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

**Current Developments  
in  
Municipal Law**



**2011**

**Massachusetts and Federal Court Cases**

**Book 2**

**Navjeet K. Bal, Commissioner  
Robert G. Nunes, Deputy Commissioner**

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# MASSACHUSETTS AND FEDERAL COURT CASES

## Book 2

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**BOARD OF ASSESSORS OF BRIDGEWATER vs. BRIDGEWATER  
STATE UNIVERSITY FOUNDATION.<sup>1</sup>**

1 Pursuant to an amendment to the indenture of trust of The Bridgewater State College Foundation, dated February 17, 2001, its name changed to The Bridgewater State University Foundation. That name change conformed to the change effected by St. 2010, c. 189, pursuant to which Bridgewater State College became a university.

No. 10-P-593.

**APPEALS COURT OF MASSACHUSETTS**

*79 Mass. App. Ct. 637; 948 N.E.2d 903; 2011 Mass. App. LEXIS 841*

March 15, 2011, Argued  
June 7, 2011, Decided

**SUBSEQUENT HISTORY:** Review granted by *Bd. of Assessors v. Bridgewater State College Found.*, 2011 Mass. LEXIS 736 (Mass., July 28, 2011)

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

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

**HEADNOTES**

Taxation, Appellate Tax Board: findings; Real estate tax: charity, exemption; Judicial review. Administrative Law, Judicial review, Substantial evidence.

**COUNSEL:** Mary C. Butler for board of assessors of Bridgewater.

Michael R. Coppock for the taxpayer.

**JUDGES:** Present: Lenk, Green, & Katzmann, JJ.

**OPINION BY:** GREEN

**OPINION**

[\*\*904] [\*637] GREEN, J. At issue in the present case is the applicability of the charitable exemption from real estate taxation provided by *G. L. c. 59, § 5*, Third, to properties owned by the appellee Bridgewater State University Foundation (foundation) but used in whole or in part by Bridgewater State University (university).<sup>2</sup> The Appellate Tax Board (board) concluded that the properties are tax-exempt because the foundation "occupied" the properties, including the portions used by the university, [\*638] reasoning that use of the properties by the university in furtherance of the foundation's charitable purposes constitutes occupancy of the property by the foundation, within the meaning of the statute. We reverse.

<sup>2</sup> See note 1, supra.

Background. We summarize the relevant facts as stipulated by the parties, supplemented by additional facts found by the board in its written decision and not disputed by the parties on appeal.<sup>3</sup> The town of Bridgewater (town) is a municipality [\*\*\*2] in the Commonwealth of Massachusetts. The foundation is a charitable foundation that was established in 1984. The university is a state university.<sup>4</sup> Its campus is situated on 235 acres in the center of the town. The foundation owns real property at the following locations in the town: (i) 180 Summer Street; (ii) 25 Park Terrace; (iii) three unimproved parcels of land on Plymouth Street (containing .74, 16.22 and 5.79 acres, respectively); and (iv) 29 Park Terrace. The foundation previously leased the buildings at 25 Park Terrace and 180 Summer Street to the university for \$1.00 per year per building (or part thereof used by the university). The lease of 25 Park Terrace was written, while the lease of 180 Summer Street was oral; by the time of the present appeal to the board, however, both leases had expired, though the university continued to use both properties without any payment. There has never been a lease from the foundation to the university of the property at 29 Park Terrace or the land on Plymouth Street; the university's use of those properties has been permissive, without payment of any amount to the foundation.

<sup>3</sup> We omit certain stipulations concerning procedural details [\*\*\*3] of the foundation's abatement requests which are not material to resolution of the legal question at issue in this appeal. The parties agree that there are no jurisdictional impediments to the foundation's requests for abatement for fiscal years 2007 and 2008.

<sup>4</sup> During the tax years in question, which preceded the changes described in note 1, supra, the university was a state college. The difference is immaterial for purposes of our analysis.

The foundation is organized and operated pursuant to *G. L. c. 15A, § 37*, exclusively for the benefit of the

university (which is an institution of public higher education within the meaning of that chapter).<sup>5</sup> The foundation's operating agreement [\*639] with the university provides that the foundation shall hold, manage and invest its money and other assets "solely for the benefit of the College<sup>6</sup> and not otherwise." The board found that the Plymouth Street parcels, though unimproved, were occupied by students of the university and student groups for recreational purposes, that this use promoted the "physical training, and the social, moral and aesthetic development" of the students of the university, and that such use is consistent with the charitable [\*\*\*4] purpose of the foundation. The board also found that 25 Park Terrace was [\*\*905] occupied in part by the foundation for its own offices and in part by the university's alumni office, while 180 Summer Street housed the university's political science department. The property at 29 Park Terrace was used by both the university and the foundation for fundraising events and receptions. Because the use of each of the properties was consistent with the foundation's charitable purpose, the board concluded that the foundation "occupied" the properties within the meaning of *G. L. c. 59, § 5, Third*.

5 Although the university and the foundation are organized within the same chapter, they are separate entities with separate functions.

6 See note 1, *supra*.

Discussion. [HN1] "We review decisions of the board for errors of law. . . . Findings of fact by the board must be supported by substantial evidence." *Middlesex Retirement Sys., LLC v. Assessors of Billerica*, 453 Mass. 495, 498-499, 903 N.E.2d 210 (2009) (internal citations omitted). [HN2] Where, as here, the case was submitted to the board on a statement of agreed facts, together with other documentary submissions, it constitutes a "case stated"; accordingly, "[t]he inferences drawn [\*\*\*5] 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.* at 499, quoting from *Caissie v. Cambridge*, 317 Mass. 346, 347, 58 N.E.2d 169 (1944). [HN3] "In reviewing mixed questions of fact and law, the board's expertise in tax matters must be recognized, and its decisions are due 'some deference.'" *Koch v. Commissioner of Rev.*, 416 Mass. 540, 555, 624 N.E.2d 91 (1993), quoting from *McCarthy v. Commissioner of Rev.*, 391 Mass. 630, 632, 462 N.E.2d 1357 (1984).

*General Laws c. 59, § 5, Third*, provides an exemption from taxation for property described in pertinent part as follows:

[HN4] "Personal property of a charitable organization, which [\*640] term, as

used in this clause, shall mean (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 if it is established by a declaration of trust executed in the commonwealth or all its trustees are appointed by a court or courts in the commonwealth and if its principal literary, benevolent, charitable, scientific or temperance purposes are solely carried out within the commonwealth [\*\*\*6] or its literary, benevolent, charitable, scientific or temperance purposes are principally and usually carried out within 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 officers for the purposes of such other charitable organization or organizations; and real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase . . . ." <sup>7</sup> (Emphasis added).

7 The statute contains several provisos not relevant to the present case.

There is no dispute that the foundation is a charitable organization within the meaning of the statute, and that the university is not.<sup>8</sup> Accordingly, strictly under the terms of the statute the properties at issue are exempt from taxation only if they are occupied by the foundation, rather than the university. See *Sturdy Memorial Found., Inc. v. Assessors of Framingham*, 47 Mass. App. Ct. 519, 520, 713 N.E.2d 1023 (1999). It is apparent [\*\*906] from the record that (except for the portions of 25 Park Terrace housing [\*\*\*7] the foundation's offices, and the occasional use of 29 Park Terrace to host fundraisers for the foundation) the university (rather than the foundation) occupies the properties, albeit for use in a manner consistent with the foundation's purposes. The statute by its terms requires occupancy by the charitable organization claiming exemption, or by another charitable organization, coupled with use for a purpose consistent with the charitable purpose of the occupying charitable organization. In the board's view, the [\*641] foundation "occupied" the properties so long as the properties were used for purposes consistent with the foundation's charitable use -- without regard to who conducted such use. But [HN5] the statutory requirements of occupancy

by a charitable organization and use for its charitable purpose are plainly separate and conjunctive; construing occupancy solely by reference to the purpose for which the property is used (as the board has done) would render superfluous the statute's reference to occupancy by the charitable organization. [HN6] Neither we, nor the board, are free to ignore the statutory requirements. We accordingly reject the board's conclusion that the foundation "occupied" the [\*\*\*8] properties within the meaning of the statute, by virtue of the university's use of them. See also *Sturdy Memorial Found., Inc. v. Assessors of Framingham, supra* (treating occupancy and use as separate and distinct requirements).<sup>9</sup>

8 Real estate owned by the university nonetheless is exempt from taxation, by virtue of *G. L. c. 59, § 5, Second*, which exempts (with exceptions not relevant here) property of the Commonwealth.

9 We have considered whether the board's decision might be sustained on the alternative principle that "where land is taken (or purchased when it could have been taken) and held for a public purpose, it shall be exempt from taxation in the absence of any express statutory provision to the contrary." *Milford Water Co. v. Hopkinton, 192 Mass. 491, 495, 78 N.E. 451 (1906)*. However, the principle is inapplicable to the present case;

the foundation did not acquire the properties by exercise of the power of eminent domain and, more importantly, does not appear from the record to hold the power to take property by eminent domain. See *Connecticut Valley St. Ry. Co. v. Northampton, 213 Mass. 54, 58, 99 N.E. 516 (1912)* (observing that the exemption described in *Milford Water* "is coextensive with the right [\*\*\*9] to take by eminent domain").

The statutory exemption created under *G. L. c. 59, § 5, Third*, does not exempt the properties owned by the foundation at issue in the present case. We recognize that our conclusion has the effect of subjecting to taxation properties that would be exempt if occupied by the charitable organization that owns them, or if owned by the state university that occupies them. The result is dictated by the terms of the statutory exemption; to the extent that it may appear either counterintuitive or (as the foundation argues) contrary to the intent of the Legislature, it is for the Legislature to address by means of a statutory amendment.<sup>10</sup>

10 Alternatively, the foundation and university could avoid taxation of the properties by transferring ownership to the university.

Decision of the Appellate Tax Board reversed.

**BOSTON HOUSING AUTHORITY vs. NATIONAL CONFERENCE  
OF FIREMEN AND OILERS, LOCAL 3.**

**SJC-10569**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

*458 Mass. 155; 935 N.E.2d 1260; 2010 Mass. LEXIS 692; 189 L.R.R.M.  
2846; 160 Lab. Cas. (CCH) P61,077*

**May 4, 2010, Argued  
October 22, 2010, Decided**

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

Suffolk. Civil action commenced in the Superior Court Department on June 4, 2008. The case was heard by Linda E. Giles, J. The Supreme Judicial Court granted an application for direct appellate review.

**HEADNOTES**

Boston Housing Authority. Arbitration, Vacating award. Labor, Public employment, Arbitration, Collective bargaining, Judicial review. Public Employment, Collective bargaining. Statute, Construction. Words, "Evergreen clause."

**COUNSEL:** Kay H. Hodge (John M. Simon with her) for the plaintiff.

Ira Sills (Nicole Horberg Decter with him) for the defendant.

John M. Becker & Patrick N. Bryant, for Massachusetts Coalition of Police, AFL-CIO, amicus curiae, submitted a brief.

**JUDGES:** Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ. BOTSFORD, J. (dissenting, with whom Ireland, J., joins).

**OPINION BY: SPINA**

**OPINION**

[\*155] [\*\*1261] SPINA, J. In this action pursuant to *G. L. c. 150C, § 11*, the Boston Housing Authority (BHA) seeks to vacate the award of an arbitrator who concluded that the BHA violated the minimum staffing provision of its collective bargaining agreement (CBA) with the National Conference of Firemen and Oilers, Local 3 (Local 3), when it laid off all sixteen members of the bargaining [\*156] unit. The arbitrator ordered the BHA to reinstate these employees with full back pay and benefits. A judge in the Superior Court denied the BHA's motion to vacate the arbitration award, and allowed Local 3's motion to confirm the award. Judgment entered on findings [\*\*\*2] of the court. The BHA appealed, and we granted its application for direct appellate review. Because we conclude that the arbitrator exceeded the scope

of his authority, we reverse the judgment and remand for entry of an order vacating the award.

1. Background. We summarize the facts as found by the arbitrator, supplemented where necessary by undisputed aspects of the record. See *New Bedford v. Massachusetts Comm'n Against Discrimination*, 440 Mass. 450, 452, 799 N.E.2d 578 (2003). The BHA is a public employer within the scope of *G. L. c. 150E*, which permits nonmanagerial employees to form and join labor organizations and to bargain collectively over wages and working conditions. It is managed by an administrator who is appointed by the mayor of Boston; the administrator has no fixed term of office and serves at the pleasure of the mayor. The mission of the BHA is to provide housing assistance to low income residents of Boston. It is funded by Federal and State grants, as well as by tenants' rent. Approximately eighty per cent of the BHA's properties are federally subsidized by the Department of Housing and Urban Development. These Federal appropriations are subject to political considerations and, therefore, [\*\*\*3] are unpredictable. As a consequence, when planning their budgets, housing authorities may not know the precise extent of their Federal funding until after a fiscal year has begun.

The Federal appropriations are divided into two parts: (1) operating funds, which are used to maintain and operate the subsidized [\*\*1262] properties; and (2) capital funds, which are used to improve the properties. State funding for the BHA is appropriated by the Legislature through the Department of Housing and Community Development. When the BHA acquires a property, a base level of funding is determined, and then it is adjusted annually without a detailed reexamination of the property's particular operating needs. The fiscal year (FY) of the BHA is from April 1 through March 31, and budget preparations begin in the late summer or early fall.

For approximately thirty-five years, Local 3 has represented a [\*157] bargaining unit comprised of low pressure firemen and stationary engineers (collectively, firemen) employed by the BHA. The traditional function of these employees was to operate and maintain high pressure heating systems at BHA properties. The BHA gradually phased out these high pressure systems and replaced them [\*\*\*4] with new heating systems that did

not require the use of licensed firemen for operation and maintenance. The number of firemen employed by the BHA declined commensurately. By 2000, there were no high pressure systems left, so the primary duties of the remaining firemen were to observe and report on the condition of the newer heating systems, rather than to operate or maintain them.

Local 3 and the BHA have entered into numerous CBAs over the years. Each of the last seven CBAs was executed well after the preceding agreement had expired according to its fixed term. In each case, terms and conditions of employment were continued pursuant to a so-called "evergreen clause" included in the former agreement, which stated that during any period of negotiations between the parties, the terms of the prior agreement would remain in full force and effect until a new agreement was signed. The most recent CBA between Local 3 and the BHA had a fixed term from April 1, 1998, through March 31, 2001, and included an evergreen clause.<sup>1</sup>

1 Article XXI of the collective bargaining agreement (CBA), entitled "Duration of Agreement," stated: "This Agreement shall take effect [\*\*\*5] on April 1, 1998 and shall remain in effect until March 31, 2001. During any period of negotiations between the parties hereto, the provisions of this Agreement shall remain in full force and effect until such time as a new Agreement has been signed. Such negotiations will be conducted in good faith."

In May, 2003, the parties executed a memorandum of agreement (MOA), which carried forward many of the provisions of the 1998-2001 CBA and amended or added several others.<sup>2</sup> One such addition, set forth in "Attachment A" of the MOA, was a provision that required the BHA to maintain "a staffing level of sixteen positions . . . for the term of the present collective bargaining agreement (April 1, 2001 - March 31, 2004)." This minimum staffing provision appeared to be part of a broader compromise between Local 3 and the BHA.

2 Paragraph 14 of the memorandum of agreement (MOA) stated: "The balance of the terms of the agreement for the period of April 1, 1998 through March 31, 2001 shall remain in full force and effect."

[\*158] In January, 2004, before the MOA was set to expire on March 31, 2004, according to its fixed term, Local 3 notified the BHA of its intention to negotiate a new CBA. The parties [\*\*\*6] met nine times over the next two years but were unable to reach an agreement. There was no evidence of any bad faith bargaining. Neither party declared an impasse. During negotiations, the

BHA sought to eliminate both the minimum staffing language from "Attachment A" of the MOA and the evergreen [\*\*\*1263] clause set forth in the 1998-2001 CBA. Local 3 did not agree to either of these proposals.

By January, 2006, the BHA learned that its Federal funding for FY 2007 likely would not be the full amount of its expected subsidy. Anticipating a budget deficit of at least \$10.5 million, the BHA proposed eliminating all sixteen firemen, which would save the BHA approximately \$1.2 million per year.<sup>3</sup> The BHA notified Local 3 of its intention to lay off the firemen, and the parties met three times to exchange proposals on the impact of this decision. The final proposal from each side was rejected by the other side.<sup>4</sup> On April 30, 2006, the BHA laid off all sixteen firemen, citing fiscal concerns and the lack of any need for such employees. Local 3 filed a grievance asserting that, by terminating the firemen, the BHA had violated numerous provisions of the MOA which, in Local 3's view, was still in force. [\*\*\*7] The BHA denied the grievance, and Local 3 submitted the matter to arbitration.

3 After adjustments to its projected Federal funding, the Boston Housing Authority's (BHA's) actual deficit for fiscal year (FY) 2007 was \$1.2 million. The arbitrator noted that operating deficits had been the rule since 1996, and that the deficit for FY 2007 was not among the largest experienced by the BHA.

4 The National Conference of Firemen and Oilers, Local 3 (Local 3), proposed a package that would have reduced the bargaining unit from sixteen to twelve employees, eliminated the minimum staffing language, and provided for voluntary layoffs and severance. The BHA proposed retaining two firemen for as long as those individuals remained employed.

Following several hearings, the arbitrator issued his award on May 12, 2008.<sup>5</sup> He first determined that, contrary to the BHA's suggestion, the duration of "Attachment A," setting forth the [\*159] minimum staffing provision, was concurrent with the other provisions of the MOA and did not expire separately on March 31, 2004. The arbitrator next determined that, pursuant to the unambiguous language of Paragraph 14 of the MOA, see note 2, supra, the evergreen clause from the 1998-2001 CBA carried forward and was incorporated into the MOA. He stated that although the fixed [\*\*\*8] term of the MOA was from April 1, 2001, to March 31, 2004, this contract, like a number of others that had preceded it, was to "remain in full force and effect" [\*\*\*1264] during "any period of negotiations" for a new agreement, and that long after March 31, 2004, the BHA continued to act as if the MOA was in force. Further, the arbitrator

continued, the record was clear that when the BHA decided to lay off the firemen, the parties were still in negotiations. Given his finding that the MOA was in effect on April 30, 2006, the arbitrator next determined that the minimum staffing provision set forth in "Attachment A" was an express limitation on the BHA's right to lay off the firemen, and that the fiscal and operational changes cited by the BHA to justify such layoffs had existed prior to the BHA's agreeing to the minimum staffing language. As such, the arbitrator continued, the BHA violated the terms of the MOA when it laid off the firemen. The arbitrator pointed out that the BHA had sought no relief prior to acting unilaterally, and that if the parties had reached a good faith impasse, then the BHA could have [\*160] implemented its impasse position. Finally, the arbitrator stated that neither the evergreen [\*\*\*9] clause nor the minimum staffing provision appeared to be an illegal contract provision that was unenforceable, and that if the parties' agreement was to be invalidated, then that decision should come from a court, not an arbitrator. The arbitrator ordered the BHA to reinstate the sixteen firemen with full back pay and benefits.

5 On March 30, 2007, the arbitrator issued an interim award based on a jurisdictional challenge by the BHA. The BHA asserted that, at the time of the events giving rise to the grievance, there was no valid CBA in effect, and, therefore, no agreement to arbitrate. The arbitrator stated that the MOA carried forward the grievance procedure set forth in the 1998-2001 CBA, and that the MOA remained in effect in 2006 because the parties were still negotiating a successor agreement. Further, he continued, it would be inappropriate for an arbitrator to decline to enforce a contract provision (here, the evergreen clause) agreed to by the parties and supported by decisions from the Labor Relations Commission based on the arbitrator's own first impression interpretation of "outside law," namely *G. L. c. 150E, § 7 (a)* (imposing three-year term limit on CBAs). The arbitrator [\*\*\*10] stated that, unless enjoined from doing so, he would take whatever evidence remained on the jurisdictional issue during the next scheduled hearing and then proceed to the merits of the case. The BHA filed a verified complaint in the Superior Court pursuant to *G. L. c. 150C, § 2 (b)*, seeking a stay of the arbitration because, in the BHA's view, there was no valid agreement to arbitrate Local 3's grievance. It also filed an emergency motion for a temporary restraining order or, in the alternative, for a preliminary injunction. A Superior Court judge denied the BHA's request for injunctive relief or for a temporary restraining order. Following a subsequent

hearing on April 3, 2007, the arbitrator issued a second interim award on May 8, 2007. He concluded that Local 3's grievance was subject to arbitration, that the evergreen clause was not rendered invalid or unenforceable by *G. L. c. 150E, § 7 (a)*, and that the arbitration hearing should proceed on the merits.

On June 4, 2008, the BHA filed in the Superior Court a complaint to vacate the arbitration award pursuant to *G. L. c. 150C, § 11*, on the grounds that the arbitrator exceeded his authority and ordered the BHA to engage in conduct [\*\*\*11] prohibited by State law. The BHA claimed that because *G. L. c. 150E, § 7 (a)*, limits the term of a CBA to three years, the MOA expired by law on March 31, 2004, and, consequently, there was no agreement in force to permit the arbitration of Local 3's grievance or to preclude the BHA's layoff of the firemen. Alternatively, the BHA asserted that, by enforcing the MOA's minimum staffing provision, the arbitration award impermissibly intruded on the BHA's nondelegable managerial rights as a housing authority under *G. L. c. 121B* and violated public policy considerations pertaining to fiscal responsibility and operational efficiency. Local 3 filed a counterclaim to confirm the award pursuant to *G. L. c. 150C, § 10*. Subsequently, on October 27, 2008, the BHA filed a motion to vacate the arbitration award, asserting, in addition to the claims already raised in its earlier complaint, that the arbitrator limited his decision to his interpretation of the words of the parties' agreement and expressly refused to consider the BHA's arguments that "outside law," namely *G. L. c. 150E, § 7 (a)*, rendered the minimum staffing provision illegal and unenforceable.<sup>6</sup> In response, Local 3 filed a motion [\*\*\*12] to confirm the arbitration award.<sup>7</sup>

6 In its memorandum of law in support of its motion to vacate the arbitration award, the BHA stated that it did not challenge any of the arbitrator's factual findings or conclusions, but merely sought the court's consideration of legal arguments that the arbitrator "expressly refused to decide and left for judicial determination." The BHA has made the same statement in its brief in the present appeal.

7 On January 6, 2009, the parties filed joint motions to consolidate their earlier action in the Superior Court, pertaining to the BHA's efforts to enjoin the arbitration hearing between the parties, see note 5, *supra*, with the present matter. The motions were allowed.

[\*161] In a detailed memorandum of decision and order dated February 24, 2009, a judge denied the BHA's motion to vacate the arbitration award and allowed Local 3's motion to confirm the award. The judge was per-

suaed that there was no conflict between *G. L. c. 150E*, § 7 (a), which states that a CBA shall not exceed [\*\*1265] a term of three years, and an evergreen clause, which merely provides for a continuing code of conduct between the parties while a new agreement is being negotiated. Next, the judge [\*\*\*13] stated that because the record seemed to indicate that the BHA does not require legislative approval for each expenditure it makes, the BHA had discretionary authority to prioritize its own budget items and could freely commit to a minimum staffing provision that guaranteed job security to sixteen firemen. Finally, the judge stated that enforcement of the arbitration award would not violate any well-established public policy, even when considering the BHA's budgetary constraints and the fact that the firemen's positions had become "virtually obsolete." In the judge's view, the BHA had not directed the court to any laws or legal precedents that would excuse its performance under a labor agreement simply because, in hindsight, it had agreed to imprudent terms.

2. Standard of review. Generally speaking, an arbitrator enjoys considerable latitude in fashioning an arbitration award. See *School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454*, 438 Mass. 739, 752, 784 N.E.2d 598 (2003). Absent one of the narrowly circumscribed grounds set forth in *G. L. c. 150C*, § 11 (a), for vacating an arbitration award, we are bound by the arbitrator's factual findings and legal conclusions, even if they are [\*\*\*14] erroneous. See *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758, 784 N.E.2d 11 (2003); *Lynn v. Thompson*, 435 Mass. 54, 61-62, 754 N.E.2d 54 (2001), cert. denied, 534 U.S. 1131, 122 S. Ct. 1071, 151 L. Ed. 2d 973 (2002). Pursuant to § 11 (a) (3), an arbitration award shall be vacated if the arbitrator "exceeded [his] powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law." The question whether an arbitrator acted in excess of his authority is always open for judicial review. See *School Comm. of Waltham v. Waltham Educators Ass'n*, 398 Mass. 703, 705-706, 500 N.E.2d 1312 (1986); *School Comm. of W. Springfield v. Korbut*, 373 Mass. 788, 792, 369 N.E.2d 1148 (1977).

[\*162] 3. Discussion. We begin with the statute that is integral to the disposition of the present matter. *General Laws c. 150E*, § 7 (a), which governs collective bargaining between public employees and public employers, provides, in relevant part: "Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years." See *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197, 203-204, 434 N.E.2d 1258 (1982) (*G. L. c. 150E*, § 7, "authorizes collective

bargaining agreements [\*\*\*15] for up to three years' duration").

The BHA contends that the arbitration award must be vacated because the minimum staffing provision in "Attachment A" of the MOA could not be enforced where the MOA expired by its fixed term on March 31, 2004. In the BHA's view, the evergreen clause, which purported to continue the terms of the MOA, including the minimum staffing provision and the grievance and arbitration procedures, during the period of negotiations between the parties for a successor agreement, violated the unambiguous language of *G. L. c. 150E*, § 7 (a). As such, the BHA continues, the arbitrator exceeded the scope of his authority in ordering the BHA to reinstate the firemen with full back pay and benefits. We agree.

It is a fundamental canon of statutory construction that "statutory language should be given effect consistent with its plain meaning and in light of the [\*\*1266] aim of the Legislature unless to do so would achieve an illogical result." *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). See *O'Brien v. Massachusetts Bay Transp. Auth.*, 405 Mass. 439, 443-444, 541 N.E.2d 334 (1989). Words are to be accorded their ordinary meaning and approved usage. See *Pyle v. School Comm. of S. Hadley*, 423 Mass. 283, 286, 667 N.E.2d 869 (1996). [\*\*\*16] Where, as here, the language of a statute is unambiguous, it is conclusive as to the intent of the Legislature. See *id.* at 285. We do not look to extrinsic sources to vary the meaning of an unambiguous statute unless a literal construction would yield an absurd or unworkable result. See *Department of Community Affairs v. Massachusetts State College Bldg. Auth.*, 378 Mass. 418, 427, 392 N.E.2d 1006 (1979).

The unambiguous language of *G. L. c. 150E*, § 7 (a), reveals a clear legislative intent to limit the term of a CBA to not more than three years. This limitation serves several important and [\*163] beneficial purposes, including giving employees the opportunity to reevaluate their choice of a bargaining representative at regular intervals; compelling the parties to reassess the terms of their CBA at least once every three years; preventing public employers from unduly tying the hands of their successors in dealing with changing and challenging circumstances; and protecting the public interest in the proper management of limited public resources and the efficient provision of government services. See, e.g., *Town of Burlington*, 3 M.L.C. 1440, 1441 (1977).

The fixed term of the MOA was from April 1, 2001, through [\*\*\*17] March 31, 2004. The evergreen clause provided that, during any period of negotiations between the parties, the provisions of the MOA would remain in full force and effect until a new CBA was signed. We recognize that an evergreen clause is designed to main-

tain the status quo in labor relations and provide for a continuing code of conduct while parties negotiate a new bargaining agreement. See *Gustafson v. Wachusett Regional Sch. Dist.*, 64 Mass. App. Ct. 802, 809-810 n.11, 836 N.E.2d 1097 (2005) (one labor law technique for avoiding gaps of time between bargaining agreements is use of evergreen clause); *Town of Burlington*, supra (evergreen clause "fosters labor peace" while new agreement under negotiation). However, the effect of an evergreen clause is to preserve and maintain all of the provisions of a CBA, thereby extending its duration beyond three years, which is prohibited by *G. L. c. 150E, § 7 (a)*. "Contract provisions which go beyond the scope of [a] statute are void."<sup>8</sup> *White Constr. Co. v. Commonwealth*, 11 Mass. App. Ct. 640, 648, 418 N.E.2d 357 (1981), S.C., 385 Mass. 1005, 432 N.E.2d 104 (1982). [\*164] The purported policy benefits of an evergreen clause cannot trump the intent of the Legislature, as unambiguously [\*\*1267] expressed in [\*\*\*18] § 7 (a), to limit the term of a CBA to no more than three years. To the extent that the Commonwealth Employment Relations Board (formerly the Labor Relations Commission) has determined that an evergreen clause may extend the term of a CBA beyond three years,<sup>9</sup> that determination is inconsistent with § 7 (a) and, therefore, not controlling. See *Kszepka's Case*, 408 Mass. 843, 847, 563 N.E.2d 1357 (1990) ("An incorrect interpretation of a statute by an administrative agency is not entitled to deference"); *School Comm. of Springfield v. Board of Educ.*, 362 Mass. 417, 441 n.22, 287 N.E.2d 438 (1972) (statutory interpretation by administrative agency not followed where contrary to unambiguous terms of statute). "The duty of statutory interpretation rests ultimately with the courts." *Town Fair Tire Ctrs., Inc. v. Commissioner of Revenue*, 454 Mass. 601, 605, 911 N.E.2d 757 (2009). As such, we conclude that *G. L. c. 150E, § 7 (a)*, renders an evergreen clause invalid.

8 In the context of public employee labor relations, *G. L. c. 150E, § 7 (d)*, states, among other things, that if a CBA contains a conflict between matters that are within the scope of negotiations pursuant to *G. L. c. 150E, § 6* (pertaining to terms and conditions of employment), and [\*\*\*19] certain enumerated statutory provisions, then the terms of the agreement shall prevail over the statute. The duration of a CBA is not, strictly speaking, a term or condition of employment (such as wages and hours) subject to negotiation under *G. L. c. 150E, § 6*. Moreover, *G. L. c. 150E, § 7 (a)*, is not among the enumerated statutory provisions that is trumped by the terms of a CBA. "[S]tatutes not specifically enumerated in § 7 (d) will prevail over contrary terms in collective bargaining agreements." *Commonwealth v. Labor Relations*

*Comm'n*, 404 Mass. 124, 126, 533 N.E.2d 1326 (1989). See *Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6*, 441 Mass. 620, 625-626, 807 N.E.2d 814 (2004).

9 See, e.g., *Massachusetts Coalition of Police*, 16 M.L.C. 1630, 1632 n.3 (1990); *Town of Burlington*, 3 M.L.C. 1440, 1441 (1977).

Local 3's reliance on *National Ass'n of Gov't Employees v. Commonwealth*, 419 Mass. 448, 646 N.E.2d 106, cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 858 (1995), for the proposition that we have recognized the validity of an evergreen clause notwithstanding *G. L. c. 150E, § 7 (a)*, is misplaced. In that case, the parties did not dispute the assumption that three CBAs remained in effect past their [\*\*\*20] expiration dates because each agreement contained an evergreen clause. See *id.* at 450-451. Consequently, this court did not consider the issue whether the evergreen clause violated § 7 (a). Similarly, *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth.*, 414 Mass. 323, 607 N.E.2d 1011 (1993), is inapposite where the Massachusetts Bay Transportation Authority (MBTA) specifically is excluded as an "employer" subject to the provisions of *G. L. c. 150E*, and where there is no statutory term limit on CBAs under *G. L. c. 161A*, which governs the MBTA. See *G. L. c. 150E, § 1; G. L. c. 161A, § 25*.

*General Laws c. 150E, § 9*, states that "nothing contained herein shall prohibit the parties from extending the terms and conditions of such a collective bargaining agreement by mutual agreement for a period of time in excess of the aforementioned [\*165] time." This provision is wholly consistent and in accordance with *G. L. c. 150E, § 7 (a)*, in that the duration of a CBA shall not exceed three years, but once that fixed term has expired, the parties are free to enter into a subsequent agreement extending the prior terms and conditions of their agreement, thereby maintaining the status quo while negotiations [\*\*\*21] for a new CBA are ongoing. See, e.g., *Gustafson v. Wachusett Regional Sch. Dist.*, supra at 806-807 (bridge agreement between parties preserved terms of prior collective bargaining agreement until successor agreement ratified).

As we have stated, the MOA expired according to its fixed term on March 31, 2004. In light of our conclusion that the evergreen clause was invalid because it violated the clear mandate of *G. L. c. 150E, § 7 (a)*, the provisions of the parties' bargaining agreement did not remain in full force and effect until such time as a new agreement was signed. It follows that the grievance and arbitration provision lapsed when the MOA expired. The arbitrator, therefore, exceeded his authority in ordering the BHA to reinstate the firemen because [\*\*1268] he had no jurisdiction to arbitrate Local 3's grievance in the first in-

stance.<sup>10</sup> Moreover, by mandating compliance with the minimum staffing provision set forth in "Attachment A," the arbitrator required the BHA to extend the provisions of the MOA past three years in violation of § 7 (a).

10 Given this conclusion, we need not, and therefore do not, consider the BHA's contention that a minimum staffing provision is enforceable for only [\*\*\*22] one fiscal year. Further, we do not address whether the BHA committed any unfair labor practices when it laid off the firemen on April 30, 2006, and we do not speculate about Local 3's rights with respect to any subsequent proceedings under *G. L. c. 150E, § 10*, pertaining to prohibited practices.

4. Conclusion. The judgment is reversed, and this case is remanded to the Superior Court for entry of an order vacating the arbitration award.

So ordered.

**DISSENT BY: BOTSFORD**

**DISSENT**

BOTSFORD, J. (dissenting, with whom Ireland, J., joins). I [\*\*\*23] agree with the court that *G. L. c. 150E, § 7 (a) (§ 7 [a])*, bars public employers and public employees from entering into a collective bargaining agreement (CBA) with a stated term of more than [\*166] three years. But the court today expands the scope of this statutory term limit to preclude the contracting parties from including in their CBA a provision, namely an "evergreen clause," that the court itself agrees is intended to serve as "a continuing code of conduct while parties negotiate a new bargaining agreement." Ante at . *Section 7 (a)* contains no direct prohibition against such a provision in a three-year CBA. In reaching its construction of § 7 (a), the court turns its back on the reasonable interpretation that the Labor Relations Commission (now division of labor relations [division])<sup>1</sup> has followed for decades, finding consistency between an evergreen clause and the provisions of § 7 (a); public sector employers and unions, including the parties to the present case, have long relied on that interpretation. The court also, in my view, ignores "the unique nature of the employer-employee relationship in the public sector," *Massachusetts Org. of State Eng'rs & Scientists v. Labor Relations Comm'n*, 389 Mass. 920, 927, 452 N.E.2d 1117 (1983), [\*\*\*24] and the special public policy considerations that animate it. I disagree with the court's interpretation of § 7 (a), and therefore respectfully dissent.

1 The Labor Relations Commission has been subsumed into the division of labor relations of the Department of Labor (division).

1. Although the court recites the background facts of this case, it is useful to highlight some of them to provide context to the questions of statutory interpretation at issue.<sup>2</sup> For over thirty years -- since at least 1978 -- the CBAs between the Boston Housing Authority (BHA) and the National Conference of Firemen and Oilers, Local 3 (Local 3), have had a stated term of between two and three years,<sup>3</sup> and have [\*\*1269] contained an identically worded clause, the evergreen clause, providing that "[d]uring any period of negotiations between the parties hereto, the provisions [\*167] of this Agreement shall remain in full force and effect until such time as a new agreement has been signed. Such negotiations will be conducted in good faith."<sup>4</sup>

2 These facts are taken from those found by the arbitrator, supplemented by undisputed information in the record.

3 The affidavit of Thomas Brassil, who served as business agent for Local 3 from 1978 to October, 2001, includes a chart reflecting the stated terms of each collective bargaining agreement (CBA) in effect between the BHA and Local 3 from 1978 to the present, and also the time period the provisions of each CBA remained in effect. The first CBA listed, with an execution date of May 24, 1979, had a stated term that went from October 1, 1978, to May 31, 1982, more than three years. All the other contracts had stated terms for three or fewer years. There is no explanation provided for the longer term of the first contract, but it appears to be an anomaly.

4 As the court states, with respect to the 2001-2004 memorandum of agreement (MOA) between the parties, the arbitrator found that it incorporated the evergreen clause contained in the parties' 1998-2001 CBA. See ante at .

The parties' most recent CBA, namely, the memorandum of agreement (MOA), had a stated term from April 1, 2001, to March 31, 2004. After Local 3 gave notice in January, 2004, of its intent to negotiate a new CBA, the parties met in negotiation sessions nine times, until April, 2006, without reaching agreement. [\*\*\*25] In the meantime, the parties continued to operate under the provisions of the 2001-2004 MOA, and there is no indication the BHA suggested in those negotiating sessions that the MOA's provisions were no longer in effect. Rather, in connection with these negotiations, one of the BHA's proposals for the new CBA was to eliminate the evergreen clause, but Local 3 did not agree. In late January, 2006, in response to what it deemed a fiscal crisis, the BHA notified Local 3 that it intended to lay off all sixteen firemen covered by the minimum staffing provision in Attachment A to the MOA. The BHA met with Local 3 three times over the layoffs, with each side offer-

ing one or more counterproposals that were not accepted by the other. Then, based on the stated reasons of lack of need for the firemen and fiscal issues, the BHA unilaterally implemented the layoffs. It was in responding to Local 3's 2006 grievance over the firemen's termination that the BHA first asserted its claim that there was no CBA in effect between the parties after March 31, 2004, because the evergreen clause contravened *G. L. c. 150E, § 7 (a)*, and therefore the BHA was not obligated to honor the minimum staffing provision [\*\*\*26] in the MOA's Attachment A.

2. The pertinent language in § 7 (a) is the following: "Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years." The court states that this language is clear, and goes on to conclude -- by employing the oft-repeated rubric of statutory interpretation that where the words of a statute are clear, the "[language] is conclusive as to the intent of the Legislature," and the court will not look to extrinsic sources -- that the [\*168] evergreen clause in the MOA was unenforceable because it violated "the unambiguous language of *G. L. c. 150E, § 7 (a)*." Ante at -. While I agree that the language of § 7 (a) provides clarity on the point that parties to a CBA may not contract for longer than three years, the language itself does not lead to the conclusion drawn by the court. Rather, the section is silent on the question whether a limit on the length of a contract precludes the enforcement of an evergreen clause.

*Section 7 (a) is part of G. L. c. 150E*, a comprehensive statutory scheme regulating public employee collective bargaining. See *Keane v. City Auditor of Boston*, 380 Mass. 201, 208, 402 N.E.2d 495 (1980). [\*\*\*27] Its meaning deserves to be considered in a broader context than the court has provided. "[T]ime and again we have stated that we should not accept the literal meaning of the words of a statute without regard for that statute's purpose and history." *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481, 852 N.E.2d 1061 (2006), quoting *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 839, 494 [\*\*1270] N.E.2d 1008 (1986). Citing the division's decision in *Town of Burlington*, 3 M.L.C. 1440 (1977), the court essentially adopts the division's articulation of the purposes served by § 7 (a): to give employees the ability to choose new bargaining representatives every three years, and protect the employer and incumbent union from too-frequent elections; to require reassessment by the parties of the CBA at least once every three years; and to "prevent[] a governing body from unduly tying the hands of its successors." *Town of Burlington*, 3 M.L.C. at 1441. See ante at [\*169]. The court, however, summarily rejects the conclusion articulated by the division in its *Town of Burlington* decision, that an evergreen clause is consistent

with these statutory purposes, and does not violate the three-year term provision in § 7 (a).

5 There is some legislative history to support this first purpose. In the legislation enacting *G. L. c. 150E*, see St. 1973, c. 1078, the Legislature made clear that it was directly replacing sections of the prior public sector collective bargaining law, *G. L. c. 149, §§ 178D, 178F-178N*, with the new chapter. See St. 1973, c. 1078, §§ 1, 2. As Local 3 points out, the prior law did not contain any language limiting the durational term of CBAs, but did contain a "contract bar" provision expressly prohibiting any election of a new union to become the exclusive bargaining representative of public employees during the term of an existing CBA. See *G. L. c. 149, § 178H (3)*, as amended by St. 1967, c. 746. The three-year term in § 7 (a) of the new *c. 150E* ensured that new elections could take place within a reasonable time period -- three years -- and thereby served the interests of all parties. The division has determined that evergreen clauses are consistent with this purpose, because the clauses do not preclude representation elections every three years. See, e.g., *Brockton Sch. Comm.*, 4 M.L.C. 1005, 1007 (1977); *University of Mass.*, 2 M.L.C. 1001, 1004 (1975); *City of Somerville*, 1 M.L.C. 1312, 1314 (1975).

We [\*\*\*28] have long recognized that the division, the State agency charged with the responsibility of implementing *G. L. c. 150E*, see *G. L. c. 23, § 9R*, has specialized knowledge and expertise in labor relations, and, as a result, its decisions are entitled to substantial deference. See *Worcester v. Labor Relations Comm'n*, 438 Mass. 177, 180, 779 N.E.2d 630 (2002); *Boston Police Superior Officers Fed'n v. Labor Relations Comm'n*, 410 Mass. 890, 892, 575 N.E.2d 1131 (1991); *Quincy City Hosp. v. Labor Relations Comm'n*, 400 Mass. 745, 748-749, 511 N.E.2d 582 (1987); *Boston Teachers Union, Local 66 v. Boston*, 44 Mass. App. Ct. 746, 752, 694 N.E.2d 33 (1998). Such deference is particularly appropriate where, as here, "statutory lacunae exist." *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 523, 870 N.E.2d 67 (2007) (where there is statutory gap, agency charged with administration of statute is to spell out details of legislative policy).

