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

LOCAL EMPLOYEES

Municipal Personnel and Workforce Issues



2013

Workshop C

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

www.mass.gov/dls

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Case Study # 1

Special Contracts for High Level Non-Union Employees

The resort town of Lenox by the Sea hired a new town manager in October 2012 after conducting a nationwide search. The board of selectmen entered into a 7 year contract with manager Spendmore under GL c. 41, §108N to pay him \$200,000 for the first year with a 10% increase each year thereafter upon receipt of a satisfactory rating by the board. The contract also provided moving expenses from California, tuition assistance for Spendmore's children, health insurance benefits entirely covered by the town during his employment, and a guarantee of health insurance coverage at the regular retiree rate after he leaves the town's employment provided he remains employed in the position for at least 5 years. Spendmore insisted on the retired health insurance clause after learning of a similar provision in the contracts of the school superintendent, police chief and building commissioner's contracts.

For FY2013 the town appropriated \$175,000 for the town manager position. The previous town manager, who received that salary, had retired unexpectedly at the end of June and the assistant town manager performed his duties until Spendmore began employment. \$20,000 from the FY2013 budget was used to pay termination benefits for the former town manager pursuant to her employment contract and \$10,000 of the account was used to cover additional pay for the assistant while he performed the manager responsibilities. The amount remaining in the account when Spendmore started was \$145,000, a bit short of the amount necessary to fund the \$150,000 to pay the new salary for the remainder of the year. The BOS sought a reserve fund transfer of \$5,000 in May, 2013 at a Special Town Meeting to meet the remaining amount, but the fincom declined to approve it at that time. Later, in June, the fincom and BOS voted to transfer amounts from another account to cover the deficit in a year end transfer, under GL c. 44, §33B.

1. May the BOS enter into an employment contract with Spendmore for 7 years?
2. Is the contract with Spendmore subject to annual appropriation, even if the contract is silent on the point?
3. Is the contract binding on the town since it was negotiated and almost completed in the first fiscal year with an insufficient appropriation remaining in the account?
4. Would your answer change if you were advised that the amounts paid to the former superintendent and the assistant were improper, and that the account should have had \$175,000 in it when Spendmore began the job?
5. Is the health insurance clause applicable during employment valid by providing 100% coverage of health insurance premiums by the town?
6. Are the after-employment health insurance clauses of the four contracts (town manager, school superintendent, police chief and building commissioner) binding on the town in the absence of an appropriation to cover those expenses?

Case Study # 2

Health Insurance Issues for Retirees

The Town of Enfield is engaged in a long-term strategy to reduce its skyrocketing health insurance costs. The voters had overturned a Proposition 2 ½ override, which sought funding for the increased health care costs. The Board of Selectmen must now seek to reduce its health care costs through increasing health care premiums of its employees and retirees, as well as engaging in other cost-savings initiatives. Recognizing its collective bargaining responsibilities under G.L. c. 150E, the Town bargained with each union to attain an 80-20 split in employee contribution rates, and to modify coverage to encourage employees to switch health insurance plans from more expensive indemnity plans.

With respect to its retirees, the Town made certain changes:

1. In 1976, the Town accepted G.L. c. 32B, s. 9E, which authorized the Town to pay toward the cost of an indemnity plan for retired employees a percentage of the monthly premium that was greater than 50%. The statute also provides that “No governmental unit, however, shall provide different subsidiary or different rates to any group or class within that unit.” From that point on, due to the relatively low cost of health insurance then, the Town contributed 99% of the premium for its retired employees, and the retirees paid 1%. In 2013, the Board of Selectmen voted to increase retiree contributions for the indemnity plan, such that the Town will pay 75% of the costs of the indemnity plan. The Board also modified the types of health insurance plans that will be offered to retirees.
2. In 2013, the Town also diligently reviewed the Medicare status of its retirees, and, pursuant to G.L. c. 32B, s. 18A, provided supplemental health plans for retirees and their spouses who were eligible for federal Medicare coverage. The Town assured that its retirees would have better or equal coverage, while achieving substantial savings.
3. The Board voted to establish a rule that retirees not covered by the Town’s health insurance plans at the time of retirement are not eligible to enroll as a retiree in the Town’s health plans.
4. As part of its effort to reduce health insurance costs for its retirees, the Board is initiating a program to encourage retirees to lead a more active lifestyle and to take certain tests to monitor the wellness of its retirees. As an incentive for completing the program, the Board is considering offering participating retirees with either a cash incentive of \$100 paid by the Town, a free month of health insurance coverage or a \$200 gift certificate from the Antediluvian Shopping Center redeemable at stores located in the shopping center.
5. In order to assist indigent retirees with their increased health insurance premiums, the Board is considering a program of health insurance “hardship” discounts for retirees who meet a certain income level.

6. In accordance with G.L. c.32B, s. 9A 1/2 , which allows municipalities to bill other governmental units where retirees previously worked for a contribution of health care premiums, the Town realized that five of its retirees had creditable service with the Town of Prescott prior to working for and retiring from the Town. Accordingly, the Town submitted to the Town of Prescott a bill for the requisite percentage of the retirees' health care costs, based upon the employees' years of prior creditable service for the Town of Prescott.

Through its strategy of adjusting retiree health care rates, the Town realized substantial savings in its provision of health care insurance to its employees and retirees.

However, shortly after making the changes the following issues arose:

1. A few of the Town's bargaining units filed grievances with the Town, citing that the Town made unlawful unilateral changes to the retiree health insurance plans and failed to provide notice and an opportunity to bargain with the units over a change of a condition of employment impacting their members' "future benefits."
2. The Town's FinCom is challenging the Board of Selectmen's assessment of a new health insurance contribution rate for retirees, stating that Town Meeting should have approved of the imposition of the new retiree health insurance rates.
3. A group of taxpayers is challenging the Board's proposed payments to retirees who participate in the Board's wellness program.
4. A year after the imposition of the rule prohibiting retirees from enrolling in the Town's health insurance plans, a retired town hall employee who did not have health insurance as a Town employee is demanding that the Town provide him with the opportunity to enroll. He has hired a lawyer.
5. A group of retirees is challenging the Board's hardship waiver program, claiming that they are now paying higher contribution rates than retirees who meet the waiver program eligibility.
6. Despite the Town of Enfield's sending of the bill to the Town of Prescott for a share of health insurance premiums for the five retirees who had prior service for the Town of Prescott, the Town Manager of the Town of Prescott is refusing to pay the bill.

Discuss the Board of Selectmen's issues with respect to each challenge.

Later in the year, a majority of the Town's insurance advisory committee, containing representatives of all bargaining units, and the Board agreed, with Town Meeting approval, that the Town should transfer its employee health insurance coverage to the Group Insurance Commission. How would such a change impact the challenges raised previously?

Case Study # 3

Leave Time Issues

The City of East Deficit has a sick, vacation and comp time benefit which calls for a payment of 75% of accrued vacation and sick leave benefits and 100% of comp time benefits earned but not taken during a retirees employment with the city, all payable within 60 days of retirement as straight time at the then current rate. These benefits are set forth in a personnel ordinance passed in 1980 and apply to all non-school personnel. The ordinance has been incorporated into the collective bargaining agreements of most of the unions, although the police and fire unions negotiated a clause beginning in 2010 that increased the payment to 85% of accrued vacation and sick leave benefits of their members, and required payments of those benefits on the date of the last regular paycheck. Those union clauses also applied to employees who leave city employment other than by retirement, but specifically deny the benefit to police officers and firefighters terminated from employment for cause and those who leave voluntarily within 10 years of the beginning of uninterrupted employment. Comp time for the police and fire union employees remained payable within 60 days of retirement, but contained a similar termination for cause provision denying the benefit in such cases.

Traditionally the amounts necessary for the payment of these benefits has been appropriated in the year of the anticipated retirement of particular employees, in the individual departmental salary item accounts. Beginning in FY2005, however, the city began appropriating to a special purpose fund from which it could pay the benefits directly in any year in which the obligation arose. In some years the amount had to be topped off with an additional appropriation or reserve fund transfer to cover all the expenses incurred for that year. The treasurer was given authority to authorize the payments directly from the account.

1. Does the accrued vacation benefit violate the fair labor provisions GL c. 149, §148, which requires that any employee shall be paid wages upon termination of employment, including “vacation payments due?”
2. Does the comp time benefit violate the fair labor standards act, because the payments weren’t made to the employee in the form of wages or salary when the work was performed? For any other reason?
3. Do the police and fire contracts govern the terms of the leave benefits to the extent they purport to provide greater benefits than other city employees?
4. Was the special purpose fund permissible in the absence of a statute authorizing it?
5. May the city transfer the funds in the special purpose fund to a new special fund for the purpose of paying compensated absences by accepting GL c. 40, §13D? If so, may the treasurer be given authority to authorize payments directly from that fund?

Case Study #1 Workshop Materials

Massachusetts General Laws Chapter 41 Section 108N

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

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

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

Massachusetts General Laws Chapter 41 Section 108O

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

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

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

section shall affect the removal powers of any city or town over its police chief and fire chief or such person performing such duties with a different title.

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

Massachusetts General Laws Chapter 71 Section 41

...

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

Massachusetts General Laws Chapter 44 Section 31

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

determination of the next subsequent annual tax rate, unless the city or town has otherwise made provision therefor. ...

Massachusetts General Laws Chapter 32B Section 7A

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

Massachusetts General Laws Chapter 32B Section 9E

A county, except Worcester county, by vote of the county commissioners; a city having a Plan D or Plan E charter by majority vote of its city council; in any other city by vote of its city council, approved by the mayor; a district, except as hereinafter provided, by vote of the registered voters of the district at a district meeting; a regional school district by vote of the regional district school committee; a veterans' services district by vote of the district board; a welfare district by vote of the district welfare committee; a health district established under section twenty-seven A of chapter one hundred and eleven by vote of the joint committee may provide that it will pay in addition to fifty per cent of a stated monthly premium as described in section seven A for contracts of insurance authorized by sections three and eleven C, a subsidiary or additional rate which may be lower or higher than the aforesaid premium and the remaining fifty per cent of said premium is to be paid by a retired employee under the provisions of the first sentence of section nine. A town shall provide for such payment by vote of the town or if a majority of the votes cast in answer to the following question which shall be printed on the official ballot to be used at an election in said town is in the affirmative:—"Shall the town, in addition to the payment of fifty per cent of a premium for contributory group life, hospital, surgical, medical, dental and other health insurance for employees retired from the service of the town, and their dependents, pay a subsidiary or additional rate?" Section nine A shall not apply in any governmental unit which accepts the provisions of this section. No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit.



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

200 Portland Street
Boston 02114-1715

MITCHELL ADAMS
Commissioner

(617) 727-2300

LESLIE A. KIRWAN
Deputy Commissioner

April 13, 1992

Charlotte M. Noponen
Office of the Town Accountant
Town Hall
Ashburnham, MA 01430

Re: Relocation Expenses
Our File No. 92-328

Dear Ms. Noponen:

You ask whether the town may pay the out of state relocation expenses of the new town administrator and whether there is any dollar limit on the amount the town may pay. Under Massachusetts General Laws Chapter 41 Section 108N the board of selectmen may enter into a contract with a town administrator which may include relocation expenses. There is no exclusion in the statute for out of state moving expenses and there is no dollar limit set forth in the statute. Nevertheless, in our opinion, any contract to pay such expenses is subject to the sufficiency of an appropriation made for the purpose of compensating the town administrator. G.L. Ch. 44, S. 31.

This opinion is not changed by the existence of any geographic or dollar limitation which appeared in G.L. Ch. 40, S. 5[67], since G.L. Ch. 40, S. 108N applies "[n]otwithstanding the provision of any general or special law to the contrary...". I point out, however, that G.L. Ch. 40, S. 5 has been amended by St. 1989, Ch. 687, S. 12 and that all the clauses of that section have been eliminated. Thus, the board of selectmen can agree to pay the out of state relocation expenses of the town administrator, provided that there is a sufficient appropriation available to cover that purpose or the purpose of compensating the administrator.

If I may be of further service, please do not hesitate to contact me again.

Very truly yours,

Harry M. Grossman
Chief, Property Tax Bureau

From: Blau, Gary on behalf of DOR DLS Law
Sent: Tuesday, April 03, 2007 9:25 AM
To: 'Cbragg1@aol.com'
Subject: EM2007-292 - question re municipal finance

Carol:

We cannot get into the specifics of your question, since the answer may vary depending on the peculiar facts and circumstances of the transaction. We recommend that town counsel be consulted concerning the terms and legal ramifications of the agreement with your town administrator, given the town's charter and/or by-laws. However, we can make some general observations about the ability of a board of selectmen to contract with a town administrator and what the municipal finance laws provide. Ordinarily an employee or appointed officer of the town provided for by town charter, by-laws, appropriation or other vote of the town is compensated for services pursuant to a contract of employment where the amount of compensation is fixed by the person, board, committee or commission responsible for appointment, limited by the appropriation made by the town, under GL c. 41, §108 and GL c. 44, §31. The authority to contract is provided to the appointing authority or department head, including the board of selectmen, based on the amount of the appropriation provided to the department for the purpose of compensation of employees or officers. If no specific statute authorizes a longer term, a municipal employment contract is usually limited to one year, based on the annual operating budget. No department of town government is authorized to incur liability in excess of any appropriation made for the purpose. GL c. 44, §31. In towns with a by-law setting a compensation classification plan, such plan will govern, again generally dependent upon a sufficient appropriation. GL c. 41, §108A. Sick, vacation and other leave benefits are usually provided by by-law to full-time employees under GL c. 40, §21A. Other benefits may be universally provided to employees by statute, such as retirement and group insurance benefits, under GL c. 32 and 32B, respectively.

With respect to town administrators, town managers and town accountants, GL c. 41, §108N authorizes a special contract, which may exceed one year, and may include several extraordinary benefits not allowed to other town employees or officers. The statute does not contain any specific provision requiring that it be reduced to writing, unlike GL c. 71, §41, requiring a written contract for school principals. GL c. 30B, §17 requires all procurement contracts of \$5,000 or more to be in writing, but that provision is inapplicable to employment contracts. GL c. 30B, §2, Definition of "Services". However, the employment contract for a town administrator is expressly made subject to the town charter, and to the extent the charter requires a written contract, that would govern. In addition, in order for the board of selectmen to enter into a contract with a town administrator, a majority of the board must vote to agree to the contract's specific provisions, and either the minutes of the board meeting should include the terms of the contract, or a written contract should be included in the documents presented to the board and incorporated into the minutes. GL c. 4, §6, Fifth. Without such specificity, the town accountant could not make determinations whether expenditures were within municipal appropriations.

