a public charity under the provisions of *G. L. c. 59, § 5, Third*, was error.

The occupancy test. The board also concluded that the individual residents of Homestead occupied the premises, and that therefore Morse could not be an occupant for purposes of an exemption analysis under *G. L. c. 59, § 5, Third*. In so concluding the board relied heavily on *G. L. c. 19D*, which it characterized as providing Homestead residents the "legal status as tenants."⁵ *Charlesbank Homes v. Bos-*

ton, 218 Mass. 14, 105 N.E. 459 (1914) (residents in low rent apartments owned by charitable corporation are strictly tenants, and are occupants thereof). Additionally, the board pointed to various provisions in the residency agreement, specifically the privacy rights conferred on the residents, the expectation that residents would carry their own insurance, and the residents' entitlement to have their recommendations and grievances addressed by Morse.

5 The board cited the following sections of *G. L. c. 19D: § 9(a)(18)* (requiring Morse to comply [**9] with the eviction requirements set forth in *G. L. c. 186* or *c. 239*), and *§ 16* (requiring assisted living residences to have specified private bathroom facilities and access to cooking capacity for the residents).

As stated above, we review the board's decision, including its application of *G. L. c. 19D*, for errors of law. In interpreting *c. 19D*, the board is deriving a tax implication from a statute covering an unrelated area and empowering a separate agency with regulatory authority.⁶ While we give "deference to the expertise of the board in tax matters involving interpretation of the laws of the Commonwealth," *Northeast Petroleum Corp. v. Commissioner of Rev.*, 395 Mass. 207, 213, 479 N.E.2d 163 (1985), we give no deference to an incorrect interpretation. See *Kszepka's Case*, 408 Mass. 843, 847, 563 N.E.2d 1357 (1990).

6 *General Laws c. 19D, § 4*, vests the Executive Office of Elder Affairs with the authority to certify sponsors of assisted living residences, who in turn are responsible for managing those residences according to the applicable laws and regulations.

We concur that there is a rational nexus between the residents' right to privacy and the question of occupancy; however, unlike [**706] the board we do not consider [**10] it to be a persuasive indication that Morse does not occupy the property. There are several reasons why the two factors are less than congruent. We note, first, that occupancy need not be exclusive, and that the occupancy test for property tax exemption is nowhere so described. While exclusive possession of a tenant has been held to defeat occupancy by another, see

Charlesbank Homes, supra at 16-17, that is not the case presented by this record, which establishes without dispute shared rights to the premises.⁷ Nor are occupancy and residence identical concepts under the law.⁸ We are therefore unpersuaded that G. L. c. 19D's procedural protections against eviction, while indisputably relevant to the residents' status, should also provide a conclusive basis to characterize Morse's status.⁹

7 Cases dealing with analogous shared possession have held that, in the absence of exclusive possession by tenants, the owner is considered the "occupant." See *M.I.T. Student House, Inc. v. Assessors of Boston*, 350 Mass. 539, 542, 215 N.E.2d 788 (1966) (occupation of cooperative living arrangement home was by corporation rather than those to whom it afforded home). See also *Franklin Square House v. Boston*, 188 Mass. 409, 410-411, 74 N.E. 675 (1905) [****11**] (holding the same for a "home for working girls").

8 "Resident" is defined as "[a] person who lives in a particular place," while "[o]ccupant" is defined as "[o]ne who has possessory rights in, or control over, certain property or premises." Black's Law Dictionary 1335, 1108 (8th ed. 2004).

9 For example, Morse's possessory rights in the face of foreclosure or eminent domain are at least equal to, if not greater than, tenants' rights in the face of eviction.

The traditional charitable purpose in which Morse is engaged, the very factor emphasized in *New Habitat*, here consists of providing living space and residential assistance to individuals who are unable to manage on their own. The board's emphasis on Morse's use of the property to provide residences -- and a certain level of residential privacy -- for the recipients of its services amounts to penalizing Morse for performing the charitable function that constitutes its mission. This anomalous result is difficult to defend under the charitable tax exemption regime of G. L. c. 59, and finds no support in the peripherally related purposes of G. L. c. 19D.

The residential agreement between Morse and the residents also provides insight into [****12**] the question of occupancy, including the element of

privacy. While absolute privacy suggests exclusive [****707**] occupancy, inferentially derived from exclusive possession of, or control over, the area in question, the residents' privacy here is far from absolute. They are entitled to twenty-four hours' notice before Morse enters an apartment, with the notable exceptions of entry to carry out the services provided by the contract or in case of an emergency. This, again, places the emphasis where it belongs, namely on Morse's presence in each apartment to perform its charitable function. Inasmuch as a predicate for the residents' occupancy is their need for Morse employees also to be present to assist them with daily living and medical needs, it is unsurprising that their right to privacy is correspondingly conditioned. Accordingly, we reject the inference of Morse's nonoccupancy derived by the board from the existence of certain privacy rights and eviction safeguards vested in the residents by statute and by the residency agreement.

The other indicia of residents' occupancy relied upon by the board are the right to have recommendations and grievances addressed and the expectation that they will [****13**] carry property insurance.¹⁰ While these factors provide some, albeit not strong, basis for characterizing the residents as occupants, they do not, as noted above, preclude occupancy by Morse.

10 We also note that the residency agreement, provided in the record, contains a reference to "the Owner's right to require changes in the apartments," suggesting that Morse controls the placement and, if necessary, the relocation of residents within the Heritage facility.

Conclusion. Morse performs a long recognized, traditionally charitable, function. Under the standards of our case law, as most recently enunciated by *New Habitat*, the board's findings require the conclusion that Morse provides a community benefit in its provision of housing and assistance to those suffering from Alzheimer's disease and similar conditions. In order to provide this benefit, Morse owns and administers real property in which it provides residences for those who benefit most directly from its charitable purpose. The board erred in concluding that the occupancy of those residences by the beneficiaries of Morse's charity re-

solves the issue of Morse's occupancy for purposes of determining G. L. c. 59 tax exemption eligibility. **[**14]** The board's findings, and the record as a whole, establish Morse's occupancy for tax exemption purposes where it is undisputed that the residents' **[*708]** occupancy is conditional on, and dependent on, Morse's regular presence and control.

Finally we note that the board's report made it unnecessary to consider the common areas of Building A, and consequently contains no findings on the use of those areas. As noted *supra*, Morse claimed a partial exemption for Building A, charac-

terizing the common areas of that building as serving the residents of Building B; the applicability of the exemption to those common areas remains unresolved.

We vacate the decision of the board and remand the matter for the purpose of determining the taxable status of the Building A common areas. A new decision shall enter granting Morse a tax exemption and abatement of its real estate tax consistent with this opinion.

So ordered.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs. BOSTON CARMEN'S UNION, LOCAL 589, AMALGAMATED TRANSIT UNION (and a companion case).

SJC-10291

SUPREME JUDICIAL COURT OF MASSACHUSETTS

454 Mass. 19; 907 N.E.2d 200; 2009 Mass. LEXIS 172; 186 L.R.R.M. 2682; 157 Lab. Cas. (CCH) P60,813

**March 3, 2009, Argued
June 4, 2009, Decided**

PRIOR HISTORY: [*1]**

Suffolk. Civil actions commenced in the Superior Court Department on February 27 and July 31, 2006. After consolidation, the cases were heard by Diane M. Kottmyer, J., on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Mary Jo Harris (Philip G. Boyle with her), for the plaintiff.

Douglas Taylor, for the defendant.

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

OPINION BY: SPINA

OPINION

[**202] [*20] SPINA, J. The Massachusetts Bay Transportation Authority (MBTA) appeals from judgments of the Superior Court confirming two separate awards by the same arbitrator in cases that were consolidated by virtue of a common issue, namely, whether an arbitrator's decision must be vacated on the ground that it violates public policy, where the arbitrator found against an employer who acted to remediate its own perceived illegal discrimination, but contrary to the terms of a collective bargaining agreement.

In the first case (Wick), the MBTA settled a handicap discrimination case (refusal to hire) without consent of the Boston Carmen's Union, Local

589, Amalgamated Transit Union (union), after a finding of probable cause by an investigating [***2] commissioner of the Massachusetts Commission Against Discrimination (MCAD). The settlement included a payment to William Wick, the claimant, in the amount of \$ 16,000, a grant to Wick of seniority under the collective bargaining agreement that was retroactive to the date he was first offered the job, and the grant of a rate of pay under the collective bargaining agreement at the top of the progressive pay scale based on months of service. The arbitrator concluded that the grant of retroactive seniority and the corresponding hourly wage violated the collective bargaining agreement, and because there had been no finding of discrimination by the MCAD, the settlement was a "private" agreement that must yield to the collective bargaining agreement. She found against the MBTA, and the Superior Court judge confirmed the decision of the arbitrator. We conclude that a presumption of legitimacy arose from the settlement agreement that the union did not rebut by showing that the settlement was an attempt to subvert the collective bargaining agreement, and that because retroactive seniority is a presumptive remedy for discrimination in hiring, public policy requires the arbitrator's award be vacated.

In [***3] the second case the MBTA, concerned that its "spare [*21] inspector" list (from which certain bus operators were given opportunities to work temporarily in a higher job classification based on seniority) might be based on a discriminatory practice, unilaterally eliminated the list and created a new list without union consent. Although there was no suggestion of bad faith, the arbitrator found there was no factual basis to sup-

port the MBTA's concern of discrimination, and concluded the MBTA violated the collective bargaining agreement. We affirm the judgment in that case.

I

The Case of William Wick

The facts are not in dispute. In 1999, William Wick applied to the MBTA for a [**203] position as rail repairer. On December 18, 1999, he was offered a position on condition that he pass a physical examination. Wick wears hearing aids, but the test was conducted without allowing him to use his hearing aids. On February 19, 2000, the MBTA notified Wick that he failed the hearing test and it withdrew the offer of employment.

Wick filed a complaint with the MCAD in which he alleged discrimination (refusal to hire) based on his handicap, in violation of *G. L. c. 151B, § 4 (16)*. In particular he alleged that he [***4] should have been accommodated by the reasonable measure of allowing him to wear his hearing aids at work. On January 13, 2001, an investigating commissioner with the MCAD found probable cause and scheduled a settlement conference. The matter did not settle and the case proceeded. On June 24, 2004, the MBTA and Wick entered into a settlement agreement whereby, in exchange for a general release, the MBTA would employ Wick as a rail repairer at the top hourly rate with seniority retroactive to December 18, 1999, the date of the MBTA's initial offer of employment. The MBTA also agreed to pay him \$ 16,000. The MBTA made no admission of discrimination. Wick commenced work as a rail repairer on July 1, 2004. The union had not been informed of the settlement negotiations and did not approve the settlement.¹

1 In its brief the union explains that William Wick was not entitled to its representation unless and until he was an employee of the Massachusetts Bay Transportation Authority (MBTA).

[*22] The union filed a grievance on behalf of an employee who lost a bid for a posted vacancy on the day shift to Wick, asserting that the employee had greater seniority than Wick. The union claimed that in the [***5] absence of a finding of discrimi-

nation or its consent, the MBTA did not have the right unilaterally to set wages and seniority of new employees, and Wick in particular, contrary to the terms of the collective bargaining agreement. Section 516 of the collective bargaining agreement provides that seniority ratings would be established when an employee first enters a classification, e.g., rail repairer, and that employees newly entering a classification would start at the bottom of the list. Section 601 of the collective bargaining agreement establishes a progressive pay scale based on months of actual service. The MBTA rejected the grievance and the union proceeded to arbitration under the terms of the collective bargaining agreement.

The union sought an order prohibiting the MBTA generally from negotiating with any individual or group to establish terms and conditions of employment without the consent of the union, even in the context of a civil rights complaint against the MBTA. The union further sought readjustment of Wick's seniority to August, 2004, when he actually entered the department and was classified as a rail repairer, so that he would not have seniority rights greater than [***6] employees who actually worked longer than Wick. It also sought retroactive pay adjustments for fellow bargaining unit members subject to wage progression under the collective bargaining agreement between August, 2004, and August, 2006, amounting to the difference between their actual pay and the pay they would have received if their hourly rate had been at the top rate for rail repairers.

The MBTA argued before the arbitrator that the grievance is not arbitrable because the MBTA has unfettered discretion under *G. L. c. 161A, § 25*,² to set terms and [**204] conditions of compensation and seniority for new employees. Alternatively, the MBTA [*23] argued that it did not violate the collective bargaining agreement by hiring Wick under the terms of the settlement agreement because, under § 102 of the agreement, the MBTA has "the exclusive right . . . to manage its business in the light of experience, good business judgment and changing conditions." The MBTA asserted it thus had the right to end the litigation and settle with Wick in a way that minimized its losses and made him "whole" for an alleged discriminatory failure to hire him in December, 1999, namely, give him the seniority status and the rate [***7] of pay that he

would have attained had he been hired at that time. The MBTA further argued that public policy against discrimination, set forth in *G. L. c. 151B*, required this result.

2 *General Laws c. 161A, § 25*, states in relevant part:

"The directors [of the MBTA] shall have authority to bargain collectively with labor organizations representing employees of the [MBTA] and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, the assignment of work schedules and work locations on the basis of seniority, including: (a) hours of work each day and days worked each week; provided, however, that a change in such assignment shall not provide for a change in classification; and (b) the filling of vacancies by promotion or transfer of qualified applicants on the basis of seniority, health benefits, pensions and retirement allowances of such employees; *provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right: (i) to direct, appoint, and employ officers, agents [***8] and employees and to determine the standards therefor . . .*" (emphasis added).

The arbitrator concluded that the case was arbitrable because the dispute involved issues of seniority and wages, which are not management prerogatives. She also rejected the MBTA's public policy

argument, ruling that absent an adjudication of discrimination the MBTA was obligated to set Wick's compensation and seniority conformably with the terms of the collective bargaining agreement as of the date he actually commenced work. She reasoned that because Wick's discrimination complaint was settled by private agreement he must be regarded as having no greater rights than any other individuals that the MBTA might have hired; and that when the MBTA settled Wick's case it could have compensated Wick for its mistake in ways other than granting him rights under the collective bargaining agreement to which he was not entitled. The Superior Court judge agreed with the arbitrator's analysis, determined that the award did not violate public policy, and confirmed the award.

Discussion. The MBTA first contends that, because it has the exclusive and inherent management right to "appoint [] and [*24] employ . . . employees and [***9] to determine the standards therefor" under *G. L. c. 161A, § 25*, this matter is not arbitrable. See *G. L. c. 150C, § 11 (a) (3)* (arbitrator's award may be vacated if she "exceeded [her] powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law"); *School Comm. of Hanover v. Curry*, 369 Mass. 683, 343 N.E.2d 144 (1976). The union acknowledges in section 102 of the collective bargaining agreement that the MBTA has the exclusive right to manage its own business. The union does not dispute that under *G. L. c. 161A, § 25*, the MBTA may employ whom it pleases, or that it may set employment standards. Cf. *School Comm. of Holbrook v. Holbrook Educ. Ass'n*, 395 Mass. 651, 652, 655, 481 N.E.2d 484 (1985) ("*G. L. c. 71, § 38 . . . provides school committees with exclusive authority to determine the qualifications of teachers*"). Rather, the union argues that seniority and wages are matters for collective [**205] bargaining, they are covered in the collective bargaining agreement, and the MBTA unilaterally may not set the wages and seniority of new employees.

There are two distinct issues before us. The first is whether the arbitrator "exceeded [her] powers" under *G. L. c. 150C, § 11 (a) (3)* [***10], by intruding on a nondelegable authority of the MBTA. See *School Comm. of Southbridge v. Brown*, 375 Mass. 502, 505-506, 377 N.E.2d 935 (1978). The second is whether arbitration of this dispute was

contemplated by the collective bargaining agreement. *Id.* at 504. These are questions for a court to decide. *Id.* at 504, 506. We answer the first question in the negative, and the second in the affirmative.

"[W]ages, salaries, hours, working conditions, the assignment of work schedules and work locations on the basis of seniority" are matters that the Legislature has identified as proper subjects of collective bargaining between the MBTA and the union. *G. L. c. 161A*, § 25. By implication, these matters do not fall within the MBTA's inherent management rights. See *School Comm. of Braintree v. Raymond*, 369 Mass. 686, 690-691, 343 N.E.2d 145 (1976); *Lynn v. Council 93, Am. Fed'n of State, County, & Mun. Employees, Local 193*, 51 Mass. App. Ct. 905, 906, 746 N.E.2d 558 (2001). The first question was not beyond the powers of the arbitrator.

Section 516 of the collective bargaining agreement expressly states: "Seniority shall be measured . . . upon first entering a [*25] classification . . . [and shall] start at the bottom of the respective lists." [***11] In addition, the progressive pay schedule in § 601 of the collective bargaining agreement requires employees to be paid initially at the lowest level of pay agreed on, with specified pay increases to be received based on the number of months actually worked. Section 100 of the collective bargaining agreement provides for arbitration of disputes over matters covered by that agreement, which includes disputes over seniority and wages. The second question was not beyond the powers of the arbitrator. Whether the MBTA conferred seniority status on Wick and agreed to pay him a starting hourly rate contrary to the terms of the collective bargaining agreement is distinct from the question of employment standards, and it constitutes a classic labor dispute that is arbitrable. See *School Comm. of Holbrook v. Holbrook Educ. Ass'n*, *supra* at 657.

The arbitrator next ruled that the MBTA violated the terms of the collective bargaining agreement when it gave Wick seniority retroactive to the date of its initial offer of employment, together with a corresponding hourly rate of pay, without the consent of the union. "[W]e are strictly bound by the arbitrator's factual findings and conclusions of law, [***12] even if they are in error." *School Comm. of*

Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 758, 784 N.E.2d 11 (2003).

The MBTA argues that the arbitrator's award must be vacated because it violates public policy. Specifically, the MBTA argues that the award requires the MBTA to continue the effects of a likely discriminatory practice in violation of *G. L. c. 151B*, § 4 (16), which proscribes handicap discrimination in employment. Although arbitration, particularly of labor disputes, is strongly favored in the Commonwealth as a matter of public policy, see *School Comm. of Pittsfield v. United Educators of Pittsfield*, *supra* at 758, an arbitral award must be vacated on proof of one of the grounds enumerated in *G. L. c. 150C*, § 11. *Id.* Section 11 (a) (3) requires the Superior Court to vacate the award of an arbitrator that "exceeded [her] powers [**206] or . . . requires a person to commit an act or engage in conduct prohibited by state or federal law." An award that violates public policy is such an award. See *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 16, 648 N.E.2d 430 [*26] (1995). "[T]he question of public policy is ultimately one for resolution by the [***13] courts." *Id.* at 16 n.5, quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) (*W.R. Grace*).

Before an arbitral award may be vacated as violating public policy, the policy must be shown to be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace*, *supra*, quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 89 L. Ed. 744 (1945). That analysis has been adopted in our Commonwealth. See *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, *supra*.

The public policy in this case is "well defined and dominant." It is the overriding governmental policy proscribing various types of discrimination, set forth in *G. L. c. 151B*. *General Laws c. 151B*, § 9, states: "This chapter shall be construed *liberally* for the accomplishment of its purposes, and *any law* inconsistent with any provision of this chapter *shall not apply* . . ." (emphasis added). The specific anti-

discriminatory policy involved in this case is set forth in *G. L. c. 151B, § 4 (16)*, which states: "It shall be [***14] an unlawful practice: . . . (16) For any employer . . . to dismiss from employment or refuse to hire . . . or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."

The most meaningful remedy for discrimination in hiring is retroactive seniority. It is designed to make the injured person whole, or put him in nearly the same position he would have enjoyed if he had not been rejected from employment for discriminatory reasons. "Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual . . . will never obtain his rightful place in the hierarchy of seniority according to which . . . various employment benefits [*27] are distributed." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 767-768, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976). See *id.* at 763-766. Retroactive seniority is presumptively awarded in Title VII cases. *Id.* at 775 n.34, 779 n.41. [***15] See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (District Court may award retroactive seniority to discriminated class members in Title VII suit over objection of "innocent" union not been found guilty of discrimination). There is no reason to treat cases under *G. L. c. 151B* differently, and neither the union, the arbitrator, nor the judge suggested otherwise.

The MBTA contends that the grant of retroactive seniority and the corresponding hourly wage in the settlement agreement was necessary to make Wick whole. The union acknowledges that a court or the MCAD could have ordered retroactive seniority as a remedy, but only if there had been a finding that the MBTA discriminated against Wick. See *G. L. c. 151B, § 5, [**207]* second par. (MCAD may order "such affirmative action . . . as, in the judgment of the [MCAD], will effectuate the purposes of this chapter"); *Heraty vs. Atlas Oil Co.*, MCAD No. 86-BEM-0123 (1994); *Moreau vs. Haverhill*, MCAD No. 88-BEM-0966 (1993). Cf.

Franks v. Bowman Transp. Co., *supra* at 762-770 (retroactive seniority available remedy under § 706[g] of Title VII of Civil Rights Act of 1964). The focus of the union's argument, and the centerpiece of the decisions [***16] of the arbitrator and the Superior Court judge, is the absence of an adjudication of discrimination, without which, they maintain, the public policy exception does not apply.

Although neither a finding nor an admission of discrimination was made here, the union has cited no case that holds either must be made before the terms of a collective bargaining agreement must yield. Nor has it cited any authority for its claim that settlement of an individual complaint, as here, requires the approval of the tribunal before whom the discrimination complaint is pending as a precondition to overriding the terms of a collective bargaining agreement. An adjudication of discrimination and a tribunal's order for retroactive seniority may indeed be outcome determinative, but they are not necessary. In certain circumstances, which exist here, a settlement may suffice to reliably and substantially establish a violation of the law proscribing discrimination that an arbitrator may not ignore.

[*28] In *Vulcan Soc. of New York City Fire Dept., Inc. v. New York*, 96 F.R.D. 626 (S.D.N.Y. 1983), the court held that settlement of an employment discrimination class action that included a grant of retroactive seniority [***17] did not require approval of an "innocent" union, an adjudication of discrimination, or an express admission of discrimination in order to be approved. *Id.* at 630. The negotiated settlement in that case, rather than a court-imposed decree, was deemed "something that carries with it a strong presumption of legitimacy" with respect to what a judge must consider when approving settlement of a class action. *Id.* at 629. A requirement that an employer proceed to trial simply to obtain a finding of discrimination is irresponsible. To hold otherwise would "force the employer to walk a 'high tightrope without a net.'" *Id.* at 630, quoting *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting).³ It also would violate the strong [**208] public policy that favors settlement of discrimination cases. See *G. L. c. 151B, § 5*, second par. (on determination of probable cause "commissioner [of the MCAD] . . . shall . . . endeavor to eliminate the

unlawful practice complained of . . . by conference, conciliation and persuasion"). See also *W.R. Grace & Co. v. Local Union 759, Int'l Union of [*29] the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 770-771, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) [***18] ("Congress intended cooperation and conciliation to be the preferred means of enforcing Title VII").