As just mentioned, the division has upheld the validity of evergreen clauses under § 7 (a), and has done so consistently since 1977. See *Town of Burlington*, 3 M.L.C. at 1441. See, e.g., *Massachusetts Coalition of Police, AFL-CIO, Local 170*, 16 M.L.C. 1630, 1632 § n.3 (1990). In *Town of Burlington*, the division explained that an evergreen [\*\*\*29] clause is consistent

with the statutory language regarding contract terms of three years because the clause merely provides a "mechanism and procedure to be followed prior to the execution of a successor agreement." *Town of Burlington*, supra at 1441.

Resting on its view that the statutory language is "unambiguous[]," the court simply states that the division's previous determinations that an evergreen clause is not inconsistent with § 7 (a) are "not controlling." Ante at . I disagree. For a number of reasons, including that an evergreen clause may or may not become operable at the end of a [\*\*1271] CBA -- it only takes effect in the circumstance where the parties have not reached a new agreement at the end of the original contract term and remain in good faith negotiations to do so; and that an evergreen clause merely allows the provisions of a CBA to continue to govern relations between parties during an interim period of [\*170] negotiations, culminating in either a new agreement or impasse, I am persuaded that there is no inherent inconsistency between an evergreen clause and § 7 (a). In my view, the division's interpretation of § 7 (a) is a reasonable one to which this court should defer.<sup>6</sup>

6 In the circumstances of this case, the court's focus on the "unambiguous[]" nature of § 7 (a) is misleading. As indicated in the text, the words used by the Legislature may be clear as far as they go, but the issue here concerns a point on which the statute is silent. As to that point, the fact that for over thirty years, the agency has adopted a construction of § 7 (a) that differs from the court's by itself indicates that the statute is not so clear when applied to the particular question we are considering. See *New England Med. Ctr. Hosp., Inc. v. Commissioner of Revenue*, 381 Mass. 748, 750, 412 N.E.2d 351 (1980), quoting *Hutton v. Phillips*, 45 Del. 156, 160, 6 Terry 156, 70 A.2d 15 (1949) (statute unambiguous if "virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely").

While [\*\*\*30] the court rejects the parties' evergreen clause -- and by extension, all evergreen clauses -- it points to a provision in *G. L. c. 150E, § 9*, that authorizes parties to a CBA to extend the contract "by mutual agreement for a period of time in excess of the aforementioned time." In the court's view, this statutory provision is in accordance with § 7 (a), because, the court states, it authorizes parties, after a CBA has expired, to enter into

"a subsequent agreement extending the prior terms and conditions of their agreement, thereby maintaining the status quo while negotiations for a new CBA are ongoing." Ante at . Considered as a whole, *G. L. c. 150E, § 9*, offers more support for the validity of an evergreen clause than for its rejection. *Section 9* provides a detailed set of procedures -- including mediation, fact finding, and arbitration -- that parties to a public sector CBA may seek to activate when one or more of them believe they have reached impasse in negotiating over the terms of the agreement. The section does not require that the parties' CBA have ended before its provisions may be invoked, and -- to put the portion of § 9 quoted by the court in context -- the statute [\*\*\*31] expressly states that when a petition is filed under its provisions

"for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement [\*171] unilateral changes until the collective bargaining process, including mediation, fact finding or arbitration, if applicable, shall have been completed and the terms and conditions of employment shall continue in effect until the collective bargaining process, including mediation, fact finding or arbitration, if applicable, shall have been completed; provided, however, that nothing contained herein shall prohibit the parties from extending the terms and conditions of such a collective bargaining agreement by mutual agreement for a period of time in excess of the aforementioned time" (emphasis added).

*G. L. c. 150E, § 9*, ninth par.

Parties to a CBA engaged in negotiating the terms of a successor agreement are not required to follow the procedural regime set out in *G. L. c. 150E, § 9*, and I recognize that "the terms and conditions" [\*\*1272] of a CBA may encompass something less than every provision of the agreement. But the important point is that § 9 recognizes the need to maintain the status quo and provide for continuity [\*\*\*32] while negotiations over a new CBA are ongoing, without waiting until the old agreement has expired and the parties are left in limbo. That, of course, is also the purpose of the evergreen clause.<sup>7</sup> As a matter of policy, the evergreen clause, like the quoted provisions of *G. L. c. 150E, § 9*, avoid "uncontracted-for gaps of time between bargaining agreements," *Gustafson v. Wachusett Regional Sch. Dist.*, 64 Mass. App. Ct. 802, 809-810 n.11, 836 N.E.2d 1097 (2005), and "[foster] labor peace by providing a continuing code of conduct while a new agreement is under negotiation." *Town of*

Burlington, 3 M.L.C. at 1441. Moreover, keeping in mind the strong policy in favor of collective bargaining between public employers and employees, see, e.g., *Somerville v. Somerville Mun. Employees Ass'n*, 451 Mass. 493, 496, 887 N.E.2d 1033 (2008), it bears emphasis that the evergreen clause included in the MOA here was the result of mutual bargaining, whereby the parties offered consideration and at least one party likely compromised or otherwise made a concession to obtain the inclusion of the clause.

7 The [\*172] parties are subject to the requirement of good faith bargaining under the explicit terms of the evergreen clause. Accordingly, one party is prevented from indefinitely stalling negotiations simply because it benefited from the terms of the prior agreement that was being preserved by the evergreen clause.

When interpreting § 7 (a) in relation to the evergreen clause, these types of public policy considerations should be weighed in the balance. [\*\*\*33] This court and the Appeals Court have recognized the special nature of collective bargaining in the public sector, where employees are not permitted to strike but perform services important to the public. See *Gustafson v. Wachusett Regional Sch. Dist.*, 64 Mass. App. Ct. at 809-810 n.11. Cf. *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth.*, 414 Mass. 323, 326-327, 607 N.E.2d 1011 (1993).<sup>8</sup> Cf. also *Massachusetts Org. of State Eng'rs & Scientists v. Labor Relations* [\*\*1273] *Comm'n*, 389 Mass. 920, 927, 452 N.E.2d 1117 (1983); *Boston Teachers Union, Local 66 v. Boston*, 44 Mass. App. Ct. at 754-755. The court, however, does not undertake any evaluation of these concerns. Nor does it consider the implication that its decision will have on the settled expectation of public sector employees and employers that evergreen clauses tied to the negotiation of a new agreement are permissible. Its failure to do so not only ignores our precedent, but may well have unfortunate consequences for employers, employees, and the public arising from uncertainty [\*173] after the stated term of a CBA has been reached and a new CBA is not yet in place.

8 In *Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth.*, 414 Mass. 323, 607 N.E.2d 1011 (1993), this court discussed a "rollover" provision in a CBA between the Massachusetts Bay Transportation Authority (MBTA) and its employees, which stated that the provisions of the CBA "shall continue in force 'from year to year thereafter unless changed by the parties.'" *Id.* at 326. Finding the "rollover" provision to be valid, this court concluded that the MBTA could not terminate unilaterally the CBA simply

by giving notice. *Id.* at 326-327. The court wrote: "Where a strike would be unlawful, or at least arguably so, and arbitration is mandated for the ultimate resolution of disputes concerning the terms of a collective bargaining agreement . . . and where the public interest in uninterrupted mass transit service is great, public policy supports the enforcement of the collective bargaining agreement as written and the rejection of any implication that the right to terminate it on reasonable notice in the circumstances of this case. By its terms, the collective bargaining agreement is still in effect." *Id.* at 327. The court states that the Local 589 decision is "inapposite" here because the MBTA is not covered by *G. L. c. 150E*, and therefore not subject to § 7 (a). Ante at . . . While it is true that § 7 (a) does not apply to the MBTA, the same public policy concerns do apply with equal force in the present case. According to art. VIII of the CBA between the BHA and Local 3, the BHA's employees -- like all other public employees, see *G. L. c. 150E*, § 9A (a) -- are not permitted to strike, arbitration has been contractually mandated for resolution of grievances under all their CBAs, and there is a strong public interest in having the operation and maintenance of public housing developments take place without disruption caused by labor unrest.

3. Underlying the court's opinion is a wholly legitimate concern about the seemingly leisurely [\*\*\*34] status and pace of public sector bargaining. I agree that successor CBAs among public sector employers and employees should be negotiated and executed on a timetable that makes them truly successive, rather than retroactively effective. At the same time, it is clear from the record, and from our own decisions, see, e.g., *National Ass'n of Gov't Employees v. Commonwealth*, 419 Mass. 448, 646 N.E.2d 106, cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 858 (1995), that this has not always been the practice or perhaps even the norm, and yet there has been no legislative effort to change it. The court's insistence that the language of § 7 (a) unambiguously invalidates an evergreen clause is belied by this history. Furthermore, in the present case, the BHA had options available to it to end the extension of the MOA as well as the evergreen clause, if that is what it sought.<sup>9</sup>

9 If the BHA were to conclude that Local 3 was not bargaining in good faith concerning the extension of the MOA (or a change in the evergreen clause), it could file an unfair labor practice charge pursuant to *G. L. c. 150E*, § 10 (b) (2), or a grievance under the MOA. A determination of bad faith bargaining in either forum, by itself, would render void the evergreen clause. Further-

more, assuming the parties continued to bargain in good faith, nothing in the evergreen clause interfered with the ability of the BHA to declare an impasse -- on its own and with no resort to the procedures laid out in *G. L. c. 150E, § 9* -- after exhausting the possibility of reaching agreement. See *Newton Branch of the Mass. Police Ass'n v. Newton*, 396 Mass. 186, 190, 484 N.E.2d 1326 (1985); *Massachusetts Org. of State Eng'rs & Scientists v. Labor Relations Comm'n*, 389 Mass. 920, 926-928, 452 N.E.2d 1117 (1983). If the BHA were to follow such a path, it would be free to implement unilaterally those changes that were "reasonably comprehended within its pre-impasse proposals." *Id.* at 927, quoting Hanson Sch.

Comm., 5 M.L.C. 1671, 1675-1676 (1979). Accord *Newton Branch of the Mass. Police Ass'n v. Newton*, *supra*.

For these reasons, I respectfully dissent. I would conclude, as did the Superior Court judge, that the arbitrator's award did not violate § 7 (a) and was not subject to vacation pursuant to *G. L. c. 150C, § 11 (a) (3)*, on that ground. Because I also believe that the judge below correctly decided, contrary to the BHA's arguments, that the award does not violate [\*\*\*35] any well-defined public policy and is not otherwise illegal -- two issues not reached by the court here -- I would affirm the judgment of the Superior Court.

MICHAEL A. CAMARA & another <sup>1</sup> vs. ATTORNEY GENERAL & another. <sup>2</sup>

- 1 ABC Disposal Service, Inc. We shall refer to a single plaintiff.  
2 Division of administrative law appeals (DALA).

SJC-10693

SUPREME JUDICIAL COURT OF MASSACHUSETTS

458 Mass. 756; 941 N.E.2d 1118; 2011 Mass. LEXIS 16; 160 Lab. Cas. (CCH) P35,862

November 4, 2010, Argued  
January 25, 2011, Decided

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

Bristol. Civil action commenced in the Superior Court Department on April 15, 2008. The case was heard by David A. McLaughlin, J., on a motion for judgment on the pleadings. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**HEADNOTES**

Attorney General. Labor, Wages. Contract, Employment. Words "Special contract."

**COUNSEL:** Karla E. Zarbo, Assistant Attorney General (Anita Maietta, Assistant Attorney General, with her) for the Attorney General.

Thomas E. Pontes for the plaintiffs.

Shannon Liss-Riordan, Ian O. Russell, & Audrey R. Richardson, for Massachusetts Employment Lawyers Association & others, amici curiae, submitted a brief.

**JUDGES:** Present: Spina, Cowin, Cordy, Botsford, & Gants, JJ.

**OPINION BY: BOTSFORD**

**OPINION**

[\*\*1119] [\*756] BOTSFORD, J. In this case we consider whether the written policy of the plaintiff ABC Disposal Service, Inc. (ABC), under [\*757] which a worker found by ABC to be at fault in an accident involving company trucks may agree to a deduction from earned wages in lieu of discipline, violates a key provision of the Massachusetts Wage Act, *G. L. c. 149, § 148* (§ 148).<sup>3</sup> In ruling on the plaintiff's appeal from a decision of the division of administrative law appeals (DALA), a judge in the Superior Court concluded that the written policy was consistent with § 148. Giving [\*\*\*2] deference to the Attorney General's reasonable interpretation of the Wage Act, *G. L. c. 149, §§ 148 and 150*, and in agreement with DALA, we conclude that the statute prohibits wage deductions associated with an employer's unilateral determination of an employee's fault and damages; and that the ABC policy, by withholding

employees' wages, contravenes the Wage Act. We therefore reverse the judgment of the Superior Court.<sup>4</sup>

3 *General Laws c. 149, § 148* (§ 148) and § 150 (§ 150), are referred to collectively in this opinion as the Wage Act.

4 We acknowledge the amicus brief of the Massachusetts Employment Lawyers Association, the Greater Boston Legal Services, the Brazilian Women's Group, Centro Presente, the Chelsea Collaborative, The Chinese Progressive Association, the Massachusetts Coalition for Occupational Safety and Health, the Massachusetts Immigrant and Refugee Advocacy Coalition, the Massachusetts Jobs with Justice, Metrowest Worker Center, Project Voice, and the American Friends Service Committee, in support of the Attorney General.

Background. The facts are not contested.<sup>5</sup> ABC is a Massachusetts corporation with a usual place of business in New Bedford. The plaintiff Michael Camara [\*\*\*3] is its vice-president and qualifies as a statutory employer of ABC's employees within the meaning of the Wage Act. ABC provides curbside collection and disposal of solid waste and recycling for participating households and small businesses. ABC employees driving company trucks have on occasion caused damage to the trucks and to personal property of third parties.

5 The parties filed with DALA a statement of agreed facts in connection with their cross motions for summary decision. The administrative magistrate adopted these facts as findings.

In an effort to promote safety and to decrease careless driving, ABC in recent years established a policy whereby drivers determined to be at fault are given an option of either accepting disciplinary action or entering into an agreement to set off the damages against their wages.<sup>6</sup> The [\*\*1120] determination of fault is [\*758] made after the ABC safety officer reviews records related to the incident and reports his findings to the safety manager. If the safety manager, in consultation with ABC management, determines the incident was a "preventable accident," see note 6, *supra*, she offers the

driver a choice of making payment for the damages or accepting discipline. [\*\*\*4] The findings of the safety manager as to whether an accident was preventable and the amount of damages are final and not subject to any appeal process. A driver determined by ABC to be at fault may enter into a written agreement with ABC for the payment of the cost of the damage by way of a setoff against wages due to the employee. Some drivers have chosen to accept disciplinary action instead of paying damages. Of those employees who have agreed to permit a setoff by ABC, the average setoff is fifteen dollars to thirty dollars per week. In no instance has a driver's pay, net of setoffs for driver fault, fallen below minimum wage standards. Between 2003 and 2006, ABC's costs attributable to damage done to vehicles and personal property has been reduced by seventy-eight per cent. ABC attributes this reduction to implementation of this policy.

6 On hiring, employees are informed in writing of the "accident reporting procedures," which essentially memorialize the terms of the policy at issue. The procedures provide that the company can impose disciplinary action on an employee who causes a preventable accident, and that an employee who has caused a preventable accident may opt to pay for [\*\*\*5] the damage, or to receive a suspension and ninety days' probation; depending on the severity of the accident, termination of employment is also a possible outcome. The parties' joint statement of agreed facts uses the terms "preventable accident" and "at fault" essentially interchangeably.

The fair labor standards division of the Attorney General's office conducted an audit of the deductions made by ABC from June, 2004, through March, 2006. The audit revealed that ABC deducted \$21,487.96 from the wages of twenty-seven employees during this time period in accordance with the policy at issue. In February, 2007, the Attorney General issued a civil citation against Camara and ABC for an intentional violation of *G. L. c. 149, § 148*; the citation required payment of \$21,487.96 in restitution and assessed a \$9,410 civil penalty. On the plaintiff's timely appeal, an administrative magistrate within DALA issued a decision upholding the Attorney General's citation.

The plaintiff sought review of the DALA decision in the Superior Court pursuant to *G. L. c. 30A, § 14*. After a hearing, [\*759] a Superior Court judge (motion judge) granted the plaintiff's motion for judgment on the pleadings, reversing the [\*\*\*6] DALA decision and invalidating the Attorney General's citation. The Attorney General appealed to the Appeals Court, and we transferred her appeal to this court on our own motion.

Discussion. In the Superior Court, ABC challenged DALA's decision as being based on an error of law. See *G. L. c. 30A, § 14 (7)(c)*. We grant de novo review of questions of law in administrative decisions. *Electronic Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 65, 907 N.E.2d 635 (2009) (Electronic Data), citing *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). However, the Attorney General's reasonable interpretation of the Wage Act is entitled to deference. See *Electronic Data*, supra at 69, quoting *Smith v. Winter Place LLC*, 447 Mass. 363, 367-368, 851 N.E.2d 417 (2006) ("Insofar 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").

[\*\*1121] Section 148 of the Wage Act requires prompt and full payment of wages due. It provides in pertinent part:

"Every person having employees [\*\*\*7] in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week . . . . No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty . . . ." (emphasis added).

*G. L. c. 149, § 148*. *General Laws c. 149, § 150 (§ 150)*, in turn, authorizes the Attorney General to "make complaint" against any employer who violates § 148 and limits employers' defenses as follows:

"On the trial no defence for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular [\*760] place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid" (emphasis added).

*G. L. c. 149, § 150*.

The Attorney General interprets the "special contract" language in § 148 as generally prohibiting an employer from deducting, or withholding payment of, any

earned wages. She [\*\*\*8] argues that this prohibition cannot be overcome by an employee's assent, both because § 148 makes the "special contract" prohibition unconditional and for reasons of public policy. In her view, regardless of an employee's agreement, there can be no deduction of wages unless the employer can demonstrate, in relation to that employee, the existence of a valid attachment, assignment or setoff as described in § 150,<sup>7</sup> a condition she claims that the ABC setoff policy does not meet.

7 The term setoff is not defined in *G. L. c. 149, § 150*. A setoff is generally defined as "something that is set off against another thing[;] . . . the discharge of a debt by setting against it a distinct claim in favor of the debtor." Webster's Third New International Dictionary 2078 (1993).

We find the Attorney General's interpretation of § 148 to be a reasonable one. It is consistent with the statute's purpose, which is "to protect employees and their right to wages." *Electronic Data*, 454 Mass. at 70. See *Boston Police Patrolmen's Ass'n v. Boston*, 435 Mass. 718, 720, 761 N.E.2d 479 (2002) ("purpose of the weekly wage law is clear: to prevent the unreasonable detention of wages"). Here, instead of receiving, for example, \$400 [\*\*\*9] a week in net pay, an ABC employee would take home only \$370 to \$385 pursuant to an agreement that applies only to that employee.<sup>8</sup> Given the undisputed manner in which the ABC policy operates, we agree with the Attorney General that even if the arrangement is voluntary and assented to,<sup>9</sup> it still represents [\*761] [\*\*1122] a "special contract," in the sense that it contains "peculiar provisions that are not ordinarily found in contracts relating to the same subject matter." Black's Law Dictionary 373 (9th ed. 2009). This interpretation of the term, as the Attorney General contends, clearly furthers the Wage Act's overarching policy of protecting employees' rights to wages. Cf. *DiFiore v. American Airlines, Inc.*, 454 Mass. 486, 497, 910 N.E.2d 889 (2009) (interpreting term "service charge" in *G. L. c. 149, § 152A* [section of Wage Act protecting tips], to protect wage earners from risk that employers may seek to use special contracts to avoid compliance with statute).

8 The record does not contain information concerning the average weekly wages of ABC employees who drive its trucks. The \$400 figure used as an example in the text is a hypothetical one, used for illustrative purposes. The reduction by fifteen to thirty [\*\*\*10] dollars per week, however, is based on the parties' statement of agreed facts.

9 The Attorney General represents in her brief that the audit of ABC performed by the fair labor

standards division in her office followed the division's receipt of a number of complaints by employees of ABC that the company had made improper deductions from their pay. The plaintiff does not address the point in its brief. Complaints of this nature would appear to call into question the nature of the assent of at least some employees.

10 The term "special contract" is not defined in the Wage Act. We give statutory language an effect consistent with its plain meaning and in light of the legislative purpose unless to do so would achieve an illogical result. *Sullivan v. Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001), and cases cited. See *Boston Professional Hockey Ass'n v. Commissioner of Revenue*, 443 Mass. 276, 287, 820 N.E.2d 792 (2005) (ordinary meaning may be understood from dictionary definition).

The plaintiff disputes this interpretation of § 148. It claims, and the motion judge agreed, that it has not violated the section's special contract prohibition because all wages were properly credited to each affected employee, and the deductions [\*\*\*11] conferred an "immediate benefit" in the form of reduced liability for him or her. Relying on *Buhl v. Viera*, 328 Mass. 201, 202, 102 N.E.2d 774 (1952), it contends that because an employee is liable to an employer for loss resulting from the employee's own negligence, and because ABC's employees have voluntarily agreed to make repayments for actual amounts expended by way of a deduction, those employees have not given up statutory rights to earned wages.

This argument lacks merit. As noted above, and as the plaintiff acknowledges, the affected employees have in fact received lower pay under ABC's policy, directly as a consequence of the policy's provisions that apply only to certain employees and only in certain circumstances. This arrangement fits squarely within the concept of a special contract, regardless whether the affected employees receive any "immediate benefit" from it. The possible existence of such a benefit is relevant only to whether the reduction in pay represents "a valid set-off" deduction under § 150. We turn to that question.

The Attorney General interprets the valid set-off defense in § 150 as strictly limited in scope and not applicable to ABC's policy. Valid setoffs enumerated in [\*\*\*12] § 150, she states, all implicitly [\*762] involve some form of due process through the court system, or occur at an employee's direction and in the employee's interests. ABC's deductions therefore do not qualify: ABC has not shown that any of the employees are legally liable for damages, or that, with respect to third parties, ABC was legally required to make payments on an employee's behalf by a judgment that "could not have been

avoided." See *Buhl v. Viera*, 328 Mass. at 202-203, quoting *Keljikian v. Star Brewing Co.*, 303 Mass. 53, 54, 20 N.E.2d 465 (1939).

The plaintiff argues that its wage adjustments do represent valid set-off deductions within the meaning of § 150. It views recouping costs from an employee who caused damage in an accident in which the employee was at fault as analogous to a setoff to correct an employee's misappropriation of an employer's funds, an arrangement [\*\*1123] the plaintiff contends has been found permissible because it merely returns to the employer funds that "as a matter of law the employee would owe." See *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 (5th Cir. 1972), cert. denied, 409 U.S. 1108, 93 S. Ct. 908, 34 L. Ed. 2d 688 (1973).<sup>11</sup> See *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1369 (5th Cir. [\*763] 1973). [\*\*\*13]<sup>12</sup> The plaintiff asserts that in this case, ABC performed thorough investigations and made findings of fault before entering into set-off agreements with employees; as such, the debts were "clear and established." See *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593, 911 N.E.2d 739 (2009) (Somers).

11 The court in *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1198 (5th Cir. 1972), cert. denied, 409 U.S. 1108, 93 S. Ct. 908, 34 L. Ed. 2d 688 (1973), did state, as the plaintiff argues, that if an agreement between an employer and an employee required the repayment of moneys "that the employee himself took or misappropriated," the agreement would not run afoul of the Federal Fair Labor Standards Act (FLSA) -- the Federal minimum wage law -- 29 U.S.C. §§ 201 et seq., because "[a]s a matter of law the employee would owe such amounts to the employer, and as a matter of fact, the repayment of moneys taken in excess of the money paid to the employee in wages would not reduce the amount of his wages." However, the court actually held in that case that Mayhue's, the employer, was in violation of the FLSA and implementing regulations because the agreement required the employer's cashiers to "voluntarily repay" missing funds [\*\*\*14] that represented cash shortages "occur[ing] through misappropriation, theft, or otherwise" (emphasis added), id., and there was no evidence that the cash shortages in question "were the result of theft on the part of the cashiers or were in any way different from the usual losses which are to be expected where cashier employees handle a large number of transactions. . . . [T]his agreement tended to shift part of the employer's business expense to the employees and was illegal to the extent that it reduced an em-

ployee's wage below the statutory minimum." *Id. at 1198-1199*. The plaintiff's policy at issue, providing as it does for a setoff against ABC's employees' wages based on an entirely unilateral and untested judgment by the employer of fault and amount of damage, seems more similar to the proscribed voluntary repayment program used by Mayhue's than to a plan for the recovery of admittedly misappropriated funds; like the latter program, the plaintiff's policy shifts to the ABC employees some of what appear to be the ordinary costs of doing business as a trash-pickup enterprise.

12 The plaintiff argues that in reversing DALA, the motion judge properly relied on *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973) [\*\*\*15] (Brennan), a case where the court found an employer subject to the minimum wage requirements of the FLSA could make set-off deductions from an employee's wages to cover wage advances made by the employer to the employee as well as to recoup the employer's reimbursements to "third-party creditors of the employee at the employee's direction and with his consent." *Id.* The *Brennan* case is plainly distinguishable from this case. The employee in *Brennan* became intoxicated, took one of his employer's trucks, caused a motor vehicle accident in which he destroyed the truck as well as the other driver's car, was criminally charged for his conduct and required to pay criminal fines that his employer paid for him; the employer also paid the third party for the destroyed car. See *id. at 1368 & n.4*. Pursuant to the plaintiff's policy, ABC's employees, acting within the scope of their employer's business, without any independent determination of negligence, have wages deducted for conduct that is not alleged to be intentional or reckless, much less criminal, and deducted for the purpose of paying their employer for the cost of repairing its own vehicles. In *Brennan*, the court concluded that the employer [\*\*\*16] violated the FLSA insofar as it undertook to recoup, through set-off deductions from the employee's wages, the cost of replacing the employer's own truck that had been destroyed by the employee in the driving spree. *Id. at 1369-1370*.

We disagree. We wrote in *Somers* that "we understand the term ["valid set-off" in § 150] . . . to refer to circumstances where there exists a clear and established debt owed to the employer by the employee." [\*\*1124] *Id.* Contrary to the plaintiff's characterization, *Somers* rejected a theory of damages that was not expressly in the statute and ran counter to the legislative purpose of protecting employees' interests. *Id. at 592-593*. An ar-

rangement whereby ABC serves as the sole arbiter, making a unilateral assessment of liability as well as amount of damages with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company, does not amount to "a clear and established debt owed to the employer by the employee." See *id.* at 593. <sup>13</sup> The option afforded ABC's employees to choose [\*764] "voluntarily" to accept either wage deductions or discipline offers them only unpalatable choices. [\*\*\*17] This procedure does not come close to providing an employee the protections granted a defendant in a formal negligence action. Contrast *Buhl v. Viera*, 328 Mass. at 202-204. <sup>14</sup>

13 The Attorney General offers the following as examples of the defenses available to employers under the category of "valid set-off": where there is proof of an undisputed loan or wage advance from the employer to the employee; a theft of the employer's property by the employee, as established in an "independent and unbiased proceeding" with due process protections for the employee; or where the employer has obtained a judgment against the employee for the value of the employer's property. We do not understand the Attorney General to be arguing that these are the only types of setoffs that are permissible under § 150; if that is her point, we do not agree with it. There well may be other circumstances -- for example as part of a collective bargaining agreement -- in which an employer and employee enter into a set-off arrangement that does not involve formal judicial or administrative proceedings but that would be valid because it can be shown that the parties have voluntarily agreed to a set of appropriately independent [\*\*\*18] procedures for determining, in a manner that adequately protects the employee's interests, both the existence and amount of the debt or obligation owed by the employee to the employer.

14 As previously noted, the plaintiff relies on *Buhl v. Viera*, 328 Mass. 201, 102 N.E.2d 774 (1952), to assert that an employee may be held liable to an employer for a loss resulting from the employee's negligence with respect to third parties. See *id.* at 202. We take no issue with the proposition that employees may be liable to employers in tort for damages caused to third parties. See *Richmond v. Schuster Express, Inc.*, 16 Mass. App. Ct. 989, 990, 454 N.E.2d 494 (1983) (employer liable on theory of respondeat superior may compel indemnification for judgment from responsible employee). In the *Buhl* case, however, the employer's liability derived from a jury verdict. *Buhl v. Viera*, *supra* at 202. The employee had actual notice of a complaint brought by a third party and an opportunity to take part in the defense at trial; the employer subsequently brought a civil complaint against the employee for indemnification. *Id.* at 202-204. The *Buhl* case stands for the proposition that an employee may be liable to an employer for damages from the [\*\*\*19] employee's negligent conduct, but it does not support the proposition that such liability may exist solely by virtue of an employer's pronouncement, without any need for independent determination or adjudication.

Conclusion. The statutory language and the interplay of §§ 148 and 150 of the Wage Act reflect that employee deduction agreements of the type at issue in this case constitute special contracts that § 148 prohibits unless the deductions are valid setoffs for clear and established debts within the meaning of § 150. For the reasons we have discussed, we do not find the deductions prescribed by the plaintiff's policy to be setoffs for clear and established debts. Accordingly, we agree [\*765] with the Attorney General that the plaintiff violated § 148. We vacate the judgment and order of the Superior Court and remand for entry of judgment affirming DALA's decision [\*\*1125] upholding the Attorney General's citation.

So ordered.

CAPE COD FIVE CENTS SAVINGS BANK, trustee,<sup>1</sup> & others<sup>2</sup> vs.  
BOARD OF ASSESSORS OF HARWICH & another.<sup>3</sup>

- 1 Of the John R. Pfeffer Family Trust.  
2 William R. Enlow, as trustee of the John R. Pfeffer Family Trust,  
and the Cape Cod National Golf Foundation, Inc.  
3 Board of assessors of Brewster.

09-P-1768

APPEALS COURT OF MASSACHUSETTS

2010 Mass. App. Unpub. LEXIS 1052

September 20, 2010, 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] Decision of the Appellate Tax Board affirmed.

**JUDGES:** Berry, Green & Rubin, JJ.

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiffs, the trustees of the John R. Pfeffer Family Trust (trust) and the Cape Cod National Golf Foundation, Inc. (foundation), appeal the decision of the Appellate Tax Board (ATB) that a private golf course, which is managed by the recently created foundation, is not recreational land under *G. L. c. 61B, § 1*,<sup>4</sup> and *§ 6*,<sup>5</sup> and that the plaintiffs' purpose in seeking recreational land classification was to evade real estate taxes on the private golf course. Fatal to the plaintiffs' position in this appeal are: (a) the suspect timing of the plaintiff foundation's creation and major transactions with the trust, all of which occurred within months of a settlement agreement, described further below, in which the trust and the Cape Cod National Golf Club (golf club) agreed not to seek recreational land classification; (b) the fact that, close in time after the signing of that settlement agreement, the plaintiffs in this appeal structured intercorporate transactions, which ensured the continued exclusivity restrictions on use of the golf club, and (c) that, following these

[\*2] intercorporate transactions postsettlement, there was continuation of the flow of golf course revenues solely to the trust. In effect, these postsettlement transactions fashioned a mirror corporate structure for the golf course, such as had existed prior to the settlement agreement in which the plaintiffs agreed not to pursue recreational land tax exemption. Given the foregoing, we conclude that the ATB correctly denied recreational land classification on the basis that the purpose of the plaintiffs' application for such classification was to evade payment of "full and proper taxes." *G. L. c. 61B, § 6*. Therefore, we affirm.

4 General Laws *G. L. c. 61B, § 1*, provides:

"Land not less than five acres in area shall be deemed to be recreational land if it is retained in substantially a natural, wild, or open condition or in a landscaped or pasture condition or in a managed forest condition under a certified forest management plan approved by and subject to procedures established by the state forester in such a manner as to allow to a significant extent the preservation of wildlife and other natural resources, including but not limited to, ground or surface water resources, clean air, vegetation, [\*3] rare or endangered species, geologic features, high quality soils, and scenic resources. Land not less than five acres in area shall also be deemed to be recreational land which is devoted primarily to recreational use and which does not materially interfere with the environmental benefits which are derived from said land, and is available to the general public or to members of a non-profit organization including a corporation or-

ganized under chapter one hundred and eighty.

"For the purpose of this chapter, the term recreational use shall be limited to the following: hiking, camping, nature study and observation, boating, golfing, non-commercial youth soccer, horse-back riding, hunting, fishing, skiing, swimming, picnicking, private non-commercial flying, including hang gliding, archery, target shooting and commercial horse-back riding and equine boarding.

"Such recreational use shall not include horse racing, dog racing, or any sport normally undertaken in a stadium, gymnasium or similar structure."

5 *General Laws c. 61B, § 6*, provides in pertinent part: "If any board of assessors shall determine that any such application is submitted for the purpose of evading payment of full and proper [\*4] taxes, such board shall disallow such application."

*Procedural and factual background.* The Cape Cod Five Cents Savings Bank and William R. Enlow, as trustees, are the assessed owners of over 150 acres of contiguous land in Brewster and Harwich. Approximately ninety acres are landscaped for use as an eighteen-hole golf course known as the Cape Cod National Golf Course (golf course). The trust also owned the golf club until 2004. The golf club ran the operations of the golf course and leased the entire property from the trust during the years leading up to, and including, 2004.

For each year, from 2001 through 2004, the trust and the golf club applied to the local town taxing authorities to have the golf course classified as recreational land under G. L. c. 61B on the basis that the golf course was open to the general public. However, contrary to that position, the golf course was only available to members of the golf club and patrons of a nearby inn. Accordingly, the assessors for the towns of Harwich and Brewster (assessors) denied recreational land classification. The trust and the golf club filed a first appeal with the ATB from the denial of recreational land status for the years [\*5] 2001 through 2004. (ATB I).

During the proceedings in ATB I, in August, 2004, the golf club and the assessors entered into a settlement agreement which dismissed the appeal in ATB I, and thereby the trust and golf club withdrew their effort to get recreational land classification for these subject

years. Based on this settlement agreement in ATB I, the ATB issued a decision for the assessors which denied recreational land classification and allowed for the imposition of real estate taxes for the subject years 2001 through 2004.

On September 14, 2004, approximately one month after the signing of the settlement agreement, there occurred a series of corporate and trust transactions involving, among other things, the conveyance of the lease from the golf course to the foundation for one dollar. Under the transferred lease, the foundation was responsible for the golf course's real property taxes and rent. Rent was owed to the trust and was equal to the trust's allowable depreciation of the cost of the improvements to the golf course. The foundation had been organized in Florida four months earlier, and had purchased the golf club from the trust shortly after being organized. Although the [\*6] golf club remained in charge of the golf course, it paid all of its revenues, minus expenses, to the foundation. The foundation then paid its expenses and distributed any excess funds to charities.

All the foundation's income comes from the golf club. Membership in the foundation is limited to members of the golf club, and all members of the golf club were made members of the foundation.

Shortly after these structuring corporate transactions, which resulted in the leasing of the golf course to the foundation, the plaintiffs in the appeal before us (that is, the trust and foundation), once again applied to the assessors in Brewster and Harwich requesting that the golf course be classified as recreational land under *G. L. c. 61B, § 1*, this time the applications being for the years 2005, 2006, and 2007. The assessors denied recreational land classification. The trust and foundation appealed to the ATB. (ATB II). In the proceedings in ATB II, the ATB found that the golf course remained available only to members of a private golf club and guests of a related inn and, therefore, was not available to the public. The ATB further determined that the plaintiffs' applications for recreational land [\*7] classification, based on the lease of the golf course to the foundation, were submitted for the purpose of evading payment of the "full and proper taxes due," on the golf course. *G. L. c. 61B, § 6*. The plaintiffs, the trust and foundation, appeal from these determinations in ATB II. We affirm.

*The applicable law and ATB analysis.* Decisions of the ATB are reviewed for errors of law. *Commissioner of Rev. v. Jafra Cosmetics, Inc.*, 433 Mass. 255, 259, 742 N.E.2d 54 (2001). "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 the material facts upon which the rights of the parties are to be determined in accordance with law,' it constitutes a

'case stated.'" *Middlesex Retirement Sys., LLC v. Board of Assessors of Billerica*, 453 Mass. 495, 499, 903 N.E.2d 210 (2009), quoting from *Caissie v. Cambridge*, 317 Mass. 346, 347, 58 N.E.2d 169 (1944). We discern no error of law in the ATB determination that *G. L. c. 61B*, § 6, applied (see note 5, *supra*) and "that the assessors were justified in denying the applications based on their determination that the [plaintiffs'] 'application [was] submitted for the purpose of evading payment of full and proper [\*8] taxes.'"

The purpose of *G. L. c. 61B*, § 6, is clear from the plain words in the statute, with a marked emphasis on denying a recreational real estate tax exemption to property owners not so entitled, who seek, by various manner and means, to evade the payment of duly assessed real estate taxes. Here, the means to evade taxation involved a swirl of intercorporate/trust and lease restructuring transactions, the set up of a new foundation, and a transferred lease. All of this reconfiguring was, as the ATB determined, designed to evade real estate taxation. The problem is: the end effect of the swirl of corporate, trust, and foundation restructuring, in actuality, returns the property to what existed before, a private golf course with private golf club members. Indeed, in this case, when the interlocking pieces of the restructuring involving the trust, i.e., the new foundation, the private golf course, and the private golf club, are separated and scrutinized, what remains is nothing more, nor less, than corporate reconfiguring designed to evade assessed real estate taxes. Hence, *G. L. c. 61B*, § 6, serves to negate the classification of the golf course as recreational land.

We set forth below [\*9] certain material findings supporting the ATB's determination under *G. L. c. 61B*, § 6, barring the classification of the subject property as recreational land.

a. *The suspect timing of the new foundation's formation and transactions.* The ATB found that the timing of the creation of the foundation and its major transactions were indicative of a tax evasion plan. The foundation was created and bought the golf club shortly before the settlement agreement was signed and the judgment of dismissal entered in ATB I. The lease was assigned one month after the settlement agreement. The compressed timing involving the creation and transfer of assets to the foundation within months of the settlement agreement in ATB I strongly supports the decision of the ATB I that a recreational land classification was not justifiable because of a tax evasion plan.

b. *The continued exclusivity of membership.* The ATB also made findings, adverse to the plaintiffs' contentions, concerning the continued restrictions on use of the golf course by select individuals in the private golf club. Prior to the creation of the foundation, use of the

golf course was limited to members of the private golf club and guests of a [\*10] nearby inn. After the foundation bought the club and the lease of the course was transferred, use of the golf course continued to be restricted to members of the private golf club and inn guests. There are no members of the foundation who are not also members of the premier golf club. The continued restriction of the golf course to the same individuals in the private golf club that had exclusive access before the creation of the foundation supports the ATB's decision that a recreational land classification was not justified, and that the plaintiffs had the purpose of evading properly assessed real estate taxes.

c. *Continued flow of revenue solely to the trust.* Another material finding by the ATB, which undermines the plaintiffs' position in this appeal involves the golf course's financial arrangement with the trust. Specifically, before the foundation was created, the golf club paid its profits and rent to the trust. After the foundation purchased the golf club and the lease was conveyed, the foundation became responsible for paying the same rent to the trust.<sup>6</sup> Furthermore, although the golf club now pays its profits to the foundation, instead of the trust, and the foundation is required [\*11] to distribute any surplus to charity, the foundation has not yet had any surplus to distribute, effectively making this difference negligible. The foundation's charitable activities, the purported purpose of its existence, have been insignificant: \$ 1,500 in total donations on almost \$ 3 million dollars in income. Significant financial expenditures continue to flow back to the trust and the foundation's charitable contributions are negligible. These facts support the ATB's finding that the purpose of the application for recreational land classification was to evade the payment of full and proper taxes.<sup>7</sup>

6 For the calendar year ending December 31, 2004, the club had total income of \$ 2,809,203, and total operating expenses of \$ 2,747,015, which included \$ 225,473 of rent. For the calendar year ending December 31, 2005, the club had total income of \$ 2,584,195, and total operating expenses of \$ 2,575,739, which included \$ 175,150 of rent.

7 The plaintiffs point out that the settlement agreement in ATB I envisioned the creation of a nonprofit organization, such as the foundation, and stated as follows:

"[N]othing herein contained shall prohibit or prejudice the rights of the [a]ppellants [\*12] (or any other entity or individual having a right to apply) to apply for such recreational land classifica-

tion of the [p]roperties or any portion thereof, if, as and when either: (a) the [a]ppellants or any one of them or the lessee from time to time of the [p]roperties shall be constituted or organized as a non-profit organization."

From there, the plaintiffs assert that the ATB erred in denying recreational land classification to the nonprofit foundation. Because we affirm the ATB's decision on the basis that the plaintiffs engaged in the corporate restructuring to evade

taxes, we need not reach this separate, nonprofit organizational based claim of error.

*Decision of the Appellate Tax*

*Board affirmed.*

By the Court (Berry, Green  
& Rubin, JJ.)

Clerk

Entered: September 20, 2010.

CITY OF BEVERLY & another<sup>1</sup> vs. CIVIL SERVICE COMMISSION  
& another.<sup>2</sup>

1 Beverly police department.  
2 Sean Bell.

No. 09-P-1959.

APPEALS COURT OF MASSACHUSETTS

78 Mass. App. Ct. 182; 936 N.E.2d 7; 2010 Mass. App. LEXIS 1380; 31  
I.E.R. Cas. (BNA) 878

June 4, 2010, Argued  
October 28, 2010, Decided

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

Essex. Civil action commenced in the Superior Court Department on September 8, 2008. The case was heard by John T. Lu, J., on motions for judgment on the pleadings.

**DISPOSITION:** Judgment affirmed.

**HEADNOTES**

Municipal Corporations, Police. Civil Service, Decision of Civil Service Commission, Judicial review, Police. Public Employment, Police. Practice, Civil, Review respecting civil service. Administrative Law, Judicial review.

**COUNSEL:** Jason R. Powalisz for Sean Bell.

Daniel B. Kulak (Robert A. Munroe with him) for the plaintiffs.