In particular, GL c. 41, §108N provides:

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

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

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

While the italicized language could be interpreted as authorizing the board of selectmen to enter into a binding employment contract with a town administrator beyond the available annual appropriation made, we have not interpreted it so broadly. We have analogized the provision with that of collective bargaining and other multi-year contracts, which require an appropriation of the cost items payable in the first year in order to make the contract binding on the parties. We think the italicized language is intended to specifically supersede any provisions in the general and special laws that limit the specific extraordinary benefits authorized in GL c. 41, §108N, such as additional retirement and health insurance benefits and severance pay.

The town accountant has the authority to prohibit payment under the contract if it is "excessive", under GL c. 41, §56, which means if it is in excess of appropriation. Ordinarily the salaries of public officials would be encumbered at the beginning of the fiscal year, establishing periodic payment amounts for each period of service, which may not be exceeded during the fiscal year. See McHenry v. Lawrence, 295 Mass. 119 (1936). This rule would also govern where the office is vacant for a period of time, leaving an amount sufficient to increase the weekly or bi-weekly pay of a successor for the balance of the fiscal year. Any such increase would have to be approved by town meeting as part of an appropriation validating the first year of the contract by authorizing the use of the appropriation or transferring additional funds to it to fund the cost item for the remainder of the year under the new contract.

With respect to your question about temporary consulting services, the board would have to have a separate appropriation for such purposes, unless the appropriation available for the town administrator is broad enough to include independent contractor consulting services. An appropriation for "Town Administrator" would normally be considered personal services and would only apply to the appointed position, not to independent contractor services, an expense item.

All the above being said, a town meeting may appropriate the funds necessary to cover previously paid amounts and those anticipated for the remainder of the year, which would ratify the contract. See Turiello v. Revere, 15 Mass. App. Ct. 185 (1983). I hope this addresses your concerns.

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

From: Cbragg1@aol.com [<mailto:Cbragg1@aol.com>]
Sent: Thursday, March 15, 2007 01:49 PM
To: DOR DLS Law
Subject: question re municipal finance

from Carol Bragg, candidate for Board of Selectmen, Seekonk (401) 724-7700, Ext. 6 (w)

On Monday, March 19, there will be a Special Town Meeting in Seekonk to request that \$70,561 be transferred from the free-cash account to the Town Administrator payroll account. Most of the funds would be to pay the Town Administrator at \$2,500/week from the second week in February through the end of the fiscal year. On December 27, 2006, the Board of Selectmen appointed the then Interim Town Administrator to the position of Town Administrator committing funds that were not in the budget, in violation of the Town Charter. The funds ran out in February. The Finance Committee has questioned the legality of the commitment of funds. The legality of the appointment and the commitment of funds aside, the Town Administrator has been working without a contract all this time. Both the Chairman of the BOS and the TA are attorneys and cite their knowledge of the law. My question is whether it is proper according to MA municipal finance law to expend funds at the rate of \$2500 per week with no written contract, either for salary or for temporary consulting services. It seems to me to be a misuse of public funds and perhaps also to place the Town and the taxpayers in financial jeopardy. There is a "gentlemen's" verbal agreement only, and no written minutes of the Selectmen's meeting when the appointment was made.

Thanks for your advisory opinion.



MASSACHUSETTS DEPARTMENT OF REVENUE

DIVISION OF LOCAL SERVICES

200 Portland Street

Boston 02114-1715

STEPHEN W. KIDDER
Commissioner

(617) 727-2300

EDWARD J. COLLINS, JR.
Deputy Commissioner

August 27, 1990

Diane E. Reichert
Executive Administrator
Town Hall
Box 5
10 Kendall Road
Tyngsborough, MA 01879-0549

Re: Executive Administrator's Contract
Payment of Additional Insurance Benefits
Our File No. 90-623

Dear Ms. Reichert:

This is in reply to your recent letter requesting an opinion with respect to the above-referenced matter.

From a review of the materials and information provided by yourself and the Town Accountant, we understand the facts to be as follows. The Board of Selectmen of Tyngsborough, pursuant to the provisions of G.L. Chapter 41, Section 108N, negotiated and signed an employment contract for you to serve as Executive Administrator for a period of three years. This contract, which was signed on September 1, 1989, provided for your salary and basic employment benefits and also, in Section 8, gave you an option to obtain additional life and disability insurance coverage in lieu of the regular group health insurance benefit. It seems that the cost items of this contract were presented to town meeting in the first year, and the additional life and disability insurance benefit for the initial year of the contract was specifically considered and approved by a town meeting appropriation to "Executive Administrator Contract Benefits" at the November, 1989 special town meeting. At issue at this time is whether payment of these additional insurance benefits may be

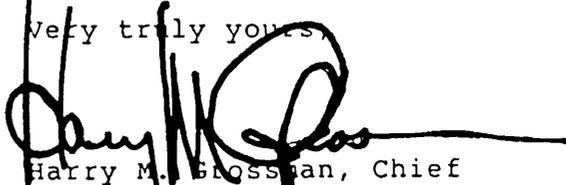
Diane E. Reichert
Executive Administrator
Page Two

approved by the Town Accountant in the second year where town meeting explicitly rejected funding for such item in the second year.

In our view, to the extent that a multi-year contract is entered into under authority of G.L. Chapter 41, Section 108N and all cost items thereof are funded in the first year by town meeting appropriation, such contract is a valid and enforceable agreement between the town and Executive Administrator. While your contractual provision regarding additional life and disability insurance benefits may well be enforceable, however, we do not feel that the Town Accountant may at this time approve such a payment. This is because a town accountant, pursuant to the provisions of G.L. Chapter 41, Section 56 and G.L. Chapter 44, Section 31, may not authorize an expenditure in excess of an appropriation, and in the situation at hand town meeting clearly deleted and disapproved funding for the additional life and disability insurance benefits in the second year of the contract. Moreover, it seems clear to us that payment may not be made from the appropriation for premium payments to the town's general health insurance carrier as the subject payment for life and disability coverage is simply not within the scope of such appropriation.

Accordingly, we are of the opinion that the Town Accountant may not at this time authorize a payment under Section 8 of your contract, and in order to recover thereunder you may have to consider the legal remedies available under your contract.

I hope this information proves helpful. If I may be of any additional assistance in the future, please do not hesitate to contact me directly.

Very truly yours,

Harry M. Grossman, Chief
Property Tax Bureau

HMG/jeb

cc: Town Accountant



May 23, 2000

Katherine A. Benoit
Town Accountant
816 Main Road
Westport, MA 02790

Re: Compensation for Police Chief and Executive Officer
Our File No. 2000-305

Dear Ms. Benoit:

You have asked us whether personal services contracts for the police chief and the chief's executive officer supersede town meeting votes against requested pay increases for those two officers. It appears that the finance committee did not recommend the increases and an amendment that would have appropriated the additional amount failed. Based on our review of the two contracts, we conclude that neither the chief nor the executive officer is entitled to the increases voted down by town meeting and they are not entitled to any increase otherwise called for under the terms of the contracts. Even if they had valid claims in contract, however, you should not authorize payment of the increase without an appropriation therefor or a judgment against the town.

The police chief's contract purports to be effective March 1, 1999 and continuing to February 28, 2002. Paragraph 11 provides that the chief of police shall as of July 1, 1999 "and each subsequent year" receive \$53,743 "plus the average percentage increase received by regular police officers of all ranks for the Town." Such amounts are specifically "subject to appropriation" under that paragraph. See also G.L. c. 41, §§97 & 97A. Thus, under the specific terms of that contract, no increase is required without the necessary appropriation.

In addition, town employment contracts are usually enforceable for only one year, given that an appropriation for such an operating expense is made on an annual basis and no departmental contract can exceed the appropriation therefor, under G.L. c. 44, §31. See also G.L. c. 41, §108 (appointed officers salary fixed by appointing authority "as soon as may be after the passage of the annual budget" unless salary fixed by a classification by-law). However, exceptions have been made by legislative enactment and court decisions. See G.L. c. 41, §108N (authorizes multi-year specialty contracts for town executive officer and accountant); G.L. c. 71, §41 (authorizes special multi-year contracts for school superintendents, business managers and principals); G.L. c. 150E, §7 (authorizes collective bargaining agreements for up to three years); Boston Teacher's Union, Local 66 v School

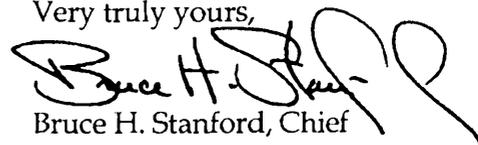
Committee of Boston, 386 Mass. 197, 212-13 (1982) (school committee bound to pay salary increases in second and third years of three year collective bargaining agreement). Thus, in the absence of one of these exceptions, municipal employment contracts purporting to be for more than one year would be subject to appropriation in subsequent years of the contract.

G.L. c. 41, §108O provides for special benefits and provisions in an employment contract for a police chief. However, the statute contains no specific authorization for a contract in excess of one year or for payment in the absence of an annual appropriation. Thus, we do not believe the chief is entitled to the increase provided in the contract, since no appropriation therefor was made by town meeting.

With respect to the executive officer, the contract purports to commence July 1, 1998 and continue to June 30, 2001. Paragraph 10 of the contract calls for the executive officer to receive \$44,823 in Fiscal 1999. For the subsequent years the executive officer "shall receive the same salary as stated above plus at least any increases in the same percentage received by any of the regular police officers of any rank for the TOWN in each of said years, as well as any increase in other benefits." This paragraph is not limited by the "subject to annual appropriation" language contained in the chief's contract. Nevertheless, G.L. c. 44, §31 and G.L. c. 41, §108 would require an annual appropriation before any compensation increase could take effect. In addition, no statute specifically authorizes a multi-year contract for such an executive officer. Thus, in the absence of an appropriation, we do not believe the increase called for in the contract may be paid.

We note that this opinion is based on the general laws and could be affected by a town charter. We hope this opinion addresses your concerns. If we may be of further assistance, please do not hesitate to contact us again.

Very truly yours,


Bruce H. Stanford, Chief
Property Tax Bureau



May 22, 2000

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

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

Dear Mr. Boudreau:

You have asked whether the Board of Selectmen may enter into multi-year personal services contracts with the building inspector, health agent, highway superintendent, planner and conservation agent. We have generally suggested that employment contracts may be made for one year only, unless a statute otherwise provides. No such statute authorizes a multi-year contract for any of the positions you have listed. In such cases, we believe the compensation for each year is subject to appropriation under G.L. c. 44, §31.

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

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

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

Very truly yours,

Bruce H. Stanford, Chief
Property Tax Bureau



January 30, 2007

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

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

Dear Ms. Scott:

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC/GAB

Blau, Gary

From: Blau, Gary on behalf of DOR DLS Law
Sent: Thursday, December 06, 2012 9:26 AM
To: 'EFaricy@wbridgewater.com.secure'
Subject: 2012-1312 - West Bridgewater - Town meeting Approval of all municipal contracts
Attachments: 95-523.pdf; 2006-189.pdf

Elizabeth:

As we discussed, I attach copies of opinions 95-523 (Whitman opinion) and 2006-189 on the issue of the necessity of town meeting appropriations to fund collective bargaining agreements and multi-year employment contracts. I am aware of no general law requiring a town meeting vote to approve an employment contract, per se, but an appropriation necessary to fund the contract will be required in order for such a contract to be binding on the town. See MGL c. 44, §31 (no department may incur expense in excess of appropriation) and MGL c. 150E, §7 (appropriation required to fund cost items of collective bargaining agreement). Contracts authorized by law for more than one year will usually require a town meeting vote to appropriate the necessary funds to cover the first year of the contract in order to be considered binding in the future contract years. See, for example, MGL c. 150E, §7 (three year collective bargaining agreements authorized); MGL c. 41, §108N (contracts authorized "for a period of time" for town administrators, town managers, executive secretaries, auditors and accountants); MGL c. 71, §41 (6 year employment contracts authorized for school superintendents and school business managers). If no statute specifically or by necessary implication authorizes a multi-year employment contract, the contract will ordinarily be binding only in the first year in which an adequate appropriation has been made, and will be binding in future years only if a sufficient appropriation has been made for such years. I hope this addresses your concerns.

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

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

From: Elizabeth Faricy [<mailto:EFaricy@wbridgewater.com>]
Sent: Tuesday, December 04, 2012 12:46 PM
To: DOR DLS Law
Cc: John Duggan
Subject: Town meeting Approval of all municipal contracts

Ms. Kathleen Colleary,

I am led to believe that the DOR once issued a letter to the Town of Whitman in the late 80's /early 90's pertaining to the need to put collective bargaining agreements and all municipal employment agreements in front of Town Meeting for approval.

Would you be able to send me a copy of that particular opinion? I have searched the DOR's web site and the closest letter on the topic is listed under 2006-189 but doesn't address the issues of Town Meeting approval.

Is it necessary that ALL agreements – collective bargaining agreements and individual employee agreements with the likes of the Administrator, Police Chief, Fire Chief, etc. be placed in front of Town Meeting?

Thank you for your time.

Sincerely,

Elizabeth D. Faricy
Administrator
Board of Selectmen
65 North Main St.
West Bridgewater, MA 02379
1-508-894-1267
efaricy@wbridgewater.com

**ROBERT O'NEILL vs. SCHOOL COMMITTEE OF NORTH BROOKFIELD &
another.¹**

1 Town of North Brookfield.

SJC-11108

SUPREME JUDICIAL COURT OF MASSACHUSETTS

464 Mass. 374; 982 N.E.2d 1180; 2013 Mass. LEXIS 24; 34 I.E.R. Cas. (BNA) 1663

October 4, 2012, Argued
February 8, 2013, Decided

PRIOR HISTORY: [***1]

Civil action commenced in the Superior Court Department on October 11, 2006. The case was heard by Mary-Lou Rup, J., on motions for summary judgment; a motion for reconsideration was considered by her; and entry of final judgment was ordered by her. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

HEADNOTES

School and School Committee, Superintendent of schools, Retirement benefits. Contract, Employment.

COUNSEL: Brian M. Maser for the defendants.