3 There are other policies at play in this case. One is the inherent right of the MBTA to conduct its business, with the exception of certain matters that may be the subject of collective bargaining. See *G. L. c. 161A, § 25*. Another is the public policy favoring settlement of disputes. See *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 638, 863 N.E.2d 503 (2007); *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) (public policy favors settlement of employment discrimination claims). The MBTA had the inherent and exclusive management right to minimize, or at least control, its potential losses, which included back pay, attorney's fees and costs, multiple and punitive damages, and civil penalties, see *G. L. c. 151B, § 5*, second and third pars.; *§ 9*, second and third pars., and the cost of a known settlement at no risk. Although the union contends it should have been afforded an opportunity to participate in settlement negotiations, it was the MBTA's exclusive prerogative to fashion a settlement, and the Legislature expressly forbids the MBTA from negotiating with unions over its inherent management [***19] rights. See *G. L. c. 161A, § 25*. Moreover, there was no assurance that the union would not have taken a position contrary to the settlement reached in Wick's case, or any settlement. The union's interest, which might not have been conducive to settlement, included leveraging rejection of the MBTA's position to reopen negotiations with a view toward obtaining a more favorable financial package for its members, an observation made by the arbitrator. Its participation was neither necessary nor appropriate to settle Wick's claim.

The MBTA rested its public policy claim on the settlement agreement and the procedural history of the case that preceded settlement. There was no

need to litigate the facts of Wick's case at arbitration because, as in *Vulcan Soc'y of the N.Y. City Fire Dep't, Inc. v. City of N.Y.*, *supra*, there was a substantial basis to believe that Wick had suffered illegal discrimination. See *id.* at 630 ("high possibility" of discrimination). The facts alleged by Wick are simple, straightforward, and compelling. See *Dahill v. Police Dep't of Boston*, 434 Mass. 233, 748 N.E.2d 956 (2001). The investigating commissioner found probable cause, a fact that we consider as an independent evaluation [***20] that Wick's case was serious and that it had heft, even if Wick ultimately might not have prevailed. The settlement contains the component that is awarded presumptively after a finding of discrimination in hiring, namely, retroactive seniority, which ordinarily would not have been included unless Wick presented a strong case of unlawful discrimination. The settlement also requires the MBTA to pay a sum of money that is no mere trifle or token amount. A public entity⁴ would not likely have entered into such a settlement unless there was a substantial basis to believe Wick would have prevailed. The terms of settlement and the litigation context in which they occur reflect the clear and overriding legislative policy against discrimination. They provide substantial and reliable basis to believe Wick suffered a violation of the antidiscrimination laws.

4 The MBTA is a political subdivision of the Commonwealth. See *G. L. c. 161A, § 2*.

The presumption of legitimacy of the settlement satisfied the MBTA's burden to show that a violation of Wick's civil rights probably occurred and that retroactive seniority was required in Wick's case. This shifted the burden to the union to show that the settlement [***21] between MBTA and Wick was a sham, that is, that the MBTA and Wick colluded to subvert the collective bargaining agreement. The union does not argue that Wick was not handicapped or that he is not capable of performing the essential functions of his job with the reasonable accommodation of the use of hearing aids. There is no question that the MBTA withdrew its [*30] employment offer to Wick because he failed the hearing test. Where the settlement is presumptively legitimate, and where the union has not shown that the settlement was a sham and in derogation of the collective bargaining agreement, public policy required the collective bargaining agree-

ment ⁵ to yield to **[**209]** Wick's settlement agreement. The arbitrator's decision to the contrary effectively perpetuates the MBTA's likely discriminatory conduct and it effectively deprives Wick of the remedy to which he is entitled: retroactive seniority. It therefore violates public policy. The matter must be remanded to the Superior Court for entry of an order vacating the decision of the arbitrator in SUCV2006-03218.

5 We note that the settlement had only a minimal impact on the union members entitled to the benefit of the collective bargaining agreement. **[***22]** It essentially gave Wick what he would have been entitled to receive had he not been impermissibly denied employment because of his handicap. If Wick had been hired on December 18, 1999, he would have been senior to employees hired after that date. In that respect he displaced no one's seniority. To the contrary, union members hired after December 18, 1999, may be viewed as having benefited from the discrimination he suffered. See *Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity*, 514 F.2d 767, 775 (2d Cir. 1975). The settlement reasonably put him in his rightful place among union members. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768, 775, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976). We also note that the settlement did not improperly alter the terms of the collective bargaining agreement. See *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757, 771, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983). Finally, there has been no showing that the result in this case would create an "unusual adverse impact" on other union members. See *Bockman vs. Lucky Stores, Inc.*, No. CIV S83-039 RAR 1986 U.S. Dist. LEXIS 21651 (E.D. Cal. Aug. 11, 1986), citing *Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140 (7th Cir. 1983), **[***23]** cert. denied sub nom. *McDonald v. United Air Lines, Inc.*, 466 U.S. 944, 104 S. Ct. 1928, 80 L. Ed. 2d 474 (1984).

II

The Spare Inspectors Case

There is a classification of employees at the MBTA known as "inspectors." Some inspectors work in bus services, and others work in train services. This case concerns bus services. The duties of those who work in bus services include monitoring attendance of bus operators, directing their activities, monitoring efficiency of bus service, and responding to emergencies. It is a permanent position, and inspectors are in a bargaining unit represented by Local 600 of the Office of Professional Employees International Union, AFL-CIO.

[*31] The back-up system for absent inspectors is the classification of "spare inspectors." The spare inspectors classification is not a full-time or permanent position. Spare inspectors in bus services typically hold the permanent position of bus operator. Individuals who have passed a written examination and otherwise qualify for the spare inspectors position based on job performance, disciplinary and safety records, are given a "ranking" by the MBTA and their names are placed on a spare inspectors list (master list) by date of qualification. A master list was **[***24]** formally adopted on February 16, 2001, in a settlement of litigation between the MBTA and the union. It was not the first such list. The February 16, 2001, master list has both "ranking" and seniority features for which the MBTA aggressively negotiated and litigated.

The spare inspectors are represented by the Boston Carmen's Union, Local 589, Amalgamated Transit Union (union). When Local 600 inspectors are absent or otherwise unavailable, the MBTA assigns spare inspectors by seniority to fill in at the garage where the temporary vacancy exists. Each garage keeps its own list of spare inspectors, in rank order and seniority for that specific garage, based on the master list. The pay for work as spare inspector is higher than the pay for bus operator. An assignment as spare inspector is coveted. Moreover, whenever permanent vacancies occur in the position of inspector, appointments routinely are made from the list of spare inspectors kept by the affected garage, in order of rank and seniority.

As of March, 2004, there were seventy-three names on the master list in bus services, and the MBTA decided to increase the size of the list. An examination had not been given since 2000, and the

[**25] [**210] MBTA posted a notice of its intention to create a new list. One legal consultant for the MBTA was concerned that its past use of discipline as one factor in making placements on the list had adversely affected women and minority bus operators disproportionately, and might be viewed negatively under the MBTA equal employment opportunity compliance program (compliance program), which we discuss later. Consequently, the MBTA decided to eliminate the February 16, 2001, master list and create a new list. In addition, it selected thirty-one union members from the original list and retained them on the new [*32] master list, by garage.⁶ The forty-two union members who were removed from the list were notified that they would have to reapply and take the written test. As a result, a number of them lost seniority to some of the thirty-one who were retained and placed on the new list. The new list was implemented in September, 2004. The union filed a grievance, which was denied. The matter proceeded to arbitration.

6 This created a separate seniority problem that we need not address.

The MBTA argued that the dispute was not arbitrable. It claimed the February 16, 2001, master list had "expired," and [**26] that because it had the inherent management right to assign, employ, and appoint employees, and to determine the standards for employment, it had the unfettered right to create a new list. See *G. L. c. 161A*, § 25. It also relied on § 127 of the collective bargaining agreement, which contains an acknowledgment of the MBTA's inherent management rights pursuant to *G. L. c. 161A*, § 25, and a statement that the MBTA "shall retain complete discretion without regard to seniority to qualify, rank and appoint individuals to the following positions: . . . Spare Chief Inspector, Spare Inspector."

The MBTA also relied on its past involvement in a 1997 agreement between the MBTA, various unions (including Local 589), and the Attorney General in what has been described as the compliance program. The compliance program identified measures required to be taken by the MBTA to implement policies of nondiscrimination and to foster an environment of equal and fair treatment in the daily operations of the MBTA as remediation for past practices that were highly questionable or out-

right discriminatory. The compliance program was designed to self-terminate after three years, in February, 2000, unless the Attorney [**27] General notified the MBTA in writing not less than sixty days in advance of the termination date, setting forth reasons with particularity why it would not terminate, in which case the compliance program would be extended for an additional two years. Thereafter, if the Attorney General determined that the MBTA was not in material compliance with the terms of the compliance program, it would remain in full force and effect until such time as material compliance was achieved.

By letter dated December 20, 1999, the Attorney General [*33] extended the compliance program two years. In January, 2002, the MBTA and the Attorney General entered into a new agreement allowing the Attorney General additional time to review and determine whether the MBTA achieved material compliance under the compliance program. In August, 2002, the Attorney General notified the MBTA that it was not currently in material compliance and he outlined the areas of noncompliance and corrective measures to be taken. On September 15, 2005, the Attorney General agreed that the MBTA effectively had addressed all areas of noncompliance, and the compliance program was terminated. The MBTA had argued during arbitration, [**211] which took [**28] place over three days between May 4 and October 5, 2005, that its decision with regard to elimination of the master list was compelled by the compliance program.

The arbitrator rejected the MBTA's claim that the dispute was not arbitrable. She concluded that the MBTA may have had the inherent right to appoint employees as spare inspectors and place their names on the master list, but having done that, it had no right to remove their names from the list.

Section 219 of the collective bargaining agreement states:

"Seniority Rating -- Bus Operations

"Seniority shall be measured -- i.e., ratings established -- in accordance with the following rules and procedures:

"A. Employees establish a rating date upon first entering a classifica-

tion . . . The rating date in that classification is permanently held under the following circumstances: a) upon transfer or promotion into a full time classification within the department, including Spare Inspector . . .

"B. In the event that more than one employee establishes a rating on the same date, seniority order will be determined by date of first entering a full time classification. In those cases where a list of eligible appointees is created following [***29] specialized qualification (for example, including a test or examination) the seniority date of these employees will be determined by the [MBTA's] ranking of them."

She also rejected the MBTA's claim that the February 16, [*34] 2001, master list was to last only two years. She noted that historically new additions to earlier master lists were appended to whatever remained of a prior list.

The arbitrator concluded there was "no real evidence on the record to support [the MBTA's] claim" that the master list could be found to have been created under discriminatory circumstances. She rejected the MBTA's assertion that it was compelled by the demands of the compliance program to act as it did in March, 2004, with respect to the master list. She found that the February 16, 2001, master list itself was developed in response to and during the Compliance Program, and the Attorney General had issued no directive to eliminate that master list. She found that there was no showing that any employee was excluded or had complained about being excluded or improperly ranked on that master list. She also found there was no evidence that the test that was administered in 2000 for the February 16, 2001, master [***30] list produced an invalid result, and that the test that was administered in 2004 for the new list did not produce qualitatively different results. The arbitrator specifically found that the compliance program neither required nor justified the actions of the MBTA as to the February 16, 2001, master list.

The arbitrator concluded that the MBTA violated the terms of the collective bargaining agreement by eliminating the master list adopted on February 16, 2001, thereby stripping some union members of the seniority to which they were entitled under the collective bargaining agreement. She ordered the MBTA to reconstitute that master list, as well as other remedies we need not address. A Superior Court judge confirmed the award.

Discussion. The arbitrator correctly concluded that the dispute was arbitrable. As in the Wick matter, *infra*, there is no dispute over the inherent management right of the MBTA to "appoint [] and employ . . . employees and to determine the standards" for employment. [**212] *G. L. c. 161A, § 25*. However, once appointed, the employees whose names appeared on the master list acquired seniority rights under the terms of the collective bargaining agreement that are recognized [***31] and protected by the statute. *Id.* The MBTA did not have the inherent management right to strip those employees of their seniority rights by eliminating the [*35] existing master list and creating a new list. See *School Comm. of Holbrook v. Holbrook Educ. Ass'n*, 395 Mass. 651, 652, 655, 481 N.E.2d 484 (1985); *School Comm. of Braintree v. Raymond*, 369 Mass. 686, 343 N.E.2d 145 (1976); *Lynn v. Council 93, Am. Fed'n of State, County, & Mun. Employees, Local 193*, 51 Mass. App. Ct. 905, 906, 746 N.E.2d 558 (2001).

The arbitrator next ruled that the MBTA violated the terms of the collective bargaining agreement. Section 219 of the collective bargaining agreement expressly gives spare inspectors seniority rights, a matter that the Legislature has said is a proper subject for collective bargaining between the MBTA and the union. See *G. L. c. 161A, § 25*. When the MBTA unilaterally eliminated the February 16, 2001, master list and placed selected names on the new master list it deprived union members of seniority status to which they were entitled under the agreement. We are bound by that determination. See *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758, 784 N.E.2d 11 (2003).

We turn to the public policy question. The Legislature [***32] has determined that discrimination against employees on the basis of race, national origin, or sex, as well as other features not applicable

here, is illegal. See *G. L. c. 151B, § 4 (1)*.⁷ This is a well-defined and dominant policy, see *G. L. c. 151B, § 9*, and it proscribes the use of promotional practices that discriminate against women and minorities.

7 *General Laws c. 151B, § 4 (1)*, states in part: "It shall be an unlawful practice: "(1) For an employer . . . because of the race, color, . . . national origin, sex, . . . or ancestry of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . ."

Although the MBTA was free to alter or modify the criteria it used to appoint persons to the spare inspector master list, as it alone determined, once the appointment was made, seniority status attached and the MBTA could not unilaterally strip employees of that status. The appropriate procedure would have been to enter negotiations with the union to remedy what the MBTA claims were improper appointments. Failing that, a unilateral attempt to override the terms of the collective bargaining agreement under the public [***33] policy exception required the MBTA to prove in arbitration that it had used criteria in making appointments [*36] to the spare inspector list that violated *G. L. c. 151B, § 4 (1)*. Had the MBTA proved its case, the arbitrator would have been required, as a matter of public policy, to rule in favor of the MBTA. Her failure to so rule itself would have constituted a violation of public policy, and her award would have to

be vacated under the public policy exception. See *Massachusetts Highway Dep't v. American Fed'n of State, County, & Mun. Employees Council 93, 420 Mass. 13, 16, 648 N.E.2d 430 (1995)*.

Unlike the Wick matter, no one had come forward with a claim of discrimination, and no claim of discrimination had been brought before an administrative tribunal or a court that resulted either in a finding of discrimination or a settlement that was presumptively legitimate and not shown (in arbitration) to be a sham. Here, the entire matter was litigated before the arbitrator and the MBTA failed to convince [**213] the arbitrator that it had discriminated against any employee when it made appointments to the February 16, 2001, master list. "[W]e are strictly bound by the arbitrator's factual findings and conclusions [***34] of law," absent proof of one of the grounds enumerated in *G. L. c. 150C, § 11. School Comm. of Pittsfield v. United Educators of Pittsfield, supra*. The Superior Court judge correctly confirmed the arbitrator's award.

III

Conclusion

These cases are remanded to the Superior Court where an order vacating the decision of the arbitrator is to enter in SUCV2006-03218. The order confirming the decision of the arbitrator in SUCV2006-00833 is hereby affirmed.

So ordered.

IN THE MATTER OF THE VALUATION OF MCI WORLDCOM NETWORK SERVICES, INC. (and sixteen companion cases).

SJC-10300

SUPREME JUDICIAL COURT OF MASSACHUSETTS

___ Mass. ___; 2009 Mass. LEXIS 635

March 5, 2009, Argued
September 10, 2009, Decided

PRIOR HISTORY: [*1]

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

Administrative Law, Judicial review, Substantial evidence, Agency's interpretation of statute. *Taxation*, Appellate Tax Board: appeal to Supreme Judicial Court; Value; Assessors. *Telephone Company*. *Bankruptcy*. *Commissioner of Revenue*. *Statute*, Construction.

COUNSEL: William A. Hazel, for the taxpayers.

Richard G. Chmielinski, Assistant City Solicitor, for Board of Assessors of Newton.

Anthony M. Ambriano, for Board of Assessors of Boston.

Daniel A. Shapiro, Assistant Attorney General (Daniel J. Hammond, Assistant Attorney General, with him) for Commissioner of Revenue.

Rosemary Crowley & David J. Martel, for Massachusetts Association of Assessing Officers, amicus curiae, submitted a brief.

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

OPINION BY: CORDY

OPINION

CORDY, J. This case presents challenges to the Commissioner of Revenue's central valuations,

made pursuant to *G. L. c. 59, § 39* (§ 39), of the "machinery, poles, wires and underground conduits, wires and pipes" (§ 39 property) of the taxpayer telephone companies for fiscal year (FY) 2004, FY 2005, and FY 2006. In deciding those challenges, we must resolve several issues including (1) whether the Appellate Tax Board (board) correctly upheld the commissioner's valuations for FY 2005 and FY 2006; (2) whether the board applied the wrong standard of [*2] review in modifying the commissioner's valuations for FY 2004; (3) whether a municipality must appeal from the commissioner's valuations in order to be entitled to relief under § 39; (4) whether one of the taxpayers qualifies for the corporate utility exemption under *G. L. c. 59, § 5, Sixteenth*, thus relieving it from the taxation of certain of its "machinery"; and (5) whether January 1, 2004, or July 1, 2004, is the proper date for determining the ownership status of property for purposes of the corporate utility exemption.

We conclude that the board properly affirmed the commissioner's valuations for FY 2005 and FY 2006, and erred in reducing the commissioner's valuations for FY 2004. We also agree with the board that a municipality must file a petition appealing from the commissioner's valuation in order to secure relief in the form of an increase in that valuation; MCI Metro Access Transmission Services, LLC (MCImetro), does not qualify for the corporate utility exemption; and the proper date for ascertaining the ownership status of § 39 property is the first day of January preceding the fiscal year for which the tax will be assessed based on the commissioner's valuation.

1. *The* [*3] *parties*. MCI WorldCom Network Services, Inc. (MWNS), and MCImetro (collectively, MCI taxpayers) provide "land-line" voice,

broadband data transfer, and Internet services in the Commonwealth using fiber optic cables, conduits, and electric machinery. MWNS is a long-distance telephone provider incorporated in Delaware ¹. MCImetro is a competitive local exchange company providing local telephone service. It was formed as a Delaware limited liability company in 1998, and was taxed as a division of MWNS until 2004, when it elected to be taxed as a separate corporation for Federal tax purposes. Under a Chapter 11 bankruptcy reorganization of WorldCom, Inc. (owner of MCI taxpayers), the assets of MCImetro (including the § 39 property) were transferred to Brooks Fiber Communications of Massachusetts, Inc. (Brooks) ². The MCI taxpayers claim that this transfer occurred prior to July 1, 2004. The board of assessors for the city of Boston (Boston assessors) and the board of assessors for the city of Newton (Newton assessors) are charged with assessing taxes on § 39 property that the commissioner has valued.

1 MCI WorldCom Network Services, LLC (MWNS), was incorporated in Delaware in 1973 as MCI [*4] Telecommunications Network; its name later changed to MCI WorldCom Network Services, Inc., then to MCI Network Services, Inc. It now operates under the name Verizon Business Network Services, Inc.

For Massachusetts tax purposes in 2002, 2003, and 2004, MWNS filed as a "utility corporation" using Form P.S.1. "Utility corporation" is defined as "every incorporated telephone and telegraph company subject to" G. L. c. 166, the general regulatory framework applicable to telephone companies. G. L. c. 63, § 52A, as amended through St. 2004, c. 466, § 4. MCImetro was included in MWNS's forms P.S.1.

2 Brooks Fiber Communications of Massachusetts, Inc., subsequently changed its name to MCI Metro Access Transmission Services of Massachusetts, Inc.

2. *Background.* Each year, the commissioner is required to conduct and certify centralized valuations of the § 39 property of all telephone and telegraph companies according to a particular schedule. G. L. c. 59, § 39. First, telephone companies must file a return with the commissioner by March 1 list-

ing all of the § 39 property that the company held on January 1 of the same year. *Id.* For the years in question, the commissioner required telephone company [*5] taxpayers to file forms denoted ³ "State Tax Form 5941" to assist with the valuation of that property ⁴. By May 15, the commissioner must conduct a centralized valuation of the § 39 property and certify that valuation to the property owners and the local boards of assessors where the property is located. *Id.* The assessors then use those valuations to assess taxes on the property owners for the fiscal year beginning July 1. G. L. c. 59, §§ 29, 38.

3 The parties agree that both MWNS and MCImetro were "telephone companies" for the purposes of G. L. c. 59, § 39, valuation.

4 State Tax Form 5941 was created by the Commissioner of Revenue (commissioner) for use in central valuations. See G. L. c. 59, § 41 ("return [for valuation of § 39 property] shall be in the form and detail prescribed by the commissioner and shall contain all information which he shall consider necessary"). The form used for fiscal year (FY) 2004 required less information than the FY 2005 and FY 2006 versions, because in 2004 the commissioner had not yet instituted the more detailed valuation method. See note 8, *infra*.

MWNS and MCImetro filed Form 5941 for FY 2004 and FY 2005. Additionally, MWNS filed Form 5941 for FY 2006. [*6] The inventory of both companies was based on financial accounting books that had been prepared for the United States Securities and Exchange Commission ⁵. For FY 2004 and FY 2005 ⁶, the commissioner conducted valuations of § 39 property owned by both MWNS and MCImetro. For FY 2006, the commissioner valued only the § 39 property of MWNS because MCImetro had transferred all of its § 39 property to Brooks prior to the date of the FY 2006 valuation.

5 A second set of property inventories was also maintained by the MCI taxpayers for Federal tax purposes. The companies' financial accounting books were subsequently restated to reflect WorldCom's bankruptcy proceedings and asset impairments.

6 For the purposes of § 39, a fiscal year runs from July 1 to June 30. For example, FY 2004 began July 1, 2003, and ended June 30, 2004.

The two preferred methods for conducting valuations of property are the "market study method," which compares the property at issue to similar, recently sold property, and the "income capitalization method," which calculates the present value of the income that property will produce. See *Blakeley v. Assessors of Boston*, 391 Mass. 473, 477 (1984); *Correia v. New Bedford Redevelopment Auth.*, 375 Mass. 360, 362 (1978) [*7] (*Correia*). However, those methods may be unavailing "where the special character of the property makes it substantially impossible to arrive at value on the basis of capitalized net earnings or on the basis of comparable sales." *Blakeley v. Assessors of Boston*, *supra*, citing *Correia*, *supra* at 362-364. In such circumstances, the commissioner may use a third method: "depreciated reproduction cost" (DRC), defined as "[t]he current cost of reproducing a property less depreciation from deterioration and functional and economic obsolescence." *Correia*, *supra* at 362⁷. That is the method elected by the commissioner for the fiscal years at issue.

7 We have in the past noted concerns with the DRC method stemming "in major part from uncertainty in accurately measuring obsolescence and physical depreciation." *Blakeley v. Assessors of Boston*, 391 Mass. 473, 478 (1984), citing *Correia v. New Bedford Redevelopment Auth.*, 375 Mass. 360, 364 (1978) (*Correia*). "There is [*8] danger . . . that evidence of reproduction cost (even if it purports to be fairly adjusted) may lead to 'an excessive [valuation] unless it is [in fact] adequately discounted for obsolescence and inadequacy as well as for physical depreciation.'" *Correia*, *supra*, quoting *Commonwealth v. Massachusetts Turnpike Auth.*, 352 Mass. 143, 148 (1967).