David Hadas, Assistant Attorney General, for Civil Service Commission, submitted a brief.

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

**JUDGES:** Present: Green, Dreben, & Milkey, JJ.

**OPINION BY:** MILKEY

**OPINION**

[\*183] [\*\*9] MILKEY, J. Having taken the relevant civil service examination, the defendant Sean Bell applied for a position as a reserve police officer with the city of Beverly (city).<sup>3</sup> The city excluded Bell from consideration because it learned that he had recently been fired from his job as a hospital security guard for allegedly having improperly accessed the voice mail accounts of other employees. Bell appealed to the Civil Service Commission (commission) pursuant to *G. L. c. 31, § 2(b)*. Through a three-to-two decision, the commission ruled in his favor, with the majority concluding that the city had not carried its burden of proving that Bell had in fact engaged in the misconduct for which he had been

fired. A Superior Court judge vacated the commission's ruling after [\*\*\*2] concluding that the commission had improperly substituted its judgment for that of the city, and Bell appealed. We affirm.<sup>4</sup>

3 We refer to the city and its police department collectively as the city, except where necessary for clarity.

4 We acknowledge the amicus brief filed by the Massachusetts Municipal Association in support of the city.

Background.<sup>5</sup> In 2006, personnel at Beverly Hospital (the hospital) became suspicious that someone was obtaining unauthorized access to the voice mail accounts of certain employees. They set up a surveillance camera to film the area around the telephone station that they believed was being used for this purpose. On June 13, 2006, hospital officials confronted Bell about breaches to the system that they concluded had occurred the previous day. According to them, the surveillance photographs showed Bell, and no one else, in the vicinity of the telephone from which the calls were made at the time they were made. The hospital immediately suspended Bell without pay, explaining in detail why it was doing so. After the meeting, hospital personnel reviewed the telephone and camera records from earlier that day [\*\*10] (the morning of June 13, 2006), and again concluded [\*\*\*3] that there was a match. By letter dated July 15, 2006, the hospital terminated Bell from his position, again recounting in detail why it was doing so. The letter explained:

"Intentionally accessing the [\*184] private voice-mail system of another person is a serious confidentiality breach, an invasion of the privacy of other employees, as well as potentially a violation of the law."

5 The factual statements below are taken largely from the commission's factual findings, which the parties acknowledged at oral argument they are not challenging. We have supplemented those findings by reference to the written exhibits that were before the commission. Those exhibits appear in the administrative record, which we ob-

tained from the Superior Court on our own initiative.

We have no evidence before us that Bell ever challenged his summary termination from his security guard job, which at that point he had held for some four years.

The Beverly police department had multiple openings for reserve police officers in 2006, and the police chief assigned Captain John DiVincenzo to conduct background checks on the eligible candidates, including Bell. Hospital officials informed Captain DiVincenzo why Bell had been [\*\*\*4] fired. When Captain DiVincenzo confronted Bell with this information in August of 2006, Bell denied having accessed the voice mails. Following this meeting, Captain DiVincenzo met with hospital officials who explained how they came to the conclusion that Bell was the one who had improperly accessed the voice mail accounts. They supplied Captain DiVincenzo with the surveillance photographs and a "call search report" that documented the voice mail accounts being accessed and the telephone extensions used to access those accounts. This report included print-outs generated by the hospital's computerized "voice mail server." Because he lacked a technical understanding of voice mail systems, Captain DiVincenzo passed the hospital's information along to Russell Fisk, an information technology specialist who worked for the city. Fisk prepared a report that concluded:

"The logs do illustrate one extension calling and accessing multiple voice mail boxes, many in the Human Resources department. The call times in the voice mail log do closely match the photographs of the security guard. [Beverly Hospital] had indicated that the telephone extension used to access the voice mail is the one shown [\*\*\*5] in the photographs."

Fisk's report also noted that two of the thirteen calls in question were made from extensions outside the system and that the hospital "records do not conclusively prove that these calls were indeed by [Bell]" (emphasis added).<sup>6</sup>

6 Read in context, Fisk's reference to "these calls" plainly refers to the two calls that were made from outside extensions. It appears that the commission may not have read the quoted language with this limiting gloss. Moreover, the fact that the majority highlighted this passage in support of its ruling suggests that they may have believed that "conclusive" proof was required.

Armed with this detailed information, Captain DiVincenzo [\*185] confronted Bell again. Bell admitted that the photographs were of him but again denied the

misconduct. When pressed to explain the evidence against him, Bell stated that the hospital must have "forensically altered" the photographs. He suggested that the hospital may have targeted him in retaliation for his union activities or his cooperation with police in some sort of past investigations at the hospital. Captain DiVincenzo informed Bell that absent proof that disputed the documents, he would recommend to the [\*\*\*6] police chief that Bell not be hired. Captain DiVincenzo did in fact provide that recommendation after concluding that "Bell was unable or unwilling to give any substantial explanation of the pictures and documents surrounding [the] incident." Relying on Captain DiVincenzo's representations and [\*\*11] Fisk's report, the police chief decided to bypass Bell and informed him that his name was being withdrawn from consideration. Bell filed a timely appeal with the commission on June 7, 2007.

At an evidentiary hearing held on February 7, 2008, the commission heard testimony from five witnesses: Bell, Captain DiVincenzo, the police chief, Henry McLaughlin (security manager at the hospital), and Greg Buckless (information technology supervisor at the hospital). Captain DiVincenzo explained the process he used, as set forth above. Although a transcript of his testimony is not before us,<sup>7</sup> it is evident from the commission's findings that Captain DiVincenzo exhibited uncommon caution in trying not to overstate the extent of his own personal knowledge. Thus, for example, the commission noted that Captain DiVincenzo "does not know whether the photographs depict [Bell] or another person," despite the fact [\*\*\*7] that Bell had admitted that the photographs were of him.<sup>8</sup> Captain DiVincenzo also stated that the hospital records did not "indicate to him that any person ever actually illegally accessed voicemail." He readily acknowledged [\*186] that he lacked a technical understanding about how the hospital's voice mail system worked and "that he relied entirely on the pictures and report and took the [h]ospital's representations at 'face value' that [Bell] had accessed voicemails."<sup>9</sup>

7 Apparently neither party requested that the transcript of the evidentiary hearing be made part of the administrative record that was filed in the Superior Court. See Superior Court Standing Order 1-96(2).

8 Notwithstanding Bell's concession on this point, the commission went out of its way to note that "no Appointing Authority witness ever testified that the [surveillance photographs] depicted [Bell]."

9 According to the commission's findings, Captain DiVincenzo "testified that the camera times in the photographs are sometimes different from the alleged improper voicemail access times

noted in the call search report." There is no discussion in the commission's decision of whether this testimony is at variance with the city's [\*\*\*8] information technology specialist's report, which concluded that the call times "closely match[ed]" those of the photographs.

Buckless, the information technology supervisor at the hospital, acknowledged "that the extensions allegedly used to improperly access voicemails could also be dialed from any location in the [h]ospital, as the extensions are not tied to a specific phone." Although the commission in its brief portrays this as a key concession that "essentially guts the case against Bell," the commission does not actually explain why that is.<sup>10</sup>

10 At least as recounted in the commission's findings, Buckless's testimony on this point appears to be of uncertain import. Whether the relevant extensions (be they the extensions of the telephone that Bell allegedly used or the extension of the voice mail accounts that were accessed) could have been "dialed" from any telephone extension in the hospital never appears to have been in dispute. Instead, the key factual question before the commission was whether one could use a telephone elsewhere in the hospital to dial the extension that Bell allegedly used and -- once this had been done -- then access the voice mail accounts of others, [\*\*\*9] all in a manner such that the voice mail server would record the intermediary extension as the originating extension of the call, instead of the extension of the telephone that the caller was actually using. If so, then the evidentiary bite of the hospital's "call search report" would indeed have been diminished. It is far from clear that Buckless's testimony established this to be the case (as opposed to merely acknowledging facts that were not in dispute).

In his own testimony, Bell denied the misconduct and stated that he could not have gained access to the voice mail accounts because he lacked the necessary [\*\*\*12] knowledge to do so (e.g., the passwords necessary to access them). He also testified about his union-related activities, which he again offered as a possible explanation for the hospital having targeted him.

A three-person majority of the commission concluded that the city "failed to prove that [Bell] illegally accessed voicemails of employees while employed at the [h]ospital, the reason given for his bypass, and accordingly did not support this reason by the necessary preponderance of the evidence." The commission [\*\*\*187] therefore ruled in Bell's favor and ordered the city to place [\*\*\*10] Bell "at the top of the next certification

list for the position of permanent Reserve Police Officer." Two commissioners dissented. They concluded that the city had shown a valid justification for bypassing Bell and that "the [c]ommission . . . applied the wrong standard in this case, by requiring that the [c]ity 'prove' that [Bell] accessed the voicemails at Beverly Hospital, leading to his termination." In vacating the commission's decision, the Superior Court judge largely tracked the reasoning of the dissent.

Discussion. We begin by addressing the respective roles of the appointing authority and the commission, and the appropriate standard of review to be employed by courts sitting in review of their decisions. All parties agree that the city could bypass Bell if it had a "reasonable justification" to do so. See *Brackett v. Civil Serv. Commn.*, 447 Mass. 233, 241, 850 N.E.2d 533 (2006). Under established case law, the city bore the burden of establishing by a preponderance of the evidence that it had such a reason. *Ibid.*, citing *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 260, 748 N.E.2d 455 (2001), and *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 303, 682 N.E.2d 923 (1997). This [\*\*\*11] means that it needed to demonstrate that its decision was "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Ibid.*, quoting from *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928).

In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority. *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727, 792 N.E.2d 711 (2003). "The commission's task, however, is not to be accomplished on a wholly blank slate." *Falmouth v. Civil Serv. Commn.*, 447 Mass. 814, 823, 857 N.E.2d 1052 (2006). Its role is to "decide[] whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.'" *Id.* at 824, quoting from *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443 (1983). The commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. See *id.* at 824-826. Although [\*\*\*12] it [\*\*\*188] is plain that the finding of the facts is the province of the commission, not the appointing authority, the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown.<sup>11</sup> [\*\*\*13] Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held,<sup>12</sup> appoint-

ing authorities are given significant latitude in screening candidates, and "[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer." *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. at 305, and cases cited.

11 As demonstrated below, this case well illustrates the difficulties inherent in sorting out what is fact finding (the province of the commission) and what is the exercise of judgment with regard to the facts (the province of the appointing authority).

12 The position of a police officer is one "of special public trust." *Police Commr. of Boston v. Civil Serv. Commn.*, 22 Mass. App. Ct. 364, 372, 494 N.E.2d 27 (1986). "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and [\*\*\*13] behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel." *Id.* at 371. See *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 823, 824 N.E.2d 855 (2005).

A court reviewing a decision made by the commission is "bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." *Leominster v. Stratton*, 58 Mass. App. Ct. at 728. All parties have accepted the commission's factual findings as far as they go, and we accept them as well.<sup>13</sup> "The open question on judicial review is whether, taking the facts as found, the action of the commission was legally tenable." *Ibid.*

13 Moreover, neither party has supplied a transcript of the testimony that the commission heard, and without that, we would be unable to evaluate any claim that the findings are unsupported by substantial evidence.

The parties agree that if Bell in fact accessed the voice mail accounts in question, that would be a sufficient reason for the city to bypass him for a position as a police officer. They disagree on what the city needed to show given that there is a factual contest over whether Bell ever engaged in the misconduct. The dispute [\*\*\*14] is thus not over whether the city relied on improper considerations, but on whether the city put forward a sufficient quantum of evidence to substantiate its legitimate concerns.<sup>14</sup> We next turn to that question.

14 Neither Bell nor the commission has ever claimed that the city's stated reason for bypassing Bell was a subterfuge designed to mask improper motives such as "political considerations, favoritism, and bias in governmental hiring and promo-

tion." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. at 259, citing *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. at 304. Thus, this case does not raise the most significant concerns that the commission was created to address, and greater deference to the local appointing authority is warranted. See *Falmouth v. Civil Serv. Commn.*, 447 Mass. at 824. Nonetheless, the commission has an important role to play "to ensure decision-making in accordance with basic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, *supra* at 264. As the commission points out in its brief, "merit principles" could be undermined if an appointing authority bypasses a qualified candidate who had been [\*\*\*15] wrongly accused of misconduct.

[\*189] During its investigation, the city uncovered the undisputed fact that Bell had been fired for alleged serious misconduct. The experienced police captain who conducted the background check did not stop there, but met with hospital officials to glean the basis of their belief that Bell had in fact engaged in the misconduct. Aware that he personally lacked the expertise to evaluate the hospital's evidence, the captain called in someone who did. The city's information technology specialist reviewed the hospital's records and prepared a report that documented that these records were consistent with the conclusions that the hospital officials drew from them (while understandably relying on representations by the hospital as to those facts not [\*\*14] disclosed by the records). In other words, the city's review confirmed that the hospital's reasons for firing Bell appeared to have a credible basis in fact. In addition, Captain DiVincenzo provided Bell two opportunities to explain his side of the story and to counter the hospital's evidence months after Bell had been informed of the reasons why he was fired. The best that Bell could come up with during these sessions [\*\*\*16] was to suggest that his union organizing activities had become such an irritant to hospital officials that they decided to frame him by falsifying the surveillance photographs.

In sum, having uncovered that Bell was fired for allegedly engaging in serious misconduct, the city conducted an impartial and reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations. The city therefore was able to show that it had legitimate doubts about Bell's suitability for such a sensitive position and, in our view, demonstrated that it had a "reasonable justification" for bypassing Bell.

[\*190] Instead of focusing on whether the city had carried its burden of demonstrating a "reasonable justification," the commission focused on whether the city had proved that Bell in fact engaged in the misconduct. We

believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission's satisfaction [\*\*\*17] that the applicant in fact engaged in the serious alleged misconduct for which he was fired.<sup>15</sup>

15 The commission initially declined to submit a brief. In light of the substantial deference owed to an agency interpretation of a statute it administers, see *Provencal v. Commonwealth Health Ins. Connector Authy.*, 456 Mass. 506, 514, 924 N.E.2d 689 (2010), we invited the commission to submit a brief, and it accepted that invitation. The commission's brief principally focuses on the facts, not on how the underlying statute should be interpreted. The commission does appear to take the position that the city faced the specific burden of proving the truth of the third party allegations of misconduct. However, it does little to attempt to support that position based on the case law, the language of the statute, or other considerations. Moreover, elsewhere in its brief, the commission appears to concede that there may well be some situations where an appointing authority would be justified in bypassing a candidate based on prior misconduct without having to prove to the commission that the applicant in fact engaged in the misconduct, e.g., "where a candidate has been convicted of a crime or found responsible [\*\*\*18] for some other type of misconduct by a court or governmental body." In any event, to the extent that the commission interprets an appointing authority's over-all burden to prove a "reasonable justification" as encompassing a specific burden of proving the truth of third party allegations of misconduct, we consider that an unreasonable interpretation to which deference is not due.

Moreover, we believe that the commission's position that the city must hire Bell unless it can prove the truth of the third-party allegations would force the city to bear undue risks. In this respect, *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. at 301, is instructive. There, an applicant for a police position had long ago engaged in certain misconduct. Recognizing that hiring the applicant posed a risk, we concluded that "[w]hether to take such a risk is, however, for the appointing authority to decide." *Id.* at 305. Although the context presented here obviously differs in that the parties dispute whether the past misconduct ever occurred, the risks presented are similar. After completing its own independent review,

the city decided that it was unwilling to bear [\*19] the risks of hiring Bell. Absent proof [\*\*\*19] that the city acted unreasonably, we believe that the [\*\*15] commission is bound to defer to the city's exercise of its judgment.

We discern no conflict between our reasoning here and that of *Leominster v. Stratton*, 58 Mass. App. Ct. at 732-733. That case involved a city's termination of a tenured police officer who had been accused of sexually abusing his daughter and stepdaughter.<sup>16</sup> The commission reinstated the officer after concluding that the evidence demonstrated that the allegations were in fact false. *Id.* at 729-731. A Superior Court judge vacated the commission's order. We reversed, concluding that the Superior Court judge should have deferred to the commission's finding of the facts. We distinguished *Cambridge v. Civil Serv. Commn.*, *supra*, by noting that the misconduct there was undisputed, while in *Leominster v. Stratton*, the commission found that "the facts justifying [the city's action] did not exist." 58 Mass. App. Ct. at 732-733. Bell argues that the commission here similarly determined that he was falsely accused and that *Leominster v. Stratton*, *supra*, therefore dictates that the commission's decision be affirmed. We disagree.

16 Although we did not expressly note that the police [\*\*\*20] officer in *Leominster v. Stratton* had obtained tenure, that status is evident from the fact that his termination proceedings were conducted under the provisions applicable to tenured employees. 58 Mass. App. Ct. at 726-727, citing *G. L. c. 31, §§ 41, 43*.

The context presented in *Leominster v. Stratton*, *supra* at 726, was significantly different. That case involved the discipline of a tenured employee, not an initial hiring decision. *Ibid.* Therefore, the appointing authority in that case had to demonstrate that it had acted with "just cause" to fire its employee (see *G. L. c. 41, § 43*), not merely that there was "reasonable justification" to bypass a job candidate. We think that the standards are materially different. Simply put, a municipality should be able to enjoy more freedom in deciding whether to appoint someone as a new police officer than in disciplining an existing tenured one.

Further, it bears noting that in *Leominster v. Stratton*, the commission found -- after two rounds of evidentiary hearings -- that the allegations of misconduct were demonstrably false, having been fabricated by the police officer's former wife. *Id.* at 730. By contrast, although a majority of commissioners [\*\*\*21] here [\*192] concluded that Bell was a credible witness, they appear in the end to have found the evidence inconclusive and ultimately rested their ruling on the city's failure to prove that the allegations of misconduct were in fact true, a

burden that we have concluded the commission erroneously assigned to the city.<sup>17</sup>

17 Nor is this a case where the individual who allegedly engaged in misconduct successfully confronted the allegations in separate proceedings in which the truth of the allegations was directly at issue. Compare *Lynn v. Thompson*, 435 Mass. 54, 55, 58, 754 N.E.2d 54 (2001) (upholding arbitration order reinstating police officer who had been discharged for allegedly using excessive force, where arbitrator rested in part on the offi-

cer having been "exonerated" in separate civil proceedings). As noted above, there is no evidence that Bell ever sought to challenge the hospital's summary termination of him.

In sum, we agree with the judge below that the city demonstrated a reasonable justification to bypass Bell and that the commission improperly substituted its judgment for that of the city in ordering that he be hired.

Judgment affirmed.

COMMONWEALTH vs. FREMONT INVESTMENT & LOAN & another<sup>1</sup> (and a companion case<sup>2</sup>).

1 Fremont General Corporation.

2 Samuel J. Lieberman vs. Attorney General.

SJC-10749

SUPREME JUDICIAL COURT OF MASSACHUSETTS

459 Mass. 209; 944 N.E.2d 1019; 2011 Mass. LEXIS 156

December 6, 2010, Argued

April 1, 2011, Decided

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

Suffolk. Civil action commenced in the Superior Court Department on October 4, 2007. A motion to intervene was heard by Margaret R. Hinkle, J. Civil action commenced in the Superior Court Department on June 22, 2009. The case was heard by Thomas A. Connors, J., on a motion for judgment on the pleadings. After consolidation, the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court. *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 897 N.E.2d 548, 2008 Mass. LEXIS 797 (2008)

**HEADNOTES**

Practice, Civil, Judgment on the pleadings, Intervention. Public Records. Constitutional Law, Separation of powers. Protective Order. Statute, Construction.

**COUNSEL:** David Pastor for Samuel J. Lieberman.

Christopher K. Barry Smith, Assistant Attorney General (Matthew H. Schrupf, Assistant Attorney General, with him) for the Commonwealth.

James R. Carroll (Peter Simshauser with him) for Fremont Investment & Loan & another.

Daniel P. Chiplock, of New York, for National Association of Shareholder and Consumer Attorneys, amicus curiae, submitted a brief.

**JUDGES:** Present: Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

**OPINION BY:** COWIN

**OPINION**

[\*210] [\*\*1021] COWIN, J. This case concerns Samuel J. Lieberman's claim to a right of access, pursuant to the public records law, *G. L. c. 66, § 10* (defining rights, remedies and procedures); see *G. L. c. 4, § 7*, Twenty-sixth (defining "[p]ublic records" and exemptions), to documents received in litigation by the Attorney General. The relevant documents [\*\*\*2] were produced by Fremont Investment & Loan<sup>3</sup> and Fremont General Corporation (hereinafter, collectively, Fremont)

in an enforcement action by the Attorney General against Fremont (enforcement action), and were subject to a protective order entered in that case. See generally *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 897 N.E.2d 548 (2008).

3 The company is now known as Fremont Reorganizing Corporation.

This case consolidates two appeals by Lieberman. One arises from Lieberman's motion to intervene in the enforcement action to pursue his claim of access to the documents under the public records law. A Superior Court judge (enforcement action judge) denied Lieberman's motion for intervention<sup>4</sup>. We vacate that order and remand for further consideration consistent with this opinion.

4 "An order 'denying intervention [is] immediately appealable by the [applicants] claiming intervention as of right.' At least where there is also an appeal from a denial of a claim of intervention as of right, we will also consider the denial of a request for permissive intervention." *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. School Comm. of Chelsea*, 409 Mass. 203, 204-205, 564 N.E.2d 1027 (1991), quoting *Attorney Gen. v. Brockton Agricultural Soc'y*, 390 Mass. 431, 433, 456 N.E.2d 1130 (1983).

[\*211] Lieberman [\*\*\*3] also filed a separate action in the Superior Court challenging the protective order (public records action). There, a second judge (public records action judge) allowed the Commonwealth's motion for judgment on the pleadings and dismissed Lieberman's complaint. We affirm the judgment.

1. Background. In October, 2007, the Attorney General brought an enforcement action against Fremont in the Superior Court, alleging unfair and deceptive practices in Fremont's mortgage lending business. During pretrial discovery, the Commonwealth and Fremont filed a joint motion for a protective order to govern the exchange of documents and information the parties claimed were confidential. The enforcement action judge entered such a protective order, and that order remains in effect.

The order defines "Confidential Materials" as those "entitled to confidential treatment pursuant to *Rule 26(c) of the Massachusetts Rules of Civil Procedure*" and designated as confidential by the producing party. Such materials are ordered to be used "only for the purposes of preparing for and conducting the [l]itigation" and are not to be disclosed to persons other than "Qualified Persons."<sup>5</sup> The Attorney General estimates [\*\*\*4] that Fremont designated 5.5 million pages as confidential pursuant to the order, and the Attorney General did not challenge any of Fremont's designations. The Attorney General and Fremont ultimately settled the case and a consent order was entered in June, 2009.

5 This includes the court and its personnel, counsel to the parties, court reporters, and other similar persons; it does not include Lieberman.

[\*\*1022] In May, 2009, Lieberman wrote to the Attorney General, pursuant to the public records law, asserting a statutory right of access to certain categories of documents received by the Attorney General during the enforcement action. The Attorney General responded with a letter indicating that she would not produce copies of any of the documents designated confidential by Fremont<sup>6</sup>.

6 In his initial request, Lieberman sought deposition transcripts and associated exhibits, court proceeding transcripts, pleadings, witness affidavits and declarations, memoranda of witness interviews conducted by the Attorney General, responses to interrogatory requests and requests for admission, all nonprivileged documents produced in the matter, and "consumer information and affidavits" compiled by the Attorney [\*\*\*5] General. In the memorandum in support of his motion for preliminary injunction, Lieberman indicated that the "main" records he sought were the deposition transcripts and exhibits of former Fremont officers, employees, and agents.

Lieberman thereafter filed the public records action seeking [\*212] declaratory and injunctive relief compelling the Commonwealth to comply with his request under the public records law. Lieberman filed the action in the business litigation session of the Superior Court Department, where the protective order had been issued, but the case was denied acceptance into that session and was assigned to a judge in a different session. The Commonwealth subsequently filed a motion for judgment on the pleadings, and after a hearing the public records action judge granted the Commonwealth's motion and dismissed Lieberman's complaint.

During the pendency of the public records action, Lieberman filed a motion to intervene in the enforcement

action, or in the alternative to transfer the public records action to the business litigation session. Fremont assented to Lieberman's intervention, and the Commonwealth did not object. The enforcement action judge nonetheless denied the motion, [\*\*\*6] stating, "This court has already declined to take the public records action (09-2592A) into the [business litigation session] and intervention is unwarranted."

Lieberman appealed to the Appeals Court both the order denying intervention in the enforcement action and the judgment dismissing the public records action, and the Appeals Court granted a motion to consolidate the appeals. We transferred the case here on our own motion<sup>7</sup>.

7 We acknowledge the amicus brief of the National Association of Shareholder and Consumer Attorneys.

2. Discussion. a. The public records action. We turn first to the decision of the judge in the public records action. "We review de novo [a] judge's order allowing a motion for judgment on the pleadings under [*Mass. R. Civ. P. 12(c)*], 365 Mass. 754 (1974)." *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 600, 925 N.E.2d 9 (2010).

The statutory basis for Lieberman's claim in the public records action is the public records law. That law governs the maintenance of public records and provides the public a right to [\*213] inspect such records. See *G. L. c. 66, § 10*. The definition of "[p]ublic records" encompasses records "made or received by any officer or employee of [\*\*\*7] any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose." See *G. L. c. 4, § 7, Twenty-sixth*. The Attorney General does not dispute that she is among the public authorities subject to the law. Although certain categories of records are exempted from the definition of public records, [\*\*1023] none of those exemptions make explicit reference to protective orders, and the issue is not addressed elsewhere in the public records law.

The question before us is whether the public records law constitutes a legislative determination that the public interest in access to government records overrides the traditional authority of courts to enter protective orders, and thus obligates the Attorney General to provide the documents to Lieberman. As an interpretation of the public records law that would compel such a conclusion would raise serious constitutional doubts as to the validity of the statute, we conclude that it does not.

The courts of the Commonwealth have certain inherent powers that are "essential to the function of the judicial [\*\*\*8] department, to the maintenance of its authority, or to its capacity to decide cases." *Querubin v. Commonwealth*, 440 Mass. 108, 114, 795 N.E.2d 534 (2003), quoting *Gray v. Commissioner of Revenue*, 422 Mass. 666, 672, 665 N.E.2d 17 (1996). Such inherent powers are protected by art. 30 of the Massachusetts Declaration of Rights<sup>8</sup>. "Although inherent powers may be recognized by statute, they exist independently, because they 'directly affect[] the capacity of the judicial department to function' and cannot be nullified by the Legislature without violating art. 30 [of the Massachusetts Declaration of Rights]." *Querubin v. Commonwealth*, *supra*, quoting *First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't*, 438 Mass. 387, 397, 780 N.E.2d 908 (2003).

8 Article 30 of the Massachusetts Declaration of Rights provides, in relevant part: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. . . ."

Among those inherent powers is the court's authority to issue [\*214] protective orders. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984), quoting *International Prods. Corp. v. Koons*, 325 F.2d 403, 407-408 (2d Cir. 1963) [\*\*\*9] (Friendly, J.) ("we have no question as to the court's jurisdiction to [issue a protective order] under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices'"). Protective orders serve to shield litigants and third parties from unwarranted disclosures, and, as a practical matter, to facilitate the discovery necessary for a trial. We have held, analogously, that a court has inherent authority to impound documents filed with it. See *George W. Prescott Publ. Co. v. Register of Probate for Norfolk County*, 395 Mass. 274, 277, 479 N.E.2d 658 (1985).

Where fairly possible, a statute must be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd.*, 452 Mass. 764, 771, 897 N.E.2d 1001 (2008), quoting *Commonwealth v. Joyce*, 382 Mass. 222, 226 n.5, 415 N.E.2d 181 (1981). As construing the public records law to invalidate an otherwise providently entered protective order would raise serious constitutional questions about the validity of that law, we conclude that the public records action judge did not err in dismissing Lieberman's claim.

Lieberman contends [\*\*\*10] that if a particular class of documents is subject to the disclosure require-

ments of the public records law, then the courts may not bind a public entity to a protective order that prevents the disclosure of such documents. He characterizes the protective order as having been entered for the purpose of protecting [\*\*1024] "confidential business information," and notes that an exemption of the public records law squarely addresses such documents<sup>9</sup>. That exemption provides an exception to disclosure for "trade secrets or commercial or financial [\*215] information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality." *G. L. c. 4, § 7, Twenty-sixth (g)*. The exemption provides further that "this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit." *Id.* As this exemption carves out a subclass of confidential business documents that includes only those provided voluntarily, and as the documents here were submitted "as required by law," Lieberman contends that the Legislature affirmatively expressed an intent to exclude the documents at issue in this case from [\*\*\*11] the exemption. He asserts in turn that a judicial protective order preventing the Attorney General from disclosing such documents is ineffective<sup>10</sup>.

9 To the extent that documents subject to the protective order fall within another exemption in the public records law, Lieberman agrees that such information is properly protected, and could be redacted prior to disclosure. For example, he notes that sensitive borrower-specific information would likely fall within the exemption to the public records law for "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy," *G. L. c. 4, § 7, Twenty-sixth (c)*, and could be properly redacted.

10 Lieberman also claims that the terms of the protective order itself dictate that it should not prevent disclosure of records requested pursuant to the public records law. The language cited by Lieberman pertains to requests by borrowers for information in borrowers' mortgage loan files, and to requirements that the Commonwealth provide documents to other governmental agencies. Those terms are inapposite.

Although Lieberman's characterization of the scope of this exemption [\*\*\*12] is sound, and thus the exemption does not insulate these particular records, his conclusion that the records must therefore be disclosed is based on the mistaken premise that all documents in the hands of public officials must, absent an applicable exception, be made public notwithstanding a court order prohibiting their circulation. We do not agree that the public records law was intended to extend this far. The

statute is silent on the issue of protective orders, and, for the constitutional reasons discussed previously, we will not assume that the Legislature intended to impose such limitations on the judiciary. Nor do we believe, as a matter of statutory construction, that the Legislature would endeavor to effect such a significant change to a long-standing and fundamental power of the judiciary by implication. Cf. *Kerins v. Lima*, 425 Mass. 108, 110, 680 N.E.2d 32 (1997), quoting *Commercial Wharf E. Condominium Ass'n v. Waterfront Parking Corp.*, 407 Mass. 123, 129, 552 N.E.2d 66 (1990), S.C., 412 Mass. 309, 588 N.E.2d 675 (1992) (requiring a clear expression to effect "radical change in the common law").

Our conclusion in that respect is consistent with our holding in *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 870 N.E.2d 33 [\*216] (2007). [\*\*\*13] There, we held that the public records law did not abrogate the attorney-client privilege because the public records law is "silen[t] on a matter of common law of fundamental and longstanding importance to the administration of justice." *Id.* at 458. That principle applies with equal force here, where the statute is silent on a matter of inherent judicial power ".

11 Our holding in *General Elec. Co. v. Department of Envtl. Protection*, 429 Mass. 798, 801, 711 N.E.2d 589 (1999), that materials falling within the work product privilege are not protected from disclosure under the public records law unless they fall within an express exemption, does not alter our conclusion in the present case. There, we were presented with more direct evidence that the Legislature had contemplated the work product privilege and decided to exclude it from the exemption, and the case did not raise the constitutional issues presented here. See *id.* at 803-804.

[\*\*1025] In affirming the decision of the public records action judge, we recognize that the judge did not rule on all questions at issue in this case. The holding of the public records action judge was limited to the conclusion that the public records law does not, as a matter [\*\*\*14] of law, render the protective order ineffective. The judge did not address the question whether the order should be modified for other reasons, or whether certain documents designated confidential by Fremont are not validly protected by the order.

b. The enforcement action. We consider next the enforcement action judge's decision to deny Lieberman's motion to intervene. Lieberman sought both intervention as of right and permissive intervention, each pursuant to *Mass. R. Civ. P. 24*, 365 Mass. 769 (1974)<sup>12</sup>.

12 *Rule 24 of the Massachusetts Rules of Civil Procedure*, 365 Mass. 769 (1974), provides, in relevant part:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the Commonwealth confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

*Rule 24(b)* provides, in relevant part:

"(b) Permissive Intervention. [\*\*\*15] Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[\*217] We begin with Lieberman's motion for intervention as of right. A judge has discretion in determining whether an intervening party has demonstrated facts that entitle him or her to intervention as of right, and we accordingly review the judge's factual findings for clear error. See *Board of Registration in Medicine v. Doe*, 457 Mass. 738, 742, 933 N.E.2d 67 (2010) (factual findings generally reviewed for clear error on appeal). Whether those facts are sufficient to meet the requirements for intervention is a question of law, however, and is reviewed as such. Cf. C.A. Wright, A.R. Miller, M.K. Kane, 7C Federal Practice and Procedure § 1902, at 261 (3d ed. 2007) (intervention of right question of law under analogous Federal rules).

Intervention as of right is appropriate under [\*\*\*16] *Mass. R. Civ. P. 24 (a)* if (1) "a statute of the Common-

wealth confers an unconditional right to intervene," or "(2) when the applicant claims an interest relating to the property or transaction [that] is the subject of the action . . ." The public records law does not confer on the public a right to intervene in cases such as the Fremont action. See *G. L. c. 66, § 10; G. L. c. 4, § 7*, Twenty-sixth. Lieberman does not claim otherwise. Moreover, Lieberman's interest in this case is in the documents produced at trial, not in the "property or transaction" that was the subject of the action. He does not seek to intervene for any reason related to the outcome of the Attorney General's suit or [\*\*1026] its settlement, or for a reason related to Fremont's loan origination and sales practices in Massachusetts. Accordingly, the judge did not err in denying intervention as of right.

The trial court also denied Lieberman permissive intervention, a decision that we review for clear abuse of discretion. See *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. School Comm. of Chelsea*, 409 Mass. 203, 209, 564 N.E.2d 1027 (1991). Permissive intervention is appropriate under *Mass. R. Civ. P. 24 (b)* where (1) "a statute of the Commonwealth [\*\*\*17] confers a conditional right to intervene," or "(2) when an applicant's claim or defense and [\*218] the main action have a question of law or fact in common. . . ." <sup>13</sup> As noted, the statute does not address a right to intervene and Lieberman makes no claim that intervention should have been permitted on that basis.

13 *Rule 24 (c) of the Massachusetts Rules of Civil Procedure*, 365 Mass. 769 (1974), also requires that the person seeking to intervene serve a motion to intervene upon the parties, and that such motion be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." We conclude that the complaint in the public records action that Lieberman annexed to his motion for intervention satisfies this requirement.

A more difficult question is whether a third party who seeks to intervene for the purpose of challenging a protective order can be said to fit within the parameters of the second part of *rule 24 (b)*. When faced with this issue, or with the broader question whether any form of intervention is warranted, the majority of Federal Circuit Courts of Appeal have held that intervention is procedurally appropriate under analogous Federal rules of civil procedure. [\*\*\*18] See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994), and cases cited (agreeing with "forming consensus in the federal courts" that permissive intervention is appropriate procedure for challenging protective orders). See also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988), quoting *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786,

789 (5th Cir. 1979) (intervention is "the procedurally correct course" for third-party challenges to protective orders).

To that end, the commonality requirement has been generously construed. In *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit concluded that "[t]here is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order." The same is true of the present case. Given that a third party may be able to bring a separate action to challenge a protective order, it will promote judicial economy in such cases for the judge who managed the relevant discovery and issued the protective order to hear the challenge to that order.

Our conclusion does not [\*\*\*19] require that a motion for permissive intervention be granted in every case in which a party moves to intervene to challenge a protective order. Indeed, *Mass. R. Civ. P. 24 (b)* [\*219] states that the judge "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." We have noted previously that a judge might consider such factors as a party's delay in seeking intervention (and the circumstances of such a delay), the number of intervention requests or likely intervention requests, the adequacy of representation of the intervening party's interests, and other similar factors. See *Attorney Gen. v. Brockton Agricultural Soc'y*, 390 Mass. 431, 435, 456 N.E.2d 1130 (1983). We reiterate that the trial judge has considerable discretion [\*\*1027] in deciding whether permissive intervention is appropriate. See *id.*

Should the enforcement action judge decide to grant permissive intervention, Lieberman would be afforded an opportunity to challenge whether the materials he seeks are validly covered by the protective order <sup>14</sup>. That inquiry will be the same as it would be at the time the protective order was granted, although assessed at the time of intervention. The [\*\*\*20] judge may thus take into account changed circumstances that may render certain materials no longer validly covered by the order. That may include, for example, consideration of Lieberman's claim that there are no longer trade secrets to protect.

14 Although Lieberman mentions the prospect of modification of the protective order in general terms, he has not addressed his arguments to any modification in particular. Nor are we presented in this case with an order denying modification. We leave to the enforcement action judge the question whether modification is appropriate in the event that the judge allows Lieberman's mo-

tion for intervention, and in the event Lieberman requests modification.

The inquiry additionally may include consideration of the reasonable reliance of a party on a protective order in its production of information. The issue may be particularly salient where a party has disclosed new information in discovery that would not otherwise have been disclosed, and that was reasonably expected at the time of disclosure to remain confidential within the terms of the order. Cf., e.g., *Pansy v. Borough of Stroudsburg*, *supra* at 790, quoting *Beckman Indus., Inc. v. International Ins. Co.*, *supra* at 475-476 [\*\*\*21] ("reliance

would be greater . . . where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege").

3. Conclusion. We conclude that the public records action judge held properly that the public records law does not abrogate [\*220] judicial protective orders, and the judgment of dismissal in that case is accordingly affirmed. The order of the enforcement action judge denying Lieberman's motion for intervention is vacated for further consideration consistent with this opinion.

So ordered.

DENVER STREET LLC vs. TOWN OF SAUGUS (and three companion cases).<sup>1</sup>

1 Paul DiBiase, as trustee of Oak Point Realty Trust vs. Town of Saugus; Kevin Procopio, as trustee of Vinegar Hill Estates Trust vs. Town of Saugus; and Central Street Saugus Realty, LLC vs. Town of Saugus.

No. 09-P-2031.

APPEALS COURT OF MASSACHUSETTS

78 Mass. App. Ct. 526; 939 N.E.2d 1187; 2011 Mass. App. LEXIS 17

September 15, 2010, Argued  
January 6, 2011, Decided

**SUBSEQUENT HISTORY:** Review granted by *Denver St. LLC v. Town of Saugus*, 459 Mass. 1104, 942 N.E.2d 968, 2011 Mass. LEXIS 229 (Mass., Mar. 2, 2011)

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

Essex. Civil actions commenced in the Superior Court Department on November 8, 2005, December 9, 2005, and May 26, 2006. After consolidation, the cases were heard by Frances A. McIntyre, J. *Denver Street LLC v. Town of Saugus*, 2009 Mass. Super. LEXIS 345 (Mass. Super. Ct., Mar. 16, 2009)

**HEADNOTES**

*Constitutional Law, Taxation. Taxation, Sewer assessment. Municipal Corporations, Sewers. Sewer Damages, Interest.*

**COUNSEL:** Ira H. Zaleznik (Kristina A. Engberg with him) for town of Saugus.

James R. Senior for Denver Street LLC & others.

John L. Davenport, for Conservation Law Foundation, Inc., amicus curiae, submitted a brief.

**JUDGES:** Present: Duffly, Sikora, & Milkey, JJ.

**OPINION BY:** DUFFLY

**OPINION**

[\*526] [\*\*\*1188] DUFFLY, J. For a number of years, the town of Saugus (town) coped with its failing sewer infrastructure by releasing water [\*527] and sewage into the Saugus River. In 2005, the town entered into an administrative consent order (ACO) with the Department of Environmental Protection (DEP) that mandated repairs to reduce the amount of groundwater inflow and infiltration (I/I) into the system. The four plaintiffs, Denver Street LLC (Denver Street), Paul DiBiase, as trustee of Oak Point Realty Trust (Oak Point), Kevin Procopio, as trustee of Vinegar Hill Estate Trust (Vinegar Hill), and Central Street Saugus Realty, LLC (Central Street), are developers and land owners who sought permits for

residential construction in the town. The town required the plaintiffs to connect [\*\*\*2] to the town sewer system and charged them an I/I reduction contribution, termed a "fee" by the town, which they paid under protest. The plaintiffs thereafter filed separate complaints in Superior Court that set forth substantially similar allegations that the I/I reduction contribution each was required to make in order to connect to the town's sewer system constituted an illegal tax rather than a permissible fee. The plaintiffs sought refunds of these payments.<sup>2</sup> Vinegar Hill also sought declaratory relief. The complaints were consolidated, and the matter proceeded to trial without a jury.

2 Denver Street paid and sought a refund in the amount of \$ 244,200, in connection with its development of a multifamily residential project containing seventy-four bedrooms; Oak Point paid and sought a refund in the amount of \$ 115,500, in connection with its development of a single-family home and a sixteen-unit residential project; Vinegar Hill paid and sought a refund in the amount of \$ 73,160, in connection with its partial development of a forty-six lot residential subdivision; and Central Street paid and sought a refund in the amount of \$ 237,600, in connection with its development of a seventy-two [\*\*\*3] bedroom multifamily residential project.

[\*\*\*1189] The trial judge determined that the I/I reduction contribution was not an allowable fee but an illegal tax. Judgments issued in favor of each of the plaintiffs ordering the town to refund the amount of the I/I reduction contribution each had paid, plus fees and costs. Prejudgment interest at the rate of twelve per cent was added to each of the awards.<sup>3</sup>

3 The judge granted Vinegar Hill's motion, filed pursuant to *Mass.R.Civ.P. 59(e)*, 365 Mass. 827 (1974), to amend the declaratory judgment. The amended judgment declares "[t]hat the I/I Reduction Contribution does not constitute a valid fee but is rather an unlawful tax and the Town of Saugus may not require the plaintiff Vinegar Hill

Estates Trust to pay it as a prerequisite to the issuance of sewer permits."