John J. Driscoll for the plaintiff.

Sandra C. Quinn & Matthew D. Jones, for Massachusetts Teachers Association, amicus curiae, submitted a brief.

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

OPINION BY: BOTSFORD

OPINION

[*374] [**1181] BOTSFORD, J. Robert O'Neill served as superintendent of schools in the town of North Brookfield (town) from 1998 to 2005. His employment contract provided that on his retirement, he would be reimbursed thereafter for a percentage of his health [*375] insurance premiums on an annual basis.² The question we consider is whether an employment contract between a school committee and a superintendent that contains a provision for annual reimbursement of health insurance premiums in the indefinite future is invalid and unenforceable because it exceeds the six-year limit on

such contracts imposed by *G. L. c. 71, § 41*. [***2] We answer the question "No" and affirm the judgment of the Superior Court.

2 Because the annual reimbursement obligation set out in Robert O'Neill's employment contract does not have an endpoint, the parties treat it as an obligation that is measured by O'Neill's life. We do as well.

Background. The school committee of North Brookfield (school committee) hired O'Neill as superintendent of schools in the spring of 1998. O'Neill continued in that position until July of 2005, and during that time he was party to a series of employment contracts with the school committee. Each provided that while employed as superintendent, O'Neill was to receive all employment-related benefits available to teachers, including health insurance coverage pursuant to *G. L. c. 32B*.³

3 General Laws c. 32B provides for contributory group insurance, including contributory group health insurance plans, for employees of counties, cities, and towns. See *G. L. c. 32B, § 1*, as amended by St. 1975, c. 806, § 1. The town of North Brookfield (town) and the school committee of North Brookfield (school committee) (collectively, defendants) argued at the summary judgment stage of this case that the agreement between the defendants [***3] and O'Neill to reimburse a portion of his health insurance premiums after retirement is governed by c. 32B. The motion judge concluded that the parties' agreement, and more specifically its provision for reimbursement of health insurance costs, fell outside the scope of c. 32B as the reimbursement provision related to a plan for individual health insurance and did not implicate the contributory group health insurance plans of the town. Chapter 32B does not control

the outcome of this case, and on appeal, the defendants largely abandon the argument.

[**1182] On October 21, 2002, O'Neill and the school committee executed an employment contract with an effective date of July 1, 2002, and extending through June 30, 2005. This contract contained for the first time a provision entitling O'Neill, on his retirement, to be reimbursed annually for a fixed percentage of the premium costs for an individual health insurance plan (reimbursement clause). The reimbursement clause reads:

"Upon retirement from the North Brookfield Public Schools, the Superintendent will be reimbursed annually [*376] for the cost of an individual retirement [health] plan of his choice. Said reimbursement will equal the percentage of the [***4] cost of the plan based on years of service as Superintendent. For each year of completed service, the reimbursement will equal 10% of the annual cost of the plan. Said reimbursement percentage will be capped equal to the town reimbursement percentage for retired employees at the time of the Superintendent's retirement."⁴

The subsequent, and final, employment contract between the school committee and O'Neill, effective July 1, 2003, through June 30, 2006, contained the same reimbursement clause.

4 O'Neill served as superintendent for seven years and thus is entitled under the reimbursement clause formula to reimbursement for seventy per cent of his annual insurance plan costs. At the time O'Neill retired, the town's reimbursement percentage for retired public employees with ten or more years of service was eighty per cent.

On January 7, 2005, O'Neill notified the school committee of his intent to retire from his position as superintendent, effective August 31, 2005. The school committee thereafter requested that O'Neill advance his retirement date to July 8, and O'Neill agreed. The parties memorialized this understanding in a written memorandum of agreement in which O'Neill agreed to retire [***5] from his position as superintendent on July 8 in exchange for, among other things, his receipt of all benefits to which he was entitled under his then-existing employment contract, i.e., the contract that was to be in effect through June 30, 2006.

O'Neill did retire on July 8, 2005, and thereafter he continued to subscribe to the town's health insurance plan

through the Consolidated Omnibus Budget Reconciliation Act (COBRA) program. When his COBRA coverage expired, O'Neill procured an individual health insurance plan from Blue Cross/Blue Shield. On October 18, O'Neill requested the school committee in writing to reimburse seventy per cent of his health insurance costs accruing from August, 2005, to the date of the request. The new superintendent of schools forwarded the request to the town, but the town did not respond. In January, 2006, O'Neill sent a second request for reimbursement for a fixed percentage of the premium costs for his health insurance policy from the date of retirement through January. On March 7, the town notified [*377] O'Neill in writing that it would not honor the request, stating, "[S]ince you are no [**1183] longer an employee, the [t]own is under no obligation to continue to [***6] honor any terms of your prior contract upon your retirement."

On October 10, 2006, O'Neill filed this action in the Superior Court against the school committee and the town (collectively, defendants)⁵ for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance of the contract. The parties filed cross-motions for summary judgment on October 30, 2008. After a hearing, a judge in the Superior Court denied the defendants' motion for summary judgment and allowed O'Neill's. The defendants filed a motion to reconsider the judgment over a year later, and on December 14, 2010, the judge denied the motion. Final judgment entered on January 11, 2011, providing that O'Neill was to recover from the defendants a total of \$46,052.57 -- representing the amount of O'Neill's health insurance premium costs that should have been reimbursed from August 15, 2005, to the date of judgment, plus interest and costs⁶ -- and ordering the defendants to reimburse O'Neill annually for seventy per cent of the cost of his health care plan as specific performance of his final employment contract and the parties' memorandum of agreement. The defendants filed timely [***7] notices of appeal.

5 At oral argument, the attorney representing the defendants argued that the school committee did not have the authority to bind the town to perform a contract. We agree that the school committee may not bind the town to perform a contract that is beyond the school committee's statutory authority or otherwise illegal. If, however, the argument being advanced is that the town as a general matter is not bound to perform any contract executed solely by the school committee because the town itself is not a party, the argument clearly is without merit; the school committee is in substance an agency of the town.

6 The reimbursement figure for the five years and five months covered by the judgment came to

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\$27,673.18, the interest was \$17,968.77, and the costs were \$410.62 -- totaling \$46,052.57.

Discussion. O'Neill's employment contract with the school committee is governed by *G. L. c. 71, § 41*, as amended through St. 1996, c. 450, § 127 (*§ 41*).⁷ *Section 41* provides in relevant part:

"A school committee may award a contract to a superintendent of schools or a school business administrator for [*378] periods not exceeding six years which may provide for the salary, fringe benefits, and [***8] other conditions of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performance of duties or office, liability insurance, and leave for said superintendent or school business administrator" (emphasis added).

⁷ *General Laws c. 71, § 41* (*§ 41*), was amended in 2006, 2008, and 2010, but those amendments do not bear on the issue on appeal. See St. 2010, c. 399; St. 2008, c. 314, § 1; St. 2006, c. 267.

The defendants argue that a continuing requirement to perform an obligation defined in a contract is evidence of an active, ongoing contract, and accordingly, the obligation to reimburse O'Neill for a percentage of his health insurance costs annually for his life signals that O'Neill's final employment contract was a lifetime agreement that exceeded six years in duration and therefore violated *§ 41*. O'Neill, on the other hand, contends that the annual reimbursement of a portion of health insurance costs is simply a benefit provided for in O'Neill's final employment contract, and the fact that it was to be paid [**1184] annually after the contract expired does not mean that the contract itself extended beyond its stated three-year [***9] term. We agree.

Section 41 vests broad discretion in a school committee to hire a superintendent and to set compensation, conditions of employment, and other benefits of employment. The statute provides a nonexclusive ("including but not limited to") list of benefits. This list includes some, such as severance pay, that in substance are earned during the period of employment but as a practical matter are paid out after the contract terminates;⁸ and others, such as salary, that are only paid during the contract term. While the record contains no information concerning the contract negotiations that led to O'Neill's final two employment contracts as superintendent, the reasonable inference to be drawn [*379] from the presence of the

reimbursement clause in them is that both parties knew at the time that O'Neill was not likely to remain superintendent for the ten-year period required for him to qualify for the town's general program, adopted pursuant to G. L. c. 32B, covering public employees' postretirement health insurance benefits, and therefore they negotiated a separate provision that specifically provided for postemployment payment of a portion of health insurance costs.

⁸ During oral argument, [***10] the attorney for the town argued that severance payments, as explicitly mentioned in *§ 41*, fundamentally are different from lifetime health insurance reimbursement because severance payments are earned during the period of employment and simply paid after termination. In our view, the reimbursement clause provides for substantively the same kind of benefit: the amount paid as reimbursement for health insurance costs after termination of the contract is tied explicitly to the number of years O'Neill was employed and serving as superintendent.

We disagree with the defendants that the reimbursement clause converts O'Neill's final employment contract of three years' duration into a lifetime agreement that would presumptively exceed six years. The reimbursement clause entitles O'Neill to reimbursement for a percentage of his health insurance costs going forward, but all the remaining provisions of the contract -- for example, those describing his duties and responsibilities as superintendent, requiring his fulfillment of those duties, fixing his salary, and entitling him to all medical, hospital, and life insurance benefits available to the town's teachers -- ceased to be in effect on O'Neill's [***11] retirement on July 8, 2005. In other contexts, we have recognized that a contract that has expired may include enforceable obligations to be performed by the parties thereafter. See *Boston Lodge 264, Dist. 38, Int'l Ass'n of Machinists & Aerospace Workers v. Massachusetts Bay Transp. Auth.*, 389 Mass. 819, 821, 452 N.E.2d 1155 (1983) (enforcing provision in collective bargaining agreement requiring payment of cost-of-living adjustments during certain periods following expiration of agreement: "[a]lthough the term of the collective bargaining agreement had ended, there continued . . . a contractual obligation to make cost-of-living adjustments under certain conditions"). The same holds true here. Although O'Neill's final, three-year employment contract with the school committee had come to a (premature) end on July 8, 2005, the school committee had agreed under the express terms of that contract to reimburse O'Neill for a portion of his health insurance costs thereafter.⁹ The directive of *§ 41* that no employment contract between a school committee and a [**1185] superintendent exceed six years does not absolve the defendants of responsibility to fulfil

[*380] this contractual obligation, because O'Neill's final contract [***12] fit well within the statute's term limitation.¹⁰

9 The 2005 memorandum of agreement between the school committee and O'Neill effectively restated, and thereby reinforced, this contractual obligation.

10 The defendants argue that for the same reasons this court invalidated evergreen clauses in *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 935 N.E.2d 1260 (2010) (Fireman & Oilers), we must invalidate the provision in O'Neill's contract requiring them to reimburse O'Neill. The reimbursement clause, however, is not an evergreen clause, and *Fireman & Oilers* provides no support for the defendants' position.

Evergreen clauses operate to extend all contractual terms beyond the termination date of that agreement. See *Firemen & Oilers*, 458 Mass. at 163 ("effect of an evergreen clause is to preserve and maintain all the provisions of a [collective bargaining agreement]" [emphasis added]). See *Gustafson v. Wachusett Regional Sch. Dist.*, 64 Mass. App. Ct. 802, 809 n.11, 836 N.E.2d 1097 (2005) ("even after the expiration of the term of the agreement, its provisions will continue in force until changed by the parties or until the negotiation of a new agreement"). In contrast, as discussed in the [***13] text, the reimbursement clause deals only with the payment of a portion of health insurance premiums on O'Neill's retirement, and does not affect any other provision of O'Neill's contract that ended with his retirement on July 8, 2005. The defendants' argument fails because it is built on the legally incorrect premise that when a contract provides for an agreed-upon benefit to extend beyond the contract term, the entire contract is extended.

The defendants also argue that, in any event, the reimbursement clause, or more specifically the payments it calls for, do not qualify as one of the "conditions of employment" that § 41 authorizes the school committee to include in an employment contract with a superintendent of schools. The defendants reason that because these payments are not to be made while O'Neill was employed as superintendent but only after his retirement, they are a form of retirement allowance or supplemental retirement benefit and simply not covered by the plain terms of § 41.¹¹ Their argument, they claim, is bolstered by reference to *G. L. c. 41, § 108N* (§ 108N), a statute defining the scope of employment contracts between a city or town and a city or town manager, town [***14] administrator,

town accountant, city auditor, or a person performing similar duties.¹² In § 108N, the Legislature authorizes cities and towns to include in employment [*381] contracts with such employees precisely the same employment benefits as are set out in § 41 -- indeed, the Legislature uses the identical language in both statutes -- but then separately states that these contracts also may provide for "supplemental retirement and insurance benefits"; § 41 contains no such separate provision. The defendants read this distinction between the two statutes as a [**1186] crystal-clear sign that the Legislature did not intend in § 41 to authorize a school committee to include any type of retirement benefit, including postretirement payments for health insurance coverage, in a contract with its superintendent.

11 See supra at .

12 *General Laws c. 41, § 108N*, provides in pertinent part:

"Notwithstanding the provision of any . . . law to the contrary, any city or town acting through its board of selectmen or city council or mayor with the approval of the city council, as the case may be, may establish an employment contract for a period of time to provide for the salary, fringe benefits, and other conditions [***15] of employment, including but not limited to, severance pay, relocation expenses, reimbursement for expenses incurred in the performances of duties or office, liability insurance, and leave for its town manager, town administrator, executive secretary, administrative assistant to the board of selectmen, town accountants, city auditor or city manager, or the person performing such duties having a different title.

"Said contract shall be in accordance with and subject to the provisions of the city or town charter In addition to the benefits provided municipal employees under [G. L. cc. 32 and 32B] said contract may provide for supplemental retirement and insurance benefits" (emphasis added).

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We do not read §§ 41 and 108N in the manner advanced by the defendants. Section 108N by its terms allows a town to provide supplemental insurance benefits to the employees covered by the section in addition to the insurance benefits that these employees would be entitled to receive under G. L. c. 32B. But § 108N, like § 41, is silent on the question whether an employment contract between a city or town and an employee performing duties covered by the section may provide for postretirement health [***16] insurance if the employee, like O'Neill, does not qualify for coverage under c. 32B because he or she had not been employed for the requisite number of years. As a general matter, an employer's provision of health insurance coverage to an employee -- whether while the employee is still employed or on his or her retirement -- represents a "fringe benefit" of the employment. Sections 41 and 108N both expressly authorize the public employer in question, school committee or municipality, to provide for fringe benefits in contracts with the employees covered by these statutes. The postretirement reimbursement for health insurance costs provided to O'Neill by the reimbursement [*382] clause derives directly from his seven-year employment as superintendent, constitutes a bargained-for fringe benefit of his employment, and is not supplemental to other, already-guaranteed benefits. We read § 41, as well as § 108N, to authorize this type of benefit.