The commissioner hired consultant George E. Sansoucy to assist in the appraisal of the § 39 property using the DRC method⁸. Sansoucy first determined the theoretical cost of newly reproducing the § 39 property⁹. Next, he discounted that amount by the value of the property's physical depreciation,

which he calculated using straight line depreciation based on the Federal Communication Commission's service life tables for twenty-three different categories of property¹⁰. Finally, he imposed a further discount by concluding that MWNS was entitled to an economic obsolescence deduction of twenty-five per cent in FY 2005 and FY 2006, and that MCI-metro was entitled to that same deduction for FY 2005. For reasons explained further below, Sansoucy did not recommend, and the commissioner did not apply, a separate obsolescence deduction for FY 2004.

8 The commissioner [*9] hired Sansoucy to evaluate the Department of Revenue's existing valuation methodology and "devise an adaptable computerized mass appraisal system" for the commissioner's application in the wake of *RCN-BecoCom, LLC v. Commissioner of Revenue*, 443 Mass. 198 (2005) (limited liability companies no longer qualified for corporate utility exemption in *G. L. c. 59, § 1*, Sixteenth [*d*]). The effect of this decision required the commissioner to value significantly more property than before.

9 In arriving at the cost of new reproduction, Sansoucy took the original cost and "trended" it using two different published and respected indices, one for generator equipment and a different one for wires, conduits, and other machinery.

"The indices are composed of digits representing the relative numeric positions of current cost and are provided for historical years to the present. To use the index, the digit for a vintage year is divided by the current year digit to arrive at a factor that is applied to the original cost to determine cost new."

By applying these indices, Sansoucy calculated the costs of new reproduction for the property of the MCI taxpayers as follows:

*2*MWNS		
	Boston property	Newton property
2004:	\$ 3,733,960	\$ 1,076,684
2005:	\$ 3,749,036	\$ 1,001,727
2006:	\$ 3,845,899	\$ 1,082,885
*2*MCImetro		
	Boston property	Newton property
2004:	\$ 100,866,166	\$ 187,625
2005:	\$ 102,943,462	\$ 195,651

10 "Straight [*10] line depreciation takes the expected service life of property and divides it into even yearly amounts. These amounts are the yearly depreciation deductions." Sansoucy adopted a "floor" for the valuation of the property below which fur-

ther depreciation would not be taken until the property is taken out of service.

Using this method, Sansoucy calculated the value of the depreciation for each fiscal year as follows:

*2*MWNS		
	Boston property	Newton property
2004:	\$ 800,824	\$ 497,391
2005:	\$ 996,945	\$ 471,571
2006:	\$ 1,247,991	\$ 578,476
*2*MCImetro		
	Boston property	Newton property
2004:	\$ 25,891,126	\$ 88,558
2005:	\$ 27,332,017	\$ 81,534

The MCI taxpayers appealed from those valuations to the board, arguing that the property's actual value was "substantially lower . . . than the valuation certified by the commissioner of revenue." *G. L. c. 59, § 39*. The Boston assessors and the Newton assessors also appealed to the board, arguing that the value of the MCI taxpayers' property in their cities was "substantially *higher* . . . than the valuation certified by the commissioner of revenue" (emphasis added). *Id.*¹¹. The appeals were consolidated into a single action on August 4, 2006.

11 The Boston assessors filed a petition [*11] appealing from only the FY 2005 assessment. See discussion, *infra* at . See also *G. L. c. 58A, § 7* (party "taking an appeal to the board . . . shall file a petition . . . set[ting] forth specifically the facts" on which the party relies and its contentions of law).

In the consolidated appeal before the board, the parties submitted statements of agreed facts with exhibits, called lay and expert witnesses, introduced

expert valuation reports, and filed posttrial briefs and reply briefs. For the purposes of this appeal, the central witnesses were Jerome Weinert (witness for MCI taxpayers, qualified as an expert in the areas of depreciation, functional obsolescence, and valuing telephone companies); Mark Rodriguez and Mark Pomykacz (witnesses for the Boston assessors and Newton assessors, qualified as experts in appraisal); and Sansoucy (witness for the commissioner, qualified as an expert in utility and telephone company personal property valuation and engineering).

In a detailed decision, the board affirmed the commissioner's valuations for FY 2005 and FY 2006; however, for FY 2004, the board required the commissioner to apply the same twenty-five per cent economic obsolescence deduction [*12] that the commissioner had applied in the later years. The board rejected other arguments made by both the taxpayers and the local assessors, as described below. MWNS filed an appeal and an application for direct appellate review, which we granted.

3. *Discussion.* In an appeal to the board of a valuation made under § 39, the appellant has the burden "of proving that the value of the machinery, poles, wires and underground conduits, wires and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the commissioner of revenue." *G. L. c. 59, § 39.* "Our review of a board decision is limited to questions of law." *Bell Atl. Mobile of Mass., Corp., Ltd. v. Commissioner of Revenue*, 451 Mass. 280, 283 (2008) (*Bell Atl.*), citing *Towle v. Commissioner of Revenue*, 397 Mass. 599, 601 (1986). "We will not disturb the board's findings so long as they are supported by substantial evidence and a correct application of the law." *Bell Atl., supra*, citing *Koch v. Commissioner of Revenue*, 416 Mass. 540, 555 (1993). Although the interpretation of statutes is a question of law that we resolve, the board's interpretation of tax statutes "may be given weight by [*13] this court" because it is an agency charged with the administration of tax law. *Bell Atl., supra*, quoting *Commissioner of Revenue v. McGraw-Hill, Inc.*, 383 Mass. 397, 401 (1981).

a. *Economic obsolescence deduction.* In their appeal to this court, the appellants do not contest the commissioner's estimates of the new reproduction costs or the discount for physical depreciation of their § 39 property; rather, they contend that the

commissioner applied an incorrect "economic obsolescence" deduction.

In the proceedings before the board, Sansoucy testified that he attempted to determine a proper economic obsolescence deduction in light of claims by some telephone companies that technological advances had rendered some property, like fiber optic cables, less valuable. Using a sample property spreadsheet that estimated economic obsolescence depreciations of five per cent to seventy per cent (depending on age of property)¹², and using information gleaned from discussions with industry representatives, Sansoucy determined that a proper weighted obsolescence deduction for all telephone companies was twenty-five per cent. As noted, that twenty-five per cent economic obsolescence deduction was then [*14] applied to the MCI taxpayers' property in 2005 and 2006¹³.

12 Sansoucy testified that the list of property used in the spreadsheet came from "a test of an actual [wireless] company" that had previously filed a list of its property with the Department of Revenue.

13 At the hearing, Sansoucy noted that his report recommended a "functional/economic depreciation of 25 per cent." He testified that some taxpayers used the terms "functional" and "economic" obsolescence interchangeably, and so he employed a term that all taxpayers could use. For the sake of clarity, and in accord with the briefs in this case, we will refer to the 25% deduction as an economic obsolescence deduction.

The economic obsolescence deduction was not applied in the same manner to the MCI taxpayers' property in 2004, principally because Sansoucy had not yet been retained to assist the commissioner in changing the appraisal system prior to the 2004 version of Form 5941 being issued. As issued, that version of the form did not require companies to list their § 39 property according to the twenty-three FCC categories later adopted at Sansoucy's recommendation for 2005 and 2006. Therefore, Sansoucy's preferred economic obsolescence [*15] valuation methodology (using weighted calculations according to the property types reported by each taxpayer) could not be employed on the 2004 data. Instead, Sansoucy recommended aggregating all of

the taxpayers' FY 2004 property categories and applying averaged cost trends and averaged depreciation percentages. This, Sansoucy testified, resulted in a conservative (low-end) estimate of the property's fair cash value, because the aggregation of property categories and averaging of depreciation percentages resulted in shorter average lives for most of the property and thus greater depreciation. The net effect of the greater depreciation, Sansoucy opined, approximated the twenty-five per cent of additional economic obsolescence taken in FY 2005 and FY 2006.

The MCI taxpayers' expert, Weinert, testified that the commissioner should have applied an obsolescence deduction of about sixty-five per cent for all three years. Unlike Sansoucy, he relied on data showing the returns on capital in ninety-eight different industries. He then compared the returns in seventy-two of those industries¹⁴ with the returns in the communications and interexchange-broadband carrier industries, which Weinert [*16] claimed was representative of the taxpayers¹⁵. He calculated that in the seventy-two industries, the weighted average of returns on capital for 2001 through 2006 was twelve per cent. The interexchange-broadband segments, on the other hand, returned only 4.5 per cent on capital. He compared these two returns and concluded that the interexchange-broadband segment was underperforming the rest of United States industry by sixty-three per cent¹⁶. He then conducted a second calculation. Based on a paper he had written, Weinert determined that all United States industries returned 13.5 per cent on capital for the period in question¹⁷. Comparing the 4.5 per cent return to the 13.5 per cent return (which he apparently rounded down to thirteen per cent), he determined that the interexchange-broadband sector was underperforming by sixty-five per cent. He therefore opined that sixty-five per cent was the proper economic obsolescence deduction.

14 Jerome Weinert testified that he excluded twenty-six industries "because the . . . data contained within [the survey] did not allow the calculations of returns on capital or equity."

15 Although Weinart claimed that the interexchange-broadband subset of [*17] the telecommunications industry "was represen-

tative of MCI," the board never credited that statement.

16 Weinert arrived at this calculation by dividing the 4.5 per cent telecommunications return by the twelve per cent broader industry return that equals 37.5 per cent. Weinert thus concluded that the interexchange broadband sector returns only thirty-seven per cent of the profits that other industries were returning, rendering that sector sixty-three per cent less valuable.

17 Weinert later admitted that this number represented only the telecommunications industry, not all United States industries.

Pomykacz, the obsolescence expert for the Boston assessors and Newton assessors, testified that the obsolescence deduction should have been twenty per cent. He arrived at that number by using a "complex analysis" of over-all land-line obsolescence, a "fiber optic utilization analysis," and a "simple analysis" based on equipment production capacity. In the first analysis, he noted that land-line telephone companies had recently seen profit declines of thirty-five per cent (2003), forty-seven per cent (2004), and fifty-three per cent (2005); however, he considered only one-half of those amounts [*18] (eighteen per cent, twenty-four per cent, and twenty-six per cent) in potential obsolescence deductions because he predicted that the industry would soon stabilize. In the "utilization" analysis, he forecast a short-term stabilized fiber optic utilization rate (fifteen per cent) and a long-term stabilized rate (thirty-five per cent); by subtracting the former forecast from the latter, he determined that fiber optic cable is currently being underutilized by twenty per cent¹⁸. Finally, in the "simple" analysis, he considered communications equipment production capacity. He testified that production should run at eighty per cent capacity; although it was currently running at only forty-five per cent to fifty-five per cent of capacity, he predicted that it should stabilize at sixty per cent of capacity. Subtracting his sixty per cent forecast from eighty per cent, he again arrived at twenty per cent as the proper economic obsolescence deduction.

18 If accurate, these forecasts would show that the fiber optic cable was being underutilized by twenty percentage *points*, not twenty per cent. [fifteen per cent utilized] / [thirty-

five per cent predicted future utilization] = [forty-three per [*19] cent utilization rate]. The underutilization rate, then, would be fifty-seven per cent.

The board first concluded that the commissioner's "trended reproduction cost new less depreciation methodology" was a valid approach to valuing telephone company § 39 property. The board reasoned that the commissioner's methodology was objective, transparent, and consistent. These conclusions are not challenged here.

The board then addressed the economic obsolescence deduction. "Recognizing the inherent difficulty in quantifying economic obsolescence" (see note 7, *supra*), it concluded that the "percentages offered by [the MCI taxpayers'] and the [Boston and Newton assessors'] valuation experts were lacking." Weinert's methodology, for example, "double counted" several factors, at one point citing economic weakness in both the "replacement cost" and "economic obsolescence" calculations. He also relied heavily on evidence that the national telecommunications industry had suffered a downturn; however, he failed to demonstrate that a similar downturn had affected this particular § 39 property, or even Massachusetts as a whole. Nor did he prove, the board found, that the interexchange-broadband sector [*20] was representative of the MCI taxpayers. Finally, the board noted that Weinert's methodology would imply that fiber optic cable had an effective economic life of only 2.1 to 3.3 years, reflecting a plainly "excessive" deduction for depreciation and obsolescence. For those reasons, the board found that Weinert's 65% economic obsolescence suggestion was "not credible."

The board also rejected the valuations of Pomykacz and Rodriguez, noting that their starting point for the property to be valued was not the property identified in the Forms 5941, resulting in both double counting and the failure to count properties located in the relevant municipalities. The board deemed Pomykacz's methodology "highly subjective," pointing out his fifty per cent reduction in recent lost profits and his "assumed, but essentially unsupported, future rate of 35%" fiber utilization rate. It also found that Pomykacz's "simple" analysis understated the economic obsolescence of land-line companies by including the manufacturers of wireless telecommunications property.

Finally, the board properly rejected suggestions by the MCI taxpayers' witnesses that any valuation should begin with a lower, bankruptcy-mandated [*21] cost restatement known as "fresh start accounting." Specifically, the MCI taxpayers proposed valuing certain property assets at about \$ 5 million, while the original cost for the property was more than \$ 42 million. "Fresh start accounting" is necessary for bankruptcy purposes, because "the overriding goal of the Bankruptcy Code [is] to provide a 'fresh start' for the debtor." *Reynolds Bros. v. Texaco, Inc.*, 420 Mass. 115, 123 (1995). Ad valorem DRC valuations, on the other hand, attempt accurately to predict the cost of reproducing unique property today, *Correia, supra* at 362, which is the relevant consideration for § 39 valuation purposes.

Based on the evidence, including its findings that the experts for the MCI taxpayers, Boston assessors, and Newton assessors were not credible, the board concluded that the commissioner's valuation was not substantially higher or substantially lower than the property's actual value. *G. L. c. 59, § 39*. As a result, it allowed the commissioner's valuations for FY 2005 and FY 2006 to stand. These conclusions are supported by substantial evidence, and the board correctly applied the relevant law to its factual findings.

With respect to the commissioner's [*22] 2004 valuations, the board "observe[d]" (without citing evidence offered by appellants) that they "are not consistent with those for [FY] 2005 and [FY] 2006, unless an additional deduction of 25% for economic obsolescence is applied." The board then asserted that "[i]t also appears to the Board that the telecommunications market was afflicted by similar economic and other external factors in all of the fiscal years at issue." Therefore, the board concluded that the commissioner's certified valuation was "substantially higher than its fair cash value," and substituted its own valuations for that year, including the additional twenty-five per cent reduction. This was error.

The appellant has the burden of proving that the value of the property is substantially higher or substantially lower than the valuation certified by the commissioner. *G. L. c. 59, § 39*. If the appellant fails to meet that burden, the board is not empowered to substitute its own valuation of the § 39 property. Cf. *Assessors of Sandwich v. Commis-*

sioner of Revenue, 393 Mass. 580, 586 (1984) ("Only if the taxpayer has met that burden does the board undertake an independent valuation of the property"). Here, the board [*23] did not credit any testimony or evidence introduced by the MCI taxpayers showing that the FY 2004 valuation was "substantially higher or substantially lower" than the property's actual value; to the contrary, the board specifically discredited the MCI taxpayers' expert witnesses on the issue of economic obsolescence. Nor did the board accept any of the appellants' arguments that the obsolescence deduction should apply to FY 2004, or find that they had met their burden on that point. In the absence of such a finding, the board erred in proceeding to revise the 2004 valuation unilaterally by substituting its own judgment for that of the commissioner.

b. *Municipal appeals.* The Boston assessors did not file a petition appealing from the § 39 valuations for FY 2004 and FY 2006. They argue, however, that the board can increase valuations of § 39 property even though they have not appealed, as long as the taxpayer has filed a petition of appeal (seeking a lower valuation).

The argument is meritless under the plain meaning of the language of § 39:

"Every owner and board of assessors to whom any such valuation shall have been so certified may . . . appeal to the appellate tax board from such valuation. [*24] . . . In every such appeal, the appellant shall have the burden of proving that the value of the [property] is substantially higher or substantially lower, as the case may be, than the valuation certified by the commissioner of revenue." (Emphases added.)

G. L. c. 59, § 39. The board correctly held that for the years 2004 and 2006, the Boston assessors were not "appellants"; therefore, " § 39 provides no mechanism for the [b]oard to find a value substantially higher than that certified by the [c]ommissioner."

In support of their position, the Boston assessors rest their argument on one sentence in a 1933

act: "Notwithstanding anything contained in this act, the board in considering any appeal brought before it may make such decision as equity may require and may reduce or increase the amount of the assessment appealed from." St. 1933, c. 321, § 9. That sentence has never been cited by a Massachusetts appellate case, nor has it been codified in the General Laws, G. L. c. 58A (board's enabling act). Indeed, the "act" to which the language refers makes no reference to the commissioner's valuation of telephone company property, or § 39 appeals from those valuations. St. 1933, c. 321 ("An [*25] Act temporarily increasing the membership of the board of tax appeals and relative to the procedure before said board"). Even if that sentence retains any force, it is subordinated to the contrary, plain language of § 39, which was rewritten in 1955 to require that the "appellant" bear the burden of proving the commissioner's valuation to be too high or too low. See St. 1955, c. 344, § 31. "[W]hen the provisions of two statutes are in conflict, 'the more specific provision, particularly where it has been enacted subsequent to a more general rule, applies over the general rule.'" *Commonwealth v. Harris*, 443 Mass. 714, 739 (2005) (Marshall, C.J., concurring in part and dissenting in part), quoting *Doe v. Attorney Gen. (No. 1)*, 425 Mass. 210, 215 (1997).

c. *Corporate utility exemption.* The MCI taxpayers argue that MCImetro should have been granted the corporate utility exemption under *G. L. c. 59, § 5, Sixteenth (1) (d)*. That clause "provides that a company classified as a corporate telephone utility is exempt from tax on all property other than real estate, poles, underground conduits, wires and pipes, and machinery used in manufacturing," *RCN-BecoCom, LLC v. Commissioner of Revenue*, 443 Mass. 198, 200 (2005); [*26] it is settled law that limited liability companies are not eligible for the corporate utility exemption. *Id.* at 207 ("By [clause Sixteenth's] plain language, it applies to corporations, not limited liability companies").

The exemption applies to telephone utility corporations only if they are subject to taxation under *G. L. c. 63, § 52A. Section 52A* applies to all "utility corporation[s] doing business within the commonwealth." *G. L. c. 63, § 52A*¹⁹. For the years in question, "utility corporation" was defined to include, inter alia, "every *incorporated* telephone and telegraph company subject to chapter one hundred

sixty-six" (emphasis added). *G. L. c. 63, § 52A (1) (a) (iii)*, as amended through St. 2004, c. 466, § 4²⁰. Because MCImetro was not incorporated, it was not subject to taxation under § 52A; therefore, it was not eligible for the corporate utility exemption under *G. L. c. 59, § 5, Sixteenth (1) (d)*. See *RCN-BecoCom, LLC v. Commissioner of Revenue, supra*. Nonetheless, for FY 2004 and FY 2005, MCImetro argues that it should be exempt under any of several theories: (1) it should benefit from the incorporation status of its parent, MWNS; (2) it filed or was included in Forms [*27] P.S.1 filed by MWNS so that it was treated like a corporation for Massachusetts tax purposes; and (3) for the period after MCImetro made an election to be taxed as a separate corporation for Federal tax purposes, it became a "foreign corporation" under *G. L. c. 63, § 30 (2)*, as amended through St. 2003, c. 4, § 13. It also contends that with respect to FY 2005, it transferred the subject property to Brooks (a utility corporation) prior to July 1, 2004, and that July 1 should be the relevant date for *G. L. c. 59, § 5*, corporate utilities exemption purposes. We reject each of these arguments.

19 "Every utility corporation doing business within the commonwealth shall pay annually a tax upon its corporate franchise in accordance with the provisions of this section." *G. L. c. 63, § 52A*.

20 That section has been amended; effective for tax years beginning January 1, 2009, the word "incorporated" has been deleted. St. 2008, c. 173, § 101.

"The burden is on the taxpayer to demonstrate entitlement to an exemption claimed." *Macy's East, Inc. v. Commissioner of Revenue, 441 Mass. 797, 804 (2004)*, quoting *South Boston Sav. Bank v. Commissioner of Revenue, 418 Mass. 695, 698 (1994)*. "Exemption from taxation [*28] is to be strictly construed and must be made to appear clearly before it can be allowed." *New Habitat, Inc. v. Tax Collector of Cambridge, 451 Mass. 729, 731 (2008)*, quoting *Springfield Young Men's Christian Ass'n v. Assessors of Springfield, 284 Mass. 1, 5 (1933)*.

During the period when MCImetro was treated as a division of MWNS, it could not benefit from the incorporated status of its parent. Even though

MCImetro was disregarded for corporate *income* tax purposes, it was always treated separately for personal property ad valorem taxation. For personal property taxation, exemption status turns on ownership. See *G. L. c. 59, § 5, Sixteenth* (property exempt from taxation only if "owned by [qualifying] bank or corporation"); *Born v. Assessors of Cambridge, 427 Mass. 790, 795 (1998)* (for property tax exemptions, "the form of legal ownership is related to whether one qualifies for the exemption"); *Minkin v. Commissioner of Revenue, 425 Mass. 174, 181 (1997)* (property owner's chosen form of organization creates tax consequences that must be accepted). MCImetro does not dispute that it is seeking an exemption for property that it, and not MWNS, owned. The same conclusion results from the filing [*29] of Forms P.S.1; even if MCImetro was included on those forms for Massachusetts income taxation purposes, it does not alter the fact that it was a limited liability company, not an incorporated utility, for the purposes of clause Sixteenth.

Even when MCImetro elected to be taxed as a separate corporation for Federal tax purposes, its status for the purposes of the corporate utility exemption did not change. MCImetro argues that at this point it became a foreign corporation under *G. L. c. 63, § 30 (2)*, as then amended, which, unlike clause Sixteenth, includes limited liability companies. That section, however, specifically does not apply to § 52A. *G. L. c. 63, § 30* ("When used in [§ 30 (2)] and in sections 31 to 52, inclusive, the following terms shall have the following meanings").

Finally, MCImetro argues that it transferred its § 39 property to Brooks prior to July 1, 2004, and that the commissioner should use that date for evaluating the property's ownership status for the purposes of the corporate utility exemption for FY 2005. We disagree. The language of the statute provides that "the date of determination as to age, ownership or other qualifying factors required by any clause [*30] shall be July first of each year unless another meaning is clearly apparent from the context" (emphasis added). *G. L. c. 59, § 5, Sixteenth (1) (d)*. For telephone utility corporations, another meaning is "clearly apparent": the relevant statute requires the commissioner to calculate "the valuation [of § 39 property] as of January first," and to complete and certify those values "[o]n or before May fifteenth in each year . . ." *G. L. c. 59, § 39*.

"Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Household Retail Servs., Inc. v. Commissioner of Revenue*, 448 Mass. 226, 229 (2007), quoting *Gurley v. Commonwealth*, 363 Mass. 595, 598 (1973). The board reached the same conclusion, and its interpretation of tax statutes "may be given weight by this court." *Bell Atl. Mobile of Mass. Corp., Ltd. v. Commissioner of Revenue*, 451 Mass. 280, 283 (2008).