On appeal, the town's challenge to the judge's conclusion [\*528] that the I/I reduction contribution constituted an illegal tax focuses on claims that (i) the new users received a particularized benefit, and (ii) the payments bore a reasonable relationship to the costs of sewer system repairs. The town also claims that it was error to impose a twelve percent rate of interest as provided by *G. L. c. 231, § 6H*. [\*\*\*4] <sup>4</sup> We affirm. <sup>5</sup>

4 The town also claims that one finding of the trial judge was not grounded in the evidence, and it filed a motion to amend findings pursuant to *Mass.R.Civ.P. 52(b)*, as amended, 423 Mass. 1402 (1996). That motion was denied. See note 16, *infra*.

5 We acknowledge the amicus brief filed by the Conservation Law Foundation, Inc.

*Facts.* We summarize the judge's comprehensive findings and the uncontested facts of record. *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 630, 925 N.E.2d 513 (2010). The town has had trouble with its sewer system for many years, with official documents in the record indicating recognition of this fact at least as far back as 1986. Central to the issues in this appeal is the town's degraded or inadequate sewer infrastructure, which allowed water to enter the sewer system and occasionally to overload it. <sup>6</sup> Overloading occurs when ground water leaks into the sanitary sewer system through defective pipes, pipe joints, and sewer connections (infiltration), or when rain or other extraneous sources of water enter the system from public sources such as manhole covers and private sources such as sump pumps and roof drains (inflow). I/I increases the volume of liquid [\*\*\*5] in the sewer system, which can result in sewage overflows when excessive amounts of I/I caused by storm events push the system to or beyond its capacity. Prior to 2005, during overflow events, in order to prevent sewage from backing up into homes and businesses linked to the sewer system, the town discharged [\*529] untreated sewage directly into the Saugus River, which flows through Rumney Marsh, an "Area of Critical Environmental Concern," and from there to the ocean.

6 As recited in the ACO, "In 1997, the Town hired a consultant to evaluate its sewer system. This evaluation identified numerous deficiencies in the sewer system including leaking manholes, mainlines and service lines, defective manholes, uncapped cleanouts, sewer pipes with blockages. The Town also identified illegal connections of sump pumps, driveway drains, and storm drains

to the sewer system. . . . The defects in the Town sewer system allow excessive amounts of infiltration and inflow to enter the sewer system. This infiltration and inflow results in sanitary sewer overflows to the Saugus River and contributes to the surcharging of the Lynn system which during wet weather experiences combined sewer system overflows to the [\*\*\*6] Saugus River and ocean." The trial judge found that, pursuant to an agreement with the city of Lynn, the town sewer system collects sanitary waste and pumps it to Lynn for treatment.

Repeated discharges of sewage into an environmentally sensitive area brought the scrutiny of the DEP, which in 2004 instituted [\*\*1190] administrative proceedings against the town for its asserted violations of the Clean Waters Act, *G. L. c. 21, § 43(2)*, and related Massachusetts regulations governing operation and maintenance of wastewater treatment works and indirect dischargers. *314 Code Mass. Regs. § 12.03(8)* (2002). *314 Code Mass. Regs. § 12.04(8)* (1996). In 2005, to resolve the administrative action, the town entered into the ACO with the DEP, which required the town to implement plans to identify and eliminate sources of I/I as a condition of allowing new wastewater discharges to the sanitary sewer system. <sup>7</sup>

7 As recited in the ACO: "The Town has installed a bypass pump that discharges raw sewage into the Saugus River to avoid backups into basements." During specified dates in 1998 and 2001 through 2004, "the Town notified the [DEP] of sanitary sewer overflows at the Lincoln Avenue pumping station." During [\*\*\*7] a DEP inspection in September, 2004, it was observed that "raw sewage had recently overflowed from the pumping station."

In accordance with the ACO, the town instituted a moratorium on any new construction that would affect the sewer system until such time as a plan was implemented that successfully addressed the I/I problems leading to overflow into the river. As further required by the terms of the ACO, the town created and implemented an "Inflow and Infiltration Reduction Program Sewer Connection and Extension Policy" (SCEP) and a mechanism for calculating when I/I reduction was such that new flow would be permitted. That mechanism, called the "sewer bank," has been in use in a number of other cities and towns in the Commonwealth.

Under the sewer bank procedure, applicants seeking to connect to the sewer system could "purchase" gallons of flow from the sewer bank by making an I/I reduction contribution. The procedure is in essence a means of record-keeping that enables the town and the DEP to

keep track of total gallons of I/I flow remediated. As repairs by the town were completed, I/I would be removed from the system. The I/I removed, measured in gallons, would result in a credit [\*\*\*8] to the sewer bank of a specified [\*530] number of gallons of flow. In accordance with the formula set forth in the ACO, the town initially was permitted to add one gallon of flow to the sewer bank for every ten gallons of I/I removed from the sanitary sewer system. These credits could then be, but were not required to be, allocated to new construction. As the town successfully removed I/I-related flow from the system, that is, when the total I/I removal reached 250,000 gallons, this 10:1 ratio would drop to 6:1; when I/I removal reached 500,000 gallons, the ratio would drop to 4:1.<sup>8</sup>

8 The parties have stipulated that the town made sufficient I/I repairs to reduce the ratio to 6:1 in August, 2005, and to 4:1 at the beginning of 2006. It is apparent from the record that the town did not implement the first reduction until nearly two years later, in January, 2007, and the second in December, 2007.

The town was prohibited from issuing permits for new sewer connections unless there were, at the time, sufficient gallons in the sewer bank to meet the new needs. The sewer bank approach was adopted to permit incremental remediation of the problem while allowing new connections to the system. As the [\*\*\*9] town embarked on a multiyear project to make repairs to the system that would result in reduction in I/I, it handled permits for new construction in the following manner: Once a sufficient number of credits had accumulated in the sewer bank under the formula set forth in the ACO, a developer seeking to connect to the sewer system (required by the town for all development of commercial [\*\*1191] or residential properties) paid an I/I reduction contribution (a monetary amount that was paid in addition to a building permit fee and a plumbing fixture fee). The I/I reduction contribution was initially calculated by multiplying by a factor of ten the number of gallons of new sewer flow proposed to be generated by the project and discharged to the sewer system,<sup>9</sup> and then multiplying that number by three dollars.<sup>10</sup> The factor of ten was reduced by the town to six in January, 2007, and to four in December, 2007.

9 The judge found that, in calculating the amount of proposed flow to be discharged to the sewer system, the town relied on, among other documents, the State sanitary code, which assigns gallonage to certain components of the project, e.g., gallons per bedroom or per fixture, which in turn is [\*\*\*10] used to predict a standard anticipated flow from a given development.

10 The three dollar figure represented "an estimate" of the costs to perform I/I-mitigating repairs, which was based on industry practice and the project coordinator's prior experience.

[\*531] The ACO did not require that any particular applicant for a sewer connection permit remove I/I, nor did it require that such an applicant pay an I/I reduction contribution. The judge found there to be "no relationship between the amount of the calculated I/I [reduction] [c]ontribution and the actual cost to the Town . . . for labor and materials necessary to make the physical connection to the sanitary sewer system." She further found that "the Town was obligated to reduce I/I whether new users were added to the system or not. The I/I problem was not caused by, or exacerbated by[,], the new users. In other words, the I/I and the [sanitary sewer overflow] problems existed independently of the requirements of new users."

*Discussion.* 1. *Claim that charges are permissible fees.* "A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. Attleboro*, 454 Mass. 165, 168, 908 N.E.2d 722 (2009), [\*\*\*11] quoting from *Commonwealth v. Caldwell*, 25 Mass. App. Ct. 91, 92, 515 N.E.2d 589 (1987). See 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"). "Towns may, however, exact fees." *Greater Franklin Developers Assn., Inc. v. Franklin*, 49 Mass. App. Ct. 500, 502, 730 N.E.2d 900 (2000), citing *G. L. c. 40, § 22F*. The plaintiffs claim that I/I reduction contributions constitute an illegal tax because they were not authorized by the Legislature; the town argues that the charges are a permissible fee under *G. L. c. 40, § 22F*.

In determining whether the charges constitute a permissible fee, we consider the three-factor test set forth in *Emerson College v. Boston*, 391 Mass. 415, 424-425, 462 N.E.2d 1098 (1984) (*Emerson College*). "Fees imposed by a governmental entity . . . share common traits that distinguish them from taxes: [1] they 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'; [2] they 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, [\*\*\*12] . . . and [3] the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Ibid.*, quoting from *National Cable Television Assn. v. United States*, 415 U.S. 336, 341, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974).

[\*532] [\*\*1192] We focus on the first and third factors, the parties having stipulated that the plaintiffs have a choice whether to pay the I/I reduction contribution, because they could choose not to develop property requiring sewer connections. See *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Bd.*, 421 Mass. 196, 206, 656 N.E.2d 563 (1995).<sup>11</sup> In our review, we bear in mind that we will "accept the judge's findings of fact unless there is clear error. . . . However, 'we scrutinize without deference the legal standard which the judge applied to the facts.'" *Silva v. Attleboro*, 454 Mass. at 167-168, quoting from *Kendall v. Selvaggio*, 413 Mass. 619, 621, 602 N.E.2d 206 (1992).

11 The court in *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgmt. Board*, 421 Mass. at 205-206, discussed the meaning of "choice," as distinct from "free choice," as that word is utilized in cases addressing the factors set forth in *Emerson College, supra*. The court cited *Bertone v. Department of Pub. Util.*, 411 Mass. 536, 583 N.E.2d 829 (1992), [\*\*\*13] as providing an example of choice. In *Bertone*, the choice presented to the plaintiffs was the same as that facing the plaintiffs here, to forgo the development of their property. *Id.* at 549.

(a) *Specific benefit.* There is ample support in the record for the judge's findings and conclusions that, under the first *Emerson College* factor, the I/I reduction contribution does not benefit the fee payers in a manner not shared by others and is better characterized as a tax. In *Emerson College*, the city of Boston passed an ordinance that imposed a fee on owners of certain buildings that "by reason of their size, type of construction, use and other relevant factors" required the city to augment its fire protection services. 391 Mass. at 416. Because of the physical characteristics of its buildings, Emerson College, a tax-exempt entity, was subject to a sizeable payment, and it sought a declaratory judgment that the charges mandated by the ordinance constituted an illegal tax. The court agreed, stating that the college was not the only beneficiary of the augmented protection but that the entire community benefited, because "the prevention of damage to buildings by fire is an object which affects [\*\*\*14] the interest of all the inhabitants and relieves them from a common burden and danger." *Id.* at 426, quoting from *Fisher v. Boston*, 104 Mass. 87, 93 (1870). See *Greater Franklin Developers Assn., Inc. v. Franklin*, 49 Mass. App. Ct. at 502-503 (benefit of new school facilities accruing to individual children, and through them to actual fee payers, is not particularized).

[\*533] We applied this factor in *Berry v. Danvers*, 34 Mass. App. Ct. 507, 508, 613 N.E.2d 108 (1993) (*Berry*), concluding that the fee imposed by the town of

Danvers on landowners seeking to connect to the common sewer system, or to increase usage by an existing connection, was an illegal tax. Through adoption of a sewer connection permit program (SCPP), Danvers increased sewer connection fees from a flat fee per connection to a fee of four dollars for each gallon of sewage to be discharged daily. *Id.* at 507-508. Danvers's sewer system experienced problems with I/I that contributed to sewage overflow "to the point where a heavy rainfall would result in lifted manhole covers and overflow of sewage into streets, yards, and nearby streams and rivers." *Id.* at 509.

We disagree with the town that *Berry, supra*, may be distinguished by the fact that [\*\*\*15] Danvers faced actual backflow of sewage into residences and streets during overflow situations, in contrast to the situation here, where (the town argues) actual [\*\*1193] backflow of sewage into homes was averted.<sup>12</sup> This is a distinction without a difference. The town was acutely aware of the potential for backflow when it discharged untreated sewage into the Saugus River in order to prevent sewage from backing up into homes and businesses linked to the sewer system. As we stated in *Berry, supra* at 511, in addition to benefiting "current users, whose streets and yards were periodically covered with raw sewage after a heavy rain . . . , the repair of the dilapidated existing system under the SCPP was of primary utility to those already connected to it and inconvenienced by its inadequacies."

12 The judge's findings belie the claim that no backflow of sewage into residences and streets occurred in the town. As the judge found, "In one instance in December 1996, the Town reported to DEP that houses on 85 streets had been affected by sewage backups into basements, with manholes overflowing on those streets. Close to twenty overflows and discharge emergencies were reported over 19 years." She further [\*\*\*16] found that the engineer hired by the town as project manager in its I/I remediation efforts "had a role in the Route One sewer problem. Near [a] restaurant at the Main Street area, the engineers discovered that sewage in a sewer pipe had risen to the level of the road surface." She also found, "Reduction of I/I also generally benefited the larger community in that there were fewer occasions of raw sewage in homes and less environmental impact, such as the destruction of shellfish beds" (emphasis added). See note 7, *supra*.

Here, as in *Berry*, every inhabitant of the town (as well as those living in the downstream communities bordering the Saugus River and beyond) benefited from I/I

repairs to the dilapidated [\*534] sewer system. Not only was sewage overflow onto streets and into residences averted, but with each repair, sewage discharge into the environmentally sensitive river and nearby ocean became less likely, with resulting environmental and health benefits extending to all inhabitants of the town. See *Shea v. Boston Edison Co.*, 431 Mass. 251, 259, 727 N.E.2d 41 (2000) (not a fee where general public receives "spillover" benefits from energy efficiency programs supported by the charges at issue).<sup>13</sup>

13 We [\*\*\*17] also reject the town's argument that new users received a particularized benefit for payment of the I/I reduction contribution in the form of accelerated access to the sewer system. As we said in *Berry*, 34 Mass. App. Ct. at 510-511, "[w]hile removal of I/I would theoretically benefit new users by freeing up additional capacity and allowing them to connect to the sewer system, it would provide as much or greater benefit to current users." Likewise here, the I/I payments were not necessitated by the new or increased access to the sewer system. Even without I/I reduction contributions from new users, the repairs would have been required, albeit funded from other sources such as higher sewer fees for all users. It may well be, as the town suggests, that the I/I reduction contributions from new users made possible more rapid completion of the I/I repairs mandated by the ACO, and that new users could therefore take advantage of sewer bank credits earlier. But an advantage was shared by all inhabitants of the town and surrounding areas, who could sooner enjoy the benefits of decreased sewage overflow events.

(b) *Reasonable relationship to costs of specific service.* To constitute a permissible [\*\*\*18] fee under the third *Emerson College* factor, "the charges [must be] collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." 391 Mass. at 425.

The I/I reduction contribution did not compensate the town for services related to expenses it incurred in connection with the entry of new users to the sewer system. We disagree that *Bertone v. Department of Pub. Util.*, 411 Mass. 536, 539, 583 N.E.2d 829 (1992) (*Bertone*), supports the town's view that the I/I reduction contribution is a permissible fee because it bears a [\*\*\*1194] reasonable relationship to the costs of reducing I/I.

In *Bertone*, the court determined that the town of Hull could permissibly assess a hook-up charge from those seeking new or expanded electrical service. In *Berry*, we distinguished the hook-up charge from the sewer connection permit program fee, noting that the

hook-up charge was "an amount that reasonably relates to the incremental cost of the additional facilities needed to provide them with service . . . [and] paid 'for those [\*535] improvements to the system . . . necessitated by the new customers, and hence . . . will benefit them alone, and the remaining improvements are paid for [\*\*\*19] by rate increases imposed on all customers.'" 34 Mass. App. Ct. at 511, quoting from *Bertone*, 411 Mass. at 546. The funds generated by the hook-up charge in *Bertone* were used to make changes to and improvements in the town's electrical infrastructure, without which it would not have been possible for the plaintiffs and thousands of other anticipated new users to connect to Hull's electrical supply system. 411 Mass. at 544-545. The existing system did not require out-of-the-ordinary repairs or modifications, and only those seeking to undertake new development of property or to expand electrical service would benefit from the changes. *Id.* at 546. The hook-up charges did not constitute a tax because "the revenues received from the hook-up charges are reasonably calculated to meet expenses incurred in providing electric service to new customers. . . . The revenues are not added to a general fund for providing service to all but rather are targeted to the newly required construction." *Id.* at 549-550. See *Silva v. Attleboro*, 454 Mass. at 169 (although "municipality has no independent power of taxation, it may assess, levy, and collect fees when authorized by Legislature, provided that those [\*\*\*20] fees are reasonable and proportional").

The I/I reduction contribution is not so limited in its benefits and thus constitutes an illegal tax. The I/I repairs that resulted in credits to the sewer bank were mandated by the DEP to rectify existing environmental problems, regardless of any benefit to new sewer system users and irrespective of whether any new users would take advantage of the credits and pay the I/I reduction contribution. There is ample evidence in the record to support the judge's finding that "[t]he I/I problem was not in any way triggered by or aggravated by new users to the system. But for the I/I problem, the [town's] sewer system would not have required renovation in order to accommodate the new users. The contribution does not go to new infrastructure, but only goes to repair an existing system."<sup>14</sup>

14 That the I/I reduction contribution bears a reasonable relationship to the cost of the repairs necessary to create sewer bank credits is refuted by the fact that although the initial I/I payment was calibrated at the 10:1 ratio, to compensate for the estimated cost of creating a gallon of credit in the sewer bank, when subsequent I/I repairs made it possible under [\*\*\*21] the terms of the ACO and SCEP to lower the ratio to 6:1 and then to 4:1, there was no concomitant reduction in the I/I payment assessed those seeking new sewer con-

nections. The 10:1 ratio remained in effect for almost two years after the ratio could have been lowered under the terms of the ACO and SCEP. See note 8, *supra*. The additional revenues generated were in excess of the cost of creating sewer bank credits and were a benefit to the town and its taxpayers.

We also reject the town's argument that the I/I reduction [\*536] contribution is a fee because it is specifically designated as such, it is calculated based on best estimates of the cost of I/I repair, and the [\*\*1195] funds are kept in a separate interest-bearing fund "earmarked for the sole purpose of addressing I/I problems." As further reflected in the judge's findings, and as supported by the record, the town has a sewer enterprise fund which is funded through the payment of the sewer rates by sewer users generally. The I/I reduction contributions are deposited into a separate fund established for those contributions. The town transferred a total of \$ 440,000 from the I/I fund to the sewer enterprise fund, primarily to pay for repairs to [\*\*\*22] the Lynnhurst pumping station and the repair of a sewer line on Route 1, performed in January, 2006. <sup>15</sup> There was no I/I associated with the pumping station, and no gallons were credited to the sewer bank as a result of repairs to it. The repairs to the pumping station "were not done to eliminate I/I." <sup>16</sup>

15 The Route 1 repairs did eventually result in some I/I reduction. However, the repairs were undertaken to address an emergency, see note 12, *supra*, not to reduce I/I, and the cost of the work that produced I/I repair was estimated to comprise less than ten percent of the total cost.

16 The town argues that because the Lynnhurst pumping station pump handled system flow which was in part the result of I/I, the repairs to the pump were therefore related to I/I, and use of the money in the fund was appropriate. But by the same logic, repairs to the sewer system of any kind would qualify as related to I/I, because flow caused by I/I moves through the sewer system.

Because new sewer users received no benefits that were not shared by other members of the town, and the amount of the I/I reduction contribution was not reasonably related to the cost of services from which the new users alone [\*\*\*23] derived a benefit, the I/I reduction contribution was an illegal tax and not a fee. <sup>17</sup>

17 We do not address the town's claim, not raised below, that because the SCEP was (as alleged by the town) produced according to a mandate from a State agency, the I/I reduction contribution is more akin to a fee. The town cites to no

persuasive or relevant authority for this proposition, see *Karellas v. Karellas*, 61 Mass. App. Ct. 716, 720 n.6, 814 N.E.2d 28 (2004), and we need not address arguments made for the first time on appeal. See *Mullins v. Pine Manor College*, 389 Mass. 47, 63, 449 N.E.2d 331 (1983). As we have noted, it appears from the text of the ACO that the DEP had no interest in the manner in which the town chose to fund its I/I repairs; its interest was only in the expeditious completion of these repairs.

2. *Applicable interest rate.* The trial judge applied a twelve [\*537] percent interest rate to the amounts awarded to the plaintiffs. The town argues that an interest rate of twelve percent was error, where the rate is authorized only under *G. L. c. 231, § 6B* (tort), § 6C (contract) and § 6H, which provides for interest at the rate of twelve percent "[i]n any action in which damages are awarded, but in which interest on [\*\*\*24] said damages is not otherwise provided by law." The town argues that the sums awarded to the plaintiffs were a refund, and thus the actions did not sound in tort or contract, and the award was not for damages. <sup>18</sup>

18 The town makes no argument that any portion of the I/I reduction contribution specifically related to each plaintiff's costs of accessing the sewer system and thus should not be included in the damages. This may be because any particularized costs of the sewer connection appear to have been included in a separate plumbing fixture fee that was in addition to a flat hook-up fee of \$ 125. For example, Denver Street paid and sought a refund of an I/I reduction contribution in the amount of \$ 244,200; Denver Street also was required to pay a plumbing fixture fee of \$ 34,000. Oak Point had two properties that it sought to develop: in connection with a single family residence on Sharon Drive, Oak Point paid an I/I reduction contribution in the amount of \$ 9,900 and a plumbing fixture fee of \$ 1,400.

[\*\*1196] The town's reliance on *116 Commonwealth Condominium Trust v. Aetna Cas. & Sur. Co.*, 433 Mass. 373, 376, 742 N.E.2d 76 (2001), is misplaced. That case involved interpretation of a directors and officers [\*\*\*25] liability endorsement to a general liability insurance policy. The court rejected the claim of the plaintiff trust that the policy's coverage for loss incurred by suits for "damages" included an equity action that sought preliminary and injunctive relief (that would allow access to an adjoining unit and common areas in the condominium) but did not request monetary damages.

Our courts have consistently defined "damages" as "the word which expresses in dollars and cents the injury

sustained by a plaintiff. It includes both the original debt or damage and whatever interest ought to be added to make a just verdict." *Turcotte v. DeWitt*, 333 Mass. 389, 392, 131 N.E.2d 195 (1955). See 116 Commonwealth [\*538] *Condominium Trust v. Aetna Cas. & Sur. Co.*, 433 Mass. at 376-377 & n.3, and cases cited therein. See also *Rood v. Newberg*, 48 Mass. App. Ct. 185, 195, 718 N.E.2d 886 (1999), quoting from *Conway v. Electro Switch Corp.*, 402 Mass. 385, 390, 523 N.E.2d 255 (1988) ("It is a 'fundamental proposition that interest is awarded to compensate a damaged party for the loss of use or the unlawful detention of money"). By any of these definitions, the plaintiffs were damaged when they were required to pay monetary sums to the town which

the town could [\*\*\*26] not legally charge and for so long as they were deprived of the use of those funds.<sup>19</sup>

19 The six percent rate proposed by the town under *G. L. c. 107, § 3*, provides a default interest rate for bonds and securities and is inapplicable here.

The judgments dated March 18, 2009, in favor of Denver Street and Central Street, the corrected judgment dated March 20, 2009, in favor of Oak Point, and the amended declaratory judgment dated May 12, 2009, in favor of Vinegar Hill, are affirmed.

*So ordered.*

MASSACHUSETTS BOARD OF HIGHER EDUCATION/HOLYOKE  
COMMUNITY COLLEGE vs. MASSACHUSETTS TEACHERS AS-  
SOCIATION/MASSACHUSETTS COMMUNITY COLLEGE COUN-  
CIL/NATIONAL EDUCATION ASSOCIATION.

No. 10-P-504.

APPEALS COURT OF MASSACHUSETTS

79 Mass. App. Ct. 27; 943 N.E.2d 485; 2011 Mass. App. LEXIS 328; 190  
L.R.R.M. 2675

December 3, 2010, Argued  
March 11, 2011, Decided

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

Suffolk. Civil action commenced in the Superior Court Department on April 2, 2009. The case was heard by Elizabeth M. Fahey, J.

**HEADNOTES**

Arbitration, Judicial review, Award, Authority of arbitrator, Arbitrable question, Collective bargaining, Vacating award, Damages. Labor, Arbitration, Public employment, Collective bargaining. Public Employment, Collective bargaining.

**COUNSEL:** Will Evans for the defendant.

Carol Wolff Fallon for the plaintiff.

**JUDGES:** Present: McHugh, Meade, & Milkey, JJ.

**OPINION BY:** MILKEY

**OPINION**

[\*28] [\*\*487] MILKEY, J. In 2006, Holyoke Community College (the college) posted a position for an assistant professor of nutrition. Elizabeth Hebert, who many years earlier had been a tenured faculty member at the college, received an initial interview for the position. However, she did not advance to the final round, and the college eventually [\*\*488] hired one of the three candidates who did. Based on a grievance that Hebert's union, Massachusetts Teachers Association/Massachusetts Community College Council/National Education Association (union), pressed on her behalf, an arbitrator ruled that the college violated its collective bargaining agreement by choosing its preferred candidate over Hebert. He ordered the college to appoint Hebert to the posted position with full back pay, or to pay broadscale damages on an ongoing basis. A Superior Court judge vacated the arbitrator's award, and the union seeks to have it reinstated on appeal. We agree with the judge that the arbitrator [\*\*\*2] exceeded his authority in some respects, but we conclude that the case must be remanded for additional proceedings.

**Background.** <sup>1</sup> Hebert has a "master's degree in food and nutrition." <sup>2</sup> In 1981, she began working as a "pro-

gram coordinator" in the dietetic technology program at the college. She was promoted to assistant professor in 1986, and she obtained tenure in 1988. In May of 1989, the college eliminated the entire dietetic technology program because of severe budgetary issues, and Hebert therefore lost her position. The college offered her a "re-training sabbatical" designed to qualify her for a position in the biology department. She initially accepted that offer, but eventually decided that she did not want to leave the nutrition field. Therefore, she resigned her position at the college. <sup>3</sup> However, at many points over the ensuing years she taught courses at the college as an adjunct professor.

1 The facts are taken from the arbitrator's findings.

2 The arbitrator's decision does not identify at which university Hebert earned her master's degree, and nothing elsewhere in the record reveals this.

3 As the arbitrator noted, there is a confusing paper trail as to whether Hebert's resignation [\*\*\*3] became effective in December of 1989 or October of 1990. Nothing turns on this fact.

On January 6, 2006, the college posted the assistant professor position in nutrition. The posting listed various "required" and "preferred" qualifications. Among the required qualifications was [\*29] that the candidate have a "[m]aster's degree in Nutrition or closely related field."

Hebert applied for the posted position, and she was among the five candidates asked to make presentations to the search committee. The committee recommended three finalists, including Hebert. In the committee's report, the chair had particularly positive things to say about Hebert's candidacy, referring to her as "exceed[ing] all candidates [in the pool] in required and preferred job qualifications." However, the college decided not to hire from the existing pool. Instead, it reposted the position on December 21, 2006. Although the new posting was slightly modified, it continued to list having a master's degree as a "required" qualification. The membership of the search committee had changed in the intervening months; for example, the chair, who had

been a booster of Hebert's in the earlier process, no longer was on the search [\*\*\*4] committee.

Hebert reapplied, and, as before, made the search committee's initial cut and was brought in for an interview. The reconstituted search committee asked each candidate a set series of questions, which was a different format than had been used in the earlier search. Hebert found the process "very strange," and she acknowledged to the arbitrator that it "threw her a bit." She did not advance further in the process.

[\*\*489] The search committee chose three finalists, including Clement Ameho, who held a Ph.D in nutrition from Tufts University; Laura Hutchinson, a Ph.D candidate at the University of Massachusetts who had completed her course work and comprehensive examinations, but had not yet finished her doctoral dissertation; and Kim Teupker, who held a master's degree in nutrition and who -- in the arbitrator's words -- had "professional and teaching experience similar to Hebert's." The college eventually hired Hutchinson for the position. <sup>4</sup>

4 According to a document included in the record appendix, the college offered the position to Hutchinson only after Ameho turned it down. The arbitrator does not mention that document, which was filed in Superior Court as an attachment to the college's [\*\*\*5] complaint for modification of the arbitration award, and it is not clear whether the document, or the underlying facts suggested by it, were before him.

On May 18, 2007, the day that Hebert learned that she was not a finalist, she filed a grievance claiming that the college had [\*30] violated the collective bargaining agreement then in effect by having "acted in an arbitrary, capricious, and unreasonable manner in failing to offer her a second interview." After the college denied the grievance on multiple grounds and mediation proved unsuccessful, the union requested that the dispute be arbitrated.

The assigned arbitrator held a hearing on November 20, 2008, and he ruled in Hebert's favor by a decision dated March 2, 2009. With the college having completed its hiring process after Hebert had filed her grievance, the arbitrator framed the issues before him as follows:

"Is the grievance of Elizabeth Hebert arbitrable?"

"If so, did the College violate the parties' collective bargaining agreement by failing to appoint the grievant to a full-time faculty position in the Nutrition Department?"

"If so, what shall be the remedy?"

The arbitrator determined that the grievance was arbitrable, because, having [\*\*\*6] lost her teaching position two decades earlier, Hebert was a "retrenched" union member who enjoyed certain preferences under the collective bargaining agreement. <sup>5</sup> He concluded that Hebert no longer was entitled to some of these preferences, either because of the sheer passage of time or because she had not followed required notification procedures in the interim. <sup>6</sup>

5 The collective bargaining agreement defined "retrenchment" as "the discontinued employment of a unit member prior to the expiration of that unit member's term of appointment through no fault or delinquency of that unit member, pursuant to Article XIX [the provisions applicable to retrenchment]."

6 Article XIX prohibits the college from filling a retrenched member's position with someone else. That prohibition lasts for a period of four years, and even if the posted position were considered the same as the one from which Hebert was laid off, almost two decades had elapsed in the interim. Different sections of article XIX provide a retrenched unit member with fairly strong preferences for being "recall[ed]" for other positions at the college. The arbitrator concluded that Hebert was not eligible for these preferences because [\*\*\*7] she had not complied with annual notification requirements that he concluded were prerequisites to being put on the "recall list."

However, the arbitrator found that Hebert still was entitled to a preference with regard to article XVI of the collective bargaining [\*31] agreement, the general provision governing the "filling of vacancies." Section 16.02 of the collective bargaining agreement requires the college president or designee to fill any vacancies with unit members within the college "when in the professional judgment of the President of [\*\*490] the College or designee such unit members are the best-qualified applicants." It further states that retrenched unit members must be given first preference "[i]f the President of the College or designee determines that two (2) or more applicants are equally best qualified."

After reviewing their respective qualifications, the arbitrator found Hebert better qualified than Hutchinson, and "[a]t the very least, Hebert should have been found [by the college] to be equally qualified as Hutchinson." Indeed, he determined that Hutchinson was per se unqualified given that, although she had completed her doctoral course work and examinations, she did not possess [\*\*\*8] a master's degree. Based on this, the arbitra-

tor concluded that, in choosing Hutchinson over Hebert, the college failed to give Hebert preference as a "retrenched faculty member" and thereby violated the collective bargaining agreement.

As to remedy, the arbitrator ordered the college to hire Hebert for the posted position (plus back pay). Recognizing doubt as to whether he could order the college to hire Hebert, the arbitrator further ordered that, in the event that his preferred remedy was struck, the college must pay Hebert the full salary of the position for as long as that job continued to exist. A Superior Court judge summarily vacated this award, stating: "Hebert is not entitled to reinstatement and not entitled to retrenchment. Where it is clear that the arbitrator exceeded his authority, and [his award] is against public policy, his decision must be VACATED."

**Discussion. Scope of review and the principle of nondelegation.** Judicial review of arbitration awards is extremely limited. We must accept an arbitrator's factual findings and legal conclusions regardless of their validity. *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990) ("Absent fraud, [\*\*\*9] errors of law or fact are not sufficient grounds for setting aside an award"). "However, the question whether an arbitrator exceeded his or her authority is always subject to judicial review." *Board of Higher Educ. v. Massachusetts Teachers Assn., NEA*, 62 Mass. App. Ct. 42, 47, 814 N.E.2d 1113 (2004), citing *School Comm. [\*32] of W. Springfield v. Korbut*, 373 Mass. 788, 792, 369 N.E.2d 1148 (1977). See *G. L. c. 150C, § 11(a)(3)*, inserted by St. 1959, c. 546, § 1 (requiring judge to vacate arbitrators' awards if "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").

An arbitrator exceeds his authority when he intrudes upon decisions that cannot be delegated, but that are instead left by statute to the exclusive managerial control of designated public officials. *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teacher's Ass'n/Mass. Community College Council*, 423 Mass. 23, 27-31, 666 N.E.2d 479 (1996) (hereinafter *Roxbury Community College*). "This gloss on public sector collective bargaining statutes is deemed necessary in order that the collective actions of public employees do not distort the normal political process [\*\*\*10] for controlling public policy." *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197, 211, 434 N.E.2d 1258 (1982). However, the principle of nondelegability is to be applied only so far as is necessary to preserve the college's discretion to carry out its statutory mandates. Thus, although the principle applies to the administration of community colleges, "unless the arbitrator's decision infringed on an area of educational pol-

icy reserved for the exclusive judgment of the administrators of the college, it cannot be disturbed." [\*\*\*491] *Roxbury Community College, supra* at 27.

*Section 22 of G. L. c. 15A*, inserted by St. 1991, c. 142, § 7, specifically delegates to the community college administrators the responsibility to "appoint, transfer, dismiss, promote and award tenure to all personnel of said institution." <sup>7</sup> Few issues are as central to setting educational policy as choosing which faculty members to hire or promote. See *id.* at 28 ("It has been observed that '[t]he success of a school system depends largely on the character and the ability of the teachers. Unless a school committee has authority to employ and discharge teachers it would be difficult to perform properly its duty of managing [\*\*\*11] a [\*33] school system"), quoting from *Davis v. School Comm. of Somerville*, 307 Mass. 354, 362, 30 N.E.2d 401 (1940). Not surprisingly, the Supreme Judicial Court long has recognized that "specific appointment determinations" cannot be delegated to an arbitrator. *School Comm. of Holbrook v. Holbrook Educ. Ass'n*, 395 Mass. 651, 655, 481 N.E.2d 484 (1985), quoting from *Boston Teachers Union, Local 66 v. School Comm. of Boston, supra*. See *School Comm. of Boston v. Boston Teachers Union, Local 66*, 25 Mass. App. Ct. 903, 904, 514 N.E.2d 678 (1987) (recognizing that school committee's duty "to ascertain the qualifications of teachers to be appointed to positions" is "nondelegable"). <sup>8</sup>

<sup>7</sup> *Section 22* delegates such decisions to the respective college's board of trustees, although -- as was the case here -- the decisions are in practice carried out by the college's president and his delegates subject to the board of trustees' review. For the sake of simplicity, we will hereinafter refer to the "college administration."

<sup>8</sup> The Reform Act, St. 1993, c. 71, § 53, made school principals rather than school committees the principal decision makers in hiring decisions for their schools. See *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 759, 784 N.E.2d 11 (2003). [\*\*\*12] This did not alter the principle of nondelegability.

These principles apply with at least equal force in the context of higher education. *Roxbury Community College, supra* at 31. <sup>9</sup> The need for college administrators to be able to exercise judgment in conducting faculty searches is reinforced by the discretionary nature of evaluating the candidates. Hiring faculty, like granting tenure, "necessarily hinge[s] on subjective [judgments] regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measure-

ment." *Berkowitz v. President & Fellows of Harvard College*, 58 Mass. App. Ct. 262, 269, 789 N.E.2d 575 (2003), quoting from *Kumar v. Trustees, Univ. of Mass.*, 774 F.2d 1, 12 (1st Cir. 1985), cert. denied, 475 U.S. 1097, 106 S. Ct. 1496, 89 L. Ed. 2d 896 (1986) (Campbell, C.J., concurring).

9 In *Roxbury Community College*, the court found no need to "consider whether the finding that the grievant was qualified for [the] position . . . exceeded the arbitrator's powers . . . because [the court] conclude[d] that the preliminary finding that a vacancy existed was improper." 423 Mass. at 32-33. [\*\*\*13] However, the court ruled that the principles of nondelegability recognized as applying to public elementary and secondary schools applied at the college level; indeed, the court observed that the statutory language delegating management authority to college administrations was "more emphatic and detailed" than the comparable language applicable to public elementary and secondary schools. *Id.* at 29.

While a college cannot delegate specific appointment decisions, it can bind itself to the process that is to be used in [\*\*492] making [\*\*34] such decisions, including the criteria by which the candidates will be judged. See, e.g., *School Comm. of Holbrook*, supra ("bargained-for procedures governing the appointment and reappointment of teachers, such as posting and evaluation requirements, are specifically enforceable"); *School Comm. of New Bedford v. New Bedford Educators Ass'n*, 9 Mass. App. Ct. 793, 798, 405 N.E.2d 162 (1980) (same principle). Sorting out when arbitrators tread into the forbidden realm of nondelegable decision-making, or are instead properly enforcing agreed-to procedures, requires nuanced analysis on a case-by-case basis. See, e.g., *School Comm. of Boston v. Boston Teachers Union, Local 66, Am. Fedn. of Teachers (AFL-CIO)*, 372 Mass. 605, 614, 363 N.E.2d 485 (1977).

**Liability.** [\*\*\*14] Following these principles, we conclude that it is beyond the authority of an arbitrator to question the judgment that a college administration exercises in evaluating candidates for a faculty appointment, regardless of whether the applicable collective bargaining agreement can be interpreted as subjecting such issues to arbitration.<sup>10</sup> Put differently, whether a college administration erred in exercising its judgment as to which candidate was best qualified is not an arbitrable issue. See *Department of State Police v. Massachusetts Org. of State Engrs. & Scientists*, 456 Mass. 450, 455-461, 924 N.E.2d 248 (2010) (absent alleged procedural violation or discrimination based on membership in constitutionally protected class, State police colonel's deci-

sion to terminate chemist was not arbitrable).<sup>11</sup> If an arbitrator were allowed to overturn a college administration's discretionary judgments on how to rank job candidates, then, absent proof of fraud, we would be compelled to let the arbitrator's decision stand [\*\*35] regardless of the reason, if any reason at all, the arbitrator gave for finding an abuse of discretion. This would render the arbitrator the ultimate decision maker on faculty hiring decisions, [\*\*\*15] a result that is plainly inconsistent with *G. L. c. 15A*, § 22.

10 The nondelegability doctrine renders interpretation of the collective bargaining agreement beside the point. Nevertheless, we note that the terms of the agreement easily can be read as congruent with the nondelegability doctrine. By its express terms, the preference on which Hebert relies comes into play only when the college president or designee (not an arbitrator) determines that two candidates are "equally best qualified." It is undisputed that the college president did not find Hebert and Hutchinson "equally best qualified."

11 See also *Sheriff of Middlesex County v. International Bhd. of Correctional Officers, Local RI-193*, 62 Mass. App. Ct. 830, 831-834, 821 N.E.2d 512 (2005) (whether sheriff erred in failing to appoint applicant to position of deputy sheriff not arbitrable). See generally *Berkshire Hills Regional Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n*, 375 Mass. 522, 526-527, 377 N.E.2d 940 (1978) (issues within employer's exclusive and nondelegable statutory authority are not proper subject for collective bargaining or arbitration).

Accordingly, to the extent that the arbitrator here substituted his judgment for that of the college administration [\*\*\*16] in making his own evaluation of the job candidates, that decision cannot stand. We are not done, however, because the union argues that the arbitrator's decision can be sustained without intruding upon matters of judgment. Specifically, it contends that the college was not free to choose Hutchinson over Hebert because Hutchinson was per se unqualified for the posted position given that she lacked a master's degree (a "required" qualification, as propounded by the college). See *School Comm. of New Bedford*, 9 Mass. App. Ct. at 798 (arbitrator's review of whether school committee hired candidate who did [\*\*493] not meet posted minimum job requirements, including that candidate possess master's degree, does "not impermissibly limit the committee's discretion").

The college counters that the arbitrator's reasoning lacks an appreciation for how the academic world weighs

such credentials. It suggests that being a doctoral candidate with "all but dissertation" (ABD) status is generally considered to provide higher rank than having a mere master's degree, and that its judgment in this regard cannot be second guessed. This argument is not without some force. However, we ultimately conclude that, having [\*\*\*17] drafted its posting expressly to require that candidates have a master's degree, the college was not free to determine that a candidate who had obtained neither a master's degree nor a higher degree nevertheless possessed "better" credentials than one with a master's degree.<sup>12</sup> We note that the college easily could have written its job posting so as to require a "master's degree or equivalent," a phrase that the college used in the collective bargaining agreement.<sup>13</sup> Having established the minimum job requirements as it did, the college had a good faith obligation to employ [\*36] them, and it lay within the arbitrator's purview to determine whether the college had done so. *School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, SEIU, 438 Mass. 739, 748-749, 784 N.E.2d 598 (2003)* (although principal retains "actual, first-line determination of whom to hire," he is bound to make "good-faith effort" to apply criteria to which he has agreed). See *School Comm. of New Bedford, supra* (school committee bound itself to follow its own appointment criteria). In sum, although the arbitrator was without authority to substitute his judgment for that of the college administration, insofar as he ruled that the [\*\*\*18] college violated the collective bargaining agreement by selecting someone who did not meet the minimum requirements set forth in the posting, his ruling cannot be disturbed.<sup>14</sup>

12 It is possible that others with ABD status might have been deterred from submitting an application because of the way the college phrased the requirements. Whatever the precise norms of the academic world with respect to whether ABD status would ordinarily be considered superior to having a master's degree, it is appropriate to hold the college to the requirements it posted.

13 Compare *Boston, Boston Pub. Library v. Professional Staff Ass'n, 61 Mass. App. Ct. 105, 111, 807 N.E.2d 229 (2004)* (upholding arbitrator's determination that it was arbitrary and capricious for public library to conclude that applicant's experience could be substituted for having master's degree under an "exceptional instances" exception included in collective bargaining agreement).