The defendants do not contend that O'Neill failed to perform his final employment contract with the school committee, or that the contract was unsupported by sufficient consideration. Nor do the defendants argue that the health insurance policy or policies [***17] that O'Neill has purchased after his retirement are excessively expensive or profligate in any way. Accordingly, as the motion judge concluded, O'Neill is entitled to the specific enforcement of the reimbursement clause in his final employment contract. See generally *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374, 893 N.E.2d 1187 (2008), citing *Pierce v. Clark*, 66 Mass. App. Ct. 912, 851 N.E.2d 450 (2006) (if defendant breached contract with plaintiff employees, plaintiffs would be entitled "to the value of the bargained-for benefit of which they have been deprived").

Finally, the defendants' assertion that enforcing this employment contract violates public policy is wholly without merit. Rather, as O'Neill contends, what may offend public policy is for a public employer such as the school committee or the town to enter into a valid contract with an employee that permissibly guarantees certain postretirement benefits and later, after the employee has fully performed, refuse to honor the plain terms of the agreement.

Conclusion. The judgment of the Superior Court is affirmed.

So ordered.

Case Study # 2 Workshop Materials

Massachusetts General Laws Chapter 32B, Section 9A

A county, except Worcester county, by vote of the county commissioners, a city having a Plan D or a Plan E charter by majority vote of its city council, any other city by vote of its city council, approved by the mayor, a regional school district by vote of the regional district school committee and a district by vote of the district at a district meeting, may provide that it will pay one-half of the amount of the premium to be paid by a retired employee under the first sentence of section 9. A town shall provide for the payment by vote of the town at a town meeting or if a majority of the votes cast in answer to the following question which shall be printed on the official ballot to be used at an election in said town is in the affirmative:— “Shall the town pay one-half the premium costs payable by a retired employee for group life insurance and for group general or blanket hospital, surgical, medical, dental and other health insurance?”

Massachusetts General Laws Chapter 32B, Section 9A 1/2

Whenever a retired employee or beneficiary receives a healthcare premium contribution from a governmental unit in a case where a portion of the retiree’s creditable service is attributable to service in 1 or more other governmental units, the first governmental unit shall be reimbursed in full, in accordance with this paragraph, by the other governmental units for the portion of the premium contributions that corresponds to the percentage of the retiree’s creditable service that is attributable to each governmental unit. The other governmental units shall be charged based on their own contribution rate or the contribution rate of the first employer, whichever is lower.

The treasurer of the first governmental unit shall annually, on or before January 15, upon the certification of the board of the system from which the disbursements have been made, notify the treasurer of the other governmental unit of the amount of reimbursement due for the previous fiscal year and the treasurer of the other governmental unit shall immediately take all necessary steps to insure prompt payment of this amount. In default of any such payment, the first governmental unit may maintain an action of contract to recover the same, but there shall be no such reimbursement if the 2 systems involved are the state employees’ retirement system and the teachers’ retirement system.

Massachusetts General Laws Chapter 32B, Section 9E

A county, except Worcester county, by vote of the county commissioners; a city having a Plan D or Plan E charter by majority vote of its city council; in any other city by vote of its city council, approved by the mayor; a district, except as hereinafter provided, by vote of the registered voters of the district at a district meeting; a regional school district by vote of the regional district school committee; a veterans’ services district by vote of the district board; a welfare district by vote of the district welfare committee; a health district established under section twenty-seven A of chapter one hundred and eleven by vote of the joint committee may provide that it will pay in addition to fifty per cent of a stated monthly premium as described in section seven A for contracts of insurance authorized by sections three and eleven C, a subsidiary or additional rate which may be lower or higher than the aforesaid premium and the remaining fifty per cent of

said premium is to be paid by a retired employee under the provisions of the first sentence of section nine. A town shall provide for such payment by vote of the town or if a majority of the votes cast in answer to the following question which shall be printed on the official ballot to be used at an election in said town is in the affirmative:—“Shall the town, in addition to the payment of fifty per cent of a premium for contributory group life, hospital, surgical, medical, dental and other health insurance for employees retired from the service of the town, and their dependents, pay a subsidiary or additional rate?” Section nine A shall not apply in any governmental unit which accepts the provisions of this section. No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit.

Massachusetts General Laws Chapter 32B, Section 18A

(a) A retiree, spouse or dependent insured or eligible to be insured under this chapter, if enrolled in Medicare Part A at no cost to the retiree, spouse or dependent or eligible for coverage under Medicare Part A at no cost to the retiree, spouse or dependent, shall be required to transfer to a Medicare health plan offered by the governmental unit under section 11C or section 16, if the benefits under the plan and Medicare Part A and Part B together shall be of comparable actuarial value to those under the retiree's existing coverage, but a retiree or spouse who has a dependent who is not enrolled or eligible to be enrolled in Medicare Part A at no cost shall not be required to transfer to a Medicare health plan if a transfer requires the retiree or spouse to continue the existing family coverage for the dependent in a plan other than a Medicare health plan offered by the governmental unit.

(b) Each retiree shall provide the governmental unit, in such form as the governmental unit shall prescribe, such information as is necessary to transfer to a Medicare health plan. If a retiree does not submit the information required, the retiree shall no longer be eligible for the retiree's existing health coverage. The governmental unit may, from time to time, request from a retiree, a retiree's spouse or a retiree's dependent, proof certified by the federal government, of eligibility or ineligibility for Medicare Part A and Part B coverage.

(c) The governmental unit shall pay any Medicare Part B premium penalty assessed by the federal government on the retiree, spouse or dependent as a result of enrollment in Medicare Part B at the time of transfer.

Massachusetts General Laws Chapter 150E, Section 7(d)

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

- (a 1/2) section six E of chapter twenty-one;
- (b) sections fifty to fifty-six, inclusive, of chapter thirty-five;
- (b 1/2) section seventeen I of chapter one hundred and eighty;
- (c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;
- (d) sections twenty-one A and twenty-one B of chapter forty;
- (e) sections one hundred and eight D to one hundred and eight I, inclusive, and sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one;
- (f) section thirty-three A of chapter forty-four;
- (g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;
- (g 1/2) section sixty-two of chapter ninety-two;
- (h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;
- (i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;
- (j) section twenty-eight A of chapter seven;
- (k) sections forty-five to fifty, inclusive, of chapter thirty;
- (l) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;
- (m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;
- (n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;
- (o) section fifty-three C of chapter two hundred and sixty-two;
- (p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;
- (q) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

[Paragraph (e) inserted by 2012, 236 effective November 4, 2012.]

(e) If the commonwealth has agreed under a collective bargaining agreement with an employee organization to exercise statutory rights of the commonwealth regarding the removal of employees in a certain manner with respect to the members of that employee organization, then the commonwealth shall exercise such rights of removal in accordance with the terms of the collective bargaining agreement.

An employer entering into a collective bargaining agreement with an employee organization shall provide a copy of the agreement to the retirement board to which the employees covered by the agreement are members. All retirement systems shall maintain files of all active collective bargaining agreements which cover the systems members. The retirement board shall review collective bargaining agreements for compliance with chapter 32.

From: Blau, Gary on behalf of DOR DLS Law
Sent: Tuesday, February 20, 2007 5:15 PM
To: 'Town Treasurer'
Subject: EM2007-191 - Request for legal advice
Joan:

The premium contributions for active and retired employees may be different, depending the sections of the law adopted by the community. You have indicated that the active employees get a 65% employer contribution and the retirees get a 50% contribution. This suggests that the town has accepted Chapter 32B, §7A (applicable to indemnity plans) and §9A of the general laws. Section 7A allows the town to pay a premium higher than 50% for its active employees, and the town has apparently adopted the 65% contribution level (assuming the town is providing indemnity coverage). One of the provisions of that section requires that the town provide the same rate to any group or class within the town, but obviously does not apply to retirees. Section 9A requires the town to contribute 50% for the retirees. Both provisions appear to be mandatory if the employee/retiree qualifies for health insurance. No statutory provision specifically indicates which of the two options are applicable when a retired employee receiving a pension also qualifies as an active employee. If the town provides HMO coverage to the employees, the town's contributions to the health insurance must be between 90% and 50% of premiums, which, for union employees, may be separately negotiated. GL c. 32B, §16. No language similar to that in Section 7A making the premium contributions uniform for all employees is present in Section 16, and since different rates can be negotiated for different classes of employees under that section, a better argument may be made that an employee covered by an HMO who is also retired may have a different rate from other active employees.

Ordinarily it is not probable that any particular employee/retiree will qualify for health insurance in both capacities. Under GL c. 32, §91 retirees are generally limited to 960 hours annually in the service of the municipality without having to reduce the amount of pension they are entitled to receive. This translates into an average of 18.5 hours per week for a full 52 week year, less than the 20 hours of regular weekly service required for eligibility. GL c. 32B, §2(d). However, a retiree may actually work more hours and receive a reduced pension, and still be able to qualify independently for insurance coverage as an employee or retiree. In addition, the two cases to which you refer, would appear to allow for dual eligibility. Elected officials may be covered as active employees even if they work less than 20 hours per week regularly, under GL c. 32B, §2(d). And, as you indicated, since school personnel often only have to work 10 months and can still be covered by health insurance for the full year, they arguably may work over 20 hours per week regularly during the school year and still be eligible for coverage as an active employee.

I have spoken to the General Counsel at the State's Group Insurance Commission, Lisa Boodman, who indicates that at the state level retirees receiving a pension must receive the retiree contribution, except in the case of certain retirees who took an early retirement incentive, where the legislature specified that returning employees were entitled to active employee contributions. I cannot find any such provision, however, and you may wish to discuss this issue further with Lisa. She may be contacted at 617-727-2310.

State policy or practice under GL c. 32A is not necessarily dispositive in the case of similar local health insurance issues under GL c. 32B. In the case of McDonald v. Town Manager of Southbridge, 423 Mass. 1018 (1996), however, the court relied on state policy in providing health coverage for employees not covered at the time of retirement and later seeking to be covered, as being instructive of how it should be done locally in similar circumstances. In the situations you suggest the answer may be as simple as the retiree canceling his or her policy coverage as a retiree and requesting coverage as an active employee. Since there is no clear cut law on this issue, this may be a case where a local regulation under GL c. 32B may be appropriate to specify what the local policy will be. See McDonald, supra. You have indicated that the town is currently covering the persons qualifying for both active and retired group health benefits at the active rate of contribution, providing the best benefit. I cannot say that is unlawful, but if the appropriate public authority (board of selectmen) wish to change the practice, it may consider issuing a regulation stating the town's policy going forward. Even in such a case, currently covered employee/retirees may bring a legal action if the policy is changed and the town's contribution percentage paid to them is reduced. You may wish to consult with town counsel as well as the Group Insurance Commission on this issue.

Gary A. Blau, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Massachusetts Department of Revenue
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blau@dor.state.ma.us

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

From: Town Treasurer [mailto:treasurer@hadleyma.org]

Sent: Thursday, February 15, 2007 9:08 AM

To: DOR DLS Law

Subject: Request for legal advice

Dear Sir or Madam,

My question is regarding health insurance.

If a retired annuitant returns to the employ of the Town of Hadley as either an "Elected Compensated Official" or an "school department employee working 20 hours per week on a regular basis" would we cover the percentage of insurance as if they were an active or retired employee?

Thank you for your assistance.

Sincerely,

Joan M. Zuzgo
Assistant Treasurer
Town of Hadley
100 Middle Street
Hadley, MA 01035
Ph# 413-586-3354
Fax 413-586-7686

From: Blau, Gary on behalf of DOR DLS Law
Sent: Tuesday, March 06, 2012 4:58 PM
To: 'Leah Talbot'
Subject: 2012-302 - Westborough - Wellness Program
Leah:

There are several issues here, including scope of appropriation, unlawful gratuity, potential inequality of rate under MGL c. 32B, §7A or §16 and gambling. We recommend that you consult town counsel on the issue. However, from a municipal finance perspective, I think the only significant issue is the scope of any appropriation to allow for the payment of health insurance by the town for the prize, which may be eliminated if the prize is offered from a gift or grant source specifically for the purpose. I assume the potential winners of the raffle are already covered by the town's health insurance plan. Thus, the "free month" of insurance would include the town's general contribution for its share of the premium, plus what would ordinarily be the employee's share. That portion could not be paid from any claims trust fund under MGL c. 32B, §3A, nor from any town appropriation to cover its share of employees health insurance premiums, since those funds are specifically limited to paying either the costs of covered members in the ordinary contribution ratio or to cover only the town's share of premiums. Thus, some other appropriation must be available for this purpose, or, alternatively, a grant or gift for the purpose, as you suggest.

Turning to the gratuity issue, case law provides that no employee may receive a gift or gratuity from the town without the town receiving some comparable benefit in return. See Jones v. Natick, 267 Mass 567 (1929) (payment for overtime was an unlawful gratuity when employee certified by signing checks that the funds received were the entirety of the compensation due); Quinlan v. Cambridge, 320 Mass. 124 (1946) (12 weeks sick leave from the beginning of employment considered unlawfully excessive). More recent cases have indicated that negotiated benefits that may otherwise seem excessive are lawful either as rewards to encourage better service to the municipality or as reasonable in the context of collective bargaining. See Attorney General v. Woburn, 317 Mass. 465 (1945); Fitchburg Teachers Association v. School Committee of Fitchburg, 360 Mass. 105, 107 (1971); Allen v. Sterling, 367 Mass. 844, 847 (1975). The legislature has on occasion specifically authorized expenditure of municipal funds for awards of one type or another. For example, prior to St. 1989, Ch. 687, 512, G.L. Ch. 40, & C1.42 & 43 provided for token awards in recreation programs and cash awards for municipal employees making suggestions for improving municipal service. Although these specific clauses were eliminated in the 1989 amendment, the general authorization for municipalities to appropriate funds for municipal purposes has been interpreted as allowing such expenses. Some of the awards permitted were up to \$1000 as of the 1989 elimination of the clause. Thus, I would conclude that the amount of the prize contemplated in this case is not excessive, given that the town expects to benefit considerably from encouraging wellness practices expected to lead to a healthier group of employees and a commensurate reduction in group health insurance expenses.