Additionally, "[c]ourts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense." *Seideman v. Newton*, 452 Mass. 472, 477 (2008), [*31] citing *Champigny v. Commonwealth*, 422 Mass. 249, 251 (1996). Those considerations support the use of January 1 for § 39 valuation purposes. *Section 39* requires the commissioner to certify valuations by May 15; it would make little sense to require this complex valuation and certification process to end on that date, only to have that work undone (and redone) if the § 39 property were transferred to an entity that qualified for the corporate utility exemption before July 1. MCI argues that the board (not the commissioner) could "order revised values via the *Section 39* process" if necessary. In essence, MCI would have each taxpayer file an appeal every time the property's ownership status

changed hands between January 1 and July 1 of each year. This would create an entirely inefficient process, and would place an unnecessary burden on the board²¹.

21 It is unclear from the record, and the board did not find, whether any of the property transferred by MCImetro is even the type that might qualify for the exemption. See *RCN-BecoCom, LLC v. Commissioner of Revenue*, 443 Mass. 198, 200 (2005) (exemption does not apply to "real estate, poles, underground conduits, wires and pipes, and machinery [*32] used in manufacturing").

4. *Conclusion.* For these reasons, we affirm the commissioner's valuations for FY 2005 and FY 2006. However, because the MCI taxpayers did not meet their statutory burden of proof, the board erred in requiring the commissioner to apply the 25% economic obsolescence deduction to FY 2004. We reverse that order, and remand that matter for the commissioner's valuation for that year to be reinstated. We also affirm the board's conclusion that municipalities must file a petition appealing the commissioner's § 39 valuation before the board may consider raising that valuation, and its conclusion that MCImetro was not entitled to the corporate utility exemption.

So ordered.

MIDDLESEX RETIREMENT SYSTEM, LLC vs. BOARD OF ASSESSORS
OF BILLERICA.

SJC-10268

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 495; 903 N.E.2d 210; 2009 Mass. LEXIS 48

February 3, 2009, Argued
March 31, 2009, Decided

PRIOR HISTORY: [***1]

Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

COUNSEL: Stephen W. DeCoursey (John M. Lynch with him) for the taxpayer.

Patrick J. Costello for board of assessors of Billerica.

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

OPINION BY: SPINA

OPINION

[*495] [**211] SPINA, J. In a formal procedure under *G. L. c. 58A, § 7*, and *G. L. c. 59, §§ 64* and *65*, the Appellate Tax Board (board) upheld real and personal property assessments by the board of [*496] assessors of Billerica (assessors) against Middlesex Retirement System, LLC (LLC), for fiscal years 2004 through 2006. LLC is a limited liability company organized under the laws of Delaware, and is wholly owned and operated by the Middlesex Retirement System [**212] (MRS), a government entity organized under *G. L. c. 34B, § 19*. LLC appealed to the Appeals Court, and we transferred the case here on our own motion. The sole issue before us, as before the board, is whether the property assessed is exempt from taxation on the ground that it belongs to an instrumentality of the Commonwealth, namely, MRS. We conclude that the real property tax was assessed properly against [***2] LLC, but that the personal property

tax was not because LLC was not the owner of the personal property in question.

1. *Background.* The case was submitted to the board on a statement of agreed facts and a supplemental statement of agreed facts. Rule 1.23 of the Rules of the Appellate Tax Board (2009). We summarize those facts.

MRS is a regional retirement system created and managed by a retirement board pursuant to *G. L. c. 34B, § 19 (a), (b)*, for the purpose of continuing the operation of the former Middlesex County retirement system following the abolition of Middlesex County government. St. 1997, c. 48. MRS administers the defined benefit retirement plan for the members-employees, retirees, and beneficiaries of the thirty-one municipalities (including Billerica) and thirty-nine other governmental subdivisions located within the geographical boundaries of Middlesex County. It is enabled and governed by applicable provisions of *G. L. c. 32* and *c. 34B*, see *G. L. c. 34B, § 19 (l)*, and it is subject to the general oversight of the Public Employee Retirement Administration Commission. See *G. L. c. 7, § 50*; *G. L. c. 32, § 21*.

The Legislature designated county treasurers of each abolished county [***3] to serve as the chairperson of the corresponding newly created regional retirement system until December 31, 2002. See *G. L. c. 34B, § 19 (b) (1)*. The Legislature also authorized a county treasurer to continue to occupy at no cost the space occupied by such treasurer on July 11, 1997. St. 1997, c. 48, § 27. For MRS, that meant it could occupy at no cost, until December 31, 2002, the space occupied by its predecessor, the Middlesex County retirement system, which operated within the office of [*497] the treasurer of

Middlesex County in the Middlesex County Court-house.

Anticipating the need to relocate after December 31, 2002, MRS entered into a purchase and sale agreement on July 29, 2002, to acquire land and a 62,000 square foot, two-story building at 25 Linnell Circle in Billerica for \$ 6,000,000.¹ On September 18, 2002, MRS created LLC, a limited liability company under the laws of the State of Delaware. On September 25, 2002, LLC registered as a foreign limited liability company with the Secretary of the Commonwealth, pursuant to *G. L. c. 156C, § 48*. MRS was and continues to be the manager and sole member of LLC. See *Del. Code Ann. tit. 6, §§ 18-101 (10), (11)* (2005 & Supp. 2008) (definitions [***4] of "[m]anager" and "[m]ember"). Also on September 25, 2002, in consideration of \$ 6,000,000, LLC acquired title to the real property at 25 Linnell Circle, conformably with its operating agreement. See *Del. Code Ann. tit. 6, § 18-101 (7)* (Supp. 2008) (definition of "[l]imited liability company agreement").

1 A regional retirement system is authorized to lease or purchase property, including real property, "necessary for the proper administration and transaction of [its] business." *G. L. c. 34B, § 19 (e)*.

MRS maintains its offices and conducts its activities on a portion of the second floor of the real property. Other portions of the real property are occupied by a commercial tenant and a nonprofit organization. [**213] According to the parties, approximately 22.5% of the real property was then vacant, and LLC had been actively seeking a tenant for that space. The real property was assessed to LLC for fiscal years 2004, 2005, and 2006. Those assessments, but not the valuations, are before us in this appeal.

The assessors estimated the value of the furniture and fixtures in MRS's office at \$ 750,000 for fiscal year 2004 and assessed a personal property tax thereon. That tax was paid. It is not clear [***5] on this record to which entity the tax was assessed, or who paid the tax, but we infer it was LLC. That assessment is not before us. MRS thereafter notified the assessors that it was the owner of the furniture and fixtures in question, not LLC, and that the property was therefore tax exempt. MRS

contends in the alternative that the valuation for fiscal year 2004 was too high. The assessors responded by letter dated August 20, 2004, with a request [*498] that MRS complete a State Tax Form 2 (form of list) and describe each item of personal property it claimed it owned. See *G. L. c. 59, § 29*. The assessors further indicated that they would accept, in lieu of the statutory form of list, MRS's accounting documentation specifying the "cost and depreciation of each item." The assessors also expressed a willingness to consider a personal property tax exemption if ownership could be documented, or a reevaluation of the property, as appropriate. MRS did not complete and return the form of list. It provided the assessors with relevant portions of accounting statements and annual reports for itself and LLC, but the information described the furniture and fixtures in the aggregate, not individually, [***6] as requested by the assessors.

The records sent by MRS indicate that it owned no real estate, but that it acquired furniture and fixtures in the amount of \$ 262,601.80 in 2002 for the operation of its offices at the real property. An additional \$ 271,015 was spent acquiring furniture and fixtures in 2003. A value of \$ 533,617 for furniture and fixtures is shown on MRS annual reports for calendar years 2003 and 2004. In its annual report for calendar years 2003 and 2004, LLC showed that it owned the real property, but that it owned no furniture or fixtures. Because MRS failed to provide information in the form requested, the assessors estimated the value of the personal property. They revalued the property at \$ 675,000 for fiscal year 2005 and fiscal year 2006 and assessed a personal property tax against LLC. See *G. L. c. 59, §§ 29-37*. Those assessments, but not the valuations, are before us in this appeal.

2. *Discussion. a. Real property.* The board ruled that (1) a regional retirement system is not entitled to an exemption for its real property under *G. L. c. 59, § 5, Second*,² and (2) even if it were entitled to such an exemption, the real property here is not exempt from taxation because [***7] it is not owned by a regional retirement system.

2 *General Laws c. 59, § 5*, states in relevant part: "The following property shall be ex-

empt from taxation . . . Second, Property of the commonwealth"

We review decisions of the board for errors of law. *Commissioner of Revenue v. Jafra Cosmetics, Inc.*, 433 Mass. 255, 259, 742 N.E.2d 54 (2001). Findings of fact by the board must be supported by [*499] substantial evidence. *New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth*, 368 Mass. 745, 749, 335 N.E.2d 897 (1975). Where, as here, the case was submitted to the board on a statement of agreed facts and a supplemental "statement of agreed facts [that] contain[] all [*214] the material facts upon which the rights of the parties are to be determined in accordance with law," it constitutes a "case stated." *Caissie v. Cambridge*, 317 Mass. 346, 347, 58 N.E.2d 169 (1944). As such, "[t]he inferences drawn by the [board] from the facts stated are not binding upon us, and questions of fact as well as questions of law are open for review" on appeal. *Id.* See *Massachusetts Bay Transp. Auth. v. Somerville*, 451 Mass. 80, 84, 883 N.E.2d 933 (2008).

The board first ruled that real property of a regional retirement system is not exempt from taxation. It reasoned that [***8] because *G. L. c. 59, § 5, Eighth*, specifically exempts "[p]ersonal property of any retirement association exempted by [*G. L. c. 32, § 19*]," and because retirement associations are mentioned nowhere else in § 5, the Legislature intended to exempt only "certain personal property of a retirement system," and not its real property. This ruling is error. In *Worcester County v. Mayor & Aldermen of Worcester*, 116 Mass. 193, 194 (1874), this court held that, notwithstanding the absence of any specific statutory exemption from taxation for county-owned land, such land is exempt from taxation if it is owned by an "instrumentalit[y]" of the Commonwealth and devoted to public purposes. "[C]ourts infer that it is not the intention of the Legislature to tax [county property used for public purposes] in the absence of any express declaration that it should be taxed." *Essex County v. Salem*, 153 Mass. 141, 142, 26 N.E. 431 (1891). MRS, the governmental successor to a component of the former Middlesex County government, presently is an instrumentality of the Commonwealth. As such, where the Legislature has not expressly declared that it should be taxed, the real property of MRS

must be deemed exempt from taxation [***9] under *G. L. c. 59, § 5, Second*.

General Laws c. 59, § 5, Eighth, which exempts "[p]ersonal property of any retirement association exempted by [*G. L. c. 32, § 19*]," is not to the contrary. That clause is not concerned with the property (furniture and fixtures) of the retirement system used to carry out its purposes. Rather, it is concerned with the property [*500] in which members, retirees, and beneficiaries of a retirement system have a beneficial interest, namely, investment funds, or personal property in which such funds have been invested.³ As such, the property described in § 5, Eighth, is not property of the Commonwealth or any of its instrumentalities. It is property held for the benefit of retirement system members, retirees, and beneficiaries.

3 *General Laws c. 32, § 19*, states in relevant part: "The funds of such system established under [*G. L. c. 231, §§ 1-28*], so far as they are invested in personal property, shall be exempt from taxation. The rights of a member . . . in the funds of any system established under [*G. L. c. 32, §§ 1-28*], shall be exempt from taxation"

The board also ruled that even if a regional retirement system is entitled to an exemption for its real property, the property [***10] here is not owned by a regional retirement system but by LLC, which is not an instrumentality of government, and the taxes were properly assessed to LLC, as owner. See *G. L. c. 59, § 11*. This ruling is correct. Although MRS could have taken title to the real property in its own name, it chose not to do so for reasons not contained in the record. Instead, MRS created LLC, a limited liability company under Delaware law, and it caused title to the real property to be placed in the name of LLC. Not only does MRS not hold title to the real property, it has no interest in it. Under Delaware law, "[a] limited liability company interest is personal property. A member has no interest [**215] in specific limited liability company property." *Del. Code Ann. tit. 6, § 18-701* (2005). Under the business structure selected by MRS to hold title to the real property, the real property is not the property of the Commonwealth or any of its instrumentalities. It is the property of LLC, and subject to taxation accordingly. See *G. L.*

c. 59, § 11 (taxes on real estate shall be assessed to record owner).

LLC urges us to look to the substance, rather than the form, of its relationship with MRS and hold that the real [***11] property is owned by MRS for purposes of *G. L. c. 59, § 5*, Second. Essentially, LLC contends that it should be treated as an instrumentality of the Commonwealth, or, alternatively, as the alter ego of MRS. The cases on which LLC relies, [*501] *Brown, Rudnick, Freed & Gesmer v. Assessors of Boston*, 389 Mass. 298, 302-303, 450 N.E.2d 162 (1983) (*Brown, Rudnick*), and *H-C Health Servs., Inc. v. Assessors of S. Hadley*, 42 Mass. App. Ct. 596, 678 N.E.2d 1339 (1997), do not support its claim.

We first address the argument that LLC should be treated as an instrumentality of the Commonwealth. In the *Brown, Rudnick* case we affirmed so much of a decision of the board that concluded that a domestic business corporation, created by and solely owned by a partnership for the stated purpose of engaging in the business of leasing personal property, was not entitled to the exemption for personal property under *G. L. c. 59, § 5*, Sixteenth (2),⁴ because it was not a domestic business corporation as that term is used in the statute. We looked to the declared purposes of and the actual work performed by the corporation to determine whether it was in fact operated for purposes that qualified for the exemption. *Id. at 303*. The stated purpose of [***12] the corporation qualified for exemption under *G. L. c. 59, § 5*, Sixteenth (2). However, the corporation leased personal property only to the partnership, and it acquired new property solely to meet the needs of the partnership. The partnership claimed to own no personal property whatsoever, and it was not entitled to any exemption for personal property under § 5. The board found, and we held, that the corporation was not an entity that was operated for gain or profit. Rather, its sole function was to shelter the partnership from personal property tax liability, which is not "business" as that term is used in § 5, Sixteenth (2). Thus, the claim for the exemption failed. *Id. at 304-306*.

4 *General Laws c. 59, § 5*, Sixteenth (2), states: "In the case of (a) domestic business corporation . . . all property owned by such

corporation other than the following" shall be exempted from taxation.

In *H-C Health Servs., Inc. v. Assessors of S. Hadley, supra*, assessors challenged a decision of the board that concluded that two corporations organized under *G. L. c. 156B* qualified for the exemption under *G. L. c. 59, § 5*, Third, for personal property owned by a charitable organization notwithstanding the [***13] fact that they were not organized under *G. L. c. 180* as nonprofit corporations. The primary purpose of the *G. L. c. 156B* corporations, as stated in their articles of organization, was to "operate, and provide services to, residential or day-care facilities for elderly or infirm persons." *Id. at 597*. Their articles of organization [*502] further provided that each corporation would apply for tax exempt status "as a charitable corporation under the provisions of § 501 (c) (3) of the Internal Revenue Code of 1954," that no part of its assets or earnings would inure to the private benefit of any person or entity, and that on liquidation or dissolution its assets shall be distributed only to a [***216] § 501 (c) (3) corporation. *Id. at 597-598*. Each corporation in fact had been granted § 501 (c) (3) status by the Internal Revenue Service, as well as a sales tax exemption certificate from the Department of Revenue. Both corporations operated nursing homes predominantly for Medicaid and Medicare patients. Based on the declared purposes of the corporations and their actual operations, and based on the absence of any requirement in the statute that a taxpayer be incorporated under *G. L. c. 180* to qualify as a charitable [***14] organization, they qualified as charitable organizations under *G. L. c. 59, § 5*, Third. *Id. at 598*.

We turn to LLC to determine if its declared purposes and its actual work warrant treatment as an instrumentality of the Commonwealth. The purposes of LLC, as stated in its operating agreement, are:

"(i) to acquire, own, improve, manage, operate, maintain, lease, sell and otherwise deal with the real property and any improvements thereon in Billerica, Massachusetts known and numbered as 25 Linnell Circle, and (ii) to engage in all related activities and businesses arising from or inci-

dental to any of the foregoing or relating thereto or necessary, desirable, advisable, convenient or appropriate in connection therewith as the Member [MRS] may determine."

These purposes are purely business in nature. LLC does not purport to undertake any governmental function of MRS.⁵ Although it performs a function that MRS is authorized to perform, namely, owning real property, that is not an inherently governmental function. There is nothing in the record to suggest that the landlord-tenant relationship between LLC and MRS is any different from that of any other landlord-tenant relationship. [*503] MRS could [***15] have leased space from someone else, and that relationship ostensibly would not appear materially different from its landlord-tenant relationship with LLC. As stated above, the record is silent as to any reason of MRS for creating LLC,⁶ and all stated purposes of LLC in this record are business purposes.

5 We express no opinion as to whether MRS could even empower it so to act.

6 If, for example, MRS created LLC as a shield against claims of premises liability, it may not properly ask to lower that shield to avoid the tax consequences of its decision.

Turning to the actual workings of LLC, we see an entity that actually is engaged in the business of owning and managing commercial real estate. As stipulated, MRS occupied approximately 23.4% of the building space, 51.5% was leased to private tenants, and LLC was actively seeking a tenant to occupy the remainder of the building. The record indicates that LLC held \$ 190,492 in cash at the end of calendar year 2002, with \$ 55,857 in receivables, and \$ 146,752 due from MRS. By the end of calendar year 2003, LLC held cash in the amount of \$ 92,436, and it had \$ 114,048 in receivables. LLC functions as a business enterprise that is distinct [***16] from MRS. It does not perform any governmental functions.

Applying the functional approach followed in the *Brown, Rudnick* and *H-C Health Servs., Inc.*, cases, we have focused on the stated purposes and actual work of LLC, and conclude that LLC is not

an instrumentality of government, but a conventional business. Its declared purposes are business purposes, it is not structured in any respect to undertake a function of government, and its actual activities are purely business in nature.

[**217] Finally, we turn to the question whether the real property should be treated as that of MRS for purposes of *G. L. c. 59, § 5*, Second. This argument effectively suggests that LLC should be treated as the alter ego of MRS and that we should disregard the separate entities involved. There are two problems with this argument. First, common ownership and common management, alone, generally will not permit disregard of the formal barriers between separate legal entities. See *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 619, 233 N.E.2d 748 (1968). Second, "[t]he doctrine of corporate disregard is an equitable tool that authorizes courts, in rare situations, to ignore corporate [*504] formalities, where such disregard [***17] is necessary to provide a meaningful remedy for injuries and to avoid injustice. . . . In certain situations, the doctrine may also properly be used to carry out legislative intent and to avoid evasion of statutes" (citation omitted). *Attorney Gen. v. M.C.K., Inc.*, 432 Mass. 546, 555, 736 N.E.2d 373 (2000). See *Gurry v. Cumberland Farms, Inc.*, 406 Mass. 615, 625-626, 550 N.E.2d 127 (1990). Although the doctrine usually applies to corporations, we see no reason why it should not also apply to limited liability companies. LLC does not argue that any of the relevant factors (other than common interest and control) applicable to corporate disregard analysis, see *Attorney Gen. v. M.C.K., Inc.*, *supra* at 555, n.19, are present in this case. Thus, its claim of alter ego necessarily fails. The board properly noted in its decision that this argument is not compelling when invoked by an entity seeking to disregard its own business structure. We agree.

For the foregoing reasons, we affirm the portion of the board's decision that upholds the assessment of the real property taxes against LLC.

b. *Personal property.* The personal property tax for furniture and fixtures was assessed against LLC because MRS failed to comply with the [***18] request of the assessors to complete the statutory form, or, alternatively, to provide accounting documentation specifying the "cost and deprecia-

tion of each item." The board upheld the decision of the assessors on grounds that LLC "failed to meet its burden of proving that it owned the subject personal property," and further, that LLC "fail[ed] to offer such testimony or supporting documentation to prove its ownership of the subject personal property." The board also concluded that personal property of a retirement system is not exempt.

The board's ruling that a retirement system's personal property is not exempt from local taxation is error, for reasons previously discussed. See *Essex County v. Salem*, 153 Mass. 141, 142, 26 N.E. 431 (1891); *Worcester County v. Mayor & Aldermen of Worcester*, 116 Mass. 193, 194 (1874).

With respect to LLC's failure to meet its burden of proof to show that it owned the subject personal property, the board appears to have placed an incorrect burden on LLC. While MRS may not have complied with the request of the assessors to show that it owned the property, the question before us [*505] whether LLC owned the property, and it consistently has claimed that it did not.

The [***19] parties stipulated that MRS acquired the subject personal property. The statements of agreed facts also show that MRS carries the per-

sonal property on its books as capital assets being depreciated, whereas LLC shows no personal property in its annual reports. LLC shows ownership of only the land and the building. The "case stated" before the board unequivocally [**218] demonstrates that LLC has no personal property. Indeed, there is no evidence whatsoever that LLC owns any personal property. It is not clear on this record whether LLC ever filed a statutory form of list stating that it had no personal property. However, where it had no personal property, it had no obligation to file the form. See *Boston & Albany R.R. v. Boston*, 275 Mass. 133, 135, 175 N.E. 740 (1931). LLC is entitled, as a matter of law, to an abatement of the entire personal property tax assessed against it for fiscal years 2005 and 2006.

3. *Conclusion.* For the foregoing reasons, the decision of the board as to the real property assessment is affirmed; the decision of the board as to the personal property assessment is reversed and the matter is remanded to the board with instructions to enter an order granting the abatement for personal [***20] property taxes assessed for fiscal years 2005 and 2006.

So ordered.

MORTON STREET LLC & another ¹ vs. SHERIFF OF SUFFOLK COUNTY & others. ²

1 Debbie, LLC.

2 Suffolk County sheriff's department and Suffolk County. We refer to the defendants collectively as the sheriff. The liability of Suffolk County, however, is not at issue.

SJC-10318

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 485; 903 N.E.2d 194; 2009 Mass. LEXIS 49

**February 2, 2009, Argued
March 31, 2009, Decided**

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on January 6, 2004. The case was heard by Margaret R. Hinkle, J. on motions for summary judgment. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: Judgment affirmed.

COUNSEL: Sander A. Rikleen (Hilary B. Dudley with him) for the plaintiffs.

Russell T. Homsy for the defendants.

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

OPINION BY: GANTS

OPINION

[*485] [**195] GANTS, J. In this case we must decide whether the sheriff of [*486] Suffolk County may terminate a ten-year lease entered into with Morton Street LLC ³ after the sheriff lost outside funding for the lease three years into the lease. We conclude that the sheriff lawfully terminated the lease.

3 Debbie, LLC, is the current owner of the premises subject to the lease, and is the successor to Morton Street LLC's interest in the

lease. We refer to Morton Street LLC and Debbie, LLC, collectively as Morton Street.

Background. The material, undisputed facts are as follows. ⁴ Prior to [**196] March, 2000, the sheriff issued a request for proposal (RFP) inviting offers to lease a minimum of 5,000 square feet of office space near the West Roxbury District Court House [***2] for use as a community corrections facility to be operated by the sheriff. ⁵, ⁶ The RFP provides that it would be "highly advantageous" if the lease term was for ten or more years. Under Part 1 of the RFP, entitled "RFP General Information, Bid Submission Requirements and Other Terms and Conditions," the RFP incorporates by reference the city of Boston (city) standard contract (known as Form CM 10), and general conditions (known as Form CM 11). The RFP declares that these forms are provided in "Attachment C," but the RFP provided to Morton Street did not include the attachment. The RFP, however, names William Sweeney as the "Procurement Team Leader," and provides his contact information, including his telephone number, "in the event this RFP is incomplete or the Proposer is having trouble obtaining any required attachments."