14 On various grounds, the college argues that the arbitrator erred in determining that Hebert was still eligible for the preference under the terms of the collective bargaining agreement. The arbitrator's determination to this effect is not open

to our review, regardless of [\*\*\*19] whether it is correct. See *Concerned Minority Educators of Worcester v. School Comm. of Worcester, 392 Mass. 184, 187, 466 N.E.2d 114 (1984)* ("absent fraud, we have no business overruling an arbitrator because we give a contract a different interpretation").

**Remedy.** It does not follow, however, that the arbitrator then could appoint Hebert an assistant professor against the wishes of the college administration. The cases consistently recognize that arbitrators do not have authority to grant such relief, because it would directly intrude upon the appointment authority left to the exclusive purview of the college administration. See, e.g., *School Comm. of Holbrook, 395 Mass. at 655* (even where arbitrator's ruling that school committee violated collective bargaining agreement by not appointing grievant to posted position, arbitrator had no authority [\*\*494] to compel appointment).<sup>15</sup> The interference with the college administration's prerogative is especially pronounced, given that -- even without Hutchinson [\*37] considered eligible for the posted search -- there was at least one other candidate in the mix who did meet the minimum requirements and whom the college administration determined was better qualified than [\*\*\*20] Hebert.<sup>16</sup> But even if there were no alternative candidates available, the college administration would remain free to pass over the entire pool of eligible candidates (as it already once did) and either to repost the position or to leave it vacant.

15 See also *School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, SEIU, supra at 751-752 (G. L. c. 150E permits parties to elect arbitration of job appointments, but does not require that result); School Comm. of New Bedford, supra at 800-801* ("an arbitrator may not force specific appointments"), citing *Berkshire Hills Regional Sch. Dist. Comm. v. Berkshire Hills Educ. Ass'n, 375 Mass. 522, 526-527, 377 N.E.2d 940 (1978)*.

16 Even if we take into account that the college's first choice apparently turned the job down (see note 4, *supra*), the third finalist, Kim Teupker, still was available from all that appears in the record. Moreover, it is not even clear that Hebert was the college's fourth choice in the process.

What relief then is appropriate to remedy the procedural violation that occurred? As the college acknowledged at oral argument, if it erred by hiring someone who did not meet the posted job requirements, then the obvious way to address [\*\*\*21] the problem directly would be to start the process again. *Boston, Boston Pub. Library v. Professional Staff Ass'n, 61 Mass. App. Ct.*

105, 111-113, 807 N.E.2d 229 (2004) (where library selected candidate who did not meet minimum posted requirements, remedy was to vacate selection and allow reposting). A new search would give all potential job applicants a fair opportunity to apply (thus mooting the procedural violation), while preserving to the college administration its exclusive authority to determine the hiring needs of the college and to make specific appointment decisions.<sup>17</sup>

17 How specifically to fashion any reposting lies within the discretion of the college administration. See *Boston, Boston Pub. Library, supra at 113* (arbitrator exceeded authority in setting pay grade of posting).

However, reposting makes sense only if the college intends to retain the position, something that cannot be determined based on the current record.<sup>18</sup> Moreover, although the union would be entitled to have the position reposted if the college intends to fill it, we are hesitant to assume that -- even in that scenario -- reposting would necessarily be in the union's (or Hebert's) interest.<sup>19</sup> We need not resolve those [\*\*\*22] questions, but simply direct that, in the event the college intends to maintain the contested [\*38] position, the union is entitled to have it reposted, using whichever criteria the college administration determines best serve the college's needs, consistent with its statutory mandates.

18 Whether to retain the position falls to the college administration. See *Roxbury Community College, 423 Mass. at 32-33* (arbitrator has no authority to create vacancy); *Boston, Boston Pub. Library, supra* (reposting could be ordered only to extent that library wanted to retain position).

19 We note that the union never sought that specific relief.

The question remains whether Hebert should be entitled to any damages. As the Supreme Judicial Court

often has recognized, "A[n] award of damages 'is separable' from an arbitrator's mistaken conclusion that a particular decision by [school administrators] is arbitrable." [\*\*\*495] *Roxbury Community College, 423 Mass. at 33*, quoting from *School Comm. of Holbrook, 395 Mass. at 657*. Therefore, "it [is] within [the arbitrator's] power to award damages for the college's violation of the agreement, so long as the damages were in an amount that would not 'have the effect of compelling [\*\*\*23] reinstatement.'" *Ibid.* The damages that the arbitrator issued here plainly run afoul of this last proviso. Indeed, the arbitrator recognized that his award could coerce the college to appoint Hebert because doing so would "result[] in the College actually getting something for the money it will otherwise have to spend for a purely monetary remedy."

Although full-scale damages plainly exceed the arbitrator's authority, this does not rule out the possibility of Hebert obtaining more limited damages. *School Comm. of Holbrook, supra at 657-658* (award of one-year's back pay upheld). What, if any, damages might be appropriate is, at this point, far from obvious given that the collective bargaining agreement expressly limits the compensation that an arbitrator can award for a breach of the agreement to "actual damages directly attributable to such breach." Nevertheless, under the cases, the question of damages is one for the arbitrator to resolve so long as he does not exceed his authority. *Ibid.*

**Conclusion.** In light of the foregoing, we reverse the judgment vacating the arbitrator's award. A new judgment shall enter reversing so much of the arbitrator's award as ordered that Hebert be appointed [\*\*\*24] with full back pay and benefits, or that she receive full pay for each year the position exists. The new judgment also should remand the case to the arbitrator for further proceedings consistent with this opinion.

So ordered.

ELIZABETH GAY MATTESON vs. ROBERT L. WALSH.

No. 10-P-537.

APPEALS COURT OF MASSACHUSETTS

79 Mass. App. Ct. 402; 947 N.E.2d 44; 2011 Mass. App. LEXIS 647

November 12, 2010, Argued

May 2, 2011, Decided

**SUBSEQUENT HISTORY:** Review denied by *Matteson v. Walsh*, 2011 Mass. LEXIS 650 (Mass., July 1, 2011)

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

Barnstable. Civil action commenced in the Superior Court Department on May 7, 2007. The case was heard by Robert C. Rufo, J.

**HEADNOTES**

Waste. Real Property, Remainder interests. Devise and Legacy, Remainder interests, Residuary interests.

**COUNSEL:** E. James Veara for the plaintiff.

Peter S. Farber for the defendant.

**JUDGES:** Present: McHugh, Sikora, & Fecteau, JJ.

**OPINION BY:** FECTEAU

**OPINION**

[\*402] [\*\*45] FECTEAU, J. This is a cross appeal from a Superior Court judgment that entered following a bench trial on an action for waste to real property in the town of Chatham (town). The plaintiff, Elizabeth Gay Matteson, brought this action as a holder of a [\*403] remainder interest against her brother, [\*\*46] Robert L. Walsh, a life tenant. The judge concluded that Walsh's failure to pay the property taxes constituted waste, essentially because his failure to do so endangered the remaindermen's interest. The judge also determined that substantial deterioration of the property had occurred by Walsh's neglect of the property amounting to waste and injuring the remainder interest, and causing Matteson to make substantial payments to repair. The total monetary award to Matteson was about \$65,000 (to reimburse her for approximately \$12,000 in real estate taxes she paid plus approximately \$53,000 in repair costs). The judge terminated Walsh's life estate and entered an order [\*\*\*2] that title was to be held by Matteson, Walsh, and their sister Catherine T. Baisly as tenants in common. We affirm in part and reverse in part.

Background. The judge found the following facts, which neither party disputes as plainly wrong. <sup>1</sup> The property was inherited by Dorothy G. Walsh, the testator and the parties' mother in 1961; she devised it in her 1977 will to Walsh, as life tenant, and thereafter to the

heirs of Walsh, Matteson, and Baisly. <sup>2</sup> The mother died in 1987, and Walsh, who had already been living on the property since 1962, continued to reside there. The property has been in the Walsh family for several generations, is slightly less than one-half acre, and is improved by three buildings: a home, first constructed in 1858, and a summer cottage and an unattached garage, both built in approximately 1900. The home contains two "apartments," with Walsh living on the first floor and the other rented out on a year-round basis; the cottage is also rented out on a seasonal basis. Walsh collected and kept all the rents.

1 We also supplement with facts undisputed by the parties.

2 The first clause of the simple, three-clause will of Dorothy Walsh states:

"I devise my house at 61 School [\*\*\*3] Street, Chatham, Barnstable County, Massachusetts, to my son, ROBERT L. WALSH, for his life provided he survives me for thirty (30) days, and in the event he does not so survive me or at his death, the remainder is to be divided in three (3) equal shares between the heirs of the said ROBERT L. WALSH, ELIZABETH G. MATTESON of Old Queen Anne Road, Chatham, Barnstable County, Massachusetts, and CATHERINE T. BAISLY of Morris Island Road, Chatham, Barnstable County, Massachusetts, or their heirs by right of representation."

[\*404] Commencing in about 2004, for reasons unexplained, Walsh simply stopped paying taxes and water bills, resulting in the town's issuance of a notice of tax taking in 2005. He also stopped maintaining the residences, and they fell into disrepair. Upon learning of the notice of tax-taking, Matteson and Baisly stepped in and paid the delinquent 2004 and 2005 taxes of approximately \$8,000, \$6,000 of which Walsh repaid. Walsh, however, failed to pay taxes for the next three years, and Matteson again satisfied those taxes in an amount of about \$13,000. Walsh did not reimburse her for any of

these subsequent payments. Matteson also paid the water bills,<sup>3</sup> and she hired a "fix [\*\*\*4] it up" man to repair the premises, which were apparently in considerable distress.<sup>4</sup> The total cost for these repairs came to about \$120,000. Residing at the premises, Walsh was aware of these ongoing repairs and he made no objection, [\*\*47] did not order the repair man to leave, and did not reimburse Matteson. Eventually, Matteson brought this action against Walsh for waste.

3 The judge did not find that Walsh's nonpayment of water and insurance bills constituted waste. Matteson does not appeal from that portion of the judge's decision.

4 The work for which Matteson paid also consisted of external repair of the grounds, referred to as landscaping; the judge did not find that such constituted waste.

The judge found that Walsh had committed waste with respect to the nonpayment of taxes resulting in a tax-taking by the town and that Walsh had committed waste with respect to the deterioration of the buildings. While he did not itemize the particular aspects of the disrepair that he held to have constituted "substantial injury," the judge stated that his finding was made after review of all the evidence, which included the testimony of Walsh, Matteson, and Matteson's carpenter, and documentary evidence [\*\*\*5] that included photographs and itemized bills paid by Matteson, finding that approximately \$53,000 of the \$120,000 paid by Matteson was necessary for repair of the property. Implicit in this finding was that the amount ordered to be repaid by Walsh was for the repair of substantial structural items, many of which Walsh himself had listed on a maintenance priority list that he gave to Matteson indicating that repairs were needed soon or as soon as possible. The evidence showed that there were many parts of all three buildings that [\*405] were open to the weather and not watertight, resulting in structural rot.<sup>5</sup>

5 The itemized bills paid by Matteson included, among others, (a) for the house, the replacement of a rotted sill, fascia boards, and a roof rafter, rebuilding the porch from the footings up, repair and reshingling of the roof and house, and repair of foundation holes; (b) for the cottage, replacement of a rotted sill, reshingling of the roof and one wall, and repair of the damaged foundation; (c) for the garage, the jacking up and rebuilding of all four walls.

Discussion. 1. Waste. Matteson brought this action against Walsh pursuant to the provisions of *G. L. c. 242, § 1*, which states, [\*\*\*6] in relevant part, that "[i]f a tenant in dower, by the curtesy, for life or for years

commits or suffers waste on the land so held, the person having the next immediate estate of inheritance may have an action of waste against such tenant to recover the place wasted and the amount of the damage." Waste has been defined as "an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in its substantial injury." *Thayer v. Shorey*, 287 Mass. 76, 81, 191 N.E. 435 (1934), quoting from *Delano v. Smith*, 206 Mass. 365, 370, 92 N.E. 500 (1910) (Delano). In *Delano*, *supra*, the court further defined waste as "the violation of an obligation to treat the premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any wilful or negligent act." *Pynchon v. Stearns*, 11 Met. 304, 11 Metc. 304 [(1846)]. *United States v. Bostwick*, 94 U.S. 53, 65, 24 L. Ed. 65, 12 Ct. Cl. 67 [(1869)]. *Moore v. Townshend*, [33 N.J.L. 284 (1869)]. Referring to its historical application, the Delano court noted "waste" frequently was used "in an agricultural sense, where it means a damaging use not in accordance with good husbandry. [\*\*\*7] . . . It generally consists in some definite physical injury. This is shown by reference to the earlier definitions, as for instance that of Blackstone, who calls it a 'spoil or destruction in houses, gardens, trees and other corporeal hereditaments.' 2 Black. Com. (Sharswood's ed.) 281." *Delano*, *supra* at 370-371. Walsh argues that his actions in failing to pay taxes and in failing to maintain the buildings does not amount to waste resulting in substantial injury to the interest of the remainder. We disagree.

a. Taxes. Walsh committed waste by failing to pay the taxes on the property, [\*\*48] which resulted in a taking by the town. Walsh [\*406] contends that a life tenant may not be held liable for waste for "merely" failing to pay property taxes, at least where, as in this case, the property has not actually been taken and sold. This is incorrect.

The town in fact issued a notice of taking. It is true that the town never actually seized the property and sold it; however, implicit in the judge's findings was that this step was not taken due only to Matteson having stepped in, paying the taxes then overdue, and satisfying that debt. Although no reported decision explicitly holds so, compare *Thayer v. Shorey*, 287 Mass. at 81, [\*\*\*8] the threat to the remainder interest here is sufficient to constitute "prejud[ice] to the inheritance." *Pynchon v. Stearns*, 11 Met. at 310. Permitting the real estate taxes assessed to the property to remain unpaid to the point that the taxing authority records a tax-taking amounts to waste.

b. Damage to property. Walsh committed waste by failing to maintain the property. Walsh contends that the judge's finding that Walsh failed to maintain the property

amounts to permissive waste, for which he, as a life tenant, cannot be liable. While this may be an accurate statement of the law as it applies to a tenant at will, see *Chalmers v. Smith*, 152 Mass. 561, 564, 26 N.E. 95 (1891), and *Gade v. National Creamery Co.*, 324 Mass. 515, 517, 87 N.E.2d 180 (1949), a life tenant is under a higher duty to preserve the estate for the benefit of the remaindermen. See *Lothrop v. Thayer*, 138 Mass. 466, 475 (1885). "At common law, a tenant for life, or for years, or at will, was not liable for waste, but tenants for life or years were made liable by the statute of Marblebridge, 52 Hen. III. c. 23, and by the statute of Gloucester, 6 Edw. I. c. 5. . . . *Sackett v. Sackett*, 25 Mass. 309, 8 Pick. 309 [(1829)]. A tenant at will was not within these [\*\*\*9] statutes, and it was held that, although a tenant at will might be liable to his landlord in an action of trespass for voluntary waste, no action would lie for permissive waste. . . . Our statutes give an action of waste, or of tort in the nature of waste, against a tenant in dower, by the courtesy, or for life or years, but not against a tenant at will." *Lothrop v. Thayer*, *supra* at 472-473.

While there appears to be no evidence that Walsh affirmatively destroyed or removed anything from the property, the judge found a degree of neglect that amounted to severe and substantial [\*407] deterioration against the right of the remainder interest that amounts to waste. The judge determined that about half of Matteson's repair expenses constituted damages for waste. The judge's decision to award Matteson damages representing approximately \$53,000 for the amount of significant structural repair necessitated by Walsh's neglect, and to reimburse Matteson for her payment of taxes was likewise amply supported by the evidence and within the authority of the governing statute.

2. Relief. Matteson complains in her cross appeal that the judge erred by granting Walsh a fee interest in common after having ordered [\*\*\*10] divestment of his life interest. <sup>6</sup> She contends that since Walsh [\*\*49] had no interest in the remainder and that the remainder had not lapsed, it was error to look beyond the specific bequest of the real estate to the residuary clause to determine the testator's intent with respect to Walsh. Matteson's essential argument is that because the devising instrument specifies that Walsh's "heirs" are to take upon termination of Walsh's life estate, and because Walsh has no "heirs" other than his two sisters, the fee interest should now pass to Matteson and Baisly, alone, as tenants in common. Walsh, unsurprisingly, contends that the judge's ruling was correct in this respect.

6 In his memorandum denying Matteson's motion under *Mass.R.Civ.P.* 59(e), 365 Mass. 827 (1974), the judge stated:

"[Matteson argues] that the language of the will should be interpreted to mean that Matteson and Baisly take with Walsh's heirs, not with Walsh himself. As this Court noted . . . currently Walsh's only heirs are his sisters, Matteson and Baisly. . . . However, no person has heirs until he or she dies. . . . Walsh may marry and/or have a child before the end of his life, and therefore the class of persons that are [\*\*\*11] his heirs is open. Plaintiff's contention that Matteson and Baisly are Walsh's current heirs is therefore unavailing.

"Moreover, a close reading of [the testator's] will reveals that she did not intend to divest Walsh of any interest in the property. The language of the will does not contemplate the life estate's termination for any reason other than Walsh's death. In addition, Walsh is named, with his sisters, in the residuary clause. For these reasons, the Court declines to alter its judgment and reiterates that the three siblings . . . take the property as tenants in common."

It is settled law that the real estate does not pass under the residuary clause unless, under the specific bequest of the real estate, the remainder interest has lapsed. *Worcester Trust Co. v. [\*408] Turner*, 210 Mass. 115, 121, 96 N.E. 132 (1911). *Flannery v. McNamara*, 432 Mass. 665, 669, 738 N.E.2d 739 (2000). Walsh's citation to *Crowell v. Chapman*, 257 Mass. 492, 498, 154 N.E. 397 (1926), is correct, insofar as it holds that a life tenant may also be a remainderman; however, in order to be such, the life tenant must also be a member of the class of remaindermen. Here, it is the "heirs of Walsh," not Walsh himself, who hold membership in the class of remaindermen. [\*\*\*12] Given that Walsh's two sisters appear to be his present heirs and that they each have children, it is clear that the remainder interest has not lapsed. To have found otherwise "would require us to read into the instrument a provision that is not there." *New England Merchs. Natl. Bank v. Morin*, 16 Mass. App. Ct. 104, 108, 449 N.E.2d 682 (1983). As specifically devised, Walsh does not take a remainder interest, because the remainder interest has not lapsed. Further, Walsh cannot take under the residuary clause as it does not operate to control the devise of the real estate.

Walsh contends that he is entitled to take a direct remainder interest under the residuary clause of the will <sup>7</sup> because his interest in the "house" was merely a right to occupy the house and that by her use of the term "house," the testator did not intend to divest him of the property on which the house is located. Thus, he alleges, the three siblings were given a direct, equal fee in common, subject to Walsh's right to occupy. First, the trial judge correctly foreclosed that claim by reference to Walsh's admission, in answer to the complaint, that his life estate was to the "property."<sup>8</sup>

7 The residuary clause is the second clause [\*\*\*13] of the testator, which states:

"I give, devise and bequeath all the rest, residue and remainder of my estate, wherever situate and of whatever kind and nature, in equal shares, to my children ROBERT L. WALSH, ELIZABETH G. MATTESON, AND CATHERINE T. BAISLY, or their heirs by right of representation."

8 In his answer to paragraph four of the complaint, Walsh admitted, among other things, that "Walsh was granted a life estate in 61 School Street, Chatham, Massachusetts (hereinafter 'Property')."

Second, "[t]ypically, 'a conveyance 'to B during his life' or 'to B until his death' or other similar words of limitation [\*\*50] will create a life estate in B.'" *Hershman-Tcherepnin v. Tcherepnin*, 452 Mass. 77, 87-88, 891 N.E.2d 194 (2008), quoting from Alperin & Shubow, Summary of Basic Law § 17.15, at 584 (3d ed. 1996). As this [\*409] grant used such terms to describe the gift to Walsh, we believe that a life estate was given to him, not merely a right to occupy the house. In addition, the clause used the language of remainder interests. *Hershman-Tcherepnin v. Tcherepnin*, *supra* at 89.

Third, as a devisee of real estate, Walsh cannot have an interest in the "house" separate from the "property." The first clause clearly implies [\*\*\*14] that the testator considered her "house" to be conterminous with her property. Since the words used in the will expressed an interest in realty, with nothing to suggest that the house was to be considered as separate and apart from that realty, it is not to be treated as divisible from the property. Moreover, the testator's intent that her property pass under the first clause is supported by the second clause, the residuary clause, wherein she gave all the rest of her property.

Furthermore, the plain and commonly understood terms of the first clause show that Walsh was bequeathed a life estate in the property, not merely a right to occupy the house, because the testator did not use different terms to distinguish what she was giving as the life estate and the remainder interest. The fallacy of Walsh's interpretation can be seen if taken to its logical conclusion -- the remainder could only be of that interest which Walsh himself was given, i.e., if his life estate was merely a right to occupy the house, then the interest that passed as the remainder would likewise be a right to occupy the house, a prospect that lacks a basis in law or logic. Since the remainder was to be "divided in [\*\*\*15] three (3) equal shares," it is likewise illogical to consider the house as separate from the property or that the testator could reasonably have intended that outcome. Walsh's actions also show that he considered himself as holding a life estate in all the property as he collected rent from the seasonal cottage and used the property as he saw fit.

The judge's decision to grant Walsh a one-third undivided interest in the property in common with his sisters under the residuary clause is thus incorrect and cannot stand. The property passes instead to the holders of the remainder interest following termination of the life estate. Nor can Walsh be granted an interest under the remainder interest as a place-holder for his heirs, as yet unascertained, contrary to his contention and the ruling by the judge.

[\*410] Such contention involves the issue as to what point in time Walsh's heirs are to be ascertained, given the judge's findings on Matteson's motion to alter or amend; it appears that one reason the judge granted a remainder interest to Walsh was that his heirs could not be ascertained until his death.<sup>9</sup> Historically, heirs were determined at the date of death of either the testator or the life [\*\*\*16] tenant, depending on the governing life. See *Boston Safe Deposit & Trust Co. v. Schmitt*, [\*\*51] 349 Mass. 669, 674, 212 N.E.2d 202 (1965). In this case, the governing life would be that of Robert Walsh. However, as noted in *Boston Safe Deposit & Trust Co.*, *supra* at 674 n.1, a change in the rule was effectuated, for instruments created after January 1, 1965, such as the will at issue here, by virtue of *G. L. c. 184, § 6A*, inserted by St. 1964, c. 307, § 1, which states:

"In a limitation of real or personal property to a class described as the 'heirs' or 'next of kin' of a person, or described by words of similar import, to take effect in enjoyment upon the happening of an event within the period of the rule against perpetuities, the class shall, unless a contrary intention appears by the instrument creating such limitation, be determined as

if such person died at the time of the happening of the event."

9 We called for supplemental briefing on the issue of the interpretation of the class of beneficiaries under the remainder clause and wish to thank the parties for providing this additional assistance. We, and the parties, agree that the judge was correct in granting Matteson and Baisly direct remainder interests [\*\*\*17] in the property; we find sufficient testamentary intent from the life estate being conditional upon Walsh's survival of the testator and for survival for thirty days after her death. The testator thus can be seen to have intended, in the event of Walsh's death, to provide for his heirs, along with his sisters directly, "or their heirs by right of representation."

This statute has been interpreted to have created a presumption that heirs are to be determined as of the date of distribution, unless contra-indicated by the governing document. See 2 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts § 33.57, at 433 (5th ed. 1997). Therefore, given the divestment of the life estate by the judge by operation of *G. L. c. 242, § 1*, under which the remainder interests are to "recover the place wasted," and by operation of *G. L. c. 184, § 6A*, such a judgment (the grant of recovery of the real prop-

erty [\*411] by the remainder interests) results in the vesting of the remainder interest as it is an "event" that terminates the life estate. Accordingly, "distribution" is required as of the date of such recovery. This outcome is consistent with the general rule of law that favors vested [\*\*\*18] over contingent interests. Thus, according to this latter statute, the remainder interests must be determined as of the date of recovery under *c. 242, § 1*, the statute of waste.

We also note from the record that Matteson and Baisly appear to be Walsh's only heirs, but as there was no definitive finding that such was the case as of the date of the termination of Walsh's life estate, a remand is necessary to ascertain the heirs in whom the remainder interests have vested.

So much of the judgment that grants an interest in common in the property at issue to Walsh is to be vacated; that portion of the judgment that grants a one-third undivided interest in the property in common to each of Matteson and Baisly is affirmed. The case is remanded for further proceedings consistent with this opinion, to identify the "heirs of Robert Walsh," and to grant such heirs an interest in the remaining one-third of the property.

So ordered.

**NORTH ADAMS APARTMENTS LIMITED PARTNERSHIP vs. CITY  
OF NORTH ADAMS.<sup>1</sup>**

1 The mayor of North Adams, the North Adams city council, and the city clerk of North Adams were also included as defendants in the plaintiff's complaint. At the time of trial, the plaintiff agreed to dismiss all claims against the defendants other than the city of North Adams (city).

No. 09-P-1677.

**APPEALS COURT OF MASSACHUSETTS**

*78 Mass. App. Ct. 602; 940 N.E.2d 494; 2011 Mass. App. LEXIS 41*

May 10, 2010, Argued  
January 18, 2011, Decided

**SUBSEQUENT HISTORY:** Review denied by *N. Adams Apts. P'ship v. City of N. Adams*, 459 Mass. 1106, 942 N.E.2d 969, 2011 Mass. LEXIS 215 (Mass., Mar. 2, 2011)

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

Berkshire. Civil action commenced in the Superior Court Department on August 23, 2007. The case was heard by John A. Agostini, J. *North Adams Apts., Ltd. P'ship v. City of North Adams*, 2009 Mass. Super. LEXIS 238 (Mass. Super. Ct., 2009)

**HEADNOTES**

Sewer. Municipal Corporations, Sewers. Eminent Domain, Damages, Proceedings for damages. Damages, Eminent domain. Practice, Civil, Eminent domain proceeding.

**COUNSEL:** Wendy H. Sibbison (Richard J. O'Brien with her) for the plaintiff.

Richard M. Dohoney for the defendant.

**JUDGES:** Present: McHugh, Smith, & Sikora, JJ.

**OPINION BY:** SMITH

**OPINION**

[\*602] [\*\*496] SMITH, J. The plaintiff, North Adams Apartments Limited Partnership, brought an action in the Superior Court against the city of North Adams (city), claiming fair compensation for the city's taking by eminent domain of the plaintiff's private sewer system. After a jury-waived trial, a judge entered a verdict in favor of the city, concluding that the plaintiff was not owed any [\*603] damages for the taking of its private sewer system for public use. On appeal, the plaintiff claims that the judge erred in his valuation of the property taken, particularly with respect to his rejection of the plaintiff's proposed method of valuation.

1. Background. We summarize the facts found by the judge, supplemented with additional undisputed facts. The plaintiff is the owner of two parcels of land on West Shaft Road, a public way in the city. In 1989, the plaintiff began planning to construct an apartment complex on one [\*\*\*2] parcel and a residential subdivision on the other parcel. The plaintiff's property, however, did not have any access to the city's sewer system because the nearest sewer line ended about 1,800 feet south of the plaintiff's property. Therefore, the plaintiff entered into negotiations with the city to determine if the city would allow the plaintiff to use the city's sewer system.

As a result of the negotiations, the plaintiff obtained an easement from the city in 1991 to construct a sewer system under West Shaft Road that would link the development to the municipal sewer system. According to the terms of the easement, in exchange for one dollar the plaintiff was given the right to "construct and maintain a sanitary sewer system . . . consisting of a six and an eight inch PVC pipe together with a duplex lift station and emergency standby power station running northerly under [West Shaft Road], with the right to connect said pipe to the sanitary sewer pipe of the City of North Adams lying under [West Shaft Road]." Under the agreement, the plaintiff also bore all construction, maintenance, and replacement costs associated with the new sewer system and agreed to keep it in good working order. [\*\*\*3] The easement agreement also provided that the "sewer system shall remain property of North Adams Apartments Limited Partnership, its successors or assigns." The plaintiff completed construction of the sewer line extension, including the pumping station, in 1992 at a total cost of \$136,540. With the sewer issue resolved, the plaintiff constructed an apartment development, known as Tunnel Brook Townhouses, on part of one parcel; the other parcel is to become a subdivision of single-family homes called Deep Woods.

On December 13, 2005, the North Adams city council voted to take the easement and sewer system by eminent domain. The [\*604] order of taking provided for a pro tanto payment of \$10,000 (which the city contends

was only a nuisance figure, the property taken having no value). Unsatisfied with the pro tanto award, the plaintiff filed a complaint in Superior Court on August 23, 2007, seeking additional compensation for the taking of the easement and the sewer system.

a. The trial. A bench trial was held in April of 2009, at which the parties presented expert testimony as to the damages owed for the taking of the sewer system.<sup>2</sup> [\*\*497] To begin, both parties' experts agreed that the first step in [\*\*4] valuing any property is to determine its highest and best use. It is undisputed that the property taken here, a sewer system, was "adapted to a single use and its value depended entirely upon a continuance of that use." *Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authy.*, 335 Mass. 189, 197, 138 N.E.2d 769 (1956), quoting from *Assessors of Quincy v. Boston Consol. Gas Co.*, 309 Mass. 60, 65, 34 N.E.2d 623 (1941). Therefore, the sole issue at trial was the value of the sewer system as a sewer system.

2 The value of the easement itself was not a contested issue at trial and is not an issue on appeal.

Both parties' experts further agreed that, once a property's highest and best use has been determined, there are three primary methods of appraising property. The Supreme Judicial Court in *Matter of the Valuation of MCI WorldCom Network Servs., Inc.*, 454 Mass. 635, 638-639, 912 N.E.2d 920 (2009), has summarized those approaches as follows:

"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. . . . [\*\*5] 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.' . . . In such circumstances, . . . a third method [may be used]: 'depreciated reproduction cost' (DRC), defined as '[t]he current cost of reproducing a property less depreciation from deterioration and functional and economic obsolescence.'" (Citations omitted.)

[\*605] The plaintiff presented the testimony of Roger Durkin, a certified general appraiser and valuation

consultant. He testified that the plaintiff's sewer system was special use property, which he defined as property that seldom trades in the open market and for which there are typically no comparable sales. Durkin primarily used the DRC method in calculating the value of the sewer system. Using the DRC method, Durkin analyzed the costs associated with excavation and materials for each component of the sewer system, subtracted an amount for depreciation based on its age, and came to a figure of \$271,370.

Durkin also offered a secondary opinion about the value of the sewer system using the income capitalization method. [\*\*6] Under that approach, Durkin opined that at the time of the taking, the net income generating value of the property over the next five years (discounted to present value) was \$235,000, which would accrue through sewer tie-in fees paid by neighboring properties that would switch from their failing septic systems to the municipal sewer system. Durkin arrived at that figure by multiplying the number of neighboring properties (twenty-two) by a tie-in fee of \$20,000 per property, and subtracting for inflation and the cost to perform the work. According to Durkin, the hypothetical \$20,000 fee was based on market value principles. In sum, Durkin characterized the value he reached as a "forecast based on demand and the number of properties in that area."

Michael Deep, a general partner of the plaintiff, also testified. Deep described the acquisition of the easement from the city, the construction of the sewer system, and its cost to build. Deep further testified that when the city took the sewer [\*\*498] system it was in excellent condition, and that at that time no neighboring residents had tied into the system.

The city presented the testimony of James Fisher, a certified general appraiser experienced [\*\*7] in commercial real estate appraisals. Fisher first explained that the foundation of his appraisal rested on his finding that the plaintiff built the sewer system to increase the market value of its two developments, Tunnel Brook Townhouses and Deep Woods. Such an increase would occur because a connection to a municipal sewer system eliminates the need for a private septic system, which requires costly replacement in the future. Because of this net benefit, according to Fisher, developers such as the plaintiff are more than [\*606] willing to build a connecting sewer system; however, they typically deed it to the city for one dollar after the development is constructed, in order to avoid the liabilities of owning and maintaining the system. Fisher based his knowledge on having valued over one hundred subdivisions, where, "[i]n virtually all of those analyses, [the sewers built] were deeded back to the town." Fisher thus opined that the "highest and best use" of the sewer system here would be to deed it to the city for no consideration or one dollar.

When asked about Durkin's appraisal, Fisher agreed that the market study approach was not viable, but disagreed with his use of the DRC method. [\*\*\*8] Fisher opined that the DRC method was misused in this case because Durkin overinflated the cost to recreate the system in 2005, and failed to take into account other economic factors that would have affected the value under that method. Essentially, Fisher noted that the DRC method is "a less reliable indicator of value, when there's not an active market or income approach to back things up."

The city also presented the testimony of Leo Senecal, a special project coordinator for the city, and Bruce Collingwood, the commissioner of public works and utilities for the city of Pittsfield. Senecal testified that the sewer system's pumps and circuits required maintenance once or twice per month by individuals who were not city staff. He also noted that, at the time of trial, four homes were served by the sewer main, and that another fourteen to sixteen could hook up to the system for a fee of \$2,000. One individual, Giroux, had also connected to the system, but was charged a larger fee because the line had to be extended 250 feet from the main to his property. After reaching an agreement with the city, Giroux paid \$10,000, one-half of the total \$20,000 cost to extend the line to his property, [\*\*\*9] and the city paid the remainder. Collingwood testified about two occasions where a developer built a sewer system which it later conveyed to the city of Pittsfield for no consideration.

b. The judge's decision. In his memorandum of decision, the judge ruled that the fair market value of the sewer system at the time of its taking was "zero." In reaching that conclusion, the judge credited the testimony of both Fisher and Collingwood as to the routine conveyance of developer-built sewers to municipalities for no consideration. Specifically, the judge found that the [\*607] system is "a liability that any developer would attempt to shed for no monetary payment to avoid on-going and perpetual maintenance/replacement responsibilities in the future." In so concluding, the judge rejected Durkin's application of the DRC method because "this proposed method does not represent the fair market value of the property at the time of the taking because of the on-going liability imposed on the owner." He likewise rejected Durkin's use of the income approach, finding the \$20,000 tie-in fee [\*\*499] "exorbitant," and the likelihood that the neighboring property owners would pay that fee "beyond speculation," given that [\*\*\*10] no neighboring resident had tied into the system during its fourteen-year existence prior to the taking.

On appeal, the plaintiff claims that the judge erred as a matter of law (1) in ruling that the plaintiff was entitled to "zero" when the city took the plaintiff's sewer system by eminent domain, and (2) in rejecting the DRC

method. The plaintiff also claims that the judge committed error in adopting Fisher's opinion.

2. Discussion. a. Standard of review. We accept a trial judge's findings of fact unless they are clearly erroneous, but we apply de novo review to legal conclusions. See *Anastos v. Sable*, 443 Mass. 146, 149, 819 N.E.2d 587 (2004). Valuation is a question of fact, which we review for clear error. See *Sherburne v. Meade*, 303 Mass. 356, 360, 21 N.E.2d 946 (1939); *Haskell v. Ver-syss Liquidating Trust*, 75 Mass. App. Ct. 120, 125, 912 N.E.2d 481 (2009); *Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 281 (1st Cir. 2003) (United States District Court judge's findings of fact, including the amount of compensation due in an eminent domain action, are reviewed for clear error). Deference is also given to the trial judge's credibility assessments of experts. See *Haskell*, *supra* at 125-126 ("within discretion [\*\*\*11] of fact finder to place little or no weight on expert evidence"), citing *Commonwealth v. Cullen*, 395 Mass. 225, 229, 479 N.E.2d 179 (1985).

b. Valuation of the plaintiff's sewer system. "The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain." *Bromfield v. Treasurer & Receiver Gen.*, 390 Mass. 665, 668, 459 N.E.2d 445 (1983), quoting from *Haverhill Bridge Proprietors v. County Comms. of Essex*, 103 Mass. 120, 124 (1869). A private sewer system is no different, and cannot be taken by a municipality [\*608] without just compensation to its owner. See 11 McQuillin, *Municipal Corporations* § 31.09, at 194 (3d ed. rev. 2000). The fact that there is no open market for a sewer system does not mean that an owner of such a system cannot be compensated for its taking.

In determining just or adequate compensation for the taking, the goal is to indemnify the party whose property is taken. See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-511, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979); *Drury v. Midland R.R.*, 127 Mass. 571, 576 (1879). Thus, the condemnee "is entitled to be put in as good a position pecuniarily as if [the] property had not been taken. [The condemnee] must be made whole [\*\*\*12] but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934). See *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-474, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973).

When valuing the property taken, "[t]he just compensation to which an owner is entitled . . . is regarded in law from the point of view of the owner and not the condemnor. In other words, just compensation in the constitutional sense is what the owner has lost, not what the condemnor has gained." 4 Nichols, *Eminent Domain* §

12.03 (rev. 3d ed. 2002). See *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-237, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003). See also *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S. Ct. 459, 54 L. Ed. 725 (1910).<sup>3</sup> Therefore, under these principles, not all takings give rise to an obligation to pay compensation. See *Brown, supra* (plaintiffs not entitled to compensation for the taking of the interest on their deposited IOLTA funds because they suffered no pecuniary losses). See also *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282, 46 S. Ct. 253, 70 L. Ed. 585, 62 Ct. Cl. 756 (1926) (even assuming government had assumed actual possession and control over railroad company during disputed period, "[n]othing was recoverable [\*609] as just compensation, because nothing of value [\*\*\*13] was taken from the company; and it was not subjected by the Government to pecuniary loss").

3 Among other things, the plaintiff argues on appeal that its sewer system was worth more than "zero" when the city took it because a study completed by the city had determined that the cost to the city to build a sewer system parallel to the one ultimately taken by eminent domain would be \$196,625. As we have pointed out *supra*, "just compensation in the constitutional sense is what the owner [here, the plaintiff] has lost, not what the condemnor [here the city] has gained." 4 Nichols, Eminent Domain § 12.03. Therefore, because the value of any benefit the city may receive from the taking is irrelevant to our determination, we reject the plaintiff's argument.

If damages are owed, they are generally measured by "the fair market value of the property at the time of the taking." *Correia v. New Bedford Development Authority*, 375 Mass. 360, 361, 377 N.E.2d 909 (1978). "Fair market value is determined on the basis of the highest and best use to which property could reasonably be put." *Douglas Envtl. Assocs., Inc. v. Department of Envtl. Protection*, 429 Mass. 71, 75, 706 N.E.2d 620 (1999).

Thus, before any valuation can be undertaken, a threshold [\*\*\*14] issue must be resolved; namely, whether the plaintiff suffered any pecuniary losses when the city took the sewer system by eminent domain, measured from the perspective of the plaintiff's loss, rather than the city's gain. Here, the judge found that the plaintiff suffered no measurable loss when the city took its sewer system, for the following reasons. First, the plaintiff benefited from the taking because it continued to be served by the system, but was no longer responsible for its maintenance. This conclusion is supported by the testimony of Collingwood and Fisher, who described the common transaction of developers who are "more than

happy and willing, [and] actually jump through hoops, so that they can have [their privately built sewer systems] deeded back to the city" for no consideration. Second, any future income the plaintiff would have earned from sewer tie-ins was purely speculative.<sup>4</sup> The judge's findings are [\*\*501] supported by the record, and are not clearly erroneous. Because no pecuniary losses were [\*610] suffered, the DRC and income valuations put forth by the plaintiff were properly rejected.<sup>5</sup>

4 The plaintiff argues that the judge rejected the income approach on the basis of his [\*\*\*15] erroneous finding that the city could terminate the easement agreement at any time. The findings were unrelated. The judge found the income approach to be speculative because "[f]rom the time the sewer extension was fully operational, [fourteen] years have elapsed and no resident agreed to connect to the system. Since the eminent domain taking only three property owners have connected to the municipal sewer system, however, for a fee of only \$2175.00 -- the cost of the connection. To accept the argument that within the next two years all of the remaining residents will take advantage of this opportunity is simply contrary to the historical record. This would be particularly true given the fact that the cost to any future user would be considerably higher than [to] the three recent connectors." The judge also distinguished the amount paid by Giroux, as his connection involved a special accommodation due to the distance of his residence from the sewer line.

5 The plaintiff cites *Township of Manchester Dep't of Util v. Even Ray Co.*, 315 N.J. Super. 122, 716 A.2d 1188 (App. Div. 1998) (Even Ray), in support of its position that the judge erroneously concluded that the DRC method was inappropriate in this case. Before [\*\*\*16] reaching the specifics of calculating compensation, and which method would be appropriate, *id.* at 134-136, the court in *Even Ray* had to first determine that the private developer in that case was entitled to compensation. In making the threshold determination that it was, the court examined the issue of value from the perspective of a potential buyer or condemnor, as framed by the plaintiff on appeal. *Id.* at 132 ("Plaintiff argues that the judgment is unsupported by any evidence that the property interests taken have any value to any party other than plaintiff"). As we have discussed *supra*, however, value must be determined from the perspective of any loss to the condemnee. In *Even Ray*, the court failed to observe that the de-

veloper in that case, as here, was in no worse position as to the physical components of his sewer after they were taken. Because in our estimation the court viewed the case through the wrong lens, we deem any subsequent determinations it made as to valuation method irrelevant to our determination.