With respect to the rate issue, MGL c. 32B, §7A provides in pertinent part that no group or unit shall receive a different rate of contribution from the municipality. This provision applies only to indemnity coverage. With respect to HMOs, the town may provide a different rate for certain employee organizations, but the employees must pay a minimum of 10% of the premium. MGL c. 32B, §16. Nevertheless, the rate of contribution would continue to be the same under the proposed "free month" of coverage for the winning employee, and the municipality would be paying the employee's share of the premium from a special appropriation or fund. Even if it could be argued that this procedure changes the rate for the employee on a one-time basis, it does not appear to violate the purpose of the restriction in the two statutes, which is to prohibit or limit contribution rate differences for groups of employees, such as those in specific collective bargaining agreements or employees in different departments.

Finally, whether the "raffle" would be considered an unlawful gambling activity, it would be prudent to check with the Attorney General's office, which has oversight authority over such issues. In this case there is no monetary stake or ante that the employee is putting up to participate in the raffle, and I suspect it is not the type of gambling that the Attorney General would regulate. However, it is not an area in which we have any particular expertise.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel

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

From: Leah Talbot [mailto:ltalbot@town.westborough.ma.us]
Sent: Monday, March 05, 2012 10:44 AM
To: DOR DLS Law
Subject: Wellness Program

Good Morning,

I am on the Town's Wellness Committee and we are trying to come up with "incentives" to get employees to lead healthier lifestyles, which in turn would lower town's costs in the area of Health Insurance.

The question was posed as to whether we could give an employee a "free month" of health insurance. This would be raffled off to any employee who completed a series of wellness events and accomplished certain goals. Is this permissible?

If this is not okay, as I'm thinking it's not, due to the size of the prize, could be up to \$500 for most expensive family plan. What if the insurance company gave the town the money to put towards the prize? If the intent of the company was to pay for this prize, I could set it up as a grant for that specific purpose?

Thanks for your attention in this matter.

Thanks,
Leah

Leah M. Talbot
Town Accountant
Town of Westborough
34 West Main Street
Westborough, MA 01581
508-366-3006
508-366-3099 (fax)

From: Blau, Gary **On Behalf Of** DOR DLS Law
Sent: Wednesday, May 27, 2009 6:18 PM
To: 'John Gannon'
Cc: 'Boodman, Lisa (GIC)'
Subject: 2009-705 - Hardship Availability for Retiree Health Care Contributions/ City of Somerville

John:

The answers to your questions are not clear based on some of the cases that have arisen concerning the interpretation of Massachusetts General Laws Chapter 32B, Section 7A, which contains the same language as the last sentence of GL c. 32B, §9E. Both provisions appear to have been added in 1973. St. 1973, c. 789, §§1 & 4. Prior to the amendment a history of collective bargaining over group insurance had resulted in contracts providing different rates of contribution for members of different unions based on the individual contracts. See Watertown Firefighters, Local 1347, I.A.F.F. AFL-CIO v. Watertown, 376 Mass. 706 (1978); Broderick v. Mayor of Boston, 375 Mass. 98 (1978) and Brooks v. School Committee of Gloucester, 5 Mass. App. Ct. 158 (1977). At least with respect to GL c. 32B, §7A, the court in those cases ruled that the 1973 amendment to that section foreclosed the ability to provide differing rates of health insurance contributions for different unions, and the cities and towns were required to equalize the contributions they made to their employees.

No similar case law has arisen under GL c. 32B, §9E, but I think it is safe to say that the provision at least prohibits different rates of contribution for retirees based on the collective bargaining units to which they belonged when employed by the city. I also do not think it requires the city to provide the same rate of contribution to its retirees as it does for its active employees, since the statutory scheme clearly contemplates different rates for retirees and active employees based on the particular sections of Chapter 32B accepted by a particular municipality. Compare GL c. 32B, §7 (employees pay 50% of premiums for the indemnity plan); §7A (employees pay less than 50%, employers pay more than 50% for indemnity plan, but only if the city accepts that section); §9 (retirees pay 100% of premiums); §9A (retirees pay 50% of premiums, but only if the city accepts that section); §9E (retirees pay less than 50%, employers pay more than 50% for the indemnity plan, but only if the city accepts that section) and §16 (employees and retirees pay at least 10% but no more than 50% of the premiums for health care organization coverage, but authorizes collective bargaining with unions for an employee rate between 10 and 50%, but only if the city accepts that section).

I think you are correct that the literal reading of the language would preclude providing different rates of contribution for different retirees based on any group or class affiliation or categorization of the retiree, which could arguably include an economic class. However, the cases above cited suggest that it may have been intended for more limited application, to avoid a competitive scramble between employee (or retiree) groups, based on union (or even department) affiliation, for more favorable treatment. Thus, I could not rule out an interpretation that would allow a subsidiary rate for employees in a class of low income retirees. However, if as you appear to have concluded the provision prohibits a different or subsidiary rate to any classification of retirees as "indigent," I would also conclude that the city could not offer a subsidy to indigent retirees to pay a common rate, because that would result in the city paying its contribution, plus the subsidy, which would translate into a lower payment for the indigent retiree, and the equivalent of a different or subsidiary rate for that class of employees.

GL c. 32B, §15(b) offers an exception to the unitary rate rule by means of contributions to a health and welfare trust fund agreement between the employer and "an employee organization." That provision allows the contribution to the trust fund to be used to pay employees' share of premiums that would result in an additional rate or subsidy that would exceed what would otherwise be permitted for the employer to pay under the chapter. However, this exception appears to be limited to employees who are members of an "employee organization", such as a union, that enters into a trust fund agreement to hold the contributions in trust until they are required for the health and welfare of the employees. I don't believe "employee organization" can be interpreted as including retired former employees, since the statute clearly differentiates between obligations to retirees and to employees. Conceivably the city could

bargain with its unions to provide a health and welfare trust fund for the benefit of its employees who subsequently retire, but I don't believe it could provide such benefits for current retirees as part of such an agreement.

Nevertheless, before that exception was added in 1988 the court considered a challenge to a similar arrangement provided in a school committee collective bargaining agreement. In Kerrigan v. Boston, 361 Mass. 24 (1972) the Supreme Judicial Court upheld the agreement in which the school committee committed to contribute specific dollar amounts per teacher to a health and welfare trust fund established by the school committee and the teacher's union. The city challenged the agreement on several grounds, but the SJC upheld the payment to the trust as part of compensation to the teachers. Challenges were made to specific payments the trust agreed to make to other kinds of insurance for the benefit of the teachers as violating GL c. 32B, §15, which made Chapter 32B the exclusive means for a city to provide group health insurance coverage. The court ruled that the income protection provisions that were applicable if a teacher was out of work due to injury or illness was not a form of group health insurance that Section 15 prohibited. Challenges to accidental death insurance and other, clearly health insurance related, payments were upheld, not because they were prohibited by Section 15, as determined by the trial court, but because the trustees of the trust fund did not specifically argue the issue in the appeal and the court considered it waived. The court also stated that the issue should be decided in a case where the issue was fully argued. The court certainly hinted that it might approve the expenditure because it would be made by a third party trust, and that once the city paid the contributions to the trust, it had no further interest (or standing, perhaps) to challenge the trust's use of the funds. [Despite the implications of Kerrigan, I still have concerns about the application of a health and welfare trust fund arrangement for retirees, as such. We have generally questioned the legal ability of a city or its officers to create a non-profit entity or a trust fund without statutory authority. At least GL c. 32B, §15(b) seems to provide such statutory authority for active employee health and welfare trusts.]

In a more recent case, the SJC has indicated that the GL c. 32B, §15 exclusivity provisions were not violated when the municipality contributed funds to pay for individual policies to cover its retirees living out of the HMO area when its indemnity carrier declined to cover the town's employees due to lack of sufficient enrollment in the plan. See Kusy v. Millbury, 417 Mass. 765, 770 n. 8 (1995). In that case the retirees brought suit to require the city to provide group indemnity coverage, either by insurance or self-insurance. While the court acknowledged the legal obligation, it refused to order the town to provide group self-insurance when the town had tried to obtain the group insurance coverage and was unable to do so. There was no discussion in the case concerning the percentage contribution of the city to those individual plans, again, presumably, because they were not group plans covered by Chapter 32B.

To the extent the payments are considered lawful, I believe they must come from the city and not from forced contributions of other retirees. Property tax abatements must come from other taxpayers in the nature of an overlay account specifically authorized by statute. See GL c. 59, §25. The overlay accounts are part of the city budget and have the effect of increasing the taxes on all taxpayers who are not exempt. No such statutory provisions exist for the subsidy from the other retirees you propose.

I am not sure why it is necessary for the Board of Aldermen to vote on the percentage contribution under Section 9E, especially when it is being lowered. The Board and Mayor must vote to accept Section 9E, but it is my understanding that as the appropriate public authority, as defined in GL c. 32B, §2(a), only the Mayor is required to set the rate, after meeting collective bargaining obligations, if any. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990) in which the town meeting had to accept GL c. 32B, §7A, but once done the board of selectmen as the appropriate public authority and bargaining agent for the town had the responsibility to negotiate the actual rate and then seek town meeting approval of any appropriation necessary to fund the town's contribution to the rate, under GL c. 150E, § 7. In this case, assuming the payment of a subsidy for the indigent retirees is otherwise lawful, the board's approval of an appropriation to cover the subsidy would be necessary. The appropriation made to cover the town's health insurance premium obligations could not be used directly for this subsidy, because it is for a different purpose. Thus, while the board's approval may not be required to set the rate, if the

reduction cannot be effectuated without the subsidy for the indigent retirees, a board of alderman vote authorizing a transfer to the new purpose will be required.

With respect to the issue of a proper definition of indigent, that is not something I can address and is a matter for local determination. Also, I have generally discussed this issue with Lisa Boodman, General Counsel at the Group Insurance Commission, and she expresses some of the same concerns I have raised. We both generally agree that while special legislation in this area is not usually recommended, it may be necessary to accomplish what you wish to do. See, for example, Chapter 63 of the Acts of 2000, authorizing the town of Hopkinton to pay certain health insurance premiums for retired employees. Generally, if the idea is a good one we prefer to see it passed as a general law amendment rather than special legislation.

I hope this addresses your concerns.

Gary A. Blau, Tax Counsel
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From: John Gannon [mailto:JGannon@somervillema.gov]
Sent: Friday, May 22, 2009 4:51 PM
To: DOR DLS Law
Subject: FW: Hardship Availability for Retiree Health Care Contributions/ City of Somerville

I should have stated in my opinion request that the Board of Aldermen meeting at which this issue will be discussed will be held on next Thursday May 28, 2009 at 6:00 pm. It is my hope that DOR could provide an opinion in time to for me to provide a response at that meeting.

Thanks so much.

John

From: John Gannon
Sent: Friday, May 22, 2009 4:37 PM
To: 'DLSLAW@dor.state.ma.us'
Subject: Hardship Availability for Retiree Health Care Contributions/ City of Somerville

To Whom It May Concern:

I am the City Solicitor for the City of Somerville. The Mayor has submitted to the Board of Aldermen a request to raise the retirees' share of the amounts paid by the City for health insurance provision, as

provided in G.L. c. 32B, s. 9E, which the City adopted in 1980. From 1980 to the present, the City has been paying 99% of the costs for indemnity plans for retirees who choose that health insurance option, and the retirees pay the remaining 1%. The last sentence of G.L. c. 32B, s. 9E states as follows: "No governmental unit, however, shall provide different or subsidiary rates to any group or class within that unit."

The City's proposal before the Board of Aldermen is to raise the indemnity health insurance contribution rate for retirees from 99-1 to 60-40. One outcome desired by the City through this measure is to encourage retirees to switch health coverage from the expensive outmoded indemnity plan to cheaper and more benefit-rich alternatives. A member of the Board of Aldermen recently requested my opinion on whether the City could charge a different rate of contribution for a group of retirees who could be classified as indigent. I provided my opinion to the Board of Aldermen that the last sentence of G.L. c.32B, s.9E would prevent the City from offering a different contribution rate for indigent retirees. At last night's meeting of the Finance Committee of the Board of Aldermen, the same alderman asked me an opinion in a similar vein. He acknowledged my legal analysis that the City could not offer a different "rate" to indigent retirees. Instead, he asked for my opinion as to whether the City could offer to indigent retirees a subsidy from City funds, at least for an interim time period, to assist them with the higher payment of the indemnity contributions. He reasoned that a subsidy of funds would appear to differ from the payment of a different "rate" that would be forbidden by s. 9E.

My question to the Division is whether the City may lawfully offer a subsidy of funds to indigent retirees to assist in their payment of the higher indemnity contribution rate that the City is seeking. In addition, I am seeking some guidance on an acceptable definition and benchmarking of "indigent" retirees. Finally, if the City is able to provide such a subsidy, would the monies for the subsidy come from a pooled lumped sum for the entire amount of the City's indemnity health care costs, such that with a 60-40 split, both the City and the retirees would subsidize the indigent retirees' contributions, similar to the concept of the various abatements provided under local property taxation. Or, would the funds for a subsidy have to come from a different source, and would you have any recommendations as to which source?

Thanks so much for your assistance in this regard. Of course, the City is in the midst of seeking lower costs in this tight economy, and this health insurance amendment would result in substantial savings to the City.

Best,

John

John G. Gannon
City Solicitor
Law Department
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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the matter of	*	Case Nos. MUP-09-5613
CITY OF SOMERVILLE,	*	MUP-09-5614
SOMERVILLE SCHOOL COMMITTEE	*	MUP-09-5735
	*	MUP-10-5765
and	*	MUP-10-5766
		MUP-10-5833
SOMERVILLE TEACHERS ASSOCIATION	*	
AND SOMERVILLE ADMINISTRATORS	*	Date issued:
ASSOCIATION AND SOMERVILLE	*	October 19, 2011
MUNICIPAL EMPLOYEES ASSOCIATION AND	*	
SOMERVILLE POLICE SUPERIOR OFFICERS	*	
ASSOCIATION	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Matthew J. Buckley, Esq.	–	Representing the City of Somerville and the Somerville School Committee
Laurie R. Houle, Esq.	–	Representing the Somerville Teachers Association
Colin R. Confoey, Esq.	–	Representing the Somerville Administrators Association
Jason R. Powalisz, Esq.	–	Representing the Somerville Municipal Employees Association and the Somerville Police Superior Officers Association

1 DECISION¹2 Summary

3 The issue in this case is whether the City of Somerville (City) and/or the
4 Somerville School Committee (collectively Respondents) violated Section
5 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when the
6 City unilaterally reduced its percentage contribution to retired employees' health
7 insurance premiums. Based on the record as a whole, and for the reasons set
8 forth below, the Commonwealth Employment Relations Board (Board) concludes
9 that the Respondents did not satisfy their statutory bargaining obligation before
10 making these changes.