4 Because we are reviewing the allowance of summary judgment in favor of the sheriff, where facts are in dispute, we accept the version set forth by the losing party, here, Morton Street. See *Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub.*

Employees Union, 407 Mass. 601, 603, 555 N.E.2d 543 (1990).

5 The community corrections facility was intended to be (and was) [***3] used as a women's resource center, "a nonresidential, administrative custody program for female offenders [providing] educational, employment and counseling services."

6 In connection with the sheriff's Request for Proposal (RFP), the city of Boston (city) and Suffolk County issued a separate RFP for the benefit of the sheriff "for [the provision of] goods and services and performing . . . work." This separate RFP is not at issue in this case.

The general conditions in Form CM 11 provide that the contract is "subject to the availability of an appropriation therefor," and includes a termination provision in § 8.4 that states:

"This Contract may be terminated at any time for the [*487] convenience of the City at the option of the Official by delivering or mailing to the Contractor at the Contractor's business address a written notice of termination setting forth the date, not less than seven (7) days after the date of such delivery or mailing, when such termination shall be effective."

The RFP recognizes the possibility of a conflict between its express terms and the forms it incorporated (Forms CM 10 and 11), as well as amendments to the RFP and "Proposer Response Content," and specifies how any [***4] such conflicts should be resolved. Under this contractual order of preference, the RFP terms took precedence, followed by Form CM 11, and then by Form CM 10.

In response to the RFP, Morton Street tendered a proposal on March 9, 2000, offering to lease space in an office building at 113-123 Morton Street in the Jamaica Plain section of Boston. Morton Street and the sheriff then engaged in negotiations for the lease of office space in these premises, which resulted in the execution of a lease on June 1, 2000.

Under the lease, the sheriff agreed to lease the office space for ten years, commencing on the delivery of the premises to the sheriff when Morton Street's required improvements were substantially completed. The lease does not include any provision giving the sheriff or the city the right to terminate the lease with seven days' notice "for the convenience of the City." Indeed, the lease provides that, if the sheriff were to fail to pay the required fixed or additional rent, Morton Street, after giving the sheriff written notice and thirty days to cure its default, was entitled to repossess the premises and to be indemnified by the sheriff for any loss of rent it may suffer during [***5] the remaining term of the lease. The lease, however, expressly [**197] states: "This Lease is subject to the City of Boston and its Law Department's approval of the contract between the City of Boston and Landlord, which approval Tenant shall seek to secure as promptly as reasonably possible." The lease further provides that, if the tenant, despite its diligent efforts, were unable to obtain the city's approval, "the obligations of each party hereto will terminate and be of no further force or effect."⁷

7 While the city apparently provides only approximately five per cent of the sheriff's funding, with the balance coming from State funds and grants, all checks written on behalf of the sheriff to vendors or contractors are issued by the city. Therefore, all contracts entered into by the sheriff had to be approved by the city and its law department.

[*488] On June 19, 2000, the sheriff wrote to the mayor of Boston asking him to approve the lease. On June 26, 2000, Sweeney sent a note to Morton Street requesting that its manager, Charles Sullivan, sign the city's standard contract (Form CM 10), with the general conditions contained in Form CM 11. Sullivan recognized that Form CM 11 included a termination [***6] provision that had not been contained in the lease, and told Sweeney by telephone that he would not sign it because it contradicted the lease.⁸ Sweeney explained that the execution of the form was an administrative requirement that had to be satisfied if any checks were to be paid to Morton Street for the lease payments. Sullivan told Sweeney, "I will sign it and send it back, but only if we agree that basically this form is meaningless, that the numbers are inaccur-

rate and the lease is the controlling document." Sweeney agreed, and Sullivan returned the executed standard contract on June 28, 2000, with a cover letter confirming "our conversation that the terms of the lease will control over any inconsistent provision of the Standard Contract." Neither Sweeney, nor anyone else on behalf of the sheriff, responded to Sullivan's letter, or otherwise indicated to Morton Street that they disagreed with its contents. On July 14, 2000, the auditor for the city signed Form CM 10, approving the availability of an appropriation for the rent. Thomas Yotts, the chief financial officer for the sheriff, also signed the form as the "awarding authority/official," but did not affix a date. On July [***7] 26, 2000, the mayor approved the lease.

8 Charles Sullivan also noted that the total amount of rent to be paid over the ten-year term of the lease was in error on the standard contract, because the lease provided for the annual rent to be adjusted at the beginning of each successive lease year based on changes in the consumer price index, but the amount stated in the standard contract assumed no adjustments during the ten years.

The sheriff occupied the leased premises for three years. During that time period, the entire cost of the lease was paid from funds provided by the Administrative Office of the Trial Court's office of community corrections (OCC). However, OCC was not able to continue to fund the lease into the fourth lease year, [*489] which commenced at the same time as the new fiscal year on July 1, 2003. Having lost the OCC funding and faced now with the prospect of having to find the funds to pay the lease from its own budget, the sheriff decided to terminate the lease.⁹ On July 2, 2003, the [**198] sheriff sent a letter of termination to Morton Street, declaring that, pursuant to the termination clause in Form CM 11, the lease was being terminated "for the convenience of the City." Morton [***8] Street responded by commencing suit in January, 2004, alleging that the termination was in breach of the lease.

9 At the time, the sheriff was grappling with difficult budgetary issues, including a \$ 5.4 million deficit for fiscal year 2003, with fiscal year 2004 looking equally bleak. The \$

5.4 million deficit for fiscal year 2003 derived in part from the settlement of a large Federal tort action against the sheriff. Payment in accordance with the settlement had been due since November, 2002, interest was accruing, and the settlement had not been fully funded by the Commonwealth.

Morton Street filed a motion for partial summary judgment, contending that the lease provided for a ten-year term and did not permit early termination. The sheriff filed a cross motion for summary judgment asserting that (1) the lease was void under § 12 (b) of the Uniform Procurement Act (Act), G. L. c. 30B, because it exceeded three years in duration without the requisite authorization by a majority of the county commissioner¹⁰; (2) the lease could be terminated under *G. L. c. 30B, § 12 (a)*, because OCC terminated its funding for the lease and adequate funds were not available in the sheriff's budget to make [***9] the lease payment¹¹; and (3) early termination of the lease was permissible under Form CM 11's termination provision. In a carefully considered opinion, a Superior Court judge agreed with the sheriff's two arguments under *G. L. c. 30B, § 12 (a)* and *(b)*, and granted summary judgment for the sheriff. A judgment entered dismissing the complaint, and Morton Street appealed. We transferred the case here on our own initiative.

10 *General Laws c. 30B, § 12 (b)*, provides in part: "Unless authorized by majority vote [here, of the county commissioners], a procurement officer shall not award a contract for a term exceeding three years"

11 *General Laws c. 30B, § 12 (a)*, provides in part: "The procurement officer shall not enter into a contract unless funds are available for the first fiscal year at the time of contracting. Payment and performance obligation for succeeding fiscal years shall depend on the availability and appropriation of funds."

[*490] We affirm the judge's grant of summary judgment, but on different grounds, namely, that under general contract principles, the sheriff was entitled to terminate the lease in accordance with Form CM 11's unambiguous termination provision.¹² Because [***10] we affirm on this

ground, we do not consider whether the sheriff would also be entitled to summary judgment on either or both of the grounds relied on by the Superior Court judge. Nor do we consider whether the sheriff is a "governmental body" under the Act, whose contracts for the procurement of supplies or real estate are governed by the Act.¹³ Nor do we consider whether, if the sheriff's contracts were governed by the Act, its leasing of [**199] real estate would be governed solely by the provisions of *G. L. c. 30B, § 16*, rather than the bidding requirements and limitations in *G. L. c. 30B, § 12*.¹⁴

12 This case does not represent the first occasion we have reviewed the sheriff's decision to terminate a lease. In *Bradston Assocs., LLC v. Suffolk County Sheriff's Dep't*, 452 Mass. 275, 275-276, 892 N.E.2d 732 (2008) (*Bradston*), we concluded that the "failure of the auditor of the city of Boston to certify that an adequate appropriation was available to fund a lease contract entered into between Bradston Associates, LLC . . . and the sheriff . . . , which was in all other respects properly executed and funded" was an insufficient ground on which the sheriff could invalidate the lease. Although the lease in [***11] the *Bradston* decision became effective only on the execution of the city's standard contract and general conditions (Forms CM 10 and 11), the sheriff never sought to terminate the lease based on the termination provision in Form CM 11. *Id.* at 276 & n.2. Therefore, the termination provision that proves decisive here was never addressed in *Bradston*.

13 A "[g]overnmental body" under the Uniform Procurement Act is defined as "a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county." *G. L. c. 30B, § 2*. Morton Street contends that the sheriff's department is "a long-standing public entity, independent of both Suffolk County and the City of Boston and therefore outside the scope of *G. L. c. 30B*."

14 Our conclusion also obviates the need to resolve Morton Street's contention that the

sheriff's statutory defenses under *G. L. c. 30B, § 12*, were waived because they were not pleaded as affirmative defenses in the sheriff's answer.

Discussion. Morton Street was given fair warning in the RFP that it would need to accept the general conditions in Form CM 11 as part of [***12] any contractual agreement with the sheriff if its proposal were accepted. Morton Street contends that it had no fair warning because it was not provided with a copy of Form CM 10 or Form CM 11 as "Attachment C" to the RFP. [*491] While Form CM 11 (and Form CM 10) should have been provided as the promised "Attachment C" to the RFP, the RFP invited those submitting proposals to contact the procurement team leader, whose name and contact information were provided "in the event this RFP is incomplete or the Proposer is having trouble obtaining any required attachments."

Contrary to Morton Street's argument, the ten-year lease term requested in the RFP is not in conflict with the termination provision in Form CM 11, so the RFP need not take precedence as to termination. While the RFP seeks at least a ten-year lease term, it does not speak of termination. When read together with Form CM 11, which the RFP expressly incorporates and which sets forth an unambiguous termination provision, the RFP seeks a lease for at least ten years that would be terminable with seven days' notice by the designated official "for the convenience of the City."

The lease later negotiated between the sheriff and Morton Street, [***13] while it did not initially incorporate the general conditions in Form CM 11, provided that the lease was null and void without the city's approval. It was soon made clear to Morton Street that the city's approval was conditioned on Morton Street's execution of Forms CM 10 and 11, which gave the sheriff a right of termination on seven days' notice that had not been provided in the lease and which declared that the lease was "subject to the availability of an appropriation therefor." Morton Street executed Form CM 10, with the general conditions as stated in Form CM 11, knowing that the terms of the general conditions of this standard contract modified the lease provision regarding termination. Morton Street, however, understood that its oral agreement with Sweeney, later memorialized in writing by Sullivan's cover letter, made

Form CM 11 effectively "meaningless." Morton Street contends that this prior oral agreement with the sheriff's procurement team leader supersedes the plain language of the written standard contract it later executed and that, essentially, the sheriff should be estopped from enforcing a termination provision that her agent orally agreed would not be binding.

We [***14] have been "reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law [*492] intended to protect the public interest." *Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth.*, 387 Mass. 687, 693, 443 N.E.2d 115 (1982), and cases cited. This traditional reluctance had been justified by the need to protect the public from improper collusion by public officials, deference to legislative policy, concern about the public fisc, and administrative efficiency. *McAndrew v. School Comm. of Cambridge*, 20 Mass. App. Ct. 356, 360, 480 N.E.2d 327 (1985). The rule against applying estoppel to the government has applied "where a government official acts, or [**200] makes representations, contrary to a statute or regulation designed to prevent favoritism, secure honest bidding, or ensure some other legislative purpose." *Id.* at 361. Consequently, when a public authority failed to follow statutory bidding procedures, we allowed the public authority to renege on an agreement to sell public property, even while recognizing that the public authority's conduct "would hardly qualify it for a 'sportsmanship' award," that the private party reasonably may conclude "that it was treated most unfairly," and that [***15] we "would extend little sympathy to a private citizen who acted similarly in a private transaction." *Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth.*, *supra* at 693, 694.

Here, the oral agreement made by Sweeney was not contrary to any statute or regulation, but it was contrary to a written agreement soon to be entered into by the sheriff, Morton Street, and the city. The application of estoppel principles would be equally inappropriate here. To permit a private party, through a prior oral agreement with a government official, to nullify a subsequent written contract with a governmental entity would invite confusion and uncertainty in public contracting and endanger the public fisc. See *Stadium Manor, Inc. v. Division of Admin. Law Appeals*, 23 Mass. App. Ct. 958,

962, 503 N.E.2d 43 (1987), quoting *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984) ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law This is consistent with the general rule that those who deal with the [g]overnment are expected to know the law and may not rely on the conduct of [g]overnment [***16] agents contrary to law").

"The reliance of the party seeking the benefit of estoppel must have been reasonable." *O'Blenes v. Zoning Bd. of Appeals [*493] of Lynn*, 397 Mass. 555, 558, 492 N.E.2d 354 (1986). See *Franklin County Realty Trust v. Assessors of Greenfield*, 391 Mass. 1018, 1018-1019, 463 N.E.2d 554 (1984); *Ford v. Rogovin*, 289 Mass. 549, 552, 194 N.E. 719 (1935); *Calnan v. Planning Bd. of Lynn*, 63 Mass. App. Ct. 384, 390, 826 N.E.2d 258 (2005). In the circumstances of this case, where the lease states that it was subject to the city's approval, we conclude, as a matter of law, that it was not reasonable for Morton Street to rely on a representation by Sweeney that the city's standard contract and general conditions (Forms CM 10 and 11) would be meaningless even after the standard contract was executed. Form CM 11 granted a right of termination that had not been provided in the lease. It was unreasonable for Morton Street to assume that the right it had granted in a written contract with the sheriff and the city would not exist or never be enforced based on Sweeney's oral representations.

Nor do the facts of this case equitably cry out for this court to overcome its historic reluctance to apply principles of estoppel to public entities. Morton [***17] Street executed a standard contract with the city knowing that the city required the contract to be executed before it would issue checks for the monthly lease payments. Under the oral agreement it made with Sweeney, the city would have continued to issue these checks, believing that Morton Street, by signing the standard contract, had accepted the general conditions when, in fact, Morton Street had rejected the termination provision of those general conditions. To grant estoppel here would mean enforcing an oral agreement whose sole purpose was to mislead the city.

[**201] Morton Street further contends that the sheriff could not terminate the lease pursuant to

the termination clause because that clause permits termination only "for the convenience of the City," and not for the convenience of the sheriff. Morton Street ignores the language that follows that phrase, which provides that termination is permissible "at any time for the convenience of the City *at the option of the Official*" (emphasis added). "Official" is a defined term in Form CM 11, meaning "the awarding authority/officer acting on behalf of the City in the execution of the Contract."¹⁵ The chief financial officer for the sheriff [***18] executed Form CM 10 as the "awarding authority/official."

15 The city is also a defined term in Form CM 11, meaning "the City of Boston or the County of Suffolk."

[*494] Morton Street argues that the phrase "for the convenience of the City" used in the termination clause of Form CM 11 should not be interpreted to allow termination of the lease at will and without regard to the needs of the city (as opposed to the sheriff). As defined in the American Heritage Dictionary of the English Language 411 (3d ed. 1996), the word "convenience" means the "quality of being suitable to one's comfort, purposes, or needs." Implicitly, when termination is permitted "for the convenience of the City," the city (here, the sheriff, acting for the city) may terminate the lease when continuing it would become inconvenient for

the city. Here, Form CM 11 provided clear notice that the lease could be terminated if its funding dried up when it declared that "[t]his Contract is subject to the availability of an appropriation therefor." We need not determine the full extent of the sheriff's discretion to terminate a contract "for the convenience of the City," because, pursuant to the general conditions, losing the funding [***19] for the lease is plainly an inconvenience justifying termination. Having lost the funding from the OCC that had previously paid the entire annual cost of the lease, the sheriff now had to determine whether to find money within her own budget to pay for the lease. Because she was already faced with a considerable deficit, funding this lease would have meant reducing or eliminating the funding devoted to other obligations or programs. See note 9, *supra*. The decision to close the community corrections facility and terminate the lease is among the many challenging decisions that public officials with considerable obligations and limited resources often need to make, especially during difficult fiscal times, in order to allocate available resources more suitably to the sheriff's purposes or needs. In these circumstances, we conclude that the sheriff acted in accordance with Form CM 11 when she terminated the lease "for the convenience of the City," and did not commit a breach of the lease by doing so.

Judgment affirmed.

ONEX COMMUNICATIONS CORPORATION vs. COMMISSIONER OF
REVENUE.

No. 07-P-1805.

APPEALS COURT OF MASSACHUSETTS

74 Mass. App. Ct. 643; 909 N.E.2d 53; 2009 Mass. App. LEXIS 953

October 10, 2008, Argued

July 13, 2009, Decided

PRIOR HISTORY: [***1]

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

HEADNOTES

Taxation, Personal property tax: abatement, Manufacturing corporation.

COUNSEL: Kenneth W. Salinger, Assistant Attorney General, for Commissioner of Revenue.

Richard L. Jones (William E. Halmkin with him), for the taxpayer.

JUDGES: Present: Rapoza, C.J., Dreben, & Mills, JJ.

OPINION BY: MILLS

OPINION

[**54] [*643] MILLS, J. Onex Communications Corporation (Onex) was formed in 1999 to design and sell integrated circuits for use in the telecommunications industry.¹ Its efforts yielded the OMNI [*644] chip,² early versions of which were produced, sold, and tested in 2001 before the device became generally available on the market in 2002. Able to accommodate thirty-two distinct voice channels on each of its 1,344 virtual circuits, a single OMNI chip could perform the work of ten chips made with prior technology. The product was revolutionary for its time and enabled substantial reductions in power use and system costs.

1 At all relevant times, Onex was a Delaware corporation with its principal place of business in Massachusetts.

2 The OMNI chip is also referred to in the record as a "chip-set," apparently because it is actually made up of two microchips, one functioning as a "switch" and the other as a "network processor." For convenience we refer to the product [***2] simply as the OMNI chip.

In 2002, the Department of Revenue (department) audited Onex's purchases of personal property. The audit period began on August 1, 1999, and extended through September 21, 2001.³ Over the course of the audit period, Onex had purchased \$ 2,723,510 of personal property for research and development (R&D) purposes, paying neither sales nor use tax. In December, 2002, the Commissioner of Revenue (commissioner) advised Onex that its R&D purchases had been taxable and that the department intended to assess use taxes of \$ 136,175 plus interest and penalties. Onex requested an abatement, contending that the items purchased were "materials, machinery and replacement parts . . . used directly and exclusively in R&D" and were, as such, exempted from the use tax by *G. L. c. 64H, § 6(r) & (s)*, as incorporated by *G. L. c. 64I, § 7(b)*.⁴ The request was denied on the grounds that Onex had qualified as neither a manufacturing nor a research and development corporation under *G. L. c. 63, §§ 38C or 42B*.⁵ In the circumstances, at least one such qualification was necessary for Onex's R&D purchases to come within [*645] the scope of the exemptions set forth in *G. L. c. 64H, § 6(r) & (s)*.

3 The [***3] end of the audit period coincided with the acquisition of Onex by Trans-Switch Corporation. Like the parties, we refer to both the pre- and postmerger entities as "Onex" in order to minimize confusion.

4 With exceptions not here relevant, *G. L. c. 64I, § 7(b)*, exempts from the use tax any item that is exempted from the sales tax imposed by *G. L. c. 64H*.

5 *General Laws c. 64H, § 6(r) & (s)*, as amended through *St. 1977, c. 620, §§ 1, 2*, contain tax exemptions for, inter alia, materials, machinery, and replacement parts "used directly and exclusively in . . . research and development by a manufacturing corporation or a research and development corporation within the meaning of [*G. L. c. 63, §§ 38C or 42B*]." The aforementioned §§ 38C and 42B are applicable to domestic and foreign corporations, respectively. As a Delaware corporation, Onex is governed by § 42B. See *Joseph T. Rossi Corp. v. State Tax Commn.*, 369 *Mass. 178, 180 n.1, 338 N.E.2d 557 (1975)*.

Onex challenged the denial of its requested abatement before the Appellate Tax Board (board). The board ruled that Onex had been a manufacturing corporation within the meaning of *G. L. c. 63, § 42B*, throughout the audit period, and that assessment of the use tax [***4] had been improper.⁶ Because we agree that Onex [**55] qualified as a § 42B manufacturing corporation throughout the audit period, we affirm the board's order directing a use tax abatement of \$ 136,175 and cancellation of all penalties and interest.

6 The board reserved decision as to whether Onex had qualified as a § 42B research and development corporation throughout the audit period. The substance of Onex's cross-appeal is that the board's findings compel a ruling that Onex was, at all relevant times, a § 42B research and development corporation. The commissioner maintains that further findings would be necessary to resolve that matter. We acknowledge Onex's preservation of the issue, but otherwise leave it undressed.

"Finished product" limitation. The commissioner maintains that Onex could not have been a manufacturing corporation during the audit period essentially because, at the conclusion of that period, Onex had yet to achieve a finished product.⁷ That analysis may have superficial appeal, but it is not compelled by the statute. Indeed, the statutory text

does little, if anything, to clarify what exactly the Legislature intended to qualify within the ambit of manufacturing. The relevant [***5] provision, *G. L. c. 63, § 42B*, states only that a "manufacturing corporation" is one "engaged in manufacturing." See *Commissioner of Rev. v. Houghton Mifflin Co.*, 423 *Mass. 42, 44, 666 N.E.2d 491 (1996)*.⁸

7 Onex disputes the commissioner's assertion that Onex achieved no tangible, finished product during the audit period. Specifically, Onex points to the production of at least fifty OMNI chips in early 2001, followed by the production of certain additional OMNI chips in mid-2001, the latter incorporating a design modification. The commissioner characterizes all the OMNI chips produced in 2001 as mere prototypes (see note 8, *infra*). Because we hold that designation as a § 42B manufacturing corporation does not require a finished product *ex ante*, we do not address whether some or all of the OMNI chips produced in 2001 ought to have been considered finished products.

8 Department regulations contained at 830 *Code Mass. Regs. § 58.2.1(6)(b)* (1999), reproduced in part below, attempt to further illuminate the term "manufacturing." The commissioner emphasizes the guideline in subparagraph 5 to support her position, while Onex points to subparagraph 7:

"(b) Manufacturing. Manufacturing is the process of substantially [***6] transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into a product possessing a new name, nature and adapted to a new use. In determining whether a process constitutes manufacturing, the Commissioner will examine the facts and circumstances of each case. However, the following principles will serve as guidelines:

" . . .

"5. Manufacturing ordinarily involves the production of products in standardized sizes and qualities and in multiple quantities. Market research, research and development, and design and creation of a prototype, although prerequisites to manufacturing, are not manufacturing.

" . . .

"7. A process which does not produce a finished product, but constitutes an essential and integral part of a total manufacturing process, may constitute manufacturing. A process that is a practical and necessary step in the production of a finished product for sale is generally an essential and integral part of a total manufacturing process."