Further, as the judge stated, the result reached has a commonsense quality to it. Unlike a typical eminent domain scenario, wherein a condemnee loses valuable rights [\*\*\*17] and retains no individual benefit from the property taken, the taking here cost the plaintiff nothing. The evidence shows that the plaintiff built a sewer system at its own cost, as is the common practice among developers, because it was necessary for its housing in-

vestments. The plaintiff was then able to recoup those costs when it rented the housing and, in the future, will be able to earn more profits if it sells subdivision lots hooked into the already built sewer. The taking by the city did not interfere with this investment equation, and thus caused no loss to the plaintiff. Because future income could not be proved, see *Beals v. Inhabitants of Brookline*, 245 Mass. 20, 25-26, 139 N.E. 492 (1923), and *Demers v. Montpelier*, 120 Vt. 380, 389-390, 141 A.2d 676 (1958), no losses were incurred from the taking in that respect as well. As the plaintiff has simply failed to prove how it is in a worse position financially following the taking in this case, it is not entitled to compensation.

Judgment affirmed.

RICHARD A. PORIO vs. DEPARTMENT OF REVENUE.

No. 10-P-1073.

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 57; 2011 Mass. App. LEXIS 1101

April 1, 2011, Argued  
August 9, 2011, Decided

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

Suffolk. Civil action commenced in the Superior Court Department on February 24, 2005. A motion to dismiss was heard by Bonnie H. MacLeod-Mancuso, J. *Human Res. Div. v. Porio*, 72 Mass. App. Ct. 1110, 891 N.E.2d 716, 2008 Mass. App. LEXIS 820 (2008)

**HEADNOTES**

Anti-Discrimination Law, Age, Termination of employment, Seniority, Collateral Estoppel, Civil Service, Decision of Civil Service Commission, Termination of employment, Labor, Civil service, Governmental Immunity, Statute, Construction.

**COUNSEL:** Frank J. Teague for the plaintiff.

Howard R. Meshnick, Assistant Attorney General, for the defendant.

**JUDGES:** Present: Wolohojian, Milkey, & Hanlon, JJ.

**OPINION BY:** MILKEY

**OPINION**

[\*58] MILKEY, J. The plaintiff, Richard A. Porio, worked as a tax examiner for the Department of Revenue (DOR). In 2002, citing budgetary shortfalls, DOR eliminated Porio's position. Porio filed an appeal with the Civil Service Commission (commission) pursuant to *G. L. c. 31, § 43*. In that proceeding (civil service appeal), Porio argued that DOR violated *G. L. c. 31, § 39*, by laying him off while retaining certain other tax examiners who had less seniority. The commission ultimately ruled against him, and its decision was upheld on appeal in an unpublished decision pursuant to our *rule 1:28*. See *Human Resources Div. v. Porio*, 72 Mass. App. Ct. 1110, 891 N.E.2d 716 (2008).

Separately, Porio filed an action pursuant to *G. L. c. 151B, § 4(1C)*, alleging that DOR had discriminated against him because of his age. This claim was based on both disparate treatment and disparate impact theories. A Superior Court judge dismissed [\*\*2] the c. 151B action in its entirety on the ground that, in light of the outcome of the civil service appeal, "Porio is . . . collaterally estopped from arguing that the DOR's reason for terminating him was anything other than justified." We disagree, and we additionally reject DOR's argument that it is im-

mune from age-based discrimination claims that are based on disparate impact.

**Background. Porio's appointment and layoff.** In 1985, DOR hired Porio as a clerical employee. Six years later, Porio took and passed the civil service exam for a Tax Examiner I (TE-I) position, the lowest of seven tax examiner classifications used by DOR. In 1998, DOR appointed him to that position, and because he came to that position through having taken the relevant exam, he was classified as a "permanent" employee. See *G. L. c. 31, § 1*.

On September 6, 2002, DOR notified Porio that it was eliminating all existing TE-I positions (twenty-six in all) because of budgetary problems it was facing. DOR offered him a demotion to a clerical position, which he accepted (with a corresponding reduction in salary).

**Civil service appeal.** In his administrative appeal filed pursuant to *G. L. c. 31, § 43*, Porio focused on [\*\*3] the fact that DOR eliminated his position while retaining a large group of tax examiners who had less seniority than he. The tax examiners in [\*\*59] that group held Tax Examiner II (TE-II) positions through provisional promotions (see *G. L. c. 31, § 15*), not as a result of their having taken civil service exams for the positions. Because these "provisional TE-II's" "held permanency" only as TE-Is, Porio argued that they had to be considered as TE-Is for purposes of determining which tax examiners should be laid off first pursuant to *G. L. c. 31, § 39*.<sup>1</sup> On this basis, Porio maintained that DOR was required to lay off these employees before it laid off other TE-Is, including him, who had greater seniority. The commission initially agreed with Porio and ordered DOR to reinstate him. As the commission explained, "[U]nder the circumstances here of existing and further expected departmental budget cuts, the appointing authority had the right to lay off employees but the wrong employees were chosen for layoff."

1 *Section 39 of G. L. c. 31*, inserted by St. 1978, c. 393, § 11, states in pertinent part:

"If permanent employees in positions having the same title in a departmental unit are to be separated [\*\*4] from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter

provided, be separated from employment according to their seniority in such unit . . . ."

DOR appealed to Superior Court pursuant to *G. L. c. 30A, § 14*. While that appeal was pending, the Supreme Judicial Court issued its ruling in *Andrews v. Civil Serv. Comm'n*, 446 Mass. 611, 846 N.E.2d 1126 (2006). In *Andrews*, the court resolved how provisionally promoted employees should be treated when reductions in force are conducted pursuant to § 39. Specifically, the court stated:

"Provisional promotion pursuant to *G. L. c. 31, § 15*, effects a real change from 'one title to the next higher title.' A provisionally promoted employee ceases to be 'in' the original title for purposes of § 39, and does not return to the lower title until the provisional promotion ceases to have effect."

*Id. at 618*. The commission agreed to reconsider its decision in light of *Andrews* and concluded that § 39 did not prevent DOR from laying off Porio before it laid off provisional TE-IIs who had less seniority than he. A Superior Court judge [\*60] upheld the commission's ruling, and we affirmed. *Human Resources Div. v. Porio*, 72 Mass. App. Ct. 1110, 891 N.E.2d 716.

**Chapter [\*5] 151B action.** Porio was fifty-three years old at the time the layoffs occurred. According to his complaint, all but three of the laid-off TE-I employees were over forty at that time, with a mean age of forty-nine and a median age of forty-seven. The complaint further alleged that -- in order to perform work that the laid-off TE-I employees previously had done -- DOR promoted employees designated as "Management Analysts" to TE-II status, and that these newly-promoted TE-IIs were on average "substantially younger" than the employees they effectively replaced.<sup>2</sup> DOR filed an answer in which it admitted that it had promoted significantly younger workers to TE-II status (the new entry-level tax examiner position) after the TE-I positions were eliminated. Specifically, DOR admitted that the mean and median ages of the terminated employees were fifty and forty-eight, respectively (slightly higher than the complaint alleged), and that the mean and median ages of the newly-promoted TE-II employees were 31.6 and 27.5, respectively.<sup>3</sup> DOR denied that its employment decisions were motivated by age discrimination and instead maintained that its actions were "based upon legitimate, non-discriminatory [\*6] reasons."

2 Porio also alleged that DOR committed age discrimination by relying in part on hiring sig-

nificantly younger "seasonal" TE-I employees to do the work of the laid-off TE-I employees.

3 Porio alleged that, after the layoffs, DOR promoted twenty-four management analysts to TE-II positions, while DOR admitted that it transferred twelve management analysts into TE-II positions in that time frame (either through promotions or reclassifications).

**Discussion.** Porio brought his age discrimination claim on two separate theories: disparate treatment and disparate impact.<sup>4</sup> [\*61] A disparate treatment case is one in which the employer "purposefully uses" the protected status in making its employment decisions. *School Comm. of Braintree v. Massachusetts Comm. Against Discrimination*, 377 Mass. 424, 428, 386 N.E.2d 1251 (1979). By contrast, disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another." *Id. at 429*. Because the motion judge focused on Porio's disparate treatment theory, we examine that first.

4 Count I of Porio's complaint is titled "Disparate Impact of DOR 'Reduction in Work Force,'" [\*7] while count II is titled "Disparate Treatment." DOR nevertheless argues that count I itself should be treated as a disparate treatment claim, because that count alleges that DOR's rationale for eliminating Porio's position was "pretextual" (proof of which is not required under a disparate impact theory). Although DOR is correct that count I, as pleaded, included some allegations more typically associated with disparate treatment claims, DOR has not argued that Porio failed to include the essential elements of a disparate impact claim in count I. The structure of Porio's complaint leaves little doubt that he intended to rely on both disparate treatment and disparate impact theories.

**Disparate treatment count.** In his disparate treatment count, Porio alleges in essence that DOR improperly targeted older workers in deciding which positions to eliminate in order to meet its budgetary needs.<sup>5</sup> For purposes of its motion to dismiss, DOR conceded that Porio's complaint set forth a prima facie disparate treatment case. However, DOR argued, and the motion judge agreed, that the civil service appeal conclusively established both that DOR had demonstrated legitimate reasons for eliminating Porio's [\*8] position and that those reasons were not pretextual. Specifically, the judge ruled that the civil service appeal "resulted in a final judgment that the DOR was justified in terminating Porio, and that it did so for valid and good faith reasons." As set forth

below, the judge overstated the preclusive impact of the civil service appeal.

5 Porio's complaint is drafted in sufficiently broad terms to allege in addition that DOR faced no budgetary crisis and that the agency's claim of such a crisis was itself pretextual. Compare *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 35 n.3, 825 N.E.2d 522 (2005), quoting from Note, *The Prima Facie Case of Age Discrimination in Reduction-In-Force Cases*, 94 Mich. L. Rev. 832, 833 n.12 (1995) (referring to some discrimination cases in which the inquiry is focused "on whether a [reduction in force] actually occurred or whether the employer has claimed falsely a [reduction in force] in order to conceal age discrimination"). However, at oral argument, Porio foreswore any reliance on such a theory.

The test for when collateral estoppel lies is well established. A party is precluded from relitigating an issue when:

"(1) there was a final judgment on the merits in [a] prior [\*\*9] adjudication; (2) the party against whom estoppel is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication is identical to the issue in the current litigation; and (4) the issue decided in the prior adjudication was essential to the earlier judgment."

[\*62] *Green v. Brookline*, 53 Mass. App. Ct. 120, 123, 757 N.E.2d 731 (2001). The first two factors are plainly met here, as Porio concedes. The dispute is instead over whether the commission decided that DOR's employment actions were undertaken for legitimate reasons, and, if so, whether the commission's resolution of that issue was "essential" to its ruling.

We agree with DOR that the commission appears to have accepted its contention that it eliminated Porio's position as part of a reduction in force that was driven by legitimate budgetary considerations. That is the thrust of the commission's finding that DOR's employment decisions were taken "for austerity reasons," as well as of the commission's conclusion that "under the circumstances here of existing and further expected departmental budget cuts, the appointing authority had the right to lay off employees."<sup>6</sup> However, it does not follow that [\*\*10] any such conclusions were "essential" to the commission's ruling. To answer that question, we must closely examine which issues were before the commission.

6 The extent to which Porio pressed that issue in the civil service appeal is not clear on the record before us. We cannot determine whether in that proceeding Porio affirmatively conceded the existence of a budgetary crisis, assumed it arguendo, or failed to counter whatever proof DOR supplied.

As noted, the sum and substance of Porio's civil service appeal was that DOR violated *G. L. c. 31, § 39*, by laying him off while retaining employees in the same job title who had less seniority. The case turned on whether the retained employees should be treated as having the "same title" for purposes of § 39. If so (as Porio argued and the commission initially ruled), then Porio would have prevailed on his § 39 claim regardless of whether DOR had legitimate budgetary reasons for eliminating his position. If, on the other hand, the retained employees should be considered as having a different title for purposes of § 39 (as the commission eventually ruled in light of *Andrews*), then Porio's § 39 claim failed as matter of law. In either event, [\*\*11] whether DOR had legitimate budgetary reasons to terminate the TE-I positions was beside the point. Put simply, the civil service appeal was about job titles and seniority rights, not about DOR's motives. Accordingly, to the extent the commission concluded that DOR was animated by legitimate motives, that resolution cannot reasonably be said to have been "essential" to the commission's [\*63] decision. Porio is therefore not precluded from relitigating that issue in his age discrimination action.

Moreover, even if the civil service appeal had conclusively established that DOR pursued a reduction in force because of legitimate budgetary considerations, this by itself would not preclude Porio's disparate treatment count. The existence of a legitimate need to reduce the workforce does not resolve which positions should be cut. Here, as in *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 51, 825 N.E.2d 522 (2005), "[t]he question is why, given [DOR's] need to reduce [its] workforce, [it] chose to discharge the older rather than the younger employee[s]." Porio is alleging that DOR responded to its legitimate budgetary constraints in a manner that was driven by an age-based bias against its older employees. That [\*\*12] contention was never before the commission, and the resolution of the civil service appeal in DOR's favor therefore could not preclude Porio from raising the issue in his c. 151B claim. Porio's disparate treatment count should not have been dismissed.

**Disparate impact count.** In ruling that Porio's complaint should be dismissed on collateral estoppel grounds, the judge did not separately address Porio's disparate impact count. As to this count, DOR's collateral estoppel argument fails not only for the reasons set forth above, but also for the additional reason that whether an

employer's actions were driven by improper motives is beside the point in a discrimination claim that is based on a disparate impact theory. See *School Comm. of Braintree v. Massachusetts Commn. Against Discrimination*, 377 Mass. at 429, citing *Smith College v. Massachusetts Commn. Against Discrimination*, 376 Mass. 221, 227, 380 N.E.2d 121 (1978). Therefore, even had the civil service appeal conclusively established that DOR based its decision entirely on legitimate considerations, this alone would not have barred Porio's disparate impact count.

For the first time on appeal, DOR argues that Porio's disparate impact count fails as [\*\*13] matter of law on a wholly separate ground. Specifically, DOR asserts that while the Commonwealth has unquestionably waived its sovereign immunity with respect to age discrimination claims that are based on disparate treatment, it is immune from those age discrimination claims that are based on disparate impact. While ordinarily we would not [\*\*64] address an issue not raised below, we exercise our discretion to do so here. This argument raises an issue of subject matter jurisdiction that is a pure question of law. See *Boxford v. Massachusetts Hy. Dept.*, 458 Mass. 596, 600-601, 940 N.E.2d 404 (2010); *Vining v. Commonwealth*, 63 Mass. App. Ct. 690, 696, 828 N.E.2d 576 (2005). Moreover, the cases reflect a strong preference for resolving governmental assertions of immunity early in the course of litigation.<sup>7</sup> With these considerations in mind, and with the issue having been briefed by both sides,<sup>8</sup> we turn to the merits of DOR's sovereign immunity argument.

7 See *Brum v. Dartmouth*, 428 Mass. 684, 688, 704 N.E.2d 1147 (1999), quoting from *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993) (order denying a claim of immunity is immediately appealable because it is "a right that is 'lost as litigation proceeds past [\*\*14] motion practice'"). Accord *Boxford v. Massachusetts Hy. Dept.*, 458 Mass. at 601.

8 Initially, Porio did not submit a reply brief responding to DOR's sovereign immunity argument. At oral argument, DOR pressed us to reach this issue, even though the trial court had not yet had the opportunity to address it. After argument, we issued an order requiring Porio to brief the issue, and he did so.

The Legislature enacted G. L. c. 151B in 1946. The key provision in c. 151B is § 4, inserted by St. 1946, c. 368, § 4, which spells out unlawful discriminatory practices by employers and others. *Subsection 1 of § 4* renders it unlawful for employers, by themselves or their agents,

"because of the race [or other specified protected statuses] of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

Although the Legislature has from time to time modified the list of statuses subject to § 4(1)'s protections, it has not otherwise amended the operative language of the subsection in the sixty-five [\*\*15] years since its enactment.

"Age" was not included as a protected status when c. 151B was first enacted. However, the Legislature added "age" to § 4(1) (and certain other subsections) four years later. See St. 1950, c. 697, § 6. In 1984, the Legislature removed age discrimination from the ambit of § 4(1), and created two new subsections dedicated to the subject -- § 4(1B) and § 4(1C). [\*\*65] See St. 1984, c. 266, §§ 5, 6.<sup>9</sup> *Section 4(1B)* applies to age discrimination claims against private employers, while § 4(1C) applies to age discrimination claims against the Commonwealth and its political subdivisions.<sup>10</sup>

9 The subject matter of this session law dealt with a host of issues related to age; for example, it amended existing laws concerning compulsory retirement. See St. 1984, c. 266, § 7.

10 In defining the proscribed employment practices, G. L. c. 151B, § 4(1B), inserted by St. 1984, c. 266, § 6, reads in full as follows:

"For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges [\*\*16] of employment, unless based upon a bona fide occupational qualification."

*Section 4(1C)*, inserted by St. 1984, c. 266, § 6, reads in full as follows:

"For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge

from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law."

We note in passing that the word "to" appears before "discharge" in § 4(1B), but not in § 4(1C). This difference appears to be of no consequence. Other wording differences are discussed in the text.

The operative language of § 4(1B) is identical to that of § 4(1) (the subsection from which it sprang), save for the addition of a single comma.<sup>11</sup> However, the operative language of § 4(1C) differs from that of § 4(1) and § 4(1B), in a couple of respects. DOR argues that one such difference bespeaks a legislative intent to shield the Commonwealth from claims that are based on a disparate impact theory.<sup>12</sup> Before turning to DOR's specific textual argument, we pause to consider the appropriate lens through which the statutory [\*\*17] language is to be viewed.

11 The additional comma is between "individual" and "or." Neither party has ascribed any substantive import to the addition of that comma, nor do we.

12 The other substantive difference in wording has to do with the test for when an otherwise prohibited employment practice is nevertheless allowed. Specifically, § 4(1B), which applies to private employers, allows otherwise prohibited practices if they are "based upon a bona fide occupational qualification," while § 4(1C), which applies to public employers, allows such practices if they are undertaken "pursuant to any other general or special law." We need not explore the import of this difference, because it is not at issue in this case.

[\*66] DOR asks us to scrutinize the language of § 4(1C) to evaluate whether we can confidently say that -- through the 1984 enactment of that language -- the Legislature expressly waived the Commonwealth's sovereign immunity as to age-based disparate impact claims, or that such waiver is necessarily implied. For that proposition, DOR relies on the principle expressed in cases such as *Ware v. Commonwealth*, 409 Mass. 89, 91, 564 N.E.2d 998 (1991), that "[c]onsent to suit must be expressed by the terms [\*\*18] of the statute, or appear by necessary implication from them."<sup>13</sup> In this manner, DOR suggests that any ambiguity in § 4(1C) must be read in its favor. Given the particular historical context in which the 1984 amendments arose, we disagree.

13 In the context of examining Congressional abrogation of State sovereign immunity, the United States Supreme Court has referred to such an interpretative principle as a "clear statement rule." See, e.g., *Apkin v. Treasurer & Recr. Gen.*, 401 Mass. 427, 433, 517 N.E.2d 141 (1988) ("The Supreme Court has expressly adopted a clear statement rule"), citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in [F]ederal court only by making its intention unmistakably clear in the language of the statute").

It is beyond dispute that the Commonwealth has generally waived its sovereign immunity pursuant to G. L. c. 151B. See *Bain v. Springfield*, 424 Mass. 758, 763, 678 N.E.2d 155 (1997), citing *G. L. c. 151B, § 1(1) and (5)* ("There is no doubt that the antidiscrimination statute, G. L. c. 151B, . . . waives the sovereign immunity of the Commonwealth and all political subdivisions . . . thereof by including [\*\*19] them in the statutory definition of persons and employers subject to the statute"). Moreover, the Supreme Judicial Court has recognized since 1979, that disparate impact claims can be brought under *G. L. c. 151B, § 4(1)* (the subsection that governed age discrimination claims prior to the 1984 amendments). See *School Comm. of Braintree*, 377 Mass. at 429 n.10, quoting from *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) (recognizing that *c. 151B, § 4*, like Federal law, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). Thus, prior to 1984, the Commonwealth plainly would have been subject to age-based discrimination claims, regardless of whether they were based on disparate treatment or disparate impact theories. The question before us, then, is not whether, by [\*67] enacting § 4(1C) in 1984, the Legislature intended to waive the Commonwealth's sovereign immunity as an original matter. Rather, the question is whether the 1984 amendments affirmatively were intended to restore immunity that the Legislature already had waived. "In this context, we believe that the rule recognized in *Ware*, 409 Mass. at 91, requiring a clear [\*\*20] statement of legislative intent, at a minimum has less force."<sup>14</sup> We are also mindful of the legislative command appearing elsewhere in *c. 151B*, that "[t]his chapter shall be construed liberally for the accomplishment of its purposes." *G. L. c. 151B, § 9*, as amended by St. 2002, c. 223, § 2.

14 Compare *Loeffler v. Frank*, 486 U.S. 549, 561, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988) ("when Congress intends the waiver of sovereign immunity in a new cause of action directed

against [F]ederal entities to be [the] exclusive [remedy], -- in effect, to limit the force of 'sue-and-be-sued' clauses [previously in effect] -- it has said so expressly"); *Berlin v. State*, 124 N.H. 627, 631, 474 A.2d 1025 (1984) (where the question is whether a statute repealed a waiver of sovereign immunity, legislative intent to do so must be clear).

We turn then to examining the particular difference in wording between § 4(1B) and § 4(1C) on which DOR focuses. Both subsections generally prohibit employers from making certain employment decisions "because of the age of" the affected individual. DOR argues that such language supports only a disparate treatment theory, on the ground that an employer can take action "because of" someone's age only through making conscious [\*\*21] decisions related to his or her age. According to DOR, there is no other language in § 4(1C) that could support a disparate impact theory. In contrast, § 4(1B) includes additional language prohibiting employers from "discriminat[ing] against" the affected individuals in certain respects, and DOR argues that it is this language, and only this language, that "arguably could be construed to authorize liability under a disparate impact theory."<sup>15</sup> Because such language is not included in § 4(1C), DOR argues that the Legislature did not intend to allow age discrimination suits against the Commonwealth and its subdivisions based on a disparate impact theory.

15 DOR appears to be suggesting that facially neutral employment practices might still be said to "discriminate against" persons based on age even if such practices were not undertaken "because of" age.

As an initial matter, we note that there is at least some doubt whether the omission of the relevant language was actually [\*\*68] intended, or whether it was instead the result of a "scrivener's error." That is because of the particulars of how the Legislature modified the operative language it borrowed from § 4(1) when it created § 4(1C) in 1984. [\*\*22] At that time, § 4(1) included (and, together with § 4(1B), still includes) the phrase, "or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (emphasis supplied). In selecting the text of § 4(1C), the Legislature omitted the first six words of that phrase (italicized above), while keeping the remainder. As a result of this partial "edit," the syntax of § 4(1C) is nonsensical (referring as it does to an employer "discharg[ing] from employment such individual in compensation or in terms, conditions or privileges of employment . . ."). There are two possible explanations for this result: either the Legislature inadvertently omitted the first six words, or it inadvertently kept the re-

mainder. The first explanation is at least as plausible as the second.<sup>16</sup>

16 The parties have not identified any legislative history that sheds any light on the issue, nor have we.

In any event, we conclude that while DOR's textual arguments are not without some force,<sup>17</sup> they ultimately place undue weight on the difference in language between § 4(1B) and § 4(1C). When the Supreme Judicial Court first recognized that one could base a c. 151B claim on a [\*\*23] disparate impact theory, the court did not tether that conclusion to any particular language in the statute.<sup>18</sup> See the 1979 decision in *School Comm. of Braintree v. Massachusetts Commn. Against Discrimination*, 377 Mass. at 428-429. Moreover, the court spoke of disparate [\*\*69] treatment and disparate impact as "two manners" of demonstrating a discrimination claim, not as distinct causes of action. *Id.* at 428. Consistent with that treatment, the court referred to "all cases of employment discrimination," including those based on disparate impact, as focusing on "whether the employer penalizes some employees or prospective employees because of their [protected status]" (emphasis added). *Ibid.* Thus, DOR's insistence that we read fine distinctions between claims that are based on actions taken "because of" a protected status and claims that are based on "discriminat[ion]" related to that status, lies in great tension with the broad-brush approach that the Supreme Judicial Court applied to the statute shortly before § 4(1C) was enacted in 1984.<sup>19</sup> Stated differently, given what the Supreme Judicial Court had said about disparate impact cases at the time, had the Legislature intended to restore [\*\*24] the Commonwealth's sovereign immunity for those age discrimination cases that were brought on a disparate impact theory, one would have expected it to employ a less obscure approach to doing so. Notably, the Legislature has demonstrated its ability to state its intent to preserve sovereign immunity where that issue may be in doubt. See, e.g., *G. L. c. 21E, § 2(a)(11)* ("nothing in this definition or in this chapter shall be construed to waive any immunity that public employers or public employees may have pursuant to chapter two hundred fifty-eight").<sup>20</sup> Compare *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (concluding that the ADEA provided for disparate impact claims, and noting that "if Congress intended to prohibit all [age-based] disparate impact claims, it certainly could have done so").

17 For example, we note that, in concluding that similar language did not support disparate impact claims under the Age Discrimination in Employment Act of 1967 (ADEA), Justice O'Connor stated her view that the statute required discrimi-

natory intent, "for to take an action against an individual 'because of such individual's age' [as provided for in the ADEA] is to do so 'by reason of' or [\*\*25] 'on account of' her age." *Smith v. City of Jackson*, 544 U.S. 228, 249, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (O'Connor, J., concurring in the judgment).

18 That approach is consistent with the approach that the United States Supreme Court took when it first recognized that disparate impact claims could be brought pursuant to Title VII of the Civil Rights Act of 1964. See *Smith v. City of Jackson*, 544 U.S. at 235 (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 [1971]), and pointing out that the Court did not identify statutory text to support disparate impact claims until its 1988 decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 [1988]).

19 The Legislature is presumed to be aware of the Supreme Judicial Court's decisions. See *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 323, 597 N.E.2d 404 (1992).

20 The quoted text was inserted by St. 1992, c. 133, § 274, and first appeared in *G. L. c. 21E*, § 2(a)(9).

In sum, where the Legislature plainly waived the Commonwealth's sovereign immunity to age discrimination claims, and given the generous reach of *G. L. c. 151B*, § 4, in providing relief from discrimination in the workplace, we conclude that the 1984 amendments to the statute did not operate to restore [\*70] sovereign immunity [\*\*26] for the subset of age discrimination claims that are based on a theory of disparate impact.

**Conclusion.** For the reasons set forth above, we conclude that the judgment must be reversed.

So ordered.

SCHOOL COMMITTEE OF CHICOPEE vs. CHICOPEE EDUCATION ASSOCIATION.

No. 10-P-387.

APPEALS COURT OF MASSACHUSETTS

80 Mass. App. Ct. 357; 2011 Mass. App. LEXIS 1173

November 8, 2010, Argued  
September 8, 2011, Decided

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

Hampden. Civil action commenced in the Superior Court Department on October 15, 2008. The case was heard by Peter A. Velis, J., on motions for judgment on the pleadings.

**HEADNOTES**

School and School Committee, Arbitration, Termination of employment. Arbitration, School committee, Vacating award, Authority of arbitrator, Collective bargaining. Contract, Collective bargaining, Arbitration. Labor, Collective bargaining, Arbitration. Public Employment, Collective bargaining.

**COUNSEL:** Gordon D. Quinn for the plaintiff.

Matthew D. Jones for the defendant.

**JUDGES:** Present: Berry, Smith, & Green, JJ.

**OPINION BY:** SMITH

**OPINION**

[\*357] SMITH, J. In June of 2007, Chicopee high school teacher Gary Sroka was terminated by the school committee of Chicopee (school committee) for improper use of a sick day and insubordinate conduct. Represented by the defendant Chicopee Education Association (association), Sroka grieved the dismissal under his union's collective bargaining agreement, and the matter proceeded to arbitration. Following a hearing, the arbitrator issued a decision reinstating Sroka to his former position. The plaintiff school committee sought to vacate the award, but a Superior Court judge denied its application and instead confirmed the [\*358] award. The school committee now appeals, arguing that the arbitrator's decision both exceeded his authority and violated public policy.

Background. The following facts, taken from the arbitrator's decision, are undisputed. Sroka began working at Chicopee high school in 2000, when the school committee [\*\*2] hired him as a special education teacher. A few years later, he was assigned to teach social studies and history. Before the events leading to his dismissal, Sroka already had established a disciplinary history at the school for using profanity in front of students and other teachers.<sup>1</sup> The school was also aware that Sroka

suffered from various mental health issues. During the 2004-2005 school year, he received an accommodation in his school schedule because of a diagnosis of attention deficit hyperactivity disorder. In 2005, Sroka took a leave of absence to recover from depression, and in early 2007, evidence was presented in connection with a profanity-related suspension that he suffered from anxiety.

1 In 2004, Sroka was issued a written warning for raising his voice and swearing to his social studies supervisor. In 2005, he was given a three-day suspension for telling a student, "I don't want to take this attitude shit from you," and telling another student, "[Y]ou're fucking out of here," while pointing at the door. Later, in April of 2007, Sroka received another three-day suspension, reduced from five days, for uttering the word "shit" in the classroom.

Against this backdrop, the [\*\*3] events leading up to Sroka's dismissal are as follows. In May, 2007, the school department of Chicopee planned to hold an "armed services career day" on May 21, 2007, mandating attendance by all high school students and teachers. Fueled by his negative feelings about the United States' involvement in the war in Iraq, and based on his belief that the event would send an inappropriate message to young and impressionable students, Sroka decided to organize a protest of it. To that end, he, his son, and some friends made protest signs and pamphlets to hand out during the event. When he arrived at school on May 21, however, Sroka noticed that the school building had been vandalized with antiwar comments. Knowing he would be a suspect, Sroka called off the protest, and informed the school's principal, Roland R. Joyal, Jr., that he did not commit the vandalism but that he knew who probably did. After his conversation with Joyal, Sroka again changed his mind about the protest and, seeing that his students had already gone to the [\*359] event, took his protest signs and protested from the event's perimeter. At some point thereafter, Joyal noticed the protest and told Sroka to return to class. Sroka [\*\*4] did so, but shortly thereafter felt suddenly anxious and went home sick.

That night, Sroka called in sick for the following day. He also got in touch with his son's friend, Barry Scott, who he believed committed the vandalism. Sroka convinced Scott to turn himself in, and in a show of support, Sroka accompanied Scott to court the next day.

While there, Sroka continued his protest outside the courthouse, and told a reporter that "a little defacement of a public building is a lot less than the crimes being committed at Chicopee High School by trying to seduce these young children to join the military."

The following day, May 23, 2007, Sroka reported to school as usual. As the day progressed, however, Sroka began to engage in odd behavior. While monitoring a test, he posted a sign stating: "Rogue Teacher Beware." Later, when he noticed that his classroom computer was missing, he wrote his department chairperson a note stating that he believed a crime had been committed, that the police should be notified, and that "I believe an incredible 'moral' crime is about to be [committed] by the administration of [Chicopee High School]. (Know I forgive you and will pray for you all!)"

A short time [\*\*5] later, during the school lunch break, Sroka apparently felt compelled to continue the protest. Joyal later found him walking outside, barefoot, with his pant legs partially rolled up, wearing an olive green military coat and hat, bearing a protest sign, and beating a bongo drum. When Joyal informed Sroka that it was time for him to return to teach his class, Sroka insisted, "I'm not Gary Sroka, I'm Sergeant Pepper." At that point, Joyal observed that Sroka did, indeed, appear to be dressed as a member of Sergeant Pepper's Lonely Hearts Club Band.<sup>2</sup> Despite several further warnings that his refusal would constitute insubordination and result in disciplinary action, Sroka continued in what he described as his "guerilla theater" efforts, and headed toward the center of Chicopee. He was placed on administrative leave later the same day, and in June [\*\*360] of 2007, his employment was terminated for insubordinate conduct, improper use of a sick day, and his prior disciplinary record.

2 A Beatles album released in 1967, with cover art depicting the members of the band dressed in military attire.

Following the May 23 incident, Sroka sought professional help and was diagnosed with bipolar II disorder. [\*\*6] His treating psychiatrist, Dr. Bennett Gaev, reported to the school committee by letter dated June 18, 2007, that prior to their initial June 5 appointment, Sroka was "hypomaniac." In deposition testimony, Dr. Gaev further opined that antidepressant medication Sroka had been taking for years to treat depression "was wrong and may have been responsible for . . . Sroka's behavior on May 22nd and May 23rd." Sroka was prescribed mood stabilizing medication to treat his disorder, and has since reported feeling better than he has in years.

a. The arbitration proceeding. In March, 2008, the parties, proceeding under the grievance procedure out-

lined in the collective bargaining agreement between the school committee and the association, submitted the matter to arbitration. In addition to two days of hearings, the record before the arbitrator included the deposition testimony of Dr. Gaev, as well as extensive posthearing briefs. The parties focused their arguments in large part on the significance of Sroka's alleged mental disorder. The association maintained that once the school committee had notice of Sroka's mental health issues, it should have engaged in further inquiry. Thereafter, if the [\*\*7] issues raised were determined to be valid, it could have provided an appropriate accommodation for Sroka's disability. The association argued in the alternative that the dismissal was simply too harsh a penalty for Sroka's conduct, especially if mitigated by the mental health component. The association lastly remarked that Sroka's past record should not have been considered because it was unrelated to the incidents precipitating the dismissal.

The school committee, on the other hand, argued that Sroka should be held fully accountable for his conduct. As to the sick day, it noted that Sroka indisputably was engaged in several activities, including going to the courthouse and using an online grading system, that indicated he was not, in fact, sick at that time. As to his "guerilla theater" activities and ultimate refusal to teach his class, the school committee argued that any mental [\*\*361] health problems suffered by Sroka had not been proven. In support of that contention, it suggested that Dr. Gaev's letters and deposition testimony were unreliable and deserved no evidentiary weight because they had been offered in an attempt to help Sroka get his job back.<sup>3</sup> The school committee also pointed [\*\*8] to Dr. Gaev's only having met with Sroka for two short sessions, and his failure to take into account key elements associated with hypomaniac episodes, as described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (DSM-IV), in reaching his diagnosis of bipolar II disorder. Finally, the school committee cited previous arbitration decisions in arguing that an employee's mental health lapse may not alter a disciplinary sanction properly resulting from the conduct in question.

3 Dr. Gaev admitted in his deposition testimony that he penned a November 5, 2007, letter to enable Sroka "to get his job back."

b. The arbitration decision. The arbitrator issued his decision in September, 2008. He framed the issue, as stipulated to by the parties, as follows: "Did the School Committee have just cause to discharge the grievant, Gary Sroka, in June 2007? If not what shall be the remedy?" In a footnote to the reference, the arbitrator cited to the paragraph of the agreement providing that "[n]o teacher will be disciplined . . . without just cause." The

arbitrator then found that notwithstanding the medical evidence, just cause for discipline [\*\*9] existed as to both the apparent sick leave violation and the insubordination. He nevertheless concluded that, "in line with principles of progressive discipline," the punishment imposed was not commensurate with the violations committed. In reaching that conclusion, the arbitrator noted that Sroka's disciplinary history was completely unrelated to the present offenses, and that Sroka had not been given prior warnings about this type of behavior. He further observed that the excessive level of discipline "suggests that indeed the [school committee] took offense at what it considered Sroka's embarrassing and inappropriate antics."

The arbitrator next considered the effect, if any, of the medical evidence of Sroka's diagnosis of bipolar II disorder on the outcome of the case. Discounting the evidence on the one hand, the arbitrator stated that Sroka "must face up to his wrongdoing [\*\*362] and accept the consequences." On the other hand, and "[a]ssuming without deciding," the arbitrator observed that Sroka likely was entitled to an accommodation for his mental illness under the Americans with Disabilities Act, and that, under Massachusetts law, he could not be fired for conduct that was the result [\*\*10] of that medical condition. In the end, the arbitrator reinstated Sroka to his former position, because "under either analysis," the discipline imposed on Sroka was too harsh.

c. Application to vacate the award. The school committee thereafter applied in the Superior Court pursuant to *G. L. c. 150C, § 11*, to vacate the award, arguing that the arbitrator exceeded his authority and that the award violated public policy. In support of its application as to the former, the school committee cited *G. L. c. 71, § 42*, the teacher dismissal statute, arguing that it precludes an arbitrator from performing a just cause analysis of a termination.<sup>4</sup>

4 On the basis of the record before us, we are unable to determine if the application of *G. L. c. 71, § 42*, was raised during the arbitration proceedings.

Under *G. L. c. 71, § 42*, as appearing in St. 1993, c. 71, § 44, a teacher with professional status may be dismissed only for "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure . . . to satisfy teacher performance standards . . . or other just cause." The statute further provides that a teacher may seek review of a dismissal by arbitration, and places the burden [\*\*11] on the school committee to prove the "just cause" that served as grounds for dismissal. In reviewing a dismissal, an arbitrator is to "consider the best interests of the pupils in the district and the need for elevation of performance standards." *G. L. c. 71, § 42*.<sup>5</sup> In

accordance with that statute, the school committee claimed that once it had proven Sroka engaged in the conduct in question, the arbitrator [\*\*363] had no choice but to uphold the dismissal, and in reinstating Sroka, the arbitrator improperly substituted his judgment for that of the school committee.

5 *General Laws c. 71, § 42*, was enacted as part of the Education Reform Act of 1993. See *School Dist. of Beverly v. Geller*, 435 Mass. 223, 225 n.1, 755 N.E.2d 1241 (2001) (Cordy, J., concurring). The relevant text of the statute is as follows:

"A teacher with professional teacher status, pursuant to section forty-one, shall not be dismissed except for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to section thirty-eight of this chapter or other just cause.

"A teacher with professional teacher status may seek review [\*\*12] of a dismissal decision within thirty days after receiving notice of his dismissal by filing a petition for arbitration with the commissioner. . . .

"At the arbitral hearing, the teacher and the school district may be represented by an attorney or other representative, present evidence, and call witnesses and the school district shall have the burden of proof. In determining whether the district has proven grounds for dismissal consistent with this section, the arbitrator shall consider the best interests of the pupils in the district and the need for elevation of performance standards."

In support of this proposition, the school committee relied heavily on Justice Cordy's concurring opinion in *School Dist. of Beverly v. Geller*, 435 Mass. 223, 231-232, 755 N.E.2d 1241 (2001) (Geller). In *Geller*, the court applied the statute in the context of a teacher who had been dismissed for conduct unbecoming a teacher after the school district fielded multiple complaints that

the teacher had used physical force against his sixth grade students. *Id.* at 226. The court issued a plurality opinion,<sup>6</sup> with Justice Cordy deciding that proper interpretation of the statute "precludes the arbitrator from conducting a further [\*\*13] 'just cause analysis' (e.g., weighing the teacher's prior record against the misconduct for the purpose of justifying a different sanction) once he has found that one of the enumerated grounds for has been proved." *Id.* at 234. A majority of the court, however, did not agree with Justice Cordy's interpretation of the statute.

6 Justice Cordy's opinion was joined by Chief Justice Marshall and Justice Sosman. Justice Cowin's dissenting opinion was joined by Justice Greaney and Justice Spina. Justice Ireland concurred with Justice Cordy in result only, deciding the case on the grounds of public policy.

d. The motion judge's decision. On cross motions for judgment on the pleadings, a Superior Court judge confirmed the award. In his decision, the judge concluded that under the deferential standard applied to arbitrators' decisions, absent a showing of fraud, the arbitrator's decision in this case was indisputable. In response to the school committee's citation to *Geller* and *G. L. c. 71, § 42*, the judge observed that *Geller* is a plurality decision in which "more questions [are] left open than answered." He also distinguished the case on the basis of [\*\*364] the underlying facts. As to public policy, [\*\*14] the judge ruled that the school committee had failed to make out a prima facie showing because it could not point to a "defined, dominant, and visible" public policy that had been violated. The school committee timely appealed, restating the arguments it advanced before the motion judge.

2. Discussion. It is a well-settled principle of law that arbitration awards are subject to a narrow scope of review, and that "[a]bsent fraud, errors of law or fact are not sufficient grounds to set aside an [arbitration] award." *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990). "The strong public policy favoring arbitration requires us to uphold an arbitrator's decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous." *Boston v. Boston Police Patrolmen's Assn.*, 443 Mass. 813, 818, 824 N.E.2d 855 (2005). Consistent with the limited scope of arbitral determinations, the Supreme Judicial Court recently cautioned that a court "should not . . . undertak[e] what in effect [is] an independent, de novo evaluation of the evidence before the arbitrator." *School Comm. of Lowell v. Robishaw*, 456 Mass. 653, 665 n.11, 925 N.E.2d 803 (2010).

In addition to [\*\*15] these principles of judicial review, the language of *G. L. c. 71, § 42*, further provides

that dismissal decisions be subject to judicial review as provided in *G. L. c. 150C*. Pursuant to *G. L. c. 150C, § 11*, a judge in the Superior Court "shall vacate" an arbitrator's award on a party's application if, among other enumerated grounds, "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." *School Comm. of Lowell v. Robishaw*, supra at 660, quoting from *G. L. c. 150C, § 11*.

A foundational step in any arbitration case is determining the source and limit of an arbitrator's authority. Ordinarily, the authority of an arbitrator is derived entirely from the parties' collective bargaining agreement, and is accordingly limited by the terms of that agreement. See *School Comm. of Waltham v. Waltham Educators Assn.*, 398 Mass. 703, 706-707, 500 N.E.2d 1312 (1986); *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. at 1007. In this case, the arbitrator and the motion judge [\*\*365] proceeded on the assumption that the arbitrator's authority was so derived. A majority of the court in *Geller* made clear, however, that [\*\*16] under the circumstances of this case, those assumptions were faulty.