11 Statement of the Case

12 In 2009 and 2010, the Somerville Municipal Employees Association, the
13 Somerville Police Superior Officers Association, and the Somerville Teachers
14 Association (collectively, the Unions) filed six separate charges of prohibited
15 practice with the Department of Labor Relations,² each of which alleged that the
16 City of Somerville or the Somerville School Committee (collectively,
17 Respondents) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
18 the Law by failing to bargain before unilaterally reducing its contribution rate to

¹ The Board's jurisdiction is not contested. References to the Board in this decision include the former Labor Relations Commission.

² Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations.

1 retiree health insurance plans.³ In 2009 and 2010, the Department investigated
2 these matters and found probable cause to issue complaints in all six matters.
3 On July 30, 2010, the Department consolidated the complaints for hearing. On
4 or about August 6, 2011, the parties petitioned to have the consolidated matters
5 heard by the Board in the first instance pursuant to M.G.L. c. 150E, §11. The
6 Board granted the request on August 8, 2011. The parties agreed to stipulate to
7 the facts in lieu of a public hearing and entered into the Stipulations of Fact set
8 forth below. The parties also filed briefs.⁴

9 Stipulations of Fact

- 10 1. The City of Somerville ("City") is a public employer within the
11 meaning of G.L. c. 150E, §1.
12
13 2. The Somerville School Committee ("School Committee") is the
14 collective bargaining agent of the City for the purpose of dealing
15 with school employees.

³ Specifically, on September 10, 2009, the Somerville Teachers Association (STA) filed two separate charges (Case Nos. MUP-09-5613 and MUP-09-5614) against the City of Somerville and the Somerville School Committee, respectively. On October 13, 2009, the City filed a motion to dismiss both charges. The Department did not grant the motion. Instead, on December 31, 2009, the Department issued a consolidated, two-count complaint against the City and School Committee. The STA withdrew the second count relating to an information request on February 18, 2011. On December 21, 2009, the Somerville Police Superiors Officers Association filed a single count charge (MUP-09-5735) against the City. The Department issued a one count complaint against the City on July 30, 2010. On January 26, 2010, the Somerville Administrators Association filed two separate charges against the City and School Committee, which were docketed, respectively, as MUP-10-5765 and MUP-10-5766. The Department issued a consolidated complaint in both cases on July 30, 2010. Finally, on April 13, 2010, the Somerville Municipal Employees Association filed a charge against the City, which was docketed as MUP-10-5833. The Department issued a complaint in that case on July 30, 2010.

⁴ The School Committee did not file a separate brief, but because the City and the School Committee are represented by the same counsel, we treat the City's brief as also having been filed on the School Committee's behalf.

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3. The Somerville Teachers Association ("STA") is an employee organization within the meaning of c. 150E, §1 and is the exclusive bargaining representative for three bargaining units of employees employed by the City's School Committee. Unit A is a bargaining unit of teachers, Unit B is a unit of paraprofessionals, and Unit D [sic] is a unit of employees employed at the Somerville Center for Adult Learning and Education, a school established and operated by the School Committee.
 4. The Somerville Administrators Association ("SAA") is an employee organization within the meaning of c. 150E, § 1 and is the exclusive bargaining representative for all Academic Administrative employees of the School Committee excluding the Superintendent and Assistant Superintendent of Schools.
 5. The Somerville Police Superior Officers Association ("SPSOA") is an employee organization within the meaning of c. 150E, §1 and is the exclusive bargaining representative for police officers holding the rank of sergeant, lieutenant or captain.
 6. The Somerville Municipal Employees Association ("SMEA") is an employee organization within the meaning of c. 150E, §1 and is the exclusive bargaining representative for three bargaining units of employees employed by the City. Unit A is a bargaining unit of supervisor employees, Unit B is a unit of clerical and labor employees, and Unit D [sic] is a unit of specialized positions.
 7. In 1979, the City accepted G.L. c. 32B, §9E by a vote of the Board of Alderman authorizing the City to pay toward the cost of an indemnity health insurance plan for retired employees a percentage of the monthly premium that was greater than 50%. From that point on, the City contributed 99% of the premium for retired employee's coverage in the indemnity plan offered by the City. Retired employees contributed the remaining 1% of the premium.
 8. For many years, the City acting pursuant to chapter 32B provided the following health insurance plans to active employees, each of which was available to employees upon retirement: Blue Cross Blue Shield Major Medical indemnity plan, Blue Cross Blue Shield Elect PPO plan, Blue Cross Blue Shield Network Blue HMO plan, Harvard Pilgrim Health Care, and Tufts Health Care Plan's EPO plan. A choice of family or individual coverage was offered under each plan.

- 1 9. Active employees and retirees who subscribed to one of the
2 group plans identified in the preceding paragraph contributed a
3 fixed percentage of the total premium cost for the plan. The
4 employer-subscriber premium split differed for each plan. The
5 premium split for the BCBS Major Medical for all employees and
6 retirees was 99-1%. For school bargaining units, the School
7 Committee paid 85% of the premium for BCBS elect; 90% for
8 BCBS Network Blue; 90% for Harvard Pilgrim; and 90% Tufts,
9 and employees and retirees paid the remainder. For the city
10 bargaining units, the City paid either 85% or 80% depending on
11 the plan and the bargaining unit. Each of these contribution
12 ratios went in effect at the time the particular plan was adopted
13 and Harvard Pilgrim Health Care 1st went in effect at the time the
14 particular plan was adopted and remained unaltered until August
15 1, 2009.
16
- 17 10. In addition to the plans in the preceding paragraphs, the City
18 provided supplemental insurance plans pursuant to G.L. c. 32B,
19 §18 for employees who were eligible for federal Medicare
20 coverage and received their primary coverage from the federal
21 plan. The supplemental coverage includes Medex, Tufts Health
22 Plan Medicare Preferred, and Harvard Pilgrim Health Care 1st
23 Seniority.
24
- 25 11. On or about July 1, 2009, the City had approximately 1,262
26 retirees who were participating in the City's group health
27 insurance plans. The great majority of the 1,262 retirees as of
28 July 1, 2009, had retired from positions that were in one of the
29 bargaining units referred to in paragraphs 3-6, above.
30
- 31 12. Effective August 1, 2009, the Respondents decreased their
32 contribution on behalf of retirees choosing the Blue Cross Shield
33 Major Medical Plan from 99% to 60% of the cost of the total
34 premium and decreased their contribution on behalf of retirees in
35 the remaining municipal plans to 75% of the cost of the total
36 premium. These changes were authorized by the Board of
37 Alderman after a properly noticed public hearing where the new
38 rates were put forward based on the Mayor's submission. The
39 parties agree that neither City nor the School Committee
40 provided any of the charging parties with notice of the decision to
41 change contribution rates or an opportunity to bargain prior to the
42 decision.
43
- 44 13. None of the collective bargaining agreements between the City
45 and the bargaining units referred to in paragraphs 3-6 above
46 address the retiree health insurance contribution rate. The

1 retiree health insurance contribution rate has never been the
2 subject of negotiation between the City and the bargaining units.

3
4 14. At all material times, the City has maintained that the authority to
5 set the retiree health insurance contribution rate is vested
6 exclusively with the Board of Alderman and the Mayor. The City
7 has further maintained at all such material times that the
8 percentage of the premium contribution that the Respondents
9 make toward retiree health insurance is not a subject over which
10 the Respondents are mandated to bargain with the charging
11 parties.

12
13 15. Consistent with the legal position as described in paragraph [14],
14 above, neither the City nor the School Committee offered to
15 bargain with the charging parties prior to making the changes
16 referred to in paragraph 12, above.

17 Opinion

18 An employer violates Section 10(a)(5) and 10(a)(1) of the Law if it makes
19 unilateral changes to an existing condition of employment or implements a new
20 condition of employment without providing the exclusive bargaining
21 representative with due notice and the opportunity to bargain. Commonwealth of
22 Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989)
23 (citing Labor Relations Commission v. Natick, 369 Mass. 431, 438 (1976)). To
24 demonstrate that an employer has made an unlawful unilateral change, a
25 charging party must show that: 1) the employer altered an existing practice or
26 instituted a new one; 2) the change affected a mandatory subject of bargaining;
27 and 3) the employer established the change without giving the union prior notice
28 to bargain to resolution or impasse. Town of Harwich, 32 MLC 27, 32 (2005).
29 When contemplating health insurance changes for school employees under
30 Chapter 32B, a municipality has an obligation to refrain from implementing any
31 benefit changes until the School Committee provides the exclusive

1 representative of those employees with notice and an opportunity to bargain to
2 resolution or impasse. City of Malden, 23 MLC 181, 184 (1997).

3 The City acknowledges that it reduced its retiree health insurance
4 premium contribution rate without first bargaining with any of the Unions.
5 Moreover, with respect to the school employees, there is no evidence and no
6 party contends that the School Committee ever provided the Somerville
7 Administrators Association or the Somerville Teachers Association with notice
8 and an opportunity to bargain over these changes. Id. Accordingly, the question
9 is whether health insurance contributions for municipal retirees constitute a
10 mandatory subject of bargaining. The City argues that it is not because: 1)
11 current employees have no right to bargain over the retiree rate of health
12 insurance contributions; and, 2) pursuant to M.G.L. c. 32B, retiree health
13 insurance rates must be established through the local governmental process, not
14 collective bargaining. Both arguments lack merit.

15 The City argues that the Unions are improperly attempting to bargain on
16 behalf of retirees who are outside the scope of the bargaining unit. It is well-
17 established, however, that unions have a right to bargain over the future
18 retirement benefits of existing bargaining unit members. Masconomet Regional
19 School Committee, 36 MLC 119, 120 (2010) (citing Town of Burlington, 35 MLC
20 18, 26 (2008); Pittsburg Plate Glass, 404 U.S. 157, 180 (1971)). Thus, even
21 though retirees are not employees within the meaning of Section 1 of the Law,
22 the Union is entitled to bargain over proposed changes to retiree health
23 insurance premium contribution rates because these changes affect the health

1 insurance benefits and costs that current bargaining unit member will receive
2 when they retire. Masconomet, 36 MLC at 120.

3 The City further claims that the Unions had no right to bargain over this
4 issue, as there are no retiree health insurance provisions in the parties' collective
5 bargaining agreements. However, the statutory duty to bargain extends to terms
6 and conditions of employment established by past practice, as well as to those
7 working conditions contained in a collective bargaining agreement. Town of
8 Burlington, 35 MLC at 25. This bargaining obligation extends to employee health
9 insurance premium contributions. City of Everett, 19 MLC 1304, 1311 (1992),
10 aff'd sub nom City of Everett v. Labor Relations Commission, 416 Mass. 620
11 (1993) and cases cited therein. The stipulations reflect the City's longstanding
12 practice of contributing more than 75% to the cost of retirees' health coverage.
13 The City was therefore obligated to bargain with the Unions before reducing its
14 contributions below that rate, regardless of whether it had previously bargained
15 over this issue.

16 The City next claims that under G.L. c. 32B, retiree health insurance
17 contribution rates must be determined at the local government level and that
18 collective bargaining over this issue would improperly usurp the local process.
19 To support this argument, the City relies heavily upon Yeretsky v. Attleboro, 424
20 Mass. 315 (1997), in which two unrepresented retirees filed suit claiming that,
21 pursuant to M.G.L. c. 32B, §16, the City of Attleboro was responsible for 90% of
22 their health insurance premium costs. Id. at 316. The Court disagreed, holding
23 that this local option statute allowed for municipal contributions ranging between

1 50 - 90%, with unionized employees' rates to be set through collective bargaining
2 and the unrepresented retirees' rate to be determined "through the local political
3 process." Id. at 324. Because no union was a party to this case, the Court did
4 not address the mandatory subject of bargaining issue presented here, except,
5 perhaps, to undercut the Respondents' claim, discussed further below, that
6 Chapter 32B's contribution rate determination procedures and Chapter 150E's
7 bargaining obligations are mutually exclusive. We therefore disagree that
8 Yeretsky controls the outcome of this case.

9 The City further argues that even if it had agreed to bargain over health
10 insurance benefits, any resulting provisions would be superseded by M.G.L. c.
11 32B, §9E. In particular, the City contends that Section 9E's directive that "no
12 governmental unit shall provide different subsidiary or additional rates to any
13 group of class within that unit," renders collective bargaining impossible with
14 multiple unions.⁵ The City also reiterates that the statute narrowly restricts
15 setting retiree health care contributions rates to the local governmental process.
16 However, the Board has long recognized that the procedures a municipality must
17 follow under various sections of M.G.L. c. 32B may make bargaining over health

⁵ M.G.L. c. 32B, §9E states, in pertinent part:

[A] city having a Plan D or Plan E charter by majority vote of its city council; in any other city by vote of its city council, approved by the mayor; ...may provide that it will pay in addition to fifty per cent of a stated monthly premium as described in section seven A for contract of insurance authorized by sections three and eleven C, a subsidiary or additional rate which may be lower or higher than the aforesaid premiums and the remaining fifty per cent of said premium is to be paid by a retired employees under the provisions of the first sentence of section nine. . . . No governmental unit, however, shall provide different subsidiary or additional rates to any group or class within that unit.

1 insurance more procedurally complex than bargaining about other issues. Town
2 of Ludlow, 17 MLC 1191, 1197-98 (1990) (citing School Committee of Medford v.
3 Labor Relations Commission, 380 Mass. 932 (1980)). It is well-settled however,
4 that in the absence of a clear conflict between Chapter 32B and the bargaining
5 obligation outlined above, Chapter 150E is not superseded. Id.