[*646] The pertinent decisional law, moreover, ascribes a far broader meaning to manufacturing than the minimalist interpretation urged by the commissioner. Massachusetts cases instruct that "[t]he words 'engaged in [***7] manufacturing' are not to be given a narrow or restricted meaning." *Assessors of Boston v. Commissioner of Corps. & Taxn.*, 323 Mass. 730, 748-749, 84 N.E.2d 129 (1949). Rather, the phrase is to be fairly construed and reasonably applied to effectuate legislative intent. *Id.* at 741. We have long inferred, without contradiction from the Legislature, that the tax exemption at issue was intended "[to] induc[e] new industries to locate [in the Commonwealth] and to foster the expansion and development of [its existing] industries" *Ibid.* See *Houghton Mifflin Co.*, 423 Mass. at 46-47.

That purpose would be substantially frustrated were we to interpret §§ 38C [*56] and 42B to mean that no corporation may be designated a manufacturing corporation until it has achieved its intended finished product. In particular, we note that such a policy would place new or specialized corporations in a highly disadvantageous tax posi-

tion. Consider the R&D purchases of an established corporation that, in addition to its R&D efforts, engages in the assembly and sale of an entirely unrelated product. Provided these latter, clearly manufacturing activities are substantial, the corporation will be entitled to classification as [***8] a manufacturing corporation, [*647] and its R&D purchases, despite their irrelevance to the corporation's existing finished product, will be exempt from sales and use taxation.⁹ Now consider identical R&D purchases, made in furtherance of R&D efforts identical to those underway at the established corporation, but this time by a new corporation that has no preexisting finished product. Under the commissioner's interpretation of the statute, the new corporation would be barred from qualifying as a manufacturing corporation and its R&D purchases would be subject to taxation.¹⁰ That result is arbitrary and inimical to the Legislature's purpose in enacting the statute.

9 Classification as a manufacturing corporation does not require that manufacturing operations constitute the principal business of the corporation so classified. Rather, any such operations that are substantial, in relative or absolute terms, will suffice. See *Commissioner of Corps. & Taxn. v. Assessors of Boston*, 321 Mass. 90, 96-97, 71 N.E.2d 874 (1947).

10 While this outcome could be avoided if the new corporation were able to qualify as a § 38C or § 42B research and development corporation, the law is unclear both as to (1) whether a corporation [***9] that has no receipts may so qualify, and (2) what constitutes "receipts" in this context. See note 6, *supra*. Moreover, manufacturing corporations are entitled to certain local tax exemptions not available to research and development corporations. See *G. L. c. 63*, §§ 38C, 42B.

Classification of Onex's activities. Having dispensed with the commissioner's contemplated finished product limitation, we must now consider at what times, if any, Onex was engaged in substantial manufacturing activities.

We first note, but do not rely upon, an amendment to §§ 38C and 42B that took effect in 2006,

several years after the present assessment against Onex. "[T]he development and sale of standardized computer software," the text added by the amendment reads, "shall be considered a manufacturing activity, without regard to the manner of delivery of the software to the customer." *G. L. c. 63, §§ 38C, 42B*, as amended through St. 2005, c. 163, §§ 27, 29, 59. Enactment of this language, which brings the creation of intangible software products within the statutory definition of manufacturing, cannot be reconciled with a legislative conception of manufacturing that is confined to the assembly line. Even before [***10] the aforementioned amendment to §§ 38C and 42B, however, Onex's activities would properly have been classified as manufacturing.

The board found, on substantial evidence, that Onex was [*648] founded for the purpose of designing and manufacturing a microchip device to enhance data transmission over communications networks. Work on that device, ultimately branded as the OMNI chip, began from a blank sheet of paper. Onex engineers created, refined, integrated, and embedded OMNI's numerous software and hardware components. From a physical standpoint, the board's findings establish that "[t]iny internal modules had to be interwoven, integrated, and laid out to enable the intended functionality." To that end, Onex engineers drafted intricate electronically-stored [**57] "blueprints" to direct, with absolute precision, the physical construction of the OMNI chip from raw silicon and the embedding of the software into the hardware.¹¹ Testimony credited by the board established that the development of these blueprints "was an essential step in manufacturing the OMNI chip." In sum, the board properly found, on the basis of the evidence before it, that "Onex's activities during the audit period centered on [***11] taking the OMNI chip from abstract concept to production." It then ruled, as matter of law, that the entirety of this process constituted manufacturing. We agree. "[P]rocesses which do not in themselves produce a finished product are nonetheless 'manufacturing' if they comprise an 'essential and integral part of a total manufacturing process.'" *Houghton Mifflin Co.*, 423 Mass. at 47, quoting from *William F. Sullivan & Co. v. Commissioner of Rev.*, 413 Mass. 576, 580, 602 N.E.2d 188 (1992).

11 Because Onex lacked the sophisticated equipment necessary to assemble the OMNI chip internally, it outsourced that task to another corporation from July, 2000, through December, 2005. That corporation was required to implement Onex's blueprints with exactitude, and the contract provided that all completed chips were the property of Onex. This arrangement does not impair Onex's status as a manufacturing corporation. See *Houghton Mifflin Co.*, 423 Mass. at 44, 48-51 (preparation of the electronic proofs for a textbook held to constitute manufacturing, notwithstanding that all printing and binding tasks were outsourced).

In *Houghton Mifflin Co.*, 423 Mass. at 50, the court held that the creation of electronic proofs of [***12] the pages of a textbook constituted manufacturing. Preparation of the proofs began with editors, generally employees of Houghton Mifflin, engaging in "extensive research and development activities regarding a proposed book" to assess marketability and determine potential [*649] content and formatting. *Id.* at 43. Composition and editing of a manuscript followed, in addition to the creation or gathering of illustrative charts, graphs, drawings, and photographs. *Id.* at 43-44. The exact placement of these various items was specified in the electronic proofs ultimately sent to outside vendors for printing and binding. *Id.* at 44, 50-51. As such, the court observed that "[Houghton Mifflin] transforms ideas, art, information, and photographs, by application of human knowledge, intelligence, and skill, into computer disks, ready for use by independent printers, containing an immense amount of information in a highly organized form" and concluded that these activities sufficed to warrant designation as a manufacturing corporation. *Id.* at 48, 50-51. In reaching this conclusion, the court emphasized that the electronic proofs were not "valued solely for their artistic and intellectual content" but were, [***13] rather, "valuable principally because they [were] physically useful in making the finished product." *Id.* at 49. See *Commissioner of Rev. v. Fashion Affiliates, Inc.*, 387 Mass. 543, 545-546, 441 N.E.2d 520 (1982). The court, we note, was not concerned with whether the finished product had yet materialized. Its inquiry instead focused on the manufacturing process that was underway -- one which, the context makes clear, was reasonably cal-

culated to culminate in a finished product. The court agreed with the board that Houghton Mifflin's operations "produce a significant degree of change and refinement to the materials involved and . . . are essential and integral steps in the manufacture of conventional books." *Houghton Mifflin Co.*, 423 Mass. at 49. The court specifically [****58**] acknowledged that some of the "materials" involved were intangible. *Id.* at 48.

The board's ruling here drew many sound comparisons between Onex's activities during the audit period and the manufacturing process delineated in *Houghton Mifflin Co.*, *supra*. Onex's creation of blueprints, the purpose of which was to direct with absolute specificity the manner in which the OMNI chip was to be assembled, does not admit of meaningful differentiation [*****14**] from Houghton Mifflin's creation of electronic proofs of textbook

pages. In each instance, a vast amount of information was marshaled in a manner sufficient to permit, and for the express purpose of permitting, assembly of a physical object intended to unleash the benefit of the information so organized. The board properly [***650**] found that Onex's activities throughout the audit period were directed toward devising and refining the blueprints that specified how to assemble the OMNI chip. As such, all of Onex's activities during that period were essential and integral to the total manufacturing process, a circumstance entitling Onex to classification as a manufacturing corporation.

Conclusion. The decision of the board is affirmed in all respects.

So ordered.

RETIREMENT BOARD OF SALEM vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & another.¹

1 Claire Cole. A suggestion of death was filed on behalf of Cole in the Superior Court on December 19, 2006.

SJC-10215

SUPREME JUDICIAL COURT OF MASSACHUSETTS

453 Mass. 286; 901 N.E.2d 131; 2009 Mass. LEXIS 28

**December 1, 2008, Argued
February 24, 2009, Decided**

PRIOR HISTORY: [***1]

Essex. Civil action commenced in the Superior Court Department on December 5, 2006. The case was heard by John T. Lu, J., on a motion for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Salem Ret. Bd. v. Contributory Ret. Appeal Bd., 2007 Mass. Super. LEXIS 483 (Mass. Super. Ct., 2007)

COUNSEL: William J. Lundregan, for the plaintiff.

Paul F. Applebaum, for Claire Cole.

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

OPINION BY: BOTSFORD

OPINION

[**132] [*286] BOTSFORD, J. Claire Cole (employee), an employee of the city of Salem for many years, suffered a permanently disabling heart attack at home within one hour after experiencing emotional distress on being told, while she was at work, that her employment position was going to be eliminated in the upcoming budget. A regional medical panel concluded that the heart attack was caused in part by the employee's emotional stress connected to [*287] learning the news of her impending job loss. At issue here is whether in such circumstances, the employee has been disabled by a

"personal injury sustained . . . as a result of, and while in the performance of" her employment duties within the meaning of *G. L. c. 32, § 7 (1)*, the accidental disability retirement statute. We conclude that the employee's [***2] disability qualifies under the statute. We therefore affirm the decision of the Contributory Retirement Appeal Board (CRAB), determining that the employee was entitled to accidental disability retirement benefits. Because the employee has since died, these benefits belong to her estate.

1. Background. The employee was born on April 3, 1940, and worked as an administrative assistant in the Salem department of public works beginning in 1975. Her duties included answering telephones, filing, typing, photocopying, and assisting with the payroll. She became a member of the contributory retirement system in 1976.

On March 22, 2000, at approximately 3:20 P.M., the employee's supervisor called her into his office and informed her that her position was being eliminated as of July 1, 2000. The employee became tearful [**133] and received permission from her supervisor to leave for the day. At approximately 4 P.M. that afternoon, after she had left the workplace, the employee developed retrosternal chest pain and went to the emergency room of Salem Hospital. The admitting physician found that she was suffering an acute myocardial infarction. The employee was admitted and remained hospitalized until March [***3] 27, 2000. In his report, the admitting physician stated that "[a]ccording to the patient, she was in her usual state of health until today when she developed retrosternal chest dis-

comfort after finding out at her place of work that her services will be terminated as of July 4th, 2000."

The employee did not return to work. On March 30, 2000, she applied for accidental disability retirement benefits (benefits) pursuant to *G. L. c. 32, § 7*, thereby setting in motion what have turned out to be lengthy and tortuous administrative and judicial proceedings. A regional medical panel consisting of three physicians evaluated the employee and certified on September 30, 2000, that she was unable to perform the duties of her job, that her disability was likely to be permanent, and that her disability [*288] was "the natural and proximate result of the personal injury sustained . . . on account of which retirement is claimed." The retirement board of Salem (board) approved the employee's application for benefits twice, but the Public Employee Retirement Administration Commission (PERAC) reversed the board and remanded the case for further review on both occasions. In 2001, on its third consideration of [***4] the employee's application, the board denied it, and in 2002, both an administrative magistrate of the division of administrative law appeals (DALA) and CRAB affirmed the denial.

In 2002, the employee appealed from CRAB's decision to the Superior Court. In 2003, a Superior Court judge, on cross motions for judgment on the pleadings, opined that "a heart attack, brought on by emotional stress resulting from a bona fide personnel action, [would constitute] a 'personal injury,'" allowed the employee's motion in part, and remanded the case "for further findings as to whether or not the [employee's] heart attack was caused by stress attendant on her receiving news of the elimination of her position, and whether or not the [employee] is currently disabled due to physical, rather than purely psychological, causes." In 2005, the medical panel answered both questions in the affirmative.

In 2006, after receipt of the medical panel's 2005 report, DALA affirmed the board's denial of benefits in its third (2001) decision, but CRAB reversed. CRAB found that the employee's "heart attack was caused by stress attendant on her receiving news of the elimination of her position" and that she "was disabled [***5] at that time due to physical rather than purely psychological causes." CRAB

then ruled that the employee's communications with her supervisor about the termination of her job were made "in the course of her employment" and that her heart attack occurred "as a result of her employment within the meaning of [*G. L. c.*] 32, § 7." The board appealed to the Superior Court pursuant to *G. L. c. 30A, § 14*. In 2007, a different Superior Court judge denied the board's motion for judgment on the pleadings and affirmed CRAB's 2006 decision to grant the employee benefits. The board appeals from this decision. We transferred the case to this court on our own motion.

2. Discussion. "Judicial review of a CRAB decision under [*289] *G. L. c. 30A, § 14*, is narrow. We are not called upon to determine whether the CRAB decision is based on the 'weight of the evidence,' [**134] nor may we substitute our judgment for that of CRAB. . . . A court may not set aside a CRAB decision unless the decision is legally erroneous or not supported by substantial evidence." *Damiano v. Contributory Retirement Appeal Bd.*, 72 *Mass. App. Ct.* 259, 261, 890 *N.E.2d* 173 (2008), quoting *Lisbon v. Contributory Retirement Appeal Bd.*, 41 *Mass. App. Ct.* 246, 252 n.6, 257, 670 *N.E.2d* 392 (1996). [***6] See *McCarthy v. Contributory Retirement Appeal Bd.*, 342 *Mass.* 45, 48-49, 172 *N.E.2d* 120 (1961). *G. L. c. 30A, § 14* (7). We are required to give due weight to the agency's experience, technical competence, and specialized knowledge. *Id.*

General Laws c. 32, § 7 (1), provides in relevant part:

"Any member . . . who is unable to perform the essential duties of his job [where] such inability is likely to be permanent before attaining the maximum age for his group by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties . . . shall be retired for accidental disability" (emphasis added).

The board argues that the plaintiff is ineligible for benefits because she did not suffer the requisite "personal injury" or, in the alternative, because her

injury was not sustained during the performance of her duties at work. We disagree.

a. Personal injury. The term "personal injury" is not defined in *G. L. c. 32, § 7 (1)*, or elsewhere in the retirement statute. Decisions of this court and the Appeals Court, however, have consistently turned to the definition of "personal injury" in *G. L. c. 152*, the workers' compensation statute. See, e.g., *Adams v. Contributory Retirement Appeal Bd.*, 414 Mass. 360, 361 n.1, 609 N.E.2d 62 (1993); [***7] *Blanchette v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 479, 482-483, 481 N.E.2d 216 (1985). In defining the term "personal injury," *G. L. c. 152, § 1 (7A)*, provides, in relevant part: "No mental or emotional disability arising principally out of a bona fide, personnel action including a . . . termination . . . shall be deemed to be a personal injury within the meaning of this chapter." The board argues that the employee in this case did not sustain the requisite "personal injury" because she suffered only an emotional disability as a result of the personnel action at [*290] issue, viz., the notification of her forthcoming termination. The board claims that the heart attack was not a "job-related physical injury," but merely a "physical sequellum [sic]. . . of her pre-existing, work-related mental and emotional condition."

As the first Superior Court judge noted, however, the statutory language regarding the bona fide personnel exception to the definition of personal injury focuses not on the cause of a disability, but on its nature; only disabilities that are emotional or mental in nature are excluded. We conclude, as did the Superior Court judge and CRAB, that this personnel action exception does [***8] not bar the employee here from receiving benefits because the exception applies only to emotional or mental disabilities and the employee's heart attack, although caused by the emotional stress of hearing from her supervisor of her forthcoming termination, resulted in a physical disability. *G. L. c. 32, § 7 (1)*. *G. L. c. 152, § 1 (7A)*.

b. Performance of work duties. The board does not dispute that the conversation between the employee and her supervisor about her forthcoming termination caused her heart attack. The board argues, however, that the heart attack was not sustained during the performance of her work duties,

as required by *G. L. c. 32, § 7 (1)*, because her heart attack occurred after she had left work for the day.

[**135] We conclude that the heart attack was "sustained" during the employee's conversation with her supervisor in that the conversation caused the emotional stress which, within one hour, caused the heart attack. Cf. *Baruffaldi v. Contributory Retirement Appeal Bd.*, 337 Mass. 495, 150 N.E.2d 269 (1958) (city engineer awarded accidental death benefits under *G. L. c. 32, § 9 [1]*, after bitter argument with contractor caused heart attack off site following day); *Robinson v. Contributory Retirement Appeal Bd.*, 20 Mass. App. Ct. 634, 638, 482 N.E.2d 514 (1985) [***9] (if deceased employee's fatal heart attack, suffered after employee left place of employment, resulted from impact of physical or emotional stress sustained during on-site performance of work duty, plaintiff widow entitled to accidental death benefits under *G. L. c. 32, § 9 [1]*).²

2 The accidental death benefits statute, *G. L. c. 32, § 9 (1)*, and the accidental disability retirement benefits statute, *G. L. c. 32, § 7 (1)*, both condition receipt of benefits on a showing that a personal injury was "sustained . . . as a result of, and while in the performance of, [work] duties."

[*291] At oral argument on this case, the board advanced a different claim, arguing that regardless whether the employee sustained her heart attack while she was physically at work, the conversation she had with her supervisor that led to the heart attack did not occur "while in the performance of [her] duties." *G. L. c. 32, § 7*. The board emphasizes that while the workers' compensation statute provides for compensation to one who experiences "a personal injury arising out of and in the course of his employment" (*G. L. c. 152, § 26*), the accidental disability retirements benefits statute is much more restrictive, and [***10] provides benefits only for those who experience a personal injury not merely as a result of the performance of work duties, but during the performance of these duties as well. See *Namvar v. Contributory Retirement Appeal Bd.*, 422 Mass. 1004, 1004-1005, 663 N.E.2d 263 (1996). *Damiano v. Contributory Retirement Appeal Bd.*, 72 Mass. App. Ct. 259, 262, 890 N.E.2d 173 (2008). The board contends that this court has construed the phrase "the performance of [work]"

duties" in narrow terms that would not include meeting with a supervisor to discuss a forthcoming job termination.

We agree that benefits may permissibly be awarded only when a disabling injury is sustained during the performance of work duties and not merely as a result of being at work when injured.³ We disagree, however, with the board's claim that the employee's injury was not sustained during the performance of a work duty. The employee was injured while she was responding to the request or direction of her supervisor, the head of her department, to speak to him in his office during the work day to discuss her employment status. Clearly her compliance with the supervisor's direction to speak with him about this subject qualifies as being actively engaged in [***11] the performance of her duties. Contrary to the board's argument, no change in the law is required to recognize this point.

3 See, e.g., *Namvar v. Contributory Retirement Appeal Bd.*, 422 Mass. 1004, 663 N.E.2d 263 (1996); *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 340 Mass. 112, 162 N.E.2d 824 (1959); *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 340 Mass. 109, 111, 162 N.E.2d 821 (1959); *Damiano v. Contributory Retirement Appeal Bd.*, 72 Mass. App. Ct. 259, 263, 890 N.E.2d 173 (2008). See also *Richard v. Retirement Bd. of Worcester*, 431 Mass. 163, 164-165, 726 N.E.2d 405 (2000).

[*292] 3. Conclusion. The decision of CRAB, granting accidental disability retirement [**136] benefits to the employee, is affirmed.

So ordered.

SECRETARY OF ADMINISTRATION & FINANCE ¹ vs. COMMON-
WEALTH EMPLOYMENT RELATIONS BOARD. ²

1 The Secretary of Administration and Finance is also known as the Commissioner of Administration. See G. L. c. 7, § 4, as appearing in St. 1996, c. 151, § 34.

2 Formerly known as the Labor Relations Commission (commission). See, e.g., G. L. c. 23, § 9O, and G. L. c. 150E, § 11, as in effect prior to St. 2007, c. 145, §§ 5, 7. For convenience, we shall refer to the appellee in this opinion as the commission.

No. 08-P-251

APPEALS COURT OF MASSACHUSETTS

74 Mass. App. Ct. 91; 904 N.E.2d 468; 2009 Mass. App. LEXIS 500

December 9, 2008, Argued

April 16, 2009, Decided

PRIOR HISTORY: [***1]

Suffolk. Appeal from a decision of the Labor Relations Commission.

COUNSEL: Ronald F. Kehoe, Assistant Attorney General, for the plaintiff.

Cynthia A. Spahl, for the defendant, submitted a brief.

JUDGES: Present: McHugh, Brown, & Vuono, JJ.

OPINION BY: BROWN

OPINION

[**469] [*91] BROWN, J. Prior to 2000, the Massachusetts Highway Department (MHD) provided some of its union engineers with free [*92] parking at its headquarters located at Ten Park Plaza in Boston. ³ This action arose out of the decision by the Commonwealth, as employer, acting through the Executive Office for Administration and Finance (EOAF), to unilaterally implement, for the first time, mandatory reporting and withholding requirements on the taxable portion of the value of those fringe benefits.

³ These engineers were members of state-wide bargaining unit 9 (hereinafter union

members). The Massachusetts Organization of State Engineers and Scientists (union), an employee organization within the meaning of G. L. c. 150E, § 1, was their exclusive collective bargaining representative.

[**470] After issuing a complaint of prohibited practice, the Labor Relations Commission (commission) concluded that the Commonwealth had violated G. L. c. 150E, § 10(a)(1) and 10(a)(5), by changing the union [***2] members' wages without engaging in collective bargaining over the impacts of the application of the Internal Revenue Service (IRS) and Department of Revenue (DOR) regulations. The Commonwealth sought judicial review of that decision in accordance with the provisions of G. L. c. 30A, § 14. See G. L. c. 150E, § 11. Giving due deference to the commission's "specialized knowledge and expertise, and to its interpretation of the applicable statutory provisions," *Worcester v. Labor Relations Commn.*, 438 Mass. 177, 180, 779 N.E.2d 630 (2002), we conclude that there was neither error of law nor offense to public policy in the decision. Accordingly, we affirm the decision and order of the commission.

Stipulated facts. ⁴ Under Federal and State law, employees are permitted to exclude a limited amount of qualified parking fringe benefits from their gross income. See 26 U.S.C. § 132(f) (2000); I.R.S. Notice 94-3, 1994-1 C.B. 327. In calendar

year 2000, the Federal and State exclusions, adjusted for inflation, were capped at \$ 175 and \$ 185 per month.⁵

4 The parties submitted the matter to the commission on a statement of agreed facts, joint exhibits, and briefs.

5 Although the DOR follows 26 U.S.C. § 132(f), in the [***3] time period relevant to this appeal, it calculated the yearly inflation adjustment through a different method, explaining the difference in the Federal and State exclusion amounts. See DOR Technical Information Release (TIR) 00-4 (March 3, 2000), reprinted in Official MassTax Guide, Cumulative Supplement 3, December 2000 (West 2001).

After completing a survey of Boston area parking rates in December, 1999, the Commonwealth concluded that the fair [*93] market value of its employer-provided parking, as defined in the IRS regulations, exceeded the amount of the exclusions, triggering tax reporting and withholding requirements.⁶ Accordingly, the Comptroller of the Commonwealth instructed all chief fiscal officers to begin treating the excess value as a noncash benefit and adding it to the employees' gross income for tax reporting and withholding purposes. Consistent with this directive, MHD subsequently determined that the fair market value of the parking passes provided to the union members was \$ 260 per month.