Before diverging in their opinion regarding the limits *G. L. c. 71, § 42*, places on arbitral review, Justice Cordy, in his concurring opinion, and Justice Cowin, in her dissent, each observed that § 42 serves as the source and limit of an arbitrator's authority in teacher dismissal cases, regardless of the provisions of a collective bargaining agreement. See *Geller*, 435 Mass. at 230 n.5 (Cordy, J., concurring) (notwithstanding citation to § 42 in the reference, "the parties could not properly authorize the arbitrator to act beyond his statutory authority in any event"); *id.* at 240 (Cowin, J., dissenting) ("The authority to arbitrate the dismissal of a teacher with professional teacher status is derived from statute rather than from contractual agreement"). Thus, despite the court's plurality opinion, *Geller* holds that in the context of teacher dismissal, an arbitrator may not "ignore the limits imposed by statute," and craft a decision grounded in the authority provided by a collective bargaining agreement.<sup>7</sup> *Ibid.* See *School Comm. of Lowell v. Vong Oung*, 72 Mass. App. Ct. 698, 705, 893 N.E.2d 1246 (2008).

7 The association argues that, [\*\*17] pursuant to *G. L. c. 150E, § 8*, as amended by St. 1978, c. 393, § 39, the collective bargaining agreement is, in fact, the arbitrator's source of authority. That statute provides that where elected by an employee, a collective bargaining agreement shall be the "exclusive procedure for resolving any . . . grievance involving . . . dismissal . . . or termination notwithstanding any contrary provision of . . .

. sections forty-two through forty-three A . . . of chapter seventy-one."

While perhaps appealing on its face, the association's argument is necessarily defeated by the Supreme Judicial Court's explicit conclusion to the contrary in *Geller*, namely that the provisions of *G. L. c. 71, § 42*, supersede a collective bargaining agreement, see *infra*, and "the established canon of statutory construction that 'general statutory language must yield to that which is more specific.'" *Silva v. Rent-A-Center, Inc.*, 454 Mass. 667, 671, 912 N.E.2d 945 (2009), quoting from *TBI, Inc. v. Board of Health of N. Andover*, 431 Mass. 9, 18, 725 N.E.2d 188 (2000).

It is undisputed, and apparent from the record, that the arbitrator in this case crafted his decision and award entirely from the assumption that the parties' collective bargaining [\*\*18] agreement controlled, and apparently unaware of the authority, standards of review, and dictates of *G. L. c. 71, § 42*. The statute is [\*\*366] mentioned nowhere in the arbitrator's decision, nor are the considerations of the "best interests of the pupils in the district and the need for elevation of performance standards." The decision is instead based entirely on the premise that the collective bargaining agreement is the

source and scope of authority. Thus, unlike in *Geller*, the decision here was fatally flawed from the start, as the arbitrator never even attempted to apply § 42 review to the case. Viewing the case through the wrong lens, he necessarily exceeded the authority provided to him under the statute. We need go no further in our analysis.<sup>8</sup> The judgment of the Superior Court confirming the arbitration award is vacated, and a new judgment shall enter vacating the award.<sup>9</sup>

8 Because our resolution of this case does not require us to reach the question "left open by the Supreme Judicial Court in [*Geller*]," *School Comm. of Lowell v. Vong Oung*, 72 Mass. App. Ct. at 705, we offer no opinion on the limits of an arbitrator's review of a dismissal decision under *G. L. c. 71, § 42*. We nevertheless [\*\*19] acknowledge the difficult task that awaits an arbitrator, should this case proceed to a second arbitration, in deciphering the limits in review posed by the statute.

9 Because we conclude that the award must be vacated, we need not review the school committee's claim that the award violated public policy.

So ordered.

\*

TOWN OF DOVER vs. BARBARA B. GOUCHER, trustee,<sup>1</sup> & another.<sup>2</sup>

1 Of Salt Marsh Farm Trust.

2 Scott Goddard, who petitioned to vacate the judgment.

10-P-1312

APPEALS COURT OF MASSACHUSETTS

2011 Mass. App. Unpub. LEXIS 958

August 10, 2011, 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.

**SUBSEQUENT HISTORY:** Reported at *Town of Dover v. Goucher*, 2011 Mass. App. LEXIS 1104 (Mass. App. Ct., Aug. 10, 2011)

**JUDGES:** [\*1] Kafker, Vuono & Rubin, JJ.

**OPINION**

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

Scott Goddard appeals from an order of the recorder of the Land Court denying his petition to vacate a judgment of foreclosure in a tax taking case in which the plaintiff town of Dover had successfully sought to foreclose the rights of redemption for the locus.<sup>3</sup> Goddard brought his petition within one year of the Land Court judgment as required by *G. L. c. 60, § 69A*.

3 The order was issued after a hearing before the recorder. Neither party contests the authority of the Land Court to take the actions it did through the recorder rather than a judge.

In his petition, Goddard alleged that in May, 2007, he entered into a purchase and sale agreement for purchase of the property at issue in this case. The signed agreement is in the record. Goddard alleged that the agreement was made on behalf of the owner of the property, Barbara Goucher (Goucher), as trustee of Salt Marsh Farm Trust, by her son Richard Goucher, who represented to Goddard that he was designated her attorney-in-fact under a power of attorney. (This is consistent with the signatures on the agreement.) Goddard further

alleged that on the date set for delivery of [\*2] the deed under the agreement in June, 2007, although he was ready, willing, and able to perform, the seller failed to deliver the deed and perform under the purchase and sale agreement. He asserted that he was prepared to pay the real estate taxes and all interest owed by the land owner to the town in order to allow him to seek specific performance under the purchase and sale agreement against the seller.

The statute does not specify who in circumstances such as these may bring a petition to vacate a judgment of foreclosure. The statute, however, does limit the right of redemption to "[a]ny person having an interest in" the land at issue. *G. L. c. 60, § 62*. This was the test used by the Land Court recorder to determine whether Goddard has standing, and we agree that the category of persons who have standing to bring such a petition is at least this broad. In *Jenney v. Tilden*, the Supreme Judicial Court explained that "'interest' in land in common speech includes 'every kind of claim to land which can form the basis of a property right.'" 270 Mass. 92, 95, 169 N.E. 669 (1930), quoting from *Union Trust Co. v. Reed*, 213 Mass. 199, 201, 99 N.E. 1093 (1912).

The Land Court recorder concluded that Goddard lacked standing [\*3] because "Massachusetts does not follow the view recognized in many states that, on the execution of a purchase and sale agreement, the purchaser is regarded as the equitable owner of real estate . . . .<sup>4</sup> *Kelley v. Neilson*, 433 Mass. 706, 714 n.16, 745 N.E.2d 952 (2001). . . . Therefore [Goddard] does not currently hold any interest in the Locus and he does not have the authority to petition this court to vacate the judgment under *G. L. c. 60, § 69A*."<sup>4</sup> The recorder expressly noted that she was not deciding whether Goddard's rights under the purchase and sale agreement had expired.

4 The recorder also noted that *G. L. c. 60, § 60*, which allows any person prior to taking or sale to pay taxes assessed, "has traditionally been interpreted as only allowing payment by those holding recognized property rights, such as mortgagees."

In *Union Trust Co.*, 213 Mass. at 200-201, the Supreme Judicial Court noted that in 1902 the words we construe today, "any person having an interest," were substituted for the word "owner" that had previously

been used to describe those who could bring an action for redemption. The court stated, "[T]his change is too radical to warrant the assumption that no alteration of meaning was [\*4] intended. It indicates a design to enlarge the scope of the right of redemption." *Id.* at 201. The rule in Massachusetts that a purchaser upon execution of a purchase and sale agreement is not an equitable owner of the real estate at issue thus does not answer the question whether the purchaser has an interest in land sufficient to allow him or her to exercise the right of redemption. In *Union Trust Co.*, the court stated that interest in land includes "all varieties of titles and rights," including "every kind of claim to land which can form the basis of a property right." *Ibid.*

A purchase and sale agreement is a contract that binds the parties to the agreement and their successors and heirs to a transfer of land. See *Kelley v. Neilson*, 433 *Mass.* at 714 (holding that a buyer may enforce a purchase and sale agreement even if the seller dies before performance is completed). A purchaser does get a right vis-à-vis the property -- he or she has "a contract right which makes the vendor's title subject to an equitable obligation to convey" the property to the buyer. *McDonnell v. Quirk*, 22 *Mass. App. Ct.* 126, 130, 491 *N.E.2d* 646 (1986). This right to compel sale under certain terms and conditions may impair [\*5] the marketability of the property and may prevent certain actions by future owners with regard to the property.

Whether a purchase and sale agreement that gives one a right to specific performance creates a sufficient interest in land to confer a right of redemption, and thus standing to bring a petition to vacate such as this, is a difficult question that has never been addressed before by an appellate court in our Commonwealth. Given the purpose of the right of redemption, it may not be one that can be answered simply by our rules about equitable ownership. See, e.g., *Lynnfield v. Owners Unknown*, 397 *Mass.* 470, 474, 492 *N.E.2d* 86 (1986) (purpose of the tax title foreclosure provision of c. 60 "is not to provide municipalities with a method of acquiring property for municipal purposes without paying the owner of the property fair compensation as in eminent domain proceedings. The redemption provisions were enacted by the Legislature to provide municipalities with a mechanism for the prompt collection of delinquent real estate taxes. . . . Thus, the only legitimate interest of a town in seeking to foreclose rights of redemption is the collection of the taxes due on the property, together with other [\*6] costs and interest"). See also *Union Trust Co.*, 213 *Mass.* at 201 ("It is the policy of the law to favor redemption from tax sales").

Given the difficulty and importance of the question, we do not think it should be decided unnecessarily or in a hypothetical case. We therefore think that the prudent

course would be to remand the case to the Land Court to make certain whether the question must be answered in order to decide this case, and whether it is, in fact, presented on the facts and circumstances here, both of which are not clear from the recorder's decision.

First, the town argues that there are a number of alternative bases upon which the recorder could have used her discretion to deny the motion to vacate, regardless of whether the purchase and sale agreement can confer standing here. For example, the town argues that the recorder should have exercised her discretion to deny the petition because Goddard waited two and one-half years from the execution of the purchase and sale agreement until he first sought to assert his rights under the agreement, which he did not by bringing an action for specific performance, but by filing the petition to vacate. This might well provide a basis [\*7] for the discretionary denial of the petition. But although Goddard agrees that the Land Court had broad discretion to deny the motion, he argues, correctly, that the recorder's decision was not based upon an exercise of her discretion but upon her particular legal conclusion, and that we may not, therefore, affirm the judgment on the former ground.

In addition, the recorder did not reach any questions about the validity of the purchase and sale agreement or the scope of Goddard's rights thereunder (including the question whether it had expired), questions that logically precede the one whether a purchase and sale agreement creates sufficient rights to provide standing in this case.<sup>5</sup>

5 Making such a determination for purposes of deciding the standing question does not amount to deciding a breach of contract claim, something that the recorder concluded raised jurisdictional concerns.

On remand, the Land Court may consider these questions in the first instance. The Land Court may, of course, exercise its discretion to deny the motion, though we express no opinion regarding the outcome of that determination. If, after remand, the court's decision on the petition turns on the question whether [\*8] a valid purchase and sale agreement gives a buyer a right of redemption under the statute, that issue may be raised at that time in an appeal to this court.

The order denying the petition to vacate the judgment is vacated, and the case is remanded to the Land Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Kafker, Vuono & Rubin, JJ.),

Entered: August 10, 2011.

WILLOWDALE LLC vs. BOARD OF ASSESSORS OF TOPSFIELD.

No. 10-P-605.

APPEALS COURT OF MASSACHUSETTS

78 Mass. App. Ct. 767; 942 N.E.2d 993; 2011 Mass. App. LEXIS 222

January 3, 2011, Argued  
February 16, 2011, Decided

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

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

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

**HEADNOTES**

Taxation, Real estate tax: abatement, exemption.

**COUNSEL:** Kevin J. Joyce for the plaintiff.

Jeffrey T. Blake for the defendant.

**JUDGES:** Present: Grasso, Trainor, & Milkey, JJ. MILKEY, J. (concurring).

**OPINION BY:** GRASSO

**OPINION**

[\*767] [\*\*994] GRASSO, J. Willowdale LLC appeals from a decision of the Appellate Tax Board (board) concluding that it is not entitled to an exemption from real estate taxes pursuant to *G. L. c. 59, § 2B*, for its use and operation of the Palmer Mansion (mansion), located within the Bradley Palmer State Park (park), for certain for-profit enterprises. The board denied Willowdale the exemption because it concluded that Willowdale's use and operation of the mansion was not reasonably necessary for the public purpose of the park.<sup>1</sup> We affirm.

1 The board bifurcated Willowdale's appeals concerning the issues of exemption and valuation, deciding only the former.

[\*768] Background. The parties submitted the case to the board on an agreed statement of facts in the nature of a case stated, see *Caissie v. Cambridge*, 317 Mass. 346, 347, 58 N.E.2d 169 (1944), and the pertinent facts are not in dispute. The park, located in Topsfield (town), consists of approximately 721 acres.<sup>2</sup> Located within the [\*\*\*2] park is the mansion, an historic property. In 1999, the Department of Conservation and Recreation (DCR)<sup>3</sup> leased the mansion and approximately six surrounding acres of the park to Willowdale under authority granted by the historic curatorship program, which was established to preserve unused, historically significant properties through a public-private partnership.<sup>4</sup> See St. 1994, c. 85, § 44, as amended by St. 1996, c. 15, § 50. The lease

authorizes Willowdale to operate the mansion as a bed and breakfast and for other specified for-profit purposes and renders Willowdale responsible for the reuse and rehabilitation of the mansion. Willowdale bears sole responsibility for any costs of restoring the mansion, but any expenditures for that purpose are credited against its rent payments to the [\*\*995] Commonwealth. The lease explicitly obligates Willowdale to pay any real estate taxes levied upon the leased premises.

2 See Department of Conservation and Recreation, Bradley Palmer State Park, <http://www.mass.gov/dcr/parks/northeast/brad.htm> (last visited Jan. 31, 2011).

3 The Department of Conservation and Recreation is the legal successor to the Department of Environmental Management (DEM), which [\*\*\*3] was originally authorized to enter into leases such as that with Willowdale.

4 The purpose of the historic curatorship program, as stated in the enabling act, is to lessen the burden on government to pay for expenses incurred in preserving and maintaining historic properties for the benefit of the general public by leasing them to private curators. Under the curatorship program, DCR partners with a curator who agrees to rehabilitate, manage, and maintain an historic property in return for a long-term lease. As a result, DCR secures the long-term preservation of threatened historic sites, and curators exchange their hard work and unique skills for the opportunity to live in or work on a one-of-a-kind property.

After completing the necessary rehabilitation, Willowdale opened the mansion as a bed and breakfast and a venue for weddings and private events, charging \$ 3,000 to \$ 6,500 for a five-hour wedding and \$ 2,000 to \$ 3,000 for other three-hour events.<sup>5</sup>

5 Under the lease, Willowdale also agreed to make "reasonable efforts" to establish public programs with DCR, as long as such programs do not "materially interfere" with Willowdale's for-profit use. In consequence, at limited times, Willowdale [\*\*\*4] grants free access to the mansion for community events and public tours.

[\*769] In 2007 and 2008, the board of assessors of the town assessed Willowdale real estate taxes of \$ 16,275.52 and \$ 15,908.47, respectively, pursuant to *G.*

*L. c. 59, § 2B*. Willowdale timely paid the taxes and applied for an abatement. After the town denied the abatement, Willowdale appealed to the board. The board affirmed the denial, concluding that Willowdale had not satisfied its burden of establishing that its use of the mansion as a business conducted for profit was reasonably necessary to the public purpose of a park.

Discussion. *General Laws c. 59, § 2B*, as appearing in St. 1980, c. 261, § 13, permits "real estate owned in fee . . . [by] the commonwealth . . . if used in connection with a business conducted for profit or leased or occupied for other than public purposes" to be taxed. Willowdale does not dispute that the mansion and surrounding real estate is "used in connection with a business conducted for profit" within the meaning of § 2B. Willowdale contends, however, that it falls within the exemption from taxability set forth in the provision of § 2B, third par., inserted by St. 1979, c. 797, § 11, which [\*\*\*5] states that "[t]his section shall not apply to a use, lease or occupancy which is reasonably necessary to the public purpose of a . . . park, which is available to the use of the general public." We disagree.

"Exemption from taxation is a matter of special favor or grace. It will be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." *New England Legal Foundation v. Boston*, 423 Mass. 602, 609, 670 N.E.2d 152 (1996), quoting from *Massachusetts Med. Soc. v. Assessors of Boston*, 340 Mass. 327, 331, 164 N.E.2d 325 (1960). As the party seeking exemption, Willowdale bears the burden of establishing its entitlement. See *AA Transp. Co. v. Commissioner of Rev.*, 454 Mass. 114, 121, 907 N.E.2d 1090 (2009). Willowdale failed in meeting this burden. Nothing in the provisions of *G. L. c. 59, § 2B*, or in the legislation establishing the historic curatorship program provides for the exemption from real estate taxation that Willowdale seeks. See *Gloucester Ice & Cold Storage Co. v. Assessors of Gloucester*, 337 Mass. 23, 27, 147 N.E.2d 820 (1958) ("It is for the Legislature to decide to what extent it will assist the execution of a public purpose").

In relying on *G. L. c. 59, § 2B*, as the basis for its [\*\*\*6] exemption, [\*770] Willowdale confuses what is reasonably necessary to the maintenance and use of the mansion as an historic property with what is reasonably necessary to the public purpose of a park available to the use of the general public. While Willowdale's for-profit use of the mansion may be reasonably necessary to fund the rehabilitation and maintenance of the mansion under the curatorship program, and may explain Willowdale's incentive to participate, that use is not reasonably necessary for the public purpose of [\*\*996] the park or for the park to be available to the use of the general public.

For an exemption from real estate taxation to apply, *G. L. c. 59, § 2B*, requires not only that the for-profit use be "reasonably necessary to the public purpose of a . . . park" but also that the park be one "which is available to the use of the general public." Willowdale's use of the mansion satisfies neither of these prerequisites. First, Willowdale's use of the mansion is not reasonably necessary to the public purpose of the park. The public's use of the environs of the park is in no way restricted by or dependent upon Willowdale's for-profit operation of the mansion as a bed and breakfast or event [\*\*\*7] venue. The public is free to walk the park's trails and meadows and admire its ponds and natural beauty without regard to the presence of the mansion. See *Salem v. Attorney Gen.*, 344 Mass. 626, 630, 183 N.E.2d 859 (1962) (park is tract of land set apart for pleasure, exercise, amusement, ornament, recreation, or enjoyment of public at large). Compare *Miller v. Commissioner of Dept. of Envtl. Mgmt.*, 23 Mass. App. Ct. 968, 969, 503 N.E.2d 666 (1987) (control by agency of ski program run by private entity in State park demonstrated public purpose); *MMC Mgmt. Group, Inc. v. Assessors of New Bedford*, 26 Mass. App. Tax Bd. Rep. 239, 245-247 (2000) (control by agency of ice rink operated by private entity demonstrated public use).<sup>6</sup> Indeed, [\*771] it is undisputed that the public may access and use all other areas of the park independently of the mansion. See *Smith v. Assessors of Fitchburg*, 34 Mass. App. Tax Bd. Rep. 52, 55-56 (2008) (private ownership of airport hangars not reasonably necessary to public's use of airport because airport could serve public without hangars).

6 Unlike the situation in *Miller v. Commissioner of Dept. of Envtl. Mgmt.*, *supra*, and in *MMC Mgmt. Group, Inc. v. Assessors of New Bedford*, *supra*, where the [\*\*\*8] degree of control retained by the agency over the private enterprise demonstrated that the use was reasonably necessary to the public purpose of a park, Willowdale's operation of the mansion is not controlled in any material respect by DCR. DCR has no control over the mansion's hours of operation, the fees it charges the public, or the type of events that may be scheduled, and it does not keep keys to the mansion, inspect the premises, or share a percentage of its gross revenues. See *MMC Mgmt. Group, Inc. v. Assessors of New Bedford*, *supra*.

Moreover, Willowdale's use of the mansion is not as a park "available to the use of the general public." Although the park itself is available to the use of the general public, the mansion's availability is limited first and foremost to those willing to pay the charges associated with its for-profit use as a bed and breakfast or event venue. Put differently, the mansion's primary availability is not to the use of the general public, but to the use of its

private customers.<sup>7</sup> Indeed, the general public has little more access to the mansion than it has to any private business. In sum, Willowdale is not entitled to an exemption from real estate taxes [\*\*\*9] under *G. L. c. 59, § 2B*, because its use of the mansion is neither reasonably necessary to the public purpose of the park nor one that is available to the use of the general public.

7 Willowdale does not argue, nor does the record support, that its lease obligation to make "reasonable efforts" to establish public programs with DCR opens the mansion to the general public to such an extent that it must be considered "open to the general public." We need not address the extent to which such a different circumstance would alter the conclusion.

Here there is no dispute that the mansion is used, primarily and substantially, as a business conducted for a profit and that any use of the mansion for public programs is entirely subsidiary and must not "materially interfere" with the for-profit use.

[\*\*997] We reject Willowdale's suggestion that exemption from taxation may be inferred from the legislative purposes of the historic curatorship program. The determination that preserving historic landmarks serves a public good does not carry with it the corresponding determination that a tax exemption applies. The governing legislation did not provide, as it could have, express exemption from real estate taxes [\*\*\*10] for all historic properties associated with the curatorship program. Compare *Cabot v. Assessors of Boston*, 335 Mass. 53, 56, 138 N.E.2d 618 (1956) (statute authorizing city to contract with private corporation for construction and operation of garage under Boston Common provided express exemption from taxation). The absence of such an express exemption signifies that such properties are not to be deemed tax [\*772] exempt merely because the curatorship program itself serves a public good. See *Atlantic Refining Co. v. Assessors of Newton*, 342 Mass. 200, 204-205, 172 N.E.2d 827 (1961) (failure to include express provision for tax exemption leaves entity open to taxation). By omitting such an express exemption, the Legislature confined the tax exemption available to curatorship properties to those that meet the requirements of *G. L. c. 59, § 2B*.

Finally, we reject Willowdale's contention that the board erred in not giving deference to a 2001 letter from DEM (now DCR) opining that Willowdale's use of the mansion under the historic curatorship program was reasonably necessary to the public purpose of a park so as to qualify for tax exemption pursuant to *G. L. c. 59, § 2B*. Even were we to assume that the letter from DEM, which [\*\*\*11] was not referenced in the agreed statement of

facts, was properly before the board, we discern no error in the board's declining to defer to DEM's stated position regarding the taxability of the mansion property. Although DEM (now DCR) has considerable expertise in the management of park property, its expertise does not encompass interpretation of the tax laws. See *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 633, 830 N.E.2d 207 (2005) (deference given to expertise and statutory interpretation of agency charged with administering the statute). Because the Department of Revenue, and by extension the board, is responsible for the administration of § 2B, it need not defer to DCR in its interpretation regarding taxability. See *AA Transp. Co. v. Commissioner of Rev.*, 454 Mass. at 118-119; *Onex Communications Corp. v. Commissioner of Rev.*, 457 Mass. 419, 423-424, 930 N.E.2d 733 (2010).

The board did not err in concluding that Willowdale failed to meet its burden of establishing that its use of the mansion as a for-profit enterprise is "reasonably necessary to the public purpose of a . . . park, which is available to the use of the general public" so as to entitle it to exemption from taxation pursuant to *G. L. c. 59, § 2B*. [\*\*\*12] <sup>8</sup>

8 Willowdale's belated contention that imposition of real estate taxes on the subject property constitutes a confiscation of a property and a violation of due process of law requires no discussion. The claim was not raised below, see *Analogic Corp. v. Assessors of Peabody*, 45 Mass. App. Ct. 605, 608-609, 700 N.E.2d 548 (1998), and need not be addressed here. Moreover, Willowdale's conclusory assertion does not rise to the level of adequate appellate argument required by *Mass.R.A.P. 16(a)(4)*, as amended, 367 Mass. 921 (1975). See *Tynan v. Attorney Gen.*, 453 Mass. 1005, 900 N.E.2d 833 (2009).

Decision of the Appellate Tax Board affirmed.

CONCUR BY: MILKEY

CONCUR

[\*773] MILKEY, J. (concurring) Because the Appellate Tax Board (board) gave the statute a reasonable interpretation, [\*\*998] I agree with the majority that the board's decision should be affirmed. See *Provençal v. Commonwealth Health Ins. Connector Authy.*, 456 Mass. 506, 514, 924 N.E.2d 689 (2010) ("substantial deference" owed to agency's interpretation of statute it administers). I write separately to make two limited points. The first has to do with those aspects of the majority's opinion that suggest a bright-line distinction between the historic building at issue (Palmer Mansion) and its surrounding parkland. [\*\*\*13] In my view, drawing such a distinc-

tion is not warranted. Notwithstanding its relatively small footprint, Palmer Mansion appears to be an integral component of Bradley Palmer State Park (park). Indeed, the park originated as a private estate. At least to a limited extent, the public can no doubt enjoy the historic and architectural attributes of Palmer Mansion (which Willowdale indisputably played a critical role in preserving) without ever entering its interior.

I also take issue with the majority's conclusion that no deference is owed to the State park agencies. Although the Department of Environmental Management (DEM) (and its successor the Department of Conservation and Recreation [DCR]) may not be owed deference on matters of taxation, they presumably are owed some deference on subsidiary issues that involve the administration and use of State parks. In its 2001 opinion letter, DEM did not merely state its view that its lessee should not be taxed. Rather, the agency specifically concluded that Willowdale's "use is reasonably necessary to the public purpose of the park," and it explained at some length how it came to that conclusion. The board upheld the town's decision without coming [\*\*\*14] to grips

with, or even mentioning, DEM's views on this issue (the determinative issue in the case). I find this omission disquieting. I am ultimately comfortable with affirming the board's decision notwithstanding this omission only because of how the issues developed over the course of the proceedings.<sup>1</sup>

1 As the majority notes, it is not at all clear that the DEM letter was properly before the board since Willowdale merely had attached the letter to its administrative brief. In addition, DCR has demonstrated little interest in pressing the position that its predecessor held. Notably, DCR did not make any amicus submission to the board or this court. When Willowdale's counsel was asked at oral argument whether he could shed any light on DCR's absence, he replied that DCR had made it plain that Willowdale "had been told previously that we were on our own" in pressing the matter. The agency's unwillingness to stand behind its predecessor's letter undercuts the force of the position that Willowdale ascribes to it.

WILLIAM FOOTE, Plaintiff, Appellant, v. TOWN OF BEDFORD ET AL., Defendants, Appellees.

No. 10-2094

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

642 F.3d 80; 2011 U.S. App. LEXIS 8182; 94 Empl. Prac. Dec. (CCH) P44,171; 32 I.E.R. Cas. (BNA) 289

April 21, 2011, Decided

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

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE. Hon. Paul J. Barbadoro, U.S. District Judge. *Foote v. Town of Bedford*, 2010 U.S. Dist. LEXIS 85702 (D.N.H., 2010)

**DISPOSITION:** Affirmed.

**COUNSEL:** Mark A. Stull for appellant.

Charles P. Bauer, with whom Beth A. Deragon and Gallagher, Callahan & Gartrell, P.C. were on brief, for appellee Town of Bedford.

Brian J.S. Cullen, with whom CullenCollimore PLLC was on brief, for individual appellees.

**JUDGES:** Before Boudin, Circuit Judge, Souter, \* Associate Justice, and Selya, Circuit Judge.

\* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

**OPINION BY:** SELYA

**OPINION**

[\*81] SELYA, Circuit Judge. A town council refused to reappoint the plaintiff to an unpaid advisory commission after he publicly criticized certain of the council's policies. The plaintiff sued, but the district court jettisoned his case at the summary judgment stage. *Foote v. Town of Bedford*, No. 09-cv-171, 2010 U.S. Dist. LEXIS 85702, 2010 WL 3238315 (D.N.H. Aug. 13, 2010). The plaintiff's appeal presents a nuanced *First Amendment* question about the relationship between policymakers and policy-related speech in the public sector. After careful consideration, we conclude that the refused reappointment, though premised on a lawful exercise of [\*\*2] the plaintiff's right to free speech, did not transgress the *First Amendment*. Consequently, we affirm the judgment below.

**I. BACKGROUND**

We draw the facts from the summary judgment record and rehearse them in the light most favorable to the

nonmovant (here, the plaintiff). *Galloza v. Foy*, 389 F.3d 26, 28 (1st Cir. 2004).

The organic governing document of Bedford, New Hampshire (the Town), is the town charter, which vests primary responsibility for the administration of municipal affairs in a seven-member town council (the Council). The charter imbues the Council with authority to appoint the members of municipal boards and commissions, including the Bedford Recreation Commission (the Commission). The Commission's bailiwick is to propound recommendations to the Council and the Town Manager about "the acquisition, holding, and disposition" of recreational facilities, the staffing of those facilities, and the "rules and regulations" for their operation. Bedford, N.H., Charter art. 1-11-1(c)(2).

The Commission holds regular meetings that are open to the public. It is composed of five members, all of whom serve without compensation. They are appointed by the Council, typically for staggered [\*\*3] three-year terms (although some appointments are for shorter periods, say, if a commissioner dies or resigns mid-term).

On May 11, 2005, the Council appointed plaintiff-appellant William Foote to fill a vacancy in the Commission's ranks. Upon completing the unexpired portion of that term, he was reappointed for three years. For aught that appears, his service was exemplary.

In January of 2009, the plaintiff received a letter reminding him that his term would expire in March and inquiring about whether he wished to continue. The letter made pellucid that reappointment would be in the Council's sole discretion. The plaintiff replied that he would be pleased to return to the Commission.

On March 6, the plaintiff attended a meeting of a committee formed to assist in developing a community park project denominated as Bedford Village Common (BVC). At the meeting, he voiced opposition to the Council's plan to revise certain aspects of the proposed project and (over the Council's objections) advocated the use of impact fees as a funding mechanism to assure financial viability. In a particularly pointed exchange, he accused the Council of "trying to kill the project with a thousand paper cuts."

A [\*\*4] municipal election took place on March 10. The plaintiff lost a bid for a [\*82] seat on the school

board. In defeat, he warned that he would be watching how the school board handled its budget.

With the election in his rear-view mirror, the plaintiff continued to press his candidacy for reappointment to the Commission. To that end, he met with members of the newly constituted Council. At a meeting held on March 16, the Council, voting four to three, proposed filling the two vacancies on the Commission with other aspirants. In a later vote, the Council named those aspirants to the Commission.

Asserting that his vocal criticism in connection with the BVC project led to this rebuff, the plaintiff sued the Town and four councillors who had voted to deny him reappointment (William Dermody, Michael Izbicki, Paul F. Roy, Sr., and Robert Young). He brought his suit in a New Hampshire state court, alleging a *First Amendment* claim under 42 U.S.C. § 1983 and three supplemental state-law claims. The defendants removed the case to federal district court, see 28 U.S.C. §§ 1331, 1441(b), 1446, and in due season sought summary judgment, see *Fed. R. Civ. P.* 56. The plaintiff opposed summary judgment.

The district court entered summary judgment on the section 1983 claim and remanded the remaining claims to state court. *Footnote*, 2010 U.S. Dist. LEXIS 85702, 2010 WL 3238315, at \*4-5. It reasoned that the defendants' "strong interest" in appointing like-minded people to the Commission outweighed the plaintiff's *First Amendment* rights. 2010 U.S. Dist. LEXIS 85702, [WL] at \*4. This timely appeal followed.

## II. DISCUSSION

We divide our substantive discussion into four segments.

### A. Standard of Review.

We review the entry of summary judgment de novo. *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). In performing this *tamiasage*, we scrutinize the facts in the light most agreeable to the nonmovant, ceding all reasonable inferences therefrom in his favor. *Cox v. Hainey*, 391 F.3d 25, 29 (1st Cir. 2004). Summary judgment is appropriate only if the record, viewed in the required light, reveals no genuine issue of material fact and demonstrates that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56. Withal, we are not married to the trial court's rationale but may uphold its ruling on any ground made manifest by the record. *Houlton Citizens' Coal.*, 175 F.3d at 184; *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48-49 (1st Cir. 1990).

### B. [\*\*6] The Decisional Framework.

The plaintiff's case stands or falls on his claim that the individual defendants impermissibly refused to reappoint him to the Commission because of his public opposition to, and criticism of, certain municipal policies. For summary judgment purposes, the district court assumed that this reason underpinned his failed bid for reappointment, and so do we. This assumption is important because "the *First Amendment* protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." <sup>1</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). As this case illustrates, that right is not absolute.

1 Of course, the plaintiff was an unpaid member of an advisory board rather than a full-fledged employee, and he was denied reappointment rather than discharged. We explain *infra* why we nonetheless consider the dismissed-employee analogy apt.

When speech by a public employee is involved, courts typically choreograph a three-step chaconne. The first step is to [\*83] determine whether the employee spoke as a citizen on a matter of public concern. *Id.* at 415-16. The second step is to balance the employee's *First Amendment* interests against [\*\*7] the interests of the government, as an employer, in providing effective and efficient services. *Waters v. Churchill*, 511 U.S. 661, 668, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). At the third and final step, the employee must "show that the protected expression was a substantial or motivating factor in the adverse employment decision." *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007).

For present purposes, the defendants do not dispute that the plaintiff spoke out as a citizen and that his public commentary related to matters of community concern. Thus, his speech triggers *First Amendment* analysis. See *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). The third step here is a foregone conclusion; we already have noted our assumption that the commentary was a substantial cause of the Council's refusal to reappoint the plaintiff to a new term on the Commission. It necessarily follows that this appeal hinges on the second step in the chaconne: the "balance between the interests of the [plaintiff], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

The [\*\*8] *Pickering* balancing test is heavily dependent on context, and the Supreme Court has established a corollary to this test with respect to policymaking employees. The seminal case is *Elrod v. Burns*, 427

U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), in which the Court held that a government employer cannot discharge an employee merely because he is not affiliated with a particular political party. *Id.* at 373 (plurality op.). But the Court noted an exception: a government employer can terminate a policymaking employee based on party affiliation. *Id.* at 367. "This exception helps to ensure that elected representatives will not be hamstrung in endeavoring to carry out the voters' mandate." *Galloza*, 389 F.3d at 28.

The Court later broadened the exception to include any employee for whom "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). Thus, when a government employer takes an adverse employment action against such a policymaking employee based on the latter's political affiliation, it has "demonstrate[d] a compelling interest in infringing *First Amendment* rights." *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 71 n.5, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

The [\*\*9] Supreme Court has not squarely addressed the question of whether, or how, the Elrod/Branti exception applies to a policymaking employee's *First Amendment* claim premised on speech rather than political affiliation. Nevertheless, a number of courts of appeals have concluded that the principles undergirding the Elrod/Branti exception provide roughly comparable shelter for a government employer where a policymaker is cashiered for policy-related speech. See, e.g., *Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir. 2002); *Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Hall v. Ford*, 856 F.2d 255, 263, 272 U.S. App. D.C. 301 (D.C. Cir. 1988). These courts sensibly "recognize [] the inherent inconsistency in a rule that protects a policymaking employee who overtly expresses his disloyalty while denying that same protection to one who merely belongs to a different political [\*84] party." *Rose*, 291 F.3d at 922; accord *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 971-72 (7th Cir. 2001). Although acknowledging that the Pickering balance must still be struck, these courts employ Elrod/Branti principles to inform that exercise. See *Vargas-Harrison*, 272 F.3d at 971. In public employee/public speech cases involving [\*\*10] policymakers, those principles ordinarily will tip the balance in favor of the government as a matter of law.<sup>2</sup> See *Rose*, 291 F.3d at 922; *Vargas-Harrison*, 272 F.3d at 971.

2 One circuit has gone even further, ruling that the Elrod/Branti exception for policymakers replaces Pickering in policymaker cases involving policy-related speech. See *Fazio v. City and Cnty. of San Francisco*, 125 F.3d 1328, 1332 (9th Cir.

1997). Under that view, a determination that the employee is a policymaker "dispos[es] of any *First Amendment* retaliation claim." *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994-95 (9th Cir. 1999). We hesitate to go so far.

The key precedent in this circuit fits tongue and groove with this case law. See *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998). That decision involved a challenge to the dismissal of two policymaking employees on both free speech and free association grounds. In ruling for the employer, we wrote:

it is a reasonable working rule that, where the employee is subject to discharge for political reasons under the Elrod and Branti cases, a superior may also -- without offending the *First Amendment's* free speech guarantee -- consider the official's substantive [\*\*11] views on agency matters in deciding whether to retain the official in a policy related position.

*Id.* "Precisely because [the plaintiffs'] speech did bear on the job and on their working relationship," the employer "was permitted to conclude reasonably that she did not have the necessary trust and confidence to retain them." *Id.* (internal quotation marks omitted).

We think that this approach follows logically from the Supreme Court's repeated admonition in the political affiliation cases that the government must be allowed to accomplish its policy objectives through loyal, cooperative deputies whom the public will perceive as sharing the administration's goals. See *Rutan*, 497 U.S. at 74; *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987). In the political affiliation cases, the Court made a "[c]ategorical judgment [] based on experience and common sense" that an "elected official is entitled to insist on the loyalty of his policymaking subordinates." *Wilbur v. Mahan*, 3 F.3d 214, 218 (7th Cir. 1993). The same commonsense tenets are in play when a policymaker, by espousing contrary views, openly undermines the appointing authority's interest in ensuring that its policies will be implemented. [\*\*12] See *Vargas-Harrison*, 272 F.3d at 971. "[D]isagreement between the employer and the policymaking employee over job-related policy issues causes the same failure of loyalty and shared political mission between superior and subordinate as inconsistent political affiliation or viewpoint." *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 978 (7th Cir. 2000).

We add that transplantation of Elrod/Branti principles to speech cases is consistent with Pickering's goal of balancing the government's interest in effective govern-

ance with the employee's right to speak out on matters of public concern. See *Pickering*, 391 U.S. at 568. The *Pickering* Court recognized the "significantly different considerations" that attend the dismissal of an employee in circumstances in which loyalty is essential. *Id.* at 570 n.3; see *Rankin*, [\*85] 483 U.S. at 388. In a case involving policy-related speech, like this one, those considerations ought to weigh heavily in the *Pickering* balance.<sup>3</sup>

3 We recognize that some courts have thus far confined the application of *Elrod* and *Branti* to cases involving political affiliation. See, e.g., *Hinshaw v. Smith*, 436 F.3d 997, 1006 (8th Cir. 2006); *Curinga v. City of Clairton*, 357 F.3d 305, 314 (3d Cir. 2004); [\*\*13] *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999). But the distinction, if one exists, is a matter of degree; those courts freely acknowledge that when the affected employee holds a policymaking position, the government's interest weighs quite heavily in the *Pickering* balance. See *Hinshaw*, 436 F.3d at 1007; *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997).

What we have said to this point dictates the decisional framework that applies here. The *Elrod/Branti* line of cases must inform the *Pickering* balance whenever a policymaking employee is dismissed for speech elucidating his views on job-related public policy.

### C. Distinguishing Characteristics.

Thus far, our analysis has focused on the *First Amendment* rights of policymakers ousted from public employment due to political affiliation and/or speech. The plaintiff does not fit that mold precisely. For one thing, he was not a government employee but, rather, a volunteer. For another thing, he was not fired but, rather, denied reappointment. In the circumstances of this case, however, neither of those distinctions inhibits the applicability of either *Pickering* or *Elrod/Branti* principles. We explain briefly.

Although some courts have ruled that [\*\*14] volunteers hold their unpaid government positions in the unfettered discretion of the appointing authority, see, e.g., *Griffith v. Lanier*, 521 F.3d 398, 404, 380 U.S. App. D.C. 297 (D.C. Cir. 2008); *Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1370 (3d Cir. 1993), we need not solve that riddle. For present purposes, it is enough to say that the government's interest in ensuring that its policymakers sing from the same sheet music applies equally to policymakers who are hired hands and policymakers who are unpaid advisors.

By like token, the fact that the plaintiff was denied reappointment, rather than dismissed, does not alter the

relevant calculus. See *Barton v. Clancy*, 632 F.3d 9, 26 (1st Cir. 2011); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993). Where, as here, the adverse action involves the denial of an appointment to an unpaid advisory post that deals with policy matters, the government's interest in effective and efficient operation is on a par with its interest when the action involves the removal of an employee from a paid policymaking position. See *Barton*, 632 F.3d at 26.

### D. The Merits.

Having determined that the principles underpinning the *Elrod/Branti* exception are transferable to public employee/public [\*\*15] speech cases, we turn to whether the position that the plaintiff sought was policymaking in nature and, if so, whether the speech that prompted the denial of reappointment was policy related. See *Rose*, 291 F.3d at 924; *Warzon*, 60 F.3d at 1239. These are quintessentially legal questions. See *Flynn*, 140 F.3d at 44.

This inquiry is both position-specific and speech-specific. See *Bonds*, 207 F.3d at 977-78; see also *Galloza*, 389 F.3d at 29. First, we examine position-specific features starting with a "high-level glimpse" at whether the particular position deals with matters that are potentially subject to differences of opinion on policy grounds. *Galloza*, 389 F.3d at 29. This assessment encompasses the extent to which the position has the capacity to "influence[] the [\*86] resolution of such matters." *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987).

We need not tarry. The Commission is obviously a policymaking body. Its principal function is to advise the Council, which is the Town's legislative and policymaking arm. See *N.H. Rev. Stat. Ann. § 49-B:2(IV)(d)*; *Town of Hooksett v. Baines*, 148 N.H. 625, 813 A.2d 474, 475-76 (N.H. 2002). State law and the town charter confer upon the Commission [\*\*16] broad duties relating to the formulation and implementation of park policy and the responsibility to work with other governmental actors to coordinate and promote recreational activities. *N.H. Rev. Stat. Ann. § 35-B:3*; Bedford, N.H., Charter art. 1-11-1(c). The Commission's responsibilities call for the exercise of discretionary judgment on matters of importance to the Town and its inhabitants and involve policy issues on which there is room for disagreement as to both goals and methods of implementation. See *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc). That these responsibilities are exercised subject to Council approval does not alter their fundamental character.