6 There is no such conflict here. Section 9E simply obligates a municipality
7 that has adopted it to put to a local vote any decision it may make to pay more
8 than 50% of a retiree's health insurance premium. Nothing in the statute
9 precludes the Town from first bargaining with its unions over its decision to
10 increase or decrease the existing premium, as long as the City continues to pay
11 at least 50%. Indeed, in a decision discussing a similar Chapter 32B provision,
12 the Appeals Court held that a school committee was not precluded from
13 bargaining over increasing its premium contribution rates above 50% even if the
14 municipality had not yet accepted a statute that permitted it to deviate from the
15 50% ceiling imposed by M.G.L c. 32B, §7. School Committee of Medford, 8
16 Mass. App. Ct. 139, 141 (1979) aff'd, 380 Mass. 932 (1980). In a particularly apt
17 passage, the Court stated that, "[w]hile the school committee cannot agree
18 unconditionally to pay more than fifty percent, it is perfectly free to talk about the
19 subject in a labor negotiation...One may bargain about terms which will be of no
20 effect unless confirmed by a legislative body." Id. The same result must obtain
21 here, where the City has already voted to accept Section 9E and nothing in that
22 section precludes collective bargaining over increasing or decreasing premium
23 contributions above the 50% floor.

1 Nor does Section 9E's proviso that the City must pay the same rate to all
2 affected groups preclude bargaining here. We note that virtually the identical
3 provision has existed for active municipal employees under M.G.L. c. 32B, §7A
4 since 1973. See Watertown Firefighters, Local 1347 v. Watertown, 376 Mass.
5 706, 714 (1986) (discussing history of Section 7A). Although this uniformity
6 requirement may make collective bargaining over premium contribution increases
7 "atypical and more difficult" as one court has remarked, Brooks v. School
8 Committee of Gloucester, 5 Mass. App. Ct. 158, 160, n. 4 (1977), there have
9 been no decisions holding, and we decline to find, that this provision obliterates
10 the bargaining obligation altogether, as the City urges.

11 None of the City's cited cases lead to a different result. Cioch v. Ludlow,
12 449, Mass. 690 (2007) only discusses a town's right to determine eligibility
13 requirements for retirement health insurance benefits. It does not address a
14 municipality's collective bargaining obligation under Chapters 32B and 150E.
15 Nor is Massachusetts Water Resources Authority v. AFSCME Council 93
16 applicable because it involves a statute that the court describes as "entirely
17 different" from anything found in Chapter 32B. 67 Mass. App. Ct. 726, 732-733
18 (2006).

19 Conclusion

20 We reject the City's claim that M.G.L. c. 32B, §9E narrowly restricts the
21 setting of the retiree health care contribution rate to the local governmental
22 process and/or renders bargaining impossible. We therefore conclude that the
23 Respondents violated the Law by unilaterally increasing bargaining unit

1 members' future retirement health insurance contributions rates without giving
2 the Unions proper notice and an opportunity to bargain to resolution or impasse.

3 Remedy

4 In cases where unilateral changes are at issue the standard remedy is to
5 order that the employer restore the status quo ante and maintain the status quo
6 until completion of all bargaining obligations. Town of Ludlow, 17 MLC at 1203.
7 In this case, that also means ordering a make-whole remedy and restoring
8 retirement contribution rates for persons who were active bargaining unit
9 employees when the City unilaterally changed the premium contribution split in
10 August 2009, but who have since retired. See, e.g., Midwest Power Systems,
11 Inc., 323 NLRB 404, 407 (1997). The make-whole remedy for these employees
12 runs from their effective retirement date.

13 Order

14 Based upon the foregoing, the Board orders that the City of Somerville
15 and the Somerville School Committee shall:

16 1. Cease and desist from:

- 17 a) Failing and refusing to bargain collectively in good faith with the
18 Unions over changes to the bargaining unit members' future
19 retiree health insurance contribution rates.
20 b) In any like or related manner, interfering with, restraining or
21 coercing employees in the exercise of their rights guaranteed
22 under the Law.

23
24 2. Take the following affirmative action that will effectuate the purposes of
25 the Law:

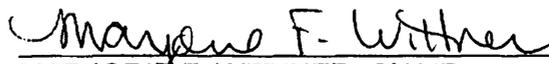
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27 a) Restore the terms of the retiree health insurance benefit in
28 effect prior to August 1, 2009 for the Unions' bargaining unit
29 members who were active employees prior to that date and who
30 retired thereafter.

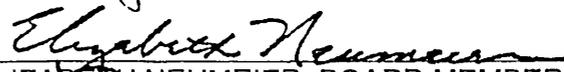
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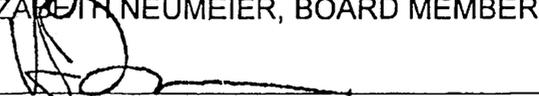
- b) Make whole those bargaining unit members who retired after August 1, 2009 for any losses they may have suffered as a result of the unilateral change in retirement health insurance contribution rates, plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly.
- c) Provide the Unions with notice before making changes to the future retirement benefits of active employees and, upon request by the Union, bargain in good faith over the proposed changes to resolution or impasse.
- d) Post immediately in all conspicuous places where members of the Unions' bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Respondents customarily communicates to their employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees.
- e) Notify the Department in writing within ten (10) days of the service of this Decision and Order of the steps taken in compliance therewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER


HARRIS FREEMAN, BOARD MEMBER



THE COMMONWEALTH OF MASSACHUSETTS
 DEPARTMENT OF LABOR RELATIONS
 COMMONWEALTH EMPLOYMENT RELATIONS BOARD
NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT
 RELATIONS BOARD**

The Commonwealth Employment Relations Board (Board) has determined that the City of Somerville and the Somerville School Committee (Respondents) have violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing and refusing to bargain collectively in good faith with the Somerville Administrators Association, the Somerville Municipal Employees Association, the Somerville Police Superior Officers Association and the Somerville Teachers Association (Unions) over changes to bargaining unit members' future retirement health insurance contribution rates.

The Respondents post this Notice to Employees in compliance with the Board's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- To engage in self-organization; to form, join or assist any union;
- To bargain collectively through representatives of their own choosing;
- To act together for the purpose of collective bargaining or other mutual aid or protection;
- and
- To refrain from all of the above.

WE WILL NOT fail to bargain collectively in good faith with the Unions over changes to bargaining unit members' future retirement health insurance contribution rates.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

- Restore the terms of the retirement health insurance benefit in effect prior to August 1, 2009 for the Unions' bargaining unit members who were active employees prior to that date and who retired thereafter.
- Make whole those bargaining unit members who retired after August 1, 2009 for any losses they may have suffered as a result of the unilateral change in retirement health insurance contribution rates.
- Provide the Unions with notice before making changes to the cost of the future retirement benefits of active employees and, upon the Unions' request, bargain in good faith over proposed changes to resolution or impasse.

 For the City of Somerville

 Date

 For the Somerville School Committee

 Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

Case Study #3 Workshop Materials

Massachusetts General Laws Chapter 149 Section 148 (excerpt)

Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge ... and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner ... The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

Massachusetts General Laws Chapter 40 Section 13D

Any city, town or district which accepts the provisions of this section by majority vote of its city council, the voters present at a town meeting or district meeting or by majority vote of a regional school committee may establish, appropriate or transfer money to a reserve fund for the future payment of accrued liabilities for compensated absences due any employee or full-time officer of the city or town upon the termination of the employee's or full-time officer's employment. The treasurer may invest the monies in the manner authorized by section 54 of chapter 44, and any interest earned thereon shall be credited to and become part of the fund. The city council, town meeting or district meeting may designate the municipal official to authorize payments from this fund, and in the absence of a designation, it shall be the responsibility of the chief executive officer of the city, town or district. In a regional school district, funds may be added to the reserve fund for the future payment of accrued liabilities only by appropriation in the annual budget voted on by the city council of member cities or at the annual town meeting of member towns.

Massachusetts General Laws Chapter 40 Section 21A

A town by by-law and a city by ordinance, unless repugnant to the charter of such city, may establish the hours, days and weeks of work and the hours, days and weeks of leave without loss of pay, including, without limiting the generality of the foregoing, holiday leave, vacation leave and sick leave, for any or all employees of such town or city other than those appointed by the school committee; provided, that the number of working hours, days or weeks so established shall not exceed, and the number of hours, days or weeks of leave without loss of pay shall not be less than, the number prescribed by any general or special law applicable to such town or city on the first day of January, nineteen hundred and fifty-two.

Massachusetts General Laws Chapter 150E Section 7 (excerpt)

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years; provided, however, that the employer and the exclusive representative through negotiation may agree to include a provision in a collective bargaining agreement stating that the agreement's terms shall remain in full force and effect beyond the 3 years until a successor agreement is voluntarily negotiated by the parties. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the commission and with the house and senate committees on ways and means forthwith by the employer. ...

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a 1/2) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(b 1/2) section seventeen *I* of chapter one hundred and eighty;

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight *I*, inclusive, and sections one hundred and eleven to one hundred and eleven *I*, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g 1/2) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section twenty-eight A of chapter seven;

(k) sections forty-five to fifty, inclusive, of chapter thirty;

(l) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;

(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;

(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;

(o) section fifty-three C of chapter two hundred and sixty-two;

(p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;

(q) section eight of chapter two hundred and eleven B. the terms of the collective bargaining agreement shall prevail.

...

Bulletin 2013-03B 2012 Legislation (excerpt) ...

Ch. 66 COMPENSATED ABSENCES SPECIAL FUND

An Act Relative to Compensated Absences in Cities and Towns. *Effective July 3, 2012.*

Adds a new local acceptance statute, G.L. c. 40, § 13D, that lets cities, towns, districts and regional school districts establish and appropriate monies into a reserve fund for future payment of accrued liabilities for compensated absences owed to employees and full-time officers when they terminate employment. Accrued liabilities would include accrued and unused sick and vacation leave and unused compensatory time earned pursuant to collective bargaining agreements, ordinances, by-laws and the like, which become due and payable upon retirement or other termination of employment as specified in the agreement or other binding provision.

Acceptance of the statute is by majority vote of a city council, town or district meeting, or regional school committee. The treasurer of the governmental unit may invest the funds in the manner authorized for trust funds under G.L. c. 44, § 54 and the interest remains with the fund. The governmental unit may designate the official authorized to make payments from the fund, and if no designation is made, the chief executive officer of the city, town or district may do so.

...

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

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

Characteristics

State and local government employers consist of those entities that are defined as public agencies by the FLSA. “Public Agency” is defined to mean the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State; or any interstate governmental agency. The public agency definition does not extend to private companies that are engaged in work activities normally performed by public employees.

Coverage

Section 3(s)(1)(C) of the FLSA covers all public agency employees of a State, a political subdivision of a State, or an interstate government agency.

Requirements

The FLSA requires employers to:

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

Youth Minimum Wage: The 1996 Amendments to the FLSA allow employers to pay a youth minimum wage of not less than \$4.25 an hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment by their employer. The law contains certain protections for employees that prohibit employers from displacing any employee in order to hire someone at the youth minimum wage.

Compensatory Time: Under certain prescribed conditions, employees of State or local government agencies may receive compensatory time off, at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours. An employee must be permitted to use compensatory time on the date requested unless doing so would “unduly disrupt” the operations of the agency.

In locations with concurrent State wage laws, some States may not recognize or permit the application of some or all of the following exemptions. Since an employer must comply with the most stringent of the State or

Federal provisions, it is strongly recommended that the State laws be reviewed prior to applying any of the exclusions or exemptions discussed herein.

For certain employees in the following examples, the calculation of overtime pay **may** differ from the general requirements of the FLSA:

- employees who solely at their option occasionally or sporadically work on a part-time basis for the same public agency in a different capacity than the one in which they are normally employed
- employees who at their option with approval of the agency substitute for another during scheduled work hours in the same work capacity
- employees who meet exemption requirements for Executive, Administrative, Professional or Outside Sales occupations
- hospital or residential care establishments may, with agreement or understanding of employees, adopt a fixed work period of 14 consecutive days and pay overtime after 8 hours in a day or 80 in the work period, whichever is greater
- mass transit employees who spend some time engaged in charter activities
- employees working in separate seasonal amusement or recreational establishments such as swimming pools, parks, etc.

Employees Engaged in Fire Protection and Law Enforcement Activities

Fire protection personnel include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who:

1. are trained in fire suppression;
2. have the legal authority and responsibility to engage in fire suppression;
3. are employed by a fire department of a municipality, county, fire district, or State; and
4. are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

There is no limit on the amount of nonexempt work that an employee employed in fire protection activities may perform. So long as the employee meets the criteria above, he or she is an employee “employed in fire protection activities” as defined in section 3(y) of the FLSA.

Law enforcement personnel are employees who are empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Employees engaged in law enforcement activities may perform some nonexempt work that is not performed as an incident to or in conjunction with their law enforcement activities. However, a person who spends more than 20 percent of the workweek or applicable work period in nonexempt activities is not considered to be an employee engaged in law enforcement activities under the FLSA.

Fire protection and law enforcement employees may at their own option perform special duty work in fire protection and law enforcement for a separate and independent employer without including the wages and hours in regular rate or overtime determinations for the primary public employer.

- Fire Departments or Police Departments **may** establish a work period ranging from 7 to 28 days in which overtime need be paid only after a specified number of hours in each work period.

- Any employee who in any workweek is employed by an agency employing less than 5 employees in fire protection or law enforcement may be exempt from overtime.

For more information on law enforcement and fire protection employees under the FLSA, see Fact Sheet #8.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

United States Department of Labor

Wage and Hour Division

Wage and Hour Division (WHD)

FMLA-34

April 12, 1994

Dear *Name**:

This is in response to your letter making an inquiry regarding provisions of the Family and Medical Leave Act of 1993 (FMLA). You request guidance regarding the relationship between compensatory time accumulated by a public employee and the taking of FMLA leave.

The 1985 amendments to the Fair Labor Standards Act (FLSA) created an alternative for public employers to pay overtime compensation required by FLSA by providing accrual of compensatory time off in lieu of immediate payment in cash. When overtime hours are worked the public employer is required to credit the employee at the rate of one and one-half hour of compensatory time for each overtime hour worked. This accrued time is then to be used at the discretion of the employee with two exceptions. A public employer may deny a request for the use of compensatory time in situations when to do so would be unduly disruptive to the agency's operations, and when such use is not requested pursuant to the agreement or understanding reached between the employer and the employee or the employee's representative prior to the performance of the work.