6 Under the applicable IRS regulations, the value of the parking fringe benefit provided to an employee is "the cost (including taxes or other added fees) that an individual would incur [***4] in an arm's-length transaction to obtain parking at the same site. If that cost is not ascertainable, then the value . . . is based on the [arm's-length] cost . . . for a space in the same lot or a comparable lot in the same general location . . ." *I.R.S. Notice 94-3, 1994-1 C.B. 327, 330.*

On July 7, 2000, the Office of the Comptroller issued a detailed implementation memorandum instructing departmental payroll directors to notify affected employees that the excess value of the parking fringe benefit was subject to taxation retroactively to January 1, 2000.

By interoffice memorandum, MHD explained the tax requirements and the implementation process, informing the union members that after the relevant exclusions were applied, \$ 85 per month would be added to their taxable Federal gross income, and \$ 75 per month would be added to their taxable State gross income, effective the first pay period of August. MHD also provided the union members with the [**471] tax option selection form developed by the Comptroller.⁷

7 For calendar year 2000, the excess values of the parking benefit subject to Federal and State taxation and withholding were \$ 1,020 and \$ 900. The tax option selection form gave union [***5] members three withholding choices with respect to the taxable portions owed retroactively for the first six months of 2000: (1) taxes withheld one time on the entire lump sum amount; (2) taxes not withheld; and (3) taxes withheld in an amount selected by the employee every bi-weekly pay period. For the second half of calendar year 2000, the Commonwealth decided to withhold taxes on a recurring basis; the selection form permitted the union members to add the excess value to their taxable gross income in the first or second pay period of each month, or to split the amount between the two.

The Commonwealth implemented these mandatory changes [*94] without providing notice to the union or the opportunity to discuss the implementation process. Moreover, when the union objected to the change in the terms and conditions of the union members' employment, the Commonwealth refused to meet with the union to discuss the subject of the parking fringe benefits.

Discussion. The parties agree that the Commonwealth, acting through EOAF, had no duty to bargain over the application of the reporting and withholding requirements mandated by Federal and State income tax laws. See *Massachusetts Correction Officers Federated Union v. Labor Relations Commn.*, 417 Mass. 7, 8-9, 627 N.E.2d 894 (1994) [***6] (MCOFU).

The question for decision is whether, even if the imposition of a new tax withholding for the parking fringe benefits was beyond the scope of collective

bargaining, the Commonwealth was required to negotiate over the impact of that change on the union members' wages. Relying upon *MCOFU* and its past decisions, the commission found that because the change affected the union members' wages, a mandatory subject of bargaining, notice to the union and the opportunity to engage in impact bargaining before implementation were required. See *G. L. c. 150E*, § 6.

On appeal, the Commonwealth argues that the commission erred by relying upon *MCOFU* as the legal foundation of its decision. As the Commonwealth reads *MCOFU*, the Supreme Judicial Court merely noted twice in passing that the employer had voluntarily agreed to engage in impact bargaining; and that absent any ruling, holding, or favorable dictum from the Supreme Judicial Court, that case cannot serve as precedent requiring impact bargaining here. The Commonwealth reads *MCOFU* too narrowly.

MCOFU involved a union challenge to the Commonwealth's unilateral reduction of certain health insurance benefits, ordinarily a mandatory subject of [***7] bargaining. The change in benefits was made by a third party, the Group Insurance Commission (GIC), pursuant to its statutory authority, a decision over which neither the Commonwealth, as employer, nor the union had any control. The Supreme Judicial Court held that the commission "correctly concluded that, because the [EOAF], acting for the Commonwealth, had no control over the GIC, the Commonwealth was relieved of any obligation to bargain over the decision (*as opposed to the impact of the decision*) to alter health insurance [*95] coverage. . . . *As the employer agreed, however, the impact of that decision remained subject to bargaining.*" (Emphasis added.) *MCOFU*, 417 Mass. at 9.

The Supreme Judicial Court's decision in *MCOFU* did not reach any issue regarding impact bargaining because that requirement was not disputed by the parties. Moreover, the court was careful to distinguish [**472] the non-negotiable subject from the negotiable subject to which the mandatory duty to bargain attached. This language supports the commission's determination here that the Commonwealth had the duty to bargain over the impact of the mandatory withholding on wages.

MCOFU does not stand alone. Other Massachusetts cases [***8] requiring impact bargaining support the result reached by the commission. See, e.g., *School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. 557, 563-564, 447 N.E.2d 1201 (1983); *Burlington v. Labor Relations Commn.*, 390 Mass. 157, 164-167, 454 N.E.2d 465 (1983); *Boston v. Boston Police Patrolmen's Assn., Inc.* 403 Mass. 680, 684-685, 532 N.E.2d 640 (1989); *Worcester v. Labor Relations Commn.*, 438 Mass. at 185. These cases are consistent with our strong public policy favoring collective bargaining between employers and employees over the terms and conditions of employment.⁸ See *G. L. c. 150E*, § 6; *Somerville v. Somerville Mun. Employees Assn.*, 451 Mass. 493, 496, 887 N.E.2d 1033 (2008).

8 In light of the Massachusetts precedents on point, there is no need to look to Federal labor law for guidance. In any event, we have considered the National Labor Relations Board cases cited by the Commonwealth in its brief and found them inapposite.

The remainder of the case argued on appeal by successor counsel for the Commonwealth looks nothing like the one presented to the board. Review pursuant to *G. L. c. 30A* is not the time to insert new issues into the case, especially those requiring statutory interpretation best left to the commission's expertise in the [***9] first instance. See *Massachusetts Org. of State Engrs. & Scientists v. Labor Relations Commn.*, 389 Mass. 920, 924, 452 N.E.2d 1117 (1983). We deem any arguments raised for the first time in this appeal waived. See *McCormick v. Labor Relations Commn.*, 412 Mass. 164, 166, 588 N.E.2d 1 (1992); *Anderson v. Commonwealth Employment Relations Bd.*, 73 Mass. App. Ct. 908, 909 n.7, 899 N.E.2d 901 (2009).

Were we to reach the merits if the Commonwealth's arguments, [*96] we would find them lacking in substance. Where a non-negotiable decision may be implemented in various ways, the public employer may be required to engage in impact bargaining with the union. See *Lynn v. Labor Relations Commn.*, 43 Mass. App. Ct. 172, 179-180, 681 N.E.2d 1234 (1997). While we agree that the Commonwealth as employer had no discretion regarding its obligation to follow the tax laws, it did possess a fair amount of discretion and control regarding the

precise tax treatment of the excess value of the fringe benefits. Given this measure of discretion, detailed below, the impact of the implementation on wages was not, as the Commonwealth argues, "inseparable" from the non-negotiable, legally required implementation of the withholding itself.

Although the Commonwealth, as employer, was required [***10] to implement reporting and withholding for employer-provided parking in 2000, much of the implementation process was left to its discretion. For example, for tax and withholding purposes, the IRS rules permitted employers to treat the fringe benefits as paid on a pay period, quarterly, semiannual, annual, or other basis. See *I.R.S. Notice 94-3, 1994-1 C.B. 327, 331*.⁹

9 In passing, we note that the only limit placed upon the employers' discretion in this regard was the requirement that the benefits be treated as paid no less frequently than annually. Moreover, under the IRS's special accounting rule, employers could treat the value of the taxable noncash fringe benefits provided during the last two months of the calendar year as paid in the following year. The tax option selection form undercuts the Commonwealth's argument that there was no impact on wages within its control and only one way to implement the tax mandate. We note that the two most advantageous methods for employees (choosing December 31, 2000, as the date on which the benefit was paid, and deferral) were not offered to the union members.

[**473] The timing of the withholdings was not the only area in which the Commonwealth had [***11] control. As explained in IRS guidelines, the Commonwealth could have charged the union members directly for the excess value per month, thereby avoiding the tax and withholding requirements altogether. The IRS also permitted employers to either add the value of the fringe benefits to regular wages for a payroll period and to calculate income tax withholding on that total, or to withhold income tax on the value of the fringe benefit at the flat twenty-eight percent rate applicable to supplemental wages. In light of all these choices, we reject the [*97] Commonwealth's assertion that there

was nothing to discuss during any bargaining session.¹⁰

10 It is true, as the Commonwealth points out, that if there is a conflict between the terms of a collectively bargained agreement and the terms of any statutes not listed in *G. L. c. 150E, § 7(d)*, such as the tax laws, the terms of the latter will prevail. No bargaining about those terms is required. See *School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. at 566. Application of those principles does not assist the Commonwealth here, where no conflict has been shown.

As discussed above, the Commonwealth had discretion and control under the tax [***12] laws over the method of implementing the withholding for the employer-provided benefits. The tax statutes did not prohibit employers from bargaining about this issue. Absent such a conflict, or an undermining of the purpose of the tax laws by collective bargaining, the Commonwealth was not excused from the general rule requiring bargaining with respect to the terms and conditions of employment.

The Commonwealth argues that any impact on the union members' wages from the implementation was immaterial, thereby excusing it from bargaining. The Commonwealth's reliance upon *West Bridgewater Police Assn. v. Labor Relations Commn.*, 18 Mass. App. Ct. 550, 468 N.E.2d 659 (1984), is misplaced. There, this court upheld the commission's determination that unscheduled, irregular overtime was a peripheral matter not impinging directly on wages and not a condition of employment within the meaning of *G. L. c. 150E, § 6*. See 18 Mass. App. Ct. at 553-554. In its decision, the commission had distinguished the regular payment of extra compensation for working regular overtime shifts, which would be a condition of employment requiring bargaining. *Id.* at 554. This court noted that in other contexts, in determining whether [***13] a payment rose to the level of a term of employment, the distinguishing factor was the regularity of the compensation. *Id.* at 554-555.

Here, the application of the tax laws directly increased the union members' gross taxable wages and caused a loss of approximately \$ 300 in regular annual take home pay. While the employer might

think differently, from the employees' perspective, the loss of \$ 300 cannot be described as immaterial. There is no more fundamental term or condition of employment than pay. The Commonwealth has provided no authority for its assertion that this amount was "negligible."

[**474] [*98] The Commonwealth has failed to establish that the commission's decision was contrary to any public policy. In the Commonwealth's view, given the protracted nature of collective bargaining and the "indefinite" delay until resolution or impasse, the imposition of a pre-implementation duty to bargain would subvert the tax laws and subject the Commonwealth and the union members to penalties. This argument is not supported by the stipulated facts and is entirely speculative.

Although the increase in parking rates triggered the mandatory reporting and withholding requirements for calendar year 2000, [***14] the Commonwealth had the entire year to implement those changes. Nothing in the tax laws required implementation by January 1, 2000. Thus, the Commonwealth had no looming deadline outside its control or exigent circumstances that might have excused the decision to implement the changes without bargaining. Moreover, because the Commonwealth did not give the union the opportunity to negotiate, it cannot establish the length of the delay caused by the bargaining. If the Commonwealth had agreed to

bargain and no resolution or impasse was in sight as the implementation deadline approached, under longstanding commission precedent, the Commonwealth could have imposed a reasonable negotiation deadline, implemented the withholding, and continued post-implementation bargaining without running afoul of its obligations under G. L. c. 150E. See *Town of Plymouth*, 26 M.L.C. 220, 223-224 (2000).

For the first time in 2000, the union members were taxed, through an increase in their gross wages, for some of their parking privileges. The Commonwealth asked them to choose from withholding choices selected solely by the Commonwealth without any input from their union. The union had the right to expect the [***15] Commonwealth to discuss the fairness of the implementation process and the withholding choices available to the union members. The topics open for bargaining were limited in scope. Cast in this light, the Commonwealth's decision to drag this case out through the appellate process rather than sitting down for a negotiating session with the union is not only perplexing, but also imprudent and wasteful.

The decision and order of the commission are affirmed.

So ordered.

JEFFREY SEIDEMAN & others¹ vs. CITY OF NEWTON.

1 Linda L. Lancaster, Samuel M. Robbins, William H. Heck, Alvan F. Rosenberg, Beverly I. Rosenberg, Michael F. McGrath, Deborah J. Donahue, M. Brewster Abele, and Arnold Garrison.

SJC-10135

SUPREME JUDICIAL COURT OF MASSACHUSETTS

452 Mass. 472; 895 N.E.2d 439; 2008 Mass. LEXIS 764

September 2, 2008, Argued
October 24, 2008, Decided

PRIOR HISTORY: [***1]

Middlesex. Civil action commenced in the Superior Court Department on May 25, 2006. The case was heard by Bruce R. Henry, J., on a motion for summary judgment. The Supreme Judicial Court granted an application for direct appellate review. *Seideman v. City of Newton*, 2007 Mass. Super. LEXIS 460 (Mass. Super. Ct., 2007)

DISPOSITION: Judgment affirmed.

COUNSEL: Donnaly B. Lynch Kahn, Associate City Solicitor (Daniel Funk, City Solicitor, with her) for the defendant.

Guive Mirfendereski for the plaintiffs.

Stephen D. Anderson, Kevin D. Batt, & Nina Pickering, for town of Acton, amicus curiae, submitted a brief.

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

OPINION BY: SPINA

OPINION

[*472] [**441] SPINA, J. On May 25, 2006, ten taxpayers (taxpayers) of the city of Newton (Newton) commenced this action for declaratory [*473] and injunctive relief in the Superior Court, challenging the legality of Newton's appropriation of \$ 765,825 in funds pursuant to the Massachusetts Community Preservation Act (CPA), *G. L. c. 44B*,

for various projects at Stearns Park and Pellegrini Park (collectively, the parks).² The taxpayers subsequently filed a motion for summary judgment on the grounds that the proposed projects did not fall within the purview of the CPA and, therefore, could not be funded under that statutory [***2] enactment. The motion judge agreed and granted summary judgment to the taxpayers. Newton appealed, and we granted its application for direct appellate review. For the reasons that follow, we now affirm.³

2 *General Laws c. 40, § 53*, provides that ten taxpayers of a municipality may bring suit to enforce laws relating to the expenditure of tax money by local officials. See *Edwards v. Boston*, 408 Mass. 643, 646, 562 N.E.2d 834 (1990), and cases cited.

3 We acknowledge the amicus brief filed by the town of Acton.

The CPA, enacted by the Legislature on September 14, 2000, see St. 2000, c. 267, provides a method for municipalities to fund "the acquisition, creation and preservation of open space, the acquisition, creation and preservation of historic resources and the creation and preservation of community housing." *G. L. c. 44B, § 2*. Given the "enormous pressures faced by rural and suburban towns presented with demands of development, and that towns may seek to prevent or to curtail the visual blight and communal degradation that growth unencumbered by guidance or restraint may occasion," a municipality may seek to preserve its character and natural resources by, among other actions, accepting the provisions [***3] of the CPA in an

effort to "limit growth by physically limiting the amount of land available for development." *Zuckerman v. Hadley*, 442 Mass. 511, 517-518, 813 N.E.2d 843 (2004).

The CPA states that "[s]ections 3 to 7, inclusive, shall take effect in any city or town upon the approval by the legislative body and their acceptance by the voters of a ballot question as set forth in this section." ⁴ *G. L. c. 44B, § 3(a)*. Notwithstanding any contrary laws, "the legislative body may vote to accept **[*474]** sections 3 to 7, inclusive, by approving a surcharge on real property of not more than 3 per cent of the real estate tax levy against real property, as determined annually by the board of assessors." *G. L. c. 44B, § 3(b)*. The legislative body, here the board of aldermen of Newton, also may vote to accept certain exemptions to the imposition of the surcharge. See, e.g., *G. L. c. 44B, § 3(e)*. "Upon approval by the legislative body, the actions of the body shall be submitted for acceptance to the voters of a city or town at the next regular municipal or state election." *G. L. c. 44B, § 3(f)*. The voters of Newton accepted *G. L. c. 44B, §§ 3-7*, in November, 2001. ⁵

4 The Massachusetts Community Preservation Act (CPA), **[***4]** *G. L. c. 44B*, defines the "[l]egislative body" as "the agency of municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled as a city council, board of aldermen, town council, town meeting or by any other title." *G. L. c. 44B, § 2*.

5 In Newton, the CPA is funded by a one per cent surcharge on the annual real estate tax levy. In addition, Newton, like other municipalities that have accepted *G. L. c. 44B, §§ 3-7*, is eligible to receive annual distributions from the Massachusetts Community Preservation Trust Fund, see *G. L. c. 44B, § 9*.

[442]** After acceptance of *G. L. c. 44B, §§ 3-7*, a municipality "shall establish by ordinance or by-law a community preservation committee," *G. L. c. 44B, § 5(a)*, the task of which is to "study the needs, possibilities and resources of the city or town

regarding community preservation." *G. L. c. 44B, § 5(b)(1)*. Based on the information gathered, after consultation with existing municipal boards and public informational hearings, "[t]he community preservation committee shall make recommendations to the legislative **[***5]** body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation and preservation of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created as provided in this section" (emphasis added). *G. L. c. 44B, § 5(b)(2)*. After receiving the committee's recommendations, the legislative body shall take such actions and approve such appropriations as it deems necessary to implement the recommendations. *G. L. c. 44B, § 5(d)*.

Newton owns and operates the parks, which have been used for recreational purposes since before the enactment of the CPA. Stearns Park is approximately 3.5 acres of land, and it **[*475]** encompasses "both passive and active recreation areas, including a large open space with benches, game tables, walkways; a basketball court; a little league baseball diamond; a tot-lot; swing sets; and two tennis courts." Pellegrini Park comprises approximately 4.5 acres, and it has "many active recreation **[***6]** options including soccer, softball, two tennis courts, indoor and outdoor basketball, indoor volleyball, and children's play structures."

On October 3, 2005, the Newton parks and recreation department, together with other interested entities, submitted an application to the community preservation committee for CPA funds to undertake substantial improvements at the parks. These improvements would constitute "Year 1" of a four-year project. Newton's community preservation committee recommended to the board of aldermen of Newton (board) that CPA funds be appropriated in accordance with the application. In Newton's view, the scope of the work is "designed to improve the parks' overall appearance by reorganizing existing park facilities, grouping the playground structures together, building a new tennis court (for Stearns Park) and reconfiguring and relocating the basketball courts, improving curb appeal through

landscaping and [the] addition of new fencing, creating new paths, installing water fountains, constructing bleachers, installing additional lighting, interpretive signage and picnic tables, and preserving the ball fields." The project "contains recreation elements to meet the needs [***7] of children and adults for both passive and active uses. For children, play areas will be reconstructed with modern equipment and low-maintenance rubberized surfaces that reduce injuries from falls. Older children and adults will benefit from resurfaced basketball and tennis courts and improved soccer and softball fields. Passive recreation needs will be satisfied by realigned and resurfaced pathways and linkages to the street and nearby elderly housing." On May 15, 2006, the board approved the appropriation of \$ 765,825 in CPA funds for "Year 1" project costs.⁶ The present action [**443] by the taxpayers against Newton ensued.

6 Of the total appropriation of \$ 765,825, the sum of \$ 762,125 was designated for "Recreation Projects," and \$ 3,700 was designated for "Legal Expenses."

In considering the taxpayers' motion for summary judgment, the judge stated that judicial interpretation of *G. L. c. 44B, § 5(b)(2)*, [**476] was determinative of whether CPA funds properly could be used for the proposed projects at the parks. The judge pointed out that there was no dispute that the parks were neither acquired nor created with CPA funds in the first instance.⁷ He declined to adopt Newton's construction of [***8] the word "creation," stating that because the parks have been dedicated to recreational uses for some time, predating the enactment of the CPA, the proposed projects did not "create" land for recreational use. Although Newton attempted to characterize some of the proposed projects as "preservation,"⁸ the judge stated that clearly what was planned was "the rehabilitation and/or restoration" of the parks, in keeping with their recreational purposes. Further, the judge continued, while the appropriation of CPA funds for the "rehabilitation"⁹ or "restoration"¹⁰ of land for recreational use is permitted under *G. L. c. 44B, § 5(b)(2)*, it is permitted only for recreational land that was originally acquired or created with CPA funds. That, the judge reiterated, did not occur here. Accordingly, because Newton's proposed uses for the CPA funds did not comport with any of the au-

thorized uses set forth in § 5(b)(2), the judge concluded that such funds could not be appropriated for the projects at the parks, and the taxpayers were entitled to summary judgment.¹¹

7 *General Laws c. 44B, § 2*, defines "[a]cquire" as "obtain by gift, purchase, devise, grant, rental, rental purchase, lease or [***9] otherwise," but the term does not encompass "a taking by eminent domain, except as provided in this chapter." The CPA does not define the term "create."

8 *General Laws c. 44B, § 2*, defines "[p]reservation" as the "protection of personal or real property from injury, harm or destruction, but not including maintenance." The term "[m]aintenance" is defined as "the upkeep of real or personal property." *Id.*

9 *General Laws c. 44B, § 2*, defines "[r]ehabilitation" as "the remodeling, reconstruction and making of extraordinary repairs to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes."

10 *General Laws c. 44B, § 2*, does not define the term "restoration."

11 "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to [***10] judgment as a matter of law." *Cargill, Inc. v. Beaver Coal & Oil Co.*, 424 Mass. 356, 358, 676 N.E.2d 815 (1997). See *Mass. R. Civ. P. 56 (c)*, as amended, 436 Mass. 1404 (2002). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. See *Pederson v. Time, Inc.*, 404 Mass. 14, 17, 532 N.E.2d 1211 (1989). Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, 436 N.E.2d 139, cert.

denied, 459 U.S. 970, 103 S. Ct. 301, 74 L. Ed. 2d 282 (1982).

The focus of Newton's appeal is the construction of *G. L. c. 44B, § 5(b)(2)*, [*477] which permits the appropriation of CPA funds "for the acquisition, creation and preservation of land for recreational use." Newton contends that the word "creation," which is not defined in *G. L. c. 44B, § 2*, should be construed broadly to include not only the creation of physical land for a park, but also the creation of new recreational uses within existing parks that [**444] would make the areas open and accessible to new groups of users, including those who are disabled. Such an interpretation, Newton continues, would reflect more accurately the intention of the CPA to promote recreational spaces [***11] within municipalities. Further, Newton argues that the proposed projects at the parks would go well beyond the mere maintenance of such real property. In Newton's view, given that the projects would prevent significant destruction of the green spaces, through improved drainage, fencing, and curbing, the proposed projects should be considered, more accurately, the "preservation" of land for recreational use, not the mere maintenance of such property for which CPA funds could not be appropriated.

Our analysis of *G. L. c. 44B*, is guided by the familiar principle that "a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606 (1934). See *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001), and cases cited. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute [***12] so as to render the legislation effective, consonant with sound reason and common sense. See *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996); *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233, 240, 475 N.E.2d 1201 (1985). Words that are not defined in a statute should be given their usual and accepted [*478]

meanings, provided that those meanings are consistent with the statutory purpose. See *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369, 361 N.E.2d 1239 (1977); *Kemble v. Metropolitan Dist. Comm'n*, 49 Mass. App. Ct. 165, 166, 727 N.E.2d 529 (2000). "We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." *Commonwealth v. Zone Book, Inc.*, *supra*.