The second element of this position-specific assessment focuses on whether the responsibilities of the posi-

tion itself "sufficiently resemble those of a policymaker." *Galloza*, 389 F.3d at 29. An important datum is whether the ability to do the work effectively will be enhanced by the appointment of persons who hold particular policy views. An office-holder who is principally involved with policy, "even if only as an adviser," qualifies as a policymaker. *Flynn*, 140 F.3d at 46.

The position [\*\*17] in question fits neatly within this paradigm. Although there is no formal job description for the position, the Commission's *raison d'être* involves policymaking, and members of the Commission are the instruments for carrying out that mission. Individual Commission members work directly with elected officials and have a considerable capacity to influence municipal decisions affecting parks and recreation. They are, therefore, policymakers. See *Vargas-Harrison*, 272 F.3d at 971; *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 14 (1st Cir. 1996).

The plaintiff suggests that because the position is merely advisory, it cannot involve policymaking. This suggestion sets up a false dichotomy. A person need not possess the ultimate decisionmaking authority in order to qualify as a policymaker. Advisors can be policymakers. See *Elrod*, 427 U.S. at 368; *Flynn*, 140 F.3d at 46.

The last piece of the puzzle is speech-specific. We ask whether the speech in question fairly can be said to conflict with the appointing authority's stated policies on matters related to the Commission's work. See *Rose*, 291 F.3d at 924; *Vargas-Harrison*, 272 F.3d at 973. This aspect of the matter is open and shut.

In the weeks before [\*\*18] the Council took the challenged action, the plaintiff made it crystal clear (openly and vociferously) that he disagreed with the Council's approach to the BVC project. In addition, he publicly opposed the Council's choice of a preferred funding mechanism for the project. These views are plainly policy related and bear directly on matters that the Council reasonably could expect to fall within the purview of the Commission. On the undisputed facts, the necessary link between the speech and the position has been forged.<sup>4</sup>

<sup>4</sup> The plaintiff also alleges that his animadversions against the school board contributed to the refusal to reappoint him to the Commission. This allegation adds nothing to the equation. After all,

the Council reasonably could have regarded those comments as interfering with his ability to carry out one of the essential functions of the Commission: coordinating park policy with other public officials. See *N.H. Rev. Stat. Ann. § 35-B:3*; Bedford, N.H., Charter art. 1-11-1(c).

[\*87] In an effort to change the trajectory of the debate, the plaintiff argues that diversity of viewpoints among Commission members is beneficial to enlightened governance. That may be true, but the choice [\*\*19] is up to the Council. The *First Amendment* does not require that an appointing authority surround itself with policymakers who represent divergent viewpoints. See *Wilbur*, 3 F.3d at 218; see also *Connick*, 461 U.S. at 146 ("[G]overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the *First Amendment*.").

In this case, all roads lead to Rome. A position-specific assessment makes manifest that compatibility of views is a reasonable requirement for appointment to the Commission. A speech-specific assessment makes manifest that the plaintiff's comments on matters within the purview of the Commission could reasonably have been seen by the defendants as demonstrating a lack of the desired compatibility. Under these circumstances, *Elrod/Branti* principles require a finding that the defendants' interest in providing effective and efficient government preponderates over the plaintiff's *First Amendment* interest in free expression of his views. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996); *Bonds*, 207 F.3d at 977. Consequently, the *Pickering* balance must be struck in favor of permitting the [\*\*20] defendants to rely on the plaintiff's public comments as a reason for declining to reappoint him to the Commission. See *Vargas-Harrison*, 272 F.3d at 974.

### III. CONCLUSION

We need go no further. While the plaintiff was within his rights to criticize the Council's vision of the BVC project, the defendants were likewise within their rights in choosing not to reappoint a foe of their policies to serve on a board whose primary function was to give them policymaking advice. Thus, the district court did not err in rejecting the plaintiff's *First Amendment* claim.

Affirmed.

IN RE: DAVID R. NICHOLS, DEBTOR.

Chapter 13, Case No. 10-12211-WCH

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF  
MASSACHUSETTS, EASTERN DIVISION

2011 Bankr. LEXIS 2213

June 7, 2011, Decided

June 7, 2011, Filed

**SUBSEQUENT HISTORY:** Request granted, in part, Request denied by, in part *In re Nichols, 2011 Bankr. LEXIS 2167 (Bankr. D. Mass., June 7, 2011)*

**COUNSEL:** [\*1] For David R Nichols, Debtor: Ronald N. Whitney, Whitney Law Office, Whitman, MA.

Trustee: Carolyn Bankowski-13, Chapter 13 Trustee Boston, Boston, MA.

**JUDGES:** William C. Hillman, United States Bankruptcy Judge.

**OPINION BY:** William C. Hillman

**OPINION**

**MEMORANDUM OF DECISION**

**I. INTRODUCTION**

The matters before the Court are the "Request of the Town of Whitman for Payment of Administrative Expense Pursuant to 11 U.S.C. [§] 503(b)(1)(A)" (the "Request") filed by the Town of Whitman (the "Town"), the "Debtor's Objection to Application of Administrative Expenses" (the "Objection") filed by David R. Nichols (the "Debtor"), and the "Application of Murphy, Lamere, & Murphy, P.C. for Allowance and Payment of Compensation for Services Rendered and For Reimbursement of Expenses Incurred as Counsel to the Town of Whitman as set forth in the [Request]" (the "Fee Application") filed by Murphy, Lamere & Murphy ("LM&M"), counsel to the Town in this case. Through its pleadings, the Town seeks a determination that demolition costs it incurred removing an unsafe structure from the Debtor's property are an administrative expense under 11 U.S.C. § 503(b)(1)(A). For the reasons set forth below, I will grant the Request in part and approve [\*2] the Fee Application in part, finding that the Town is entitled to an administrative expense claim in the amount of \$14,046.

**II. BACKGROUND**

The facts relevant to the present matter are few and undisputed. The Debtor filed his Chapter 13 petition on March 3, 2010. The Debtor resides at 655 Washington Street in Whitman, Massachusetts (the "Property"). In addition to a multi-family residence, the Property also contained an unoccupied barn (the "Barn") that was de-

tached from the primary residence and abutting a public way (the "Barn"). The Debtor also kept an inoperable camper at the Property adjacent to the Barn.

By notices dated February 9, 2010, and May 20, 2010, the Town informed the Debtor that the Barn had been declared unsafe by the building commissioner and ordered him to either repair or remove it. Though he received the notice, the Debtor neither appealed the building commissioner's determination nor took any action to repair or remove the Barn. Upon completion of a survey of the structure, the Town sent the Debtor a third notice on May 26, 2010, requiring removal of the Barn. By an undated correspondence received in either June or July of 2010, the Debtor acknowledged receipt of [\*3] the notices. Thereafter, the Town undertook the necessary actions to secure public funds and arrange for a contractor to remove the Barn.

On October 27, 2010, the Town filed an "Emergency Motion for Leave to Remove Unsafe Building From Property Located at 655 Washington Street, Whitman, MA and Leave to Recover Petitioner's Costs for Removal" (the "Emergency Motion"). In the Emergency Motion, the Town explained that the Barn had recently demonstrated an immediate risk of collapse and, given its proximity to the multi-family residence and the public way, threatened both the Property inhabitants and the nearby pedestrian and automobile traffic. Accordingly, the Town sought an order authorizing its agents to enter the Property to immediately remove the Barn, as well as any impediments to the proposed demolition, including the inoperable camper. The Town also requested permission to assess and collect the reasonable costs of demolition against the Debtor pursuant to its authority under *Mass. Gen. Laws ch. 143, § 9*.

I conducted a hearing on the Emergency Motion on October 28, 2010. The Debtor did not file an objection and during oral argument, counsel for the Town represented that the Debtor [\*4] had, in prior discussions, consented to the removal of the Barn. At the conclusion of the hearing, I granted the Town relief from stay to remove the Barn, but deferred to make any ruling regarding costs until the Town filed a proof of claim.

On December 10, 2010, the Town filed the Request seeking administrative expense treatment under 11 U.S.C. § 503(b)(1)(A) for costs in the amount of \$15,068 incurred demolishing the Barn (the "Demolition Costs").

According to the affidavit and invoices attached to the Request, the Town incurred the following expenses: labor and supplies in the amount of \$500 for the removal of a water meter and seventeen tires, the patching of a water line, and backfilling done at the Property; compensation in the amount of \$480 for police details; towing expenses in the amount of \$500 payable to C&M Towing for the removal of the camper; costs for demolition, debris removal, and general lot grading payable to Hercules Building Wrecking Company in the amount of \$9,500; and legal fees payable to LM&M in the amount of \$4,088. Notably, the only expense not substantiated by any documentation was LM&M's legal fees. The Town asserted that the Demolition Costs qualified [\*5] as administrative expenses because they reflected the actual and necessary costs of preserving the bankruptcy estate.

On December 14, 2010, the Debtor filed the Objection, which consisted of a single sentence stating that the Debtor lacked sufficient funds to pay an administrative expense through his Chapter 13 plan. I heard the matter on March 3, 2011,<sup>1</sup> at which time the Debtor argued that the Demolition Costs are not an administrative expense because, pursuant to *Mass. Gen. Laws ch. 143, § 9*, such costs are to be added to the real estate tax bill after two years and therefore, are not presently collectable. With the consent of the Debtor, I authorized the Town to record a lien on the Property for the Demolition Costs, but took the issue of whether they qualified as an administrative expense under advisement. On March 23, 2011, I ordered the Town to file a fee application to support LM&M's request for legal fees. On April 6, 2011, the Town filed the Fee Application.

1 A hearing on the Request was delayed by the temporary dismissal of the Debtor's case for failure to make payments pursuant to his Chapter 13 plan.

### III. DISCUSSION

Pursuant to *Mass. Gen. Laws ch. 143, § 9*, where a local building [\*6] inspector makes a determination that a structure is dangerous and the owner refuses or neglects to correct the situation, "the local inspector shall cause it to be made safe and taken down."<sup>2</sup> Additionally,

The costs and charges incurred shall constitute a debt due the city or town upon completion of the work and the rendering of an account therefor to the owner of such structure, and shall be enforced in an action of contract, and such owner . . . shall, for every day's continuance of such refusal or neglect after being so notified, be punished by a fine of not less than one

hundred dollars. The provisions of the second paragraph of section three A of chapter one hundred and thirty-nine, relative to liens for such debt and the collection of claims for such debt, shall apply to any debt referred to in this section.<sup>3</sup>

Generally speaking, *Mass. Gen. Laws ch. 139, § 3A* provides that demolition expenses shall, if a notice is properly recorded within 90 days, constitute a lien on the property which will continue for two years, accruing interest at 6% per annum.<sup>4</sup> If the debt remains unpaid at the end of the two years, the debt will be certified to the tax assessors, who will then add it to [\*7] the real estate tax bill.<sup>5</sup>

2 *Mass. Gen. Laws ch. 143, § 9*.

3 *Id.* (emphasis added). Notably, the statute was amended in 1992 to substitute "debt due the city or town upon completion of the work and the rendering of an account therefor to the owner of such structure," for "lien upon the land upon which the structure is located." St. 1992, c. 133, § 499. Although the Debtor relies on the prior language of the statute, the difference would not change the result in this case.

4 *Mass. Gen. Laws ch. 139, § 3A*.

5 *Id.*

Contrary to the Debtor's assertion, both of these statutes indicate that the Demolition Costs are presently collectable "in an action of contract."<sup>6</sup> Indeed, this is further supported by the fact that the Demolition Costs are accruing statutory interest at a rate of 6% per annum, which would be wholly illogical if they were not currently recoverable.<sup>7</sup> While the statute contemplates circumstances where the debt remains outstanding for over two years, it neither forces the Town to wait nor grants the Debtor the right to defer payment. Instead, it merely provides the Town an alternative mechanism to collect these types of expenses without having to sue the property owner.

6 *Mass. Gen. Laws ch. 139, § 3A* [\*8] (a claim for the expense of such demolition or removal . . . shall be recoverable from such owner in an action of contract) (emphasis added); *Mass. Gen. Laws ch. 143, § 9* (The costs and charges incurred . . . shall be enforced in an action of contract) (emphasis added).

7 See *Mass. Gen. Laws ch. 139, § 3A*.

*Section 503(b)(1)(A) of the Bankruptcy Code* provides that "there shall be allowed administrative expenses . . . including--the actual, necessary costs and expenses of preserving the estate . . ." <sup>8</sup> From the outset,

I note that the Debtor's inability to pay the Demolition Costs as an administrative expense is irrelevant to the question of whether they qualify as such. Fundamentally, priorities are narrowly construed statutory exceptions to the general rule of equal and ratable distribution in bankruptcy.<sup>9</sup> Accordingly, a debtor's ability to pay simply has no impact on whether a claim is afforded such treatment under the statute.

8 11 U.S.C. § 503(b)(1)(A).

9 See, e.g., *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008); *Howard Delivery Service, Inc. v. Zurich American Ins. Co.*, 547 U.S. 651, 126 S. Ct. 2105, 165 L. Ed. 2d 110 (2006).

In several respects, the request for Demolition Costs associated with [\*9] the removal of the Barn is analogous to cases addressing requests for administrative expense priority for necessary environmental cleanup costs provided to a contaminated estate. In *Midlantic Bank v. New Jersey Dept. of Environmental Protection*, the Supreme Court of the United States, quoting a prior decision, stated:

Finally, we do not question that anyone in possession of the site—whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.<sup>10</sup>

While *Mass. Gen. Laws ch. 143, § 9* is not an environmental statute, it nonetheless demands the abatement of a public nuisance that threatens the safety and welfare of the general populace. Given the Supreme Court's directive, the Debtor, who as a Chapter 13 debtor remained in control of the Property, was not relieved of his obligation to remove the unsafe structure. As such, the Demolition Costs, for which there can be no argument [\*10] that they are anything but a post-petition claim, were necessarily expended for the preservation of the bankruptcy estate.<sup>11</sup> Indeed, the demolition of the Barn substantially benefited the estate as it eliminated a threat to the multi-family residence also located at the Property, reduced the potential for liability claims against the estate, and likely increased the value of the Property. Therefore, the Demolition Costs are administrative expenses under 11 U.S.C. § 503(b)(1)(A).

10 *Midlantic Nat'l Bank v. New Jersey Dept of Environmental Protection*, 474 U.S. 494, 502, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986) (quoting *Ohio v. Kovacs*, 469 U.S. 274, 285, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985)) (emphasis removed).

11 See, e.g., *In re Caslin*, 97 B.R. 366, 369 (Bankr. S.D. Ohio 1989) (city's claim for demolishing a building to abate a nuisance was an administrative expense); *In re Vermont Real Estate Inv. Trust*, 25 B.R. 804, 806 (Bankr. D. Vt. 1982) (city entitled to an administrative expense claim for costs incurred demolishing the remainder of a collapsed building). But see *Gray v. City of Decatur (In re Gray)*, 394 B.R. 900, 905 (Bankr. C.D. Ill. 2008) (claim for demolition expenses will be determined to be pre-petition or post-petition claims depending on when [\*11] the city became involved by either performing inspections or sending the debtor notices); *City of Clarksburg v. Sprouse (In re Sprouse)*, No. 07-120, 2008 Bankr. LEXIS 1090, 2008 WL 1767727 \*3 (Bankr. N.D. W.Va. 2008) (city's claim for demolition costs arose prepetition when it sent the debtor a notice of condemnation).

The final issue before me is whether the Demolition Costs are reasonable and I find that, with the exception of LM&M's legal fees, they are. At the March 3, 2011 hearing, I noted my concern that the legal fees appeared high considering the relative simplicity of the matter involved. Having carefully reviewed the time entries attached to the Fee Application, I conclude that my prior concerns were well-founded and that LM&M's billings are excessive

As I have previously stated:

A deficient fee application is filed at the applicant's peril. "Reduction of compensation is appropriate where time records inadequately describe services, provide insufficient detail, or are incomprehensible. The subject matter or purpose of meetings, letters, telephone conferences, and office conferences must be set forth." Failure to do so may result in denial or reduction of compensation for the task, as the Court cannot [\*12] find services reasonable and necessary without disclosure of the need and purpose of the task.<sup>12</sup>

Moreover, "[i]f the time expended appears duplicative, excessive, or otherwise unnecessary, it will be appropriately reduced."<sup>13</sup> "The Court need not 'track down every

entry, correlate them against the other fees applications, and . . . delete those entries insufficiently substantiated,' but may use its discretion to determine that a percentage of the fee application is overstated." <sup>14</sup>

12 *In re McMullen, No. 00-10151-WCH, 2009 Bankr. LEXIS 555, 2009 WL 530296 \*28 (Bankr. D. Mass. Feb. 18, 2009) (quoting In re Smug-gler's Beach Properties, Inc., 149 B.R. 740, 743 (Bankr. D. Mass. 1993)) (footnotes omitted).*

13 *2009 Bankr. LEXIS 555, [WL] at \*26 (citing Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984).*

14 *2009 Bankr. LEXIS 555, [WL] at \*27 (quot-ing In re Bank of New England Corp., 142 B.R. 584, 586 (D. Mass. 1992)).*

The time entries attached to the Fee Application contain several large blocks of time where various tasks such as research, drafting, and telephone conferences are all lumped together making it difficult to gauge how counsel's time was spent. Nonetheless, it appears that LM&M spent approximately 12 hours researching and drafting the Emergency [\*13] Motion, even though it was only four pages long and contained only three statu-tory citations. Additionally, on October 28, 2010,

LM&M spent 3.30 hours preparing for and attending the hearing on the Emergency Motion. Given that the Emer-gency Motion was uncontested and the October 28, 2010 hearing lasted approximately 6 minutes, the 3.30 hours billed is grossly excessive. Because the "lumping" in-volved precludes any meaningful attempt to strike unreas-onable time entries, I will instead reduce the Fee Appli-cation by 25%, or \$1,022.

In sum, I find that the Town has an administrative expense claim in the amount of \$14,046 for the Demoli-tion Costs.

#### IV. CONCLUSION

In light of the foregoing, I will enter an order grant-ing the Request in part and approving the Fee Applica-tion in part, finding that the Town is entitled to an ad-ministrative expense in the amount of \$14,046.

/s/ William C. Hillman

William C. Hillman

United States Bankruptcy Judge

Dated: June 7, 2011

KEITH RUDY, JR., THERESE COOPER, JOHN DAVIS, FRANCIS  
AUBREY, DENNIS DALEY, ANGELA MAILLE, DENISE  
PELLETIER, SEAN O'CONNELL, TIMOTHY LEKITES, STEPHEN  
PARIS, ERIN DALTON, MILDRED BADILLO, et al., Plaintiffs, v.  
CITY OF LOWELL, Defendant.

Civil Action No. 07-11567-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
MASSACHUSETTS

2011 U.S. Dist. LEXIS 26956

March 14, 2011, Decided

March 14, 2011, Filed

**SUBSEQUENT HISTORY:** Later proceeding at *Rudy v. City of Lowell*, 2011 U.S. Dist. LEXIS 32824 (D. Mass., Mar. 29, 2011)

**PRIOR HISTORY:** *Rudy v. City of Lowell*, 716 F. Supp. 2d 130, 2010 U.S. Dist. LEXIS 57046 (D. Mass., 2010)

**COUNSEL:** [\*1] For Keith Rudy, Therese Cooper, John Davis, Francis Awbrey, Angela Maille, Mildred Badillo, Denise Pelletier, Everett Potter, Plaintiffs: Daniel W Rice, LEAD ATTORNEY, Glynn, Landry & Rice, LLP, Boston, MA.

For City of Lowell, Defendant: Brian W. Leahey, LEAD ATTORNEY, City of Lowell Law Department, City Hall, Lowell, MA.

**JUDGES:** Nathaniel M. Gorton, United States District Judge.

**OPINION BY:** Nathaniel M. Gorton

## OPINION

### MEMORANDUM & ORDER

GORTON, J.

The named plaintiffs brought suit on behalf of themselves and others similarly situated against the City of Lowell ("the City") for violating the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, by undercalculating the "regular rate" of pay used to determine overtime wages. Before the Court are the defendant's motion for summary judgment as to damages and plaintiffs' motion to amend the complaint.

#### I. Factual Background

This case involves a technical dispute with respect to the calculation of overtime pay under the FLSA. All of the plaintiffs are or, at the time of the complaint, were employed by the City and members of the American Federation of State, County and Municipal Employees,

AFL-CIO State Council 93, Local 1705. A collective bargaining agreement ("CBA") sets forth [\*2] the terms and conditions of the plaintiffs' employment.

The CBA provides that employees may receive a \$3.00 per hour augmentation to their pay for plowing snow, a 5% differential for working undesirable night shifts and a \$150 weekly "standby" payment to employees at its Water Distribution System. The agreement also allows employees to earn overtime pay of one-and-one-half times their regular pay if they work in excess of eight hours in one day or forty hours in one week. The crux of this dispute concerns whether the three named pay augmentations should be included in the employees' regular rate of pay for the purpose of calculating overtime wages and, if so, how the City is permitted to net out those augmentations against other "premiums" paid to employees beyond the requirements of the FLSA.

#### II. Procedural History

Plaintiffs filed their complaint on August 22, 2007 and filed an amended complaint two months later identifying 88 plaintiffs. In November, 2009, the parties filed cross-motions for summary judgment with respect to liability. The City then conceded that it had violated the FLSA by failing to include the snow plow stipend and shift differentials in the plaintiffs' regular rate [\*3] calculations.

In a Memorandum and Order ("M&O") on June 7, 2010, the Court found that the Water Department's \$150 standby stipend also should be included in the regular rate of pay in the weeks during which employees volunteered for standby duty. *Rudy v. City of Lowell*, 716 F. Supp. 2d 130, 133 (D. Mass. 2010). As such, the Court allowed the plaintiffs' motion for summary judgment. With respect to damages, the Court stated that the parties would either resolve issues related to the calculation of back pay and damages by August 15, 2010 or, if further court intervention was necessary, the parties would submit memoranda in support of their positions by August 31, 2010.

On January 7, 2011, after two extensions of time, the City moved for summary judgment as to damages and the plaintiffs filed a memorandum addressing damages. Plaintiffs also moved to amend their complaint to add a claim for a violation of the Massachusetts Payment of Wages Law, *Mass. Gen. Laws ch. 149, § 148*. The parties have submitted timely oppositions to each others' motions.

### **III. Motion for Summary Judgment**

#### **A. Summary Judgment Standard**

The role of summary judgment is "to pierce the pleadings and to assess the proof in order [\*4] to see whether there is a genuine need for trial." *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990)). The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that [\*5] party's favor. *O'Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993). Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

#### **B. Application**

At this point, the parties do not dispute the facts or the defendant's liability. All that remains for the Court to decide are questions of law relating to damages.

##### **1. Offset Calculation**

207(h)(2) of the FLSA provides that

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

29 U.S.C. § 207(h)(2). Only the "premium" portion of the contractual overtime rate (the extra one-half on top of the regular rate) may be used to offset the defendant's statutory overtime liability. *O'Brien v. Town of Agawam*, 350 F.3d 279, 289 (1st Cir. 2003) ("O'Brien I").

Here, the CBA allows employees to treat certain non-work days such as vacation, sick and personal days as hours actually worked for the purpose of determining overtime hours. The City also pays some workers time [\*6] and one-half for working on holidays. The parties do not dispute that the extra compensation provided for in the plaintiffs' CBA falls within the compensation described in subsection (5), (6) and (7) and can be used to offset defendant's underpayment, pursuant to § 207(h)(2).

The parties do dispute, however, whether premium compensation earned in one week can be used to offset an underpayment in a different week. Plaintiffs argue that their damages for unpaid overtime should be calculated on a workweek basis and that any offsets pursuant to § 207(h)(2) may only be attributed to the singular workweeks in which the premiums and overtime were earned. In other words, an underpayment one week cannot be offset by a premium payment made in a different week. The defendant contends, to the contrary, that it is entitled to a "cumulative offset", consisting of all premium payments, against any FLSA overtime it owes, regardless of when the premium payments were earned or made.

The FLSA does not provide an explicit answer to this difference of interpretation and the United States Circuit Courts have taken divergent positions. Some courts have held that § 207(h) offsets should be calculated on a workweek [\*7] basis. *Herman v. Fabric-Centers of Am., Inc.*, 308 F.3d 580, 585-93 (6th Cir. 2002); *Howard v. City of Springfield*, 274 F.3d 1141, 1147-49 (7th Cir. 2001); *Roland Elec. Co. v. Black*, 163 F.2d 417, 420 (4th Cir. 1947); *Conzo v. City of New York*, 667 F. Supp. 2d 279, 291 (S.D.N.Y. 2009); *Bell v. Iowa Turkey Growers Co-op.*, 407 F. Supp. 2d 1051, 1063 (S.D. Iowa 2006); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 331 (N.D. Ill. 2000). Other courts have allowed defendants to apply a cumulative offset. *Singer v. City of Waco*, 324 F.3d 813, 826-28 (5th Cir. 2003); *Kohlheim v. Glynn County*, 915 F.2d 1473, 1481 (11th Cir. 1990).

The First Circuit has not directly addressed this issue but other sessions in this District have. In *O'Brien v. Town of Agawam*, United States District Judge Michael A. Ponsor addressed facts analogous to those at bar and held that the employer could apply a cumulative offset. 491 F. Supp. 2d 170, 176 (D. Mass. 2007) ("*O'Brien II*"). The Court surmised that the First Circuit would hold accordingly given its holding in *Lupien v. City of Marlborough*. *Id.* at 175. In *Lupien*, the employer's practice of compensating employees for overtime by use of compensatory time ("comp time"), [\*8] instead of in cash, violated the FLSA. 387 F.3d 83 (1st Cir. 2004). With respect to damages, the First Circuit held that the employer did not have to pay its employees for overtime hours for which the employee had used comp time, regardless of when the employee used the comp time. The Court reasoned that paying the employees for overtime hours for which they had used comp time would result in double payment for the same overtime hours. In *Murphy v. Town of Natick*, another case analogous to this one, United States District Judge Richard G. Stearns agreed with the holding in *O'Brien II* and also allowed defendants to apply a cumulative offset. 516 F. Supp. 2d 153, 160-61 (D. Mass. 2007).

Although the two cases in this District are directly analogous to this case, the Court disagrees with them with respect to their interpretation of the FLSA and of *Lupien*. A further analysis of the *Lupien* case, the purpose of the FLSA and its interpretation by the Department of Labor ("the DOL") and the First Circuit's language in *O'Brien I* all undermine the position adopted by the courts in *O'Brien II* and *Murphy*. Rather, they lead to the conclusion that § 207(h)(2) offsets should be calculated on a workweek [\*9] basis for the following reasons:

1. This case is distinguishable from *Lupien* and other First Circuit case law indicates support for a workweek offset model. *Lupien* dealt with an application of § 207(o) (regulating the use of compensatory time), not § 207(h). In fact, § 207(h) is not referred to in that opinion. Furthermore, here, the employees were not given the option of taking comp time rather than overtime payments. Thus, there is no risk in our case, as there was in *Lupien*, that the plaintiffs will be compensated twice for the same hours. Thus, the Court concludes that the First Circuit's decision in *Lupien* does not indicate how it would decide the question at bar.

More on point is the First Circuit's discussion of § 207(h)(2) in *O'Brien I*, in which it stated that

The regulations specifically explain how to treat such mid-workweek contractual overtime payments under the Act: only the premium portion of the contractual

overtime rate (that is, the amount in excess of the employee's regular rate) is deemed "overtime" pay and may be offset against any statutory overtime liability in the same week.

*O'Brien I*, 350 F.3d at 289 (citing 29 C.F.R. §§ 778.201(a), 202(a)) (emphasis added). Thus, [\*10] although not resolving the offset issue in that decision, the First Circuit conveyed its inclination by specifying that offsets pursuant to § 207(h)(2) would apply "in the same week".

2. The FLSA overtime requirement uses a single workweek as its basic unit of measurement. *Scott v. City of New York*, 592 F. Supp. 2d 475, 484 (S.D.N.Y. 2008). Section 207(a)(1) sets forth the basic overtime rule:

no employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

The focus on the unitary workweek is prevalent throughout § 207 and the DOL's interpretation of that section. For example, 29 C.F.R. § 778.103 directs employers to calculate overtime liability on a weekly basis. Further, 29 C.F.R. § 778.104 provides that "[t]he Act takes a single workweek as its standard" and an employer cannot average the number of hours an employee worked in two weeks in order to avoid paying overtime:

[I]f an employee works 30 hours one week and 50 hours the next, he must receive overtime [\*11] compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40.

It is clear from § 778.104 that cumulative offsets were not contemplated by the DOL. In addition, where the single workweek model is problematic, i.e. when applied to firefighters and law enforcement officers, the FLSA includes a very specific and limited exception. See 29 U.S.C. § 207(k).

With regard to the exact issue before the Court, 29 C.F.R. § 778.202(c) explains that credits pursuant to § 207(h) may be given for overtime due "in that workweek". See *Howard*, 274 F.3d at 1148-49; *Conzo*, 667 F.

*Supp. 2d at 290.* Finally, and perhaps most importantly, the DOL has also issued an opinion letter stating that

surplus overtime premium payments, which may be credited against overtime pay pursuant to *section 7(h) of FLSA*, may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.

Letter from Herbert J. Cohen, Deputy Administrator, U.S. Dep't of Labor, WH-526, 1985 WL 304329 (Dec. 23, 1985).

3. Overtime payments are intended to be paid as soon as is practicable. [\*12] Although they are not entitled to deference by this Court, several of the DOL's official interpretations of § 207 demonstrate the FLSA's emphasis on ensuring that overtime payments are made soon after they are earned. *Howard, 274 F.3d at 1148.* For instance, *29 C.F.R. § 778.106* provides that overtime payments need not be paid weekly but must be paid as soon as is practicable:

Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made.

See also *Nolan, 125 F. Supp. 2d at 332* (discussing *29 C.F.R. § 778.106* and holding that offsets for overtime paid apply on a pay period basis).

The reason for requiring employers to calculate and make overtime payments as soon as practicable is obvious: employees are entitled to know how much they will be paid and to prompt payment of what they have earned. As poignantly stated by the Seventh Circuit in *Howard v. City of Springfield*, if § 207(h)(2) were to permit a cumulative offset, employers could withhold overtime earnings in order to offset them against potential "short" [\*13] weeks in the future. *274 F.3d at 1148-49.* Under such a model, an employee's overtime payments could be put on hold indefinitely until the employer is either willing or compelled to pay. That outcome is not only illogical but also contradicts the FLSA's focus on the workweek as a unit and its concern with prompt overtime payments.

In fact, this case uniquely illustrates why a workweek offset is appropriate: if the City had correctly calculated its overtime rate and applied the § 207(h)(2) offsets contemporaneously, it would not have been able to

apply those offsets to obligations incurred one or two years later. See *id. at 1148.* The workweek method of calculating offsets most closely reproduces what the parties would be entitled to had there been no error in the City's initial computation of its overtime liability. See *Nolan, 125 F. Supp. 2d at 333.*

4. The purpose of the FLSA, to protect workers from "excessive work hours and substandard wages", is best served by the workweek offset model. *Howard, 274 F.3d at 1148; see Herman, 308 F.3d at 585-93.* This was clearly articulated in *Scott v. City of New York*, in which the DOL advocated for the workweek offset model. *592 F. Supp. 2d at 484.* [\*14] The District Court in that case found that "both the structure of the Act and its legislative history lend credence to DoL's interpretation." *Id.* The Court explained how a cumulative offset undermines the protections afforded by the FLSA:

The [overtime] requirement protects workers from the imposition of excessive hours by placing an immediate cost on the employer. If employers were allowed to bank credit for contractual overtime against future obligations to pay statutory overtime, it would place workers in the employer's debt[.]

*Id.* In essence, it would require employees to work large blocks of overtime without premium compensation.

5. Finally, the arguments for applying a cumulative offset are unpersuasive. The City claims that a workweek offset will result in a windfall to the employees but that seems implausible given the fact that, if the City had been correctly calculating its overtime rate and applying the § 207(h)(2) offset at every pay period, the offset would have been applied only to the overtime liability in that pay period. Moreover, the circuit court cases cited by the City do not provide support for a cumulative offset. In *Singer v. City of Waco, 324 F.3d at 827*, the Fifth [\*15] Circuit held that § 207(h) was inapplicable, while in *Kohlheim v. Glynn County, 915 F.2d at 1481*, the Eleventh Circuit did not even explain why it allowed a cumulative offset.

In summary, the Court finds that the plaintiffs' method of calculating damages is most compatible with both the language and purpose of the FLSA's overtime requirements and the First Circuit's understanding of those requirements. As such, the plaintiffs' damages for unpaid overtime should be calculated on a workweek basis and any offsets pursuant to § 207(h)(2) should be attributed only to the singular workweeks in which both premiums and overtime were earned. The Court concludes that only the premium portions of the extra payments, i.e. the extra one-half of the regular rate, may be

used to offset the City's overtime liability. *O'Brien II*, 491 F. Supp. 2d at 176.

## 2. Liquidated Damages

Section 216(b) of the FLSA provides that a plaintiff whose employer violated the FLSA is entitled to liquidated, or double, damages. 29 U.S.C. § 216(b). Liquidated damages are intended to serve as compensation for the delay in payment of wages owed to the plaintiff. *Lupien*, 387 F.3d at 90. Good faith is an affirmative defense to paying [\*16] such damages if the employer can demonstrate that its conduct or omission giving rise to the lawsuit

was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act[.]

29 U.S.C. § 260. Good faith is lacking where the defendant has failed to investigate potential liability or "inquire about the law's requirements." *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 270 (3rd Cir. 1999). Case law suggests that liquidated damages are to be awarded unless the employer shows that it relied on the advice of informed counsel or an opinion it solicited from the Department of Labor. *O'Brien II*, 482 F. Supp. 2d at 120 (citing *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 72 (2d Cir. 1997); *McLaughlin v. Hogar San Jose, Inc.*, 865 F.2d 12, 14 (1st Cir. 1989)).

The Court concludes that the City acted in good faith here. Apparently, the City made no inquiry into whether its payment practices were in compliance with the FLSA before the complaint was filed in this case and the City does not deny that it still has not adjusted its payroll practices in accordance with this Court's June, 2010 M&O. Nevertheless, as this Court noted [\*17] in that M&O, this case presents a statutory interpretation of first impression in the First Circuit. Until June, 2010, there was no First Circuit case law addressing the question of whether standby pay must be included in the employee's regular rate for the purposes of calculating overtime.

In the absence of guidance from other courts in this circuit, this Court relied on its own statutory interpretation and a number of non-controlling DOL Wage and Hour Division FLSA Opinion Letters. Thus, even if the City had solicited an opinion from informed counsel or from the DOL, it is unclear what advice it would have received.

Moreover, there is a circuit split with respect to how § 207(h)(2) offsets are applied and the two district judges of this Court who have addressed the issue allowed the

application of a cumulative offset. Thus, it was not unreasonable for the City to believe that the § 207(h)(2) offsets could be applied cumulatively to mitigate any miscalculation.

Finally, the complaint in this case constituted the first written assertion that the City's regular rate calculation violated the FLSA. In fact, the City had collectively bargained in good faith with the Union for a regular rate [\*18] of pay that specifically included a Water Utility Compensation augmentation but not the 5% Night-Time Shift Differential, the \$3 Snowplow Driver Stipend or the standby pay. When an employer's decision is "made above board and justified in public", such as during collective bargaining, the employer is more likely to be found to have acted in good faith because "[d]ouble damages are designed in part to compensate for concealed violations, which may escape scrutiny." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 312 (7th Cir. 1986). Here, the lack of any evidence that the City knowingly concealed its violation of the FLSA weighs against awarding liquidated damages. The Court finds, therefore, that the City acted in good faith and "had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]". 29 U.S.C. § 260. As such, the Court concludes that liquidated damages are unwarranted in this case.

## 3. Willfulness and the Statute of Limitations

Plaintiffs claim that back pay for a minimum of three years before each plaintiff opted into this action is required by § 255(a) of the FLSA because the City's violation was "willful". 29 U.S.C. § 255(a). Section 255(a) [\*19] provides for a two-year statute of limitations for FLSA actions unless the cause of action arises out of a willful violation, in which case the statute of limitations is three years. A violation is willful where the employer either "knew or showed reckless disregard for" whether its payment practices were in violation of the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988). The employee seeking to benefit from the extended statute of limitations bears the burden of showing that the defendant's conduct was willful. *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 2011 WL 117575, at \*6 (4th Cir. 2011).

Generally, willfulness is a question of fact for the jury. See *Singer*, 324 F.3d at 821. Nevertheless, the Court finds that the plaintiffs have alleged no facts from which a reasonable jury could find that the defendant acted willfully with respect to the proper regular rate calculation. Merely failing to investigate the law does not rise to the level of willfulness. *Richland Shoe Co.*, 486 U.S. at 133; *Baystate Alt. Staffing, Inc. v. Herman*, 163

*F.3d 668, 680 (1st Cir. 1998)*. Therefore, the two-year statute of limitations will [\*20] apply in this case.

Defendant maintains that no damages for the snow plow stipend existed before May, 2006, because that is when the stipend was instituted. Because the plaintiffs do not refute that assertion, the Court finds that the plaintiffs are entitled to damages arising from the snow plow stipend only after May, 2006.

**IV. Motion for Leave to Amend the Complaint**

Plaintiffs move to amend their complaint for a second time to add a claim for failure to make timely overtime payments, in violation of the Massachusetts Payment of Wages Law (*Mass. Gen. Laws ch. 149, § 148*). The defendant opposes that motion, arguing that adding an entirely new theory of liability and damages would "dramatically expand and prolong this action". The defendant contends that the motion to amend was brought with a bad faith or dilatory motive.

**A. Motion to Amend Standard**

Under *Fed. R. Civ. P. 15(a)*, leave to amend before trial will be freely given "when justice so requires". Despite that liberal amendment policy, the Court may deny a motion for leave to amend if, among other reasons, amendment would result in undue delay or prejudice. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*.

**B. Application**

The Court concludes that [\*21] another amendment of the complaint at this stage of the litigation, more than

three years after its inception, would result in undue delay. Liability has already been determined and the only issue left before the Court is damages. The plaintiffs provide no justifiable reason for the delay and none is readily apparent. Moreover, the proposed additional count is a state law claim that may, if plaintiffs choose, still be brought in state court.

**ORDER**

In accordance with the foregoing,

1) defendant's motion for summary judgment (Docket No. 37) is, with respect to the absence of willfulness and the denial of liquidated damages, **ALLOWED**, but is, with respect to the cumulative offset calculation, **DENIED**;

2) plaintiffs' motion to amend (Docket No. 43) is **DENIED**; and

3) the parties are directed to submit supplemental memoranda containing calculations of damages in accordance with this Order on or before March 22, 2011.

**So ordered.**

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated March 14, 2011

KEITH RUDY, JR., THERESE COOPER, JOHN DAVIS, FRANCIS  
AUBREY, DENNIS DALEY, ANGELA MAILLE, DENISE  
PELLETIER, SEAN O'CONNELL, TIMOTHY LEKITES, STEPHEN  
PARIS, ERIN DALTON, MILDRED BADILLO, et al., Plaintiffs, v.  
CITY OF LOWELL, Defendant.

Civil Action No. 07-11567-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
MASSACHUSETTS

2011 U.S. Dist. LEXIS 32824

March 29, 2011, Decided

March 29, 2011, Filed

**PRIOR HISTORY:** *Rudy v. City of Lowell*, 2011 U.S. Dist. LEXIS 26956 (D. Mass., Mar. 14, 2011)

**COUNSEL:** [\*1] For Keith Rudy, Therese Cooper, John Davis, Francis Awbrey, Angela Maille, Mildred Badillo, Denise Pelletier, Everett Potter, Plaintiffs: Daniel W Rice, LEAD ATTORNEY, Glynn, Landry & Rice, LLP, Boston, MA.

For City of Lowell, Defendant: Brian W. Leahey, LEAD ATTORNEY, City of Lowell Law Department, Lowell, MA.

**JUDGES:** Nathaniel M. Gorton, United States District Judge.

**OPINION BY:** Nathaniel M. Gorton

**OPINION**

**MEMORANDUM & ORDER**

**GORTON, J.**

The named plaintiffs brought suit on behalf of themselves and others similarly situated against the City of Lowell ("the City") for violating the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, by undercalculating the "regular rate" of pay used to calculate overtime wages. It was determined that the three wage augmentations at issue must be included in that regular rate. *Rudy v. City of Lowell*, 716 F. Supp. 2d 130, 133 (D. Mass. 2010). Thereafter, on March 14, 2011, the Court issued a Memorandum & Order holding that 1) the City's offset calculation, pursuant to 29 U.S.C. § 207(h)(2), must be calculated on a week-by-week basis and not on a cumulative basis, 2) a two-year statute of

limitations will apply and 3) the plaintiffs are not entitled to liquidated damages. *Rudy v. City of Lowell*, No. 07-11567, 2011 U.S. Dist. LEXIS 26956, 2011 WL 915334, \*8 (D. Mass. Mar. 14, 2011).

In [\*2] accordance with that M&O, the parties submitted their respective formulae for calculating damages on March 24, 2011. Surprisingly, plaintiffs argue that some of the premium payments pursuant to their collective bargaining agreement cannot be used to offset the overtime that the City owes under the FLSA. The Court considers that argument to have been waived, however, because it was not raised in the briefing on damages submitted in January, 2011 or at the hearing in March, 2011.

Instead, the Court will adopt the City's formula for calculating the payment shortfall and any offsets pursuant to § 207(h) (2) because it is clear and consistent with the Court's understanding of the FLSA.

**ORDER**

In accordance with the foregoing, the City's proposed formula for calculating damages (Docket No. 54) is **ADOPTED**. The City shall submit a progress report on the final calculation on or before May 12, 2011 and its final calculation on or before June 29, 2011.

**So ordered.**

Dated March 29, 2011

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