It is significant in this case that the parks have been devoted to recreational uses since before the enactment of the CPA. Contrary to the statutory construction proposed by Newton, the appropriation of CPA funds pursuant to the language of *G. L. c. 44B, § 5(b)(2)*, is for the creation of land for recreational use, not the creation of new recreational uses on existing land already devoted to that purpose. The word "create" means "[t]o bring into [***13] being" or "to cause to exist." Black's Law Dictionary 366 (6th ed. 1990). Land for recreational use is not being created where a municipality chooses simply to enhance or redevelop that which already exists as such. However, to the extent that a municipality chooses to convert land that had been used for a purpose other than recreational use, including blighted land, or land that, at some point in the past, ceased to exist for recreational purposes, that action by the municipality would constitute the creation of land for recreational use, and CPA funds could be appropriated for the necessary costs of the project. Such statutory construction is in keeping with an underlying principle of the CPA to preserve the character and natural resources of a municipality, particularly its open space, in the face of growing urbanization and development. See *G. L. c. 44B, § 2* (defining "[o]pen space" as including "land for recreational use"). It also constitutes a recognition that in many communities there simply is little available open [**445] space, but that real property no longer being used for its original purpose can be transformed to create a new purpose, such as recreational use.

As to Newton's [***14] contention that its proposed projects at the parks constitute the "preservation" of land for recreational use, we conclude that the work for which Newton has sought CPA funds is not designed for the "protection of . . . real property from injury, harm or destruction." *G. L. c. 44B*,

§ 2. Rather, Newton has requested the appropriation of CPA funds for extensive improvements and upgrades to the parks. Projects of this [*479] nature are not encompassed by the statutory definition of "preservation."

In its application to the community preservation committee, Newton stated that, over the years, enhancements had been made to the parks with funds from both the parks and recreation department and the community development block grant program, including the installation of new light fixtures, game tables, and benches, the purchase of new play equipment, the construction of a retaining wall and fence, the partial paving of a parking lot, and the planting of new trees. While, in Newton's view, the improvements had left the parks "in passable condition," neighborhood residents did not feel that the parks were "fully meeting the recreational needs of the community." Newton's goals with respect to the proposed [***15] projects are to maximize recreational opportunities; improve accessibility; bring an orderly flow to the fragmented sections of the parks; enhance beautification; use better materials to raise standards of safety and cleanliness; increase park usage; improve signage, decorative fencing, and landscaping; provide more seating throughout the parks; and boost the spirit and involvement of the neighborhood community.

Newton is not seeking to "preserve" the parks by protecting them from decay and destruction, see *G. L. c. 44B, § 2*, but to improve substantially the parks' over-all quality, attractiveness, and usage. We agree with the motion judge that the proposed projects set forth in Newton's application to the community preservation committee fall more squarely within the definition of "rehabilitation," which includes "the remodeling, reconstruction and making of extraordinary repairs" to "lands for recreational use" so that they will be "functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act." *G. L. c. 44B, § 2*. However, the appropriation of CPA funds for the parks' "rehabilitation" is not permitted under *G. L. c. 44B, § 5(b)(2)* [***16], where, as here, it is undisputed that the parks were not acquired or created with such funds in the first instance.¹²

12 The parties do not discuss the appropriation of CPA funds for the "acquisition" of land for recreational use, as permitted under *G. L. c. 44B, § 5(b)(2)*. Nonetheless, pursuant to *G. L. c. 44B, § 2*, a municipality can "[a]cquire" land for recreational use "by gift, purchase, devise, grant, rental, rental purchase, lease or otherwise" (emphasis added). In its simplest form, this language means that a municipality can, for example, purchase real property for the specific purpose of devoting it to recreational use. Alternatively, the word "otherwise" is broad enough to include a "transfer" of land for recreational use. In that situation, real property already owned by a municipality and designated for a particular purpose could be "acquired" for recreational use, a wholly different purpose, by transferring it from one municipal entity to another. See *G. L. c. 40, § 15A* (whenever board or officer having charge of land, with certain exceptions, determines that land is no longer needed for particular purpose, legislative body may transfer care, custody, management, [***17] and control of such land to another board or officer for another municipal purpose); *Harris v. Wayland*, 392 Mass. 237, 242-243, 466 N.E.2d 822 (1984). See also D.A. Randall & D.E. Franklin, *Municipal Law and Practice* § 27.3 (5th ed. 2006) (control and use of municipal property).

[**446] Newton next asserts that the judge erred in allowing the [*480] taxpayers' motion for summary judgment where, in Newton's view, there were disputed issues of material fact. In particular, Newton points out that it provided an affidavit from its community development planner in which she stated that the proposed projects for the parks include significant aspects of both "creation" and "preservation" within the meaning of the CPA. As such, Newton continues, it was improper for the judge to decide the matter without a trial on the merits. We disagree. Contrary to Newton's assertion, whether the proposed projects constitute the creation and preservation of land for recreational use, as set forth in *G. L. c. 44B*, is a question of law, not one of fact. The nature of the projects is as Newton has extensively described them in its application for CPA funds. Whether the appropriation of

CPA funds for these projects is permissible under the [***18] provisions of G. L. c. 44B is a question of statutory interpretation for a court to decide.¹³ See *Boston Police Patrolmen's Ass'n v. Boston*, 435 Mass. 718, 719, 761 N.E.2d 479 (2002).

13 We also have been urged to specify that our interpretation of *G. L. c. 44B, § 5(b)(2)*, will be applied prospectively such that our ruling will have no effect on CPA appropriations already expended by municipalities throughout the Commonwealth. This issue has not been raised by the parties, and we reserve opinion on the matter until it is prop-

erly presented. In any event, an action by ten taxpayers under *G. L. c. 40, § 53*, is subject to laches, see *Zeitler v. Hinsdale*, 5 Mass. App. Ct. 778, 359 N.E.2d 1315 (1977), and must be brought before obligations are incurred by a municipality. See *G. L. c. 40, § 53* ("ten taxable inhabitants" entitled to relief in equity if town is "about to" raise or expend money, or incur obligations); *Kapinos v. Chicopee*, 334 Mass. 196, 198, 134 N.E.2d 548 (1956).

Judgment affirmed.

PAUL F. SILVA vs. CITY OF ATTLEBORO & others. ¹

1 The city of New Bedford and the city of Taunton.

SJC-10330

SUPREME JUDICIAL COURT OF MASSACHUSETTS

454 Mass. 165; 908 N.E.2d 722; 2009 Mass. LEXIS 325

**April 6, 2009, Argued
June 26, 2009, Decided**

PRIOR HISTORY: [***1]

Bristol. Civil action commenced in the Superior Court Department on April 27, 2005. The case was heard by Richard J. Chin, J., on an agreed statement of facts. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Silva v. City of Attleboro, 72 Mass. App. Ct. 450, 892 N.E.2d 792, 2008 Mass. App. LEXIS 905 (2008)

DISPOSITION: Judgment affirmed.

COUNSEL: Irene B. Schall, for city of New Bedford.

Robert S. Mangiaratti, for city of Attleboro.

Martin A. Silva, for the plaintiff.

Steven A. Torres, City Solicitor, & Jane E. Estey, Assistant City Solicitor, for city of Taunton, submitted a brief.

Martha Coakley, Attorney General, & Peter Sacks, Assistant Attorney General, for the Commonwealth, amicus curiae, submitted a brief.

Juliana deHaan Rice, Town Counsel, & Thomas J. Urbelis, for City Solicitors & Town Counsel Association, amicus curiae, submitted a brief.

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

OPINION BY: COWIN

OPINION

[**723] [*165] COWIN, J. In this case, we are asked to consider whether a charge assessed by certain municipalities for the issuance of a [*166] burial permit is a lawful fee or an unlawful tax. The Appeals Court, applying our decision in *Emerson College v. Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984) (*Emerson College*), held that the burial permit charge was [***2] an unlawful tax. See *Silva v. Attleboro*, 72 Mass. App. Ct. 450, 455, 892 N.E.2d 792 (2008). We conclude that it is a valid regulatory fee.

Background. *General Laws c. 114, § 45*, requires that any funeral director seeking to dispose of the body of a deceased person must obtain a burial permit from the board of health or the clerk of the municipality in which the decedent died. The statute requires that a person seeking the burial permit must present both a death certificate and "a satisfactory written statement containing the facts required [**724] by law to be returned and recorded" in order for the burial permit to issue. The municipality must issue the burial permit upon receipt of the statement and certificate required by the statute. See *id.* Some municipalities, including the defendants, exact a monetary charge to issue these burial permits. These amounts are deposited in each of the defendants' general revenue funds. The amounts constitute a relatively small portion of the budget of each defendant's board of health, and are roughly proportional to the cost of compensating municipal employees for their time in receiving and examining the death certificates, issuing the burial permits, and record-keeping [***3] associated with the process.

The plaintiff is a licensed funeral director operating his business in the city of Fall River and surrounding communities throughout Bristol County. He brought this action seeking declaratory and injunctive relief against the defendants, claiming that the burial permit fees are illegal taxes.² After a jury-waived trial, a Superior Court judge ruled for the defendants. Applying the Appeals Court's decision in *Silva v. Fall River*, 59 Mass. App. Ct. 798, 807, 798 N.E.2d 297 (2003), see note 2, *supra*, the judge concluded that the burial permit charges are not exacted in exchange for any particularized benefit that is not also provided to other members [*167] of the community. He also decided that payment of the charges was mandatory rather than voluntary. The judge found, however, that the defendants "incurred significant expenses in issuing, processing and regulating burial permits," and that "the fee charged is reasonable and is used to cover these expenses." He therefore concluded that the burial permit charges were permissible fees intended to defray costs associated with the permit process and were not unlawful taxes.

2 The plaintiff previously brought a similar action against [***4] the city of Fall River. On appeal, the Appeals Court, also relying on *Emerson College v. Boston*, 391 Mass. 415, 424-425, 462 N.E.2d 1098 (1984), concluded that the summary judgment record established that Fall River's burial permit charges were unlawful taxes. See *Silva v. Fall River*, 59 Mass. App. Ct. 798, 807, 798 N.E.2d 297 (2003).

As stated, the Appeals Court reversed. See *Silva v. Attleboro*, *supra* at 455. That court determined that the judge had given improper weight to the fact that the burial permit charges were reasonably proportional to the costs incurred by the defendants. *Id.* Because "the issuance of burial permits has a shared public benefit and . . . the services provided are involuntary in a way that is distinct from the typical regulatory fee," the Appeals Court held that the burial permit charges were not valid regulatory fees but improper taxes. *Id.* We granted further appellate review.^{3, 4} We affirm the [**725] Superior Court judgment.⁵

3 The city of Taunton did not apply for further appellate review, and the adjudication of

its rights are thus not before us. See *Bradford v. Baystate Med. Ctr.*, 415 Mass. 202, 205, 613 N.E.2d 82 (1993).

4 The record does not show that the plaintiff has presently been assessed burial permit [***5] charges by any of the defendants. None of the parties has addressed the question whether a justiciable controversy exists for the purposes of the declaratory judgment statute. We hesitate to reach an issue where the potential harm to the plaintiff is merely speculative or hypothetical. See *Supreme Council of the Royal Arcanum v. State Tax Comm'n*, 358 Mass. 111, 113, 260 N.E.2d 822 (1970). However, the record in this case indicates that the plaintiff sometimes provides burial arrangements for those who reside in Fall River but die in the defendant municipalities, and that the defendants regularly exact burial permit charges from such providers. Even were we to conclude that the question is not properly before us, we have discretion to consider it. The question has been fully briefed and is likely to arise again, the opposing interests are adequately represented, the relevant facts are not in dispute, and judicial resolution will put this controversy to rest. See *Sierra Club v. Commissioner of the Dep't of Env'tl. Mgt.*, 439 Mass. 738, 745, 791 N.E.2d 325 (2003); *Newton v. Department of Public Utils.*, 367 Mass. 667, 669, 328 N.E.2d 885 (1975).

5 We acknowledge the amicus briefs of the Attorney General and the City Solicitors and Town [***6] Counsel Association.

Discussion. We accept the judge's findings of fact unless there is clear error. See *Marlow v. New Bedford*, 369 Mass. 501, 508, 340 N.E.2d 494 (1976). However, "we scrutinize without deference the legal standard which the judge applied to the facts." *Kendall v. [*168] Selvaggio*, 413 Mass. 619, 621, 602 N.E.2d 206 (1992). "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 92, 515 N.E.2d 589 (1987). See *Opinion of the Justices*, 378 Mass. 802, 810 n.10, 393 N.E.2d 306 (1979), citing art. 2 of the Amendments to the Massachusetts Constitution, as appearing in art. 89, §§ 1, 6 and 7 ("Cities and

towns have no independent power of taxation"). The plaintiff has the burden of proving the invalidity of the exaction. See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 201, 656 N.E.2d 563 (1995) (*Nuclear Metals*); *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 403, 486 N.E.2d 700 (1985) (*Southview*). Although we give some deference to the defendants' classification of the burial permit charge as a fee, "[u]ltimately" the nature of a monetary exaction "must be determined [***7] by its operation rather than its specially descriptive phrase." *Emerson College, supra* at 424, quoting *Thomson Elec. Welding Co. v. Commonwealth*, 275 Mass. 426, 429, 176 N.E. 203 (1931).

In distinguishing fees from taxes, we have noted that fees tend to share common traits. Fees, unlike taxes, "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society.'" *Emerson College, supra*, quoting *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974). Fees "are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." *Emerson College, supra* at 424-425. Finally, the charges "are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Id.* at 425. Valid fees fall into one of two categories: "user fees, based on the rights of the entity as proprietor of the instrumentalities used . . . or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities." *Id.* at 424, citing *Opinion of the Justices*, 250 Mass. 591, 597, 602, 148 N.E. 889 (1925).

The [***8] plaintiff argues that the burial permit charges are not fees, but are rather taxes that the defendants lack statutory or constitutional authority to levy. Relying on *Emerson College, supra* at 424-425, and *Silva v. Fall River*, 59 Mass. App. Ct. 798, 807, [*169] 798 N.E.2d 297 (2003), the plaintiff argues that the burial permit fees lack the essential characteristics of fees because, according to the analysis prescribed in the *Emerson College* decision, the charges are not exacted in exchange for a particular governmental [**726] service that bene-

fits the permit seeker in a manner not shared by other members of society; they are not voluntarily incurred because a burial permit is required for the plaintiff to dispose of a body in a lawful manner; and they are not charged in order to compensate the municipalities for their expenses, but rather are intended to raise general revenue because the proceeds are deposited into the general fund of each of the defendants.

We do not agree. Although a municipality has no independent power of taxation, it may assess, levy, and collect fees when the Legislature has authorized it to do so, provided that those fees are reasonable and proportional.⁶ See *Commonwealth v. Caldwell, supra*. [***9] Here, the defendants are required to issue the burial permits in question pursuant to *G. L. c. 114, § 45*, and are authorized, pursuant to *G. L. c. 40, § 22F*, to defray these expenses by charging a reasonable fee. In pertinent part, the latter statute provides:

"Any municipal board or officer empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons, may, from time to time, fix reasonable fees for all such licenses, permits, or certificates issued pursuant to statutes or regulations wherein the entire proceeds of the fee remain with such issuing city or town, and may fix reasonable charges to be paid for any services rendered or work performed by the city or town or any department thereof, for any person or class of persons" ⁷

[*170] *G. L. c. 40, § 22F*. The trial judge found that the defendants incur significant expenses in issuing said permits, and the evidence supports his finding. The parties stipulated in their statements of agreed facts that the amounts charged by the defendants for the issuance of burial permits are reasonably proportional to the amounts expended by their boards of health in administering the permit [***10] process. All the statutory conditions required under *G. L. c. 40, § 22F*, have therefore been satisfied.⁸

6 The Legislature is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the . . . [C]ommonwealth." Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. *Opinion of the Justices*, 220 Mass. 613, 618-619, 108 N.E. 570 (1915). Compare *C & S Wholesale Grocers, Inc. v. Westfield*, 436 Mass. 459, 461-464, 766 N.E.2d 63 (2002) (considering whether imposition of tax by municipality on real property improvements was excessive and disproportionate), with *Sears v. Aldermen of Boston*, 173 Mass. 71, 75-79, 53 N.E. 138 (1899) (considering whether municipal assessment for watering of city streets is proportional and reasonable).

7 The provisions of the statute "may be accepted in a city by a vote of the city council, with the approval of the mayor if so required by law, and in a town by vote of the town meeting, or by vote of the town council in towns with no town meeting." *G. L. c. 40, § 22F*. There is no dispute that the defendants have adopted § 22F.

8 Both New Bedford and Taunton argued in their briefs to the [***11] Appeals Court that the burial permit charges are permissible because they are authorized by *G. L. c. 40, § 22F*. New Bedford has renewed this argument in its brief here. By contrast, Attleboro did not argue this point to the Appeals Court and, as we have mentioned, see note 3, *supra*, Taunton did not apply for further appellate review in this case. However, there is no logical reason why our conclusion that the burial permit charges are lawful fees authorized by the statute should not apply to all the defendants. "[T]he issues raised here present only questions of law," the relevant facts are identical with respect to each of the defendants, the plaintiff has responded to the § 22F argument in his briefs, and the issue "implicate[s] the [power] of numerous [municipalities]" to impose fees for the issuance of required permits and licenses. See *Altshuler v. Boston Rent Bd.*, 12 Mass. App. Ct. 452, 460, 425 N.E.2d 781 (1981), *S.C.* 386 Mass. 1009, 438 N.E.2d 73 (1982).

[**727] In addition, the reasoned application of the factors discussed in *Emerson College*, and subsequent cases demonstrates that the burial permit charges are valid regulatory fees, not taxes. As to the first factor, we are not persuaded that funeral directors [***12] who pay the burial permit charges receive no special benefit that other members of society do not. Contrast *Silva v. Fall River*, *supra* at 802-804. We have long held that the Legislature may authorize a municipality to impose a reasonable fee to defray the cost of issuing a license that the municipality lawfully requires for one to engage in a particular activity. See *Southview*, *supra* at 398-402; *Commonwealth v. Plaisted*, 148 Mass. 375, 382, 19 N.E. 224 (1889). The Appeals Court's analysis in this case overlooks a crucial distinction between proprietary fees and regulatory fees, i.e., that the particularized benefit provided in exchange for the latter is the existence of the regulatory scheme whose costs the fee serves to defray. Regulatory fees are founded on the State's police power to regulate a particular activity or business, *Emerson* [*171] *College*, *supra* at 424, and serve regulatory purposes either "directly by, for example, deliberately discouraging particular conduct by making it more expensive," or indirectly by defraying an agency's regulation-related expenses. *Nuclear Metals*, *supra* at 201-202, quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

The [***13] burial permit charges are regulatory fees, not proprietary fees. These charges are founded upon the State's police power to regulate the disposal of dead bodies in a manner that preserves the public health, safety and welfare. See *Wyeth v. Board of Health of Cambridge*, 200 Mass. 474, 479 (1909). They are not exacted in exchange for the use of the defendants' property, but are "imposed by an agency upon those subject to its regulation." *Nuclear Metals*, *supra* at 201, quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of P.R.*, *supra*. In exchange for payment of the burial permit charges, funeral directors and their clients (on whose behalf the former act) receive particularized benefits in the form of a well-regulated industry for the disposal of human remains. The administration of the burial permit process by municipal boards of health provides assurances that the decedent's body is disposed of properly. The process also helps to police the industry by allowing the

board of health to ensure that funeral directors have complied with applicable regulations governing the disposition of human remains and to take action against those who do not. Law-abiding funeral directors are thus [***14] spared from having to compete at a disadvantage against those who flaunt the rules governing their profession. See *Nuclear Metals*, *supra* at 204-205.

We turn our attention to the second *Emerson College* factor, voluntariness. *Emerson College*, *supra* at 424-425. We conclude that the Appeals Court erred in applying this criterion to the present case, and that the role of the voluntariness factor in *Emerson College* is limited to the particular factual context of that case. The *Emerson College* decision dealt with purported proprietary fees in the form of assessments of certain large buildings for augmented fire services. See *id.* at 419-423, 425. The burial permit charges at issue here, however, are regulatory [**728] rather than proprietary in nature. The second factor of the *Emerson College* decision should not be understood as having described the [*172] essential characteristics shared by all fees, both regulatory and proprietary. Nothing in that case suggests that whether a charge is incurred voluntarily is relevant in the regulatory fee context.

Massachusetts cases decided since *Emerson College*, which we cite in the margin,⁹ have consistently given less weight to the voluntariness factor. Other jurisdictions [***15] have abandoned it as unhelpful in determining whether a charge is a fee or a tax, in part because "citizens routinely incur different levels of compulsory taxation based on the voluntary choices they make." *Hill v. Kemp*, 478 F.3d 1236, 1252-1253 (10th Cir. 2007). An alternative test to that discussed in *Emerson College* focuses instead on "whether the charge (1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received." *State v. Medeiros*, 89 Haw. 361, 367, 973 P.2d 736 (1999). We need not consider whether to follow the courts of these jurisdictions with respect to proprietary charges. We decide only that, although relevant in the context of proprietary fees, the question whether a regulatory charge is voluntarily incurred is of no relevance in determining whether that charge is a fee or a tax.

9 See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 206, 656 N.E.2d 563 (1995) (in regulatory fee context, "element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge"); *Bertone v. Department of Public Utils.*, 411 Mass. 536, 549, 583 N.E.2d 829 (1992) [***16] (fees are not taxes even if they must be paid in order to enjoy right to develop one's land); *Southview Coop. Hous. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 402, 486 N.E.2d 700 (1985) (although landlords who believe they are not receiving fair rents and want individual rent adjustments must pay fees, "[s]uch charges, if reasonably calculated to do nothing more than compensate a governmental agency for its services, are fees, not taxes, even though they must be paid in order that a right may be enjoyed"); *Baker v. Department of Env'tl. Protection*, 39 Mass. App. Ct. 444, 446, 657 N.E.2d 480 (1995) ("The requirement of choice does not focus on whether it is purely voluntary, but whether the charge benefits those regulated in a manner distinguishable from the benefits at large"); *Berry v. Danvers*, 34 Mass. App. Ct. 507, 512 n.6, 613 N.E.2d 108 (1993) (voluntariness factor is "arguably only subsidiary to, and an additional manifestation of, the analytically more comprehensive first factor, particularized private rather than general public benefit").

Finally, the plaintiff argues, as mentioned, that the burial permit charges lack the third characteristic of permissible fees described in *Emerson College*, i.e., that the charges [***17] are revenue-raising rather than compensatory because the proceeds are [*173] deposited into each defendant's general fund. See *Emerson College*, *supra* at 425. That the amounts collected from the receipt of burial permit charges are deposited in a general fund instead of a fund for a particular purpose "is of weight in indicating that the charge is a tax," but it is "not decisive." *Id.* at 427, quoting P. Nichols, *Taxation in Massachusetts* 7 (3d ed. 1938). Accord *WB&T Mtge. Co. v. Assessors of Boston*, 451 Mass. 716, 720, 889 N.E.2d 404 (2008). However, "the critical question is whether the [burial permit] charges [are] reasonably designed to compensate"

the board of health for its anticipated regulation-related expenses. *Southview, supra* at 404. See *Baker v. Department of Env'tl. Protection*, 39 Mass. App. Ct. 444, 446-447, 657 N.E.2d 480 (1995). As discussed previously, the evidence [**729] in the record clearly supports the conclusion that the amounts of the burial permit charges are reasonably proportional to those expended by the boards of health in administering the permit process. The Ap-

peals Court correctly concluded that "there is ample evidence in the present case to show that the charges collected were for compensation and [***18] not for the general raising of revenue." *Silva v. Attleboro*, 72 Mass. App. Ct. 450, 453, 892 N.E.2d 792 (2008).

Judgment affirmed.