The FMLA provides that an employee is entitled to 12 weeks of unpaid leave for certain family or medical reasons. The FMLA further provides for substitution of certain accrued paid leaves for periods of unpaid FMLA leave. Section 102(d)(2) of the statute provides that an employee may elect or an employer may require the substitution of accrued paid leave for periods of unpaid FMLA leave. The types of leave identified in the statute are: paid vacation leave, personal leave, family leave and medical or sick leave. The legislative history makes it clear that the types of accruals that may be substituted for unpaid FMLA leave are types of leave provided by the employer. Compensatory time off accrued in lieu of the payment in cash of FLSA required statutory overtime pay is not a form of accrued personal leave, nor is it identified in FMLA as an accrual that may be substituted for unpaid FMLA leave.

A public employee may elect, subject to employer approval, to use accrued compensatory time off for an absence that would otherwise qualify as a reason for taking FMLA leave. If the employee does so, the employer may not designate the absence as FMLA leave and thereby reduce the employee's FMLA leave entitlement.

Hopefully this has been responsive to your inquiry. If I may be of further assistance please let me know.

Sincerely,

J. Dean Speer
Director, Division of Policy and Analysis

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*



July 7, 2008

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

Re: Compensatory Time
Our File No. 2008-56

Dear Mr. Ward:

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

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

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

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

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

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

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

Under state law we don't believe a town administrator or even a board of selectmen could bind the town to provide compensatory time in lieu of overtime pay or to make payments for compensatory time not taken, without a town meeting appropriation, by-law, or approved collective bargaining agreement so providing. Thus, for the period of time prior to the 1995 effective date of the town by-law, we do not think the town has any legal liability for any agreements that may have been made by previous town officers to provide compensatory time benefits. Even during the 1995-2001 period when compensatory time hours may have been documented by the custodian, there is no indication that the department head or appointing authority was monitoring and authorizing the overtime work which the employee claims to have accumulated. You may also wish to consult with town counsel on the effect of the town's by-law on the responsibilities of the town.

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

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathleen Colleary". The signature is fluid and cursive, with the first name "Kathleen" written in a larger, more prominent script than the last name "Colleary".

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:GAB



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

200 Portland Street
Boston 02114-1715

MITCHELL ADAMS
Commissioner

(617) 727-2300

LESLIE A. KIRWAN
Deputy Commissioner

June 4, 1991

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

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

Dear Ms. Summers:

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

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

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

Sharon L. Summers
Page Two

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

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

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

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

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

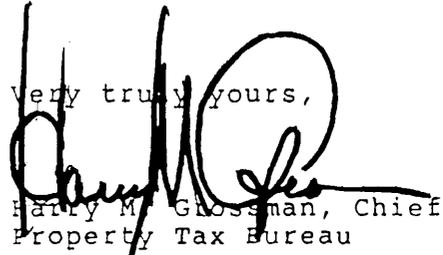
Sharon L. Summers
Page Three

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

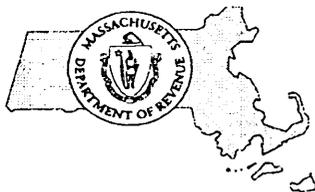
"Annual operating accounts" are fiscal year budget appropriations which are made to cover the expenses for operating the town during that fiscal year. Such accounts may be transferred under G.L. Ch. 44, S. 33B for another purpose, but they close out at the end of the year if not spent, because the annual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

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

Very truly yours,



Harry M. Grossman, Chief
Property Tax Bureau



MASSACHUSETTS DEPARTMENT OF REVENUE
DIVISION OF LOCAL SERVICES

P.O. Box 9655
Boston, MA 02114

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

MITCHELL ADAMS
Commissioner

ROBERT H. MARSH
Deputy Commissioner

January 8, 1996

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

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

Dear Mr. Torrissi:

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

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

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

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

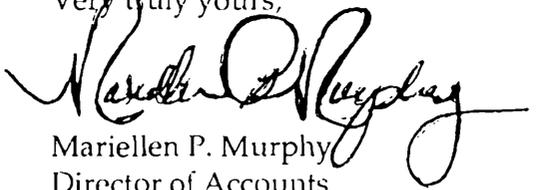
of retirement or termination. These policies have arisen in different ways. In some towns it has become a practice without any by-law or general policy vote of a board of selectmen. In others department heads may have established their own practices. In still others a by-law may provide the policy. See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

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

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

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

Very truly yours,



Mariellen P. Murphy
Director of Accounts

From: Gannon, John on behalf of DOR DLS Law
Sent: Friday, March 30, 2012 2:03 PM
To: 'Jennifer Luiz'
Subject: RE: Multi Year Department Head Contracts/Special Benefits
Jennifer,

My apologies for the delay in responding. As a general matter, special multi-year employment contracts are only provided in special statutory provisions, such as G.L. c. 41, s. 108N or s. 108O, or by special act. With respect to whether both contracts are binding in the second and third year, as a general rule, any contract of employment with a town is limited to the year in which an appropriation is made by town meeting to fund the position. G.L. c. 44, s. 31 (authority to contract is limited to the amount of the appropriation available, and appropriations are grants of authority).

Multi-Year Contracts:

With respect to the Police Chief, G.L. c. 41, 108O authorizes a special contract, but it makes no mention of any specific or general time period for such a contract. A contract in that case would appear to be limited by an annual appropriation. Because police chiefs are often subject to civil service, they may be appointed indefinitely and be entitled to just cause protection. In that case, the annual appropriation limitation would appear to govern. If the chief is not subject to civil service, the governing statutes provide for an appointment annually or a term not exceeding three years. G.L. c. 41, ss. 97 and 97A. Without some clear indication from the statute that a multi-year binding contract is authorized, we think that the annual appropriation limit under G.L. c. 44, s. 31 still governs. However, the term of office is based on the local election to grant an annual or greater term up to three years and would be a reasonable period for a contract if G.L. c. 41, s. 108O were to be interpreted to allow multi-year contracts.

With regard to the Highway Superintendent, no specific statute authorizes a multi-year contract for that office. Therefore, G.L. c. 44, s. 31 and G.L. c. 41, s. 108 would require an annual appropriation before any compensation increase could take effect.

With respect to the Fire Chief, G.L. c. 41, s. 108O allows special contracts for fire chiefs, but the statute provides no express provision authorizing multi-year contracts. Therefore, such contracts must be funded through an annual appropriation.

Vacation Buybacks:

With respect to the Fire Chief and Police Chief contracts, G.L. c. 41, s. 108O would authorize contractual provisions concerning vacation time buyback. With respect to the Highway Superintendent contract, however, since there is no state law authorizing additional compensation beyond that received by other Town employees, that contract may not provide for a vacation time buyback, assuming that there is no local authorization allowing buyback of vacation time to other Town employees.

Compensation Retroactive to July 1, 2011:

Concerning the payment of the Fire Chief's salary increase retroactive to July 1, 2011, the retroactive payment within the fiscal year would be appropriate. Should there be available funds within the Fire Department's salary account, the salary account may provide funding for that retroactive salary increase.

Please let me know if you have any additional questions.

Regards,

John

John G. Gannon, Tax Counsel
Bureau of Municipal Finance Law
Division of Local Services
Department of Revenue
617-626-2400
DLSLAW@dor.state.ma.us

From: Jennifer Luiz [<mailto:jluiz@townofdighton.com>]
Sent: Tuesday, February 28, 2012 2:03 PM
To: DOR DLS Law
Subject: Multi Year Department Head Contracts/Special Benefits

Good Afternoon,

Our Board of Selectmen has negotiated individual 3 year contracts with our Police Chief and Highway Superintendent for FY12-FY14. These were signed before FY12 started and funding was provided for in the annual budget for FY12 wages. These are the first non-union department head contracts that I am aware of in the Town of Dighton. In the past, the Non-Union Department Heads and non-union employees received the same benefits (ex. wage increases etc) of the union employees working in the same department.

Please advise if a 3 year contract for these individuals is binding in the 2nd and 3rd year. Is there a MGL that would allow a multi year contract for the above mentioned Department Heads or for the Fire Chief in the last question?

Also included in the individual contracts is the ability to buyback 2 weeks of unused vacation time at fiscal year end. During the FY09 Local Aid Cuts our BOS created a policy in which non-union employees were no longer allowed to buyback vacation time at year end. All department heads in Dighton are non-union along with other individual employees. Each year since the policy went into effect the BOS sends out a yearly reminder of the policy including this year.

Please advise if a vacation buyback can be incorporated into these contracts when it is not available to all the other non-union employees.

Currently our Board of Selectmen is negotiating an individual 3 year contract with our Fire Chief for FY12-FY14. The contract includes a retro pay back to July 1, 2011.

Please advise if this contract would need to go to a Town Meeting in order to appropriate the funding even if it is from an available source. for example in the Fire Department personnel budget or from a reserve fund transfer.

I am attaching File No. 2006-189 which is what has raised the questions for me.

Respectfully Submitted,

Jennifer Luiz

Town Accountant

Town of Dighton

979 Somerset Ave

Dighton, MA 02715

508-669-6011

508-669-4505 fax

jluiz@townofdighton.com

Web link http://www.dighton-ma.gov/Public_Documents/DightonMA_Accountant/index

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

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

Jason:

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

I hope this addresses your concerns.

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

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

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

Good Afternoon,

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

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

Thank you for your assistance.

Best,
Jason

From: Donald E. Gorton for DLS LAW
Sent: Wednesday, February 25, 2009 12:05PM
To: chatty@456@verizon.net
Cc: Amy Handfeld
Subject: Re: Our File No. 2009-244/Question on Vacation/Sick Time

Dear Ms. Whitney:

While it is necessary to have an appropriation in order to pay for the buyback of the sick time in question, no difficulty arises from the fact that unused leave time arose over several fiscal years. It is possible for a town to set aside money to buyback unused compensated leave time for departing employees by means of a single special purpose appropriation which carries over from year to year. Alternatively Town Meeting can budget for buybacks annually by department---a more cumbersome process which might necessitate a special Town Meeting to transfer unexpended funds to other purposes, if the budgeted amount for the year was more than was eventually needed. Any unexpended funds in a departmental appropriation for the purpose would otherwise be closed out to the General Fund at the end of the fiscal year. (The extent to which already-appropriated funds are available for the buyback of the full sick time allotment is unclear from the correspondence.)

...

Donald Gorton, Counsel
Bureau of Municipal Finance Law
Division of Local Services
Massachusetts Department of Revenue
617-626-2400
DLSLAW@dor.state.ma.us

This e-mail response is intended to provide general information about the application of municipal tax and finance laws and Department of Revenue policies and procedures. It is not a public written statement, as defined in 830 CMR 62C.3.1, and does not state the official position of the Department on the interpretation of the laws pertaining to local taxes and finance. Informational responses provided by this e-mail means are akin to ordinary telephone or face-to-face conversations and do not reflect the level of factual or legal inquiry or analysis which would be applied in the case of a formal legal opinion.

From: Januskiewicz, Amy
Sent: Wednesday, February 25, 2009 10:07 AM
To: DOR DLS Law
Subject: FW: Question on Vacation, Sick Time

From: Maggie Whitney [<mailto:chatty456@verizon.net>]
Sent: Wednesday, February 25, 2009 9:48 AM
To: Januskiewicz, Amy
Subject: Question on Vacation, Sick Time

Good Morning Amy,

Would you please confirm the legality of the action below? It was my understanding that money from one fiscal year cannot be paid in the next fiscal year because it needs to be approved at Town Meeting. We did this at the Special Town Meeting dated November 13, 2008 for other deferred compensation for the Town Administrator. I want to be sure the process is followed correctly.

...

Thanks,
--Maggie

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From: Blau, Gary on behalf of DOR DLS Law
Sent: Monday, July 14, 2008 10:02 AM
To: 'Rick Fitzpatrick'
Subject: 2008-341 - Request for opinion
Rick:

I am not aware of any statute that would prohibit payment in lieu of taking vacation as provided in the recent collective bargaining agreement, assuming, as you have indicated, that the cost of the benefit was appropriated after the contract was executed. I note that M.G.L. c. 41, §§111A, 111D and 111L, which are local acceptance statutes, require accepting cities to provide a minimum of 2 weeks paid vacation for police officers (§111A), allow 3 weeks vacation for police officers serving between 5 and 10 years for the municipality or 4 weeks vacation for 10 or more years service (§111D) and allow 5 weeks vacation for police officers serving 20 or more years (§111L). At least §§111A and 111D may be superseded by a collective bargaining agreement to the contrary, under M.G.L. c. 150E, §7(d)[e]. It is not clear whether M.G.L. c. 41, §§111A, 111D and 111L, if accepted, require the officer to receive the time off with pay and preclude voluntarily giving up the time off in exchange for additional payment. A quick review of the City's online code appendix, which lists statutes accepted by the city, suggests that the city has not accepted Chapter 41, §§111A, 111D or 111L. If that is the case, I would assume vacation entitlement for the officers is spelled out in the collective bargaining agreement, and can be modified by this new benefit clause.

With respect to the method of authorizing and approving the funds for this benefit, you have indicated that while the funds have been placed in the general salary item for the department, the informational material provided by the mayor showed the funding for the particular benefit in a specific line item. In addition, you stated that the amount in the item included the week's paid vacation for every police officer, not just an actuarial determination of what number of officers would request the benefit. Ordinarily the appropriation of such amount in the first year of the contract would be sufficient to make the provision binding for the entire contract. See Boston Teacher's Union, Local 66 v. School Committee of Boston, 386 Mass. 197 (1982).

However, you have also indicated that the city may have only included sufficient funds to cover a five day regular vacation payment, and the union is suggesting that the benefit includes a 7 day week payment, a portion of longevity and perhaps other add-ons, similar to the benefit paid upon retirement. This calls into question whether a sufficient appropriation was voted to make the vacation benefit binding. See GL c. 150E, §7, requiring the contract to be submitted to the City Council for an appropriation necessary to fund the cost items. Where the appropriation is not provided, the parties would have to go back to the bargaining table. I understand that the Massachusetts Labor Relations Commission will look at whether the City made a good faith estimate of the cost of providing the benefit and if that amount is appropriated, the contract may still be considered binding, even if it may be underfunded. I am not aware of any appellate case on this issue. In this case, the appropriation may in fact be sufficient, given that every officer is not likely to take the benefit. However, an argument may be made that the parties never arrived at a meeting of the minds, and while the amount appropriated was clearly reasonable based on the employer's understanding of the benefit, it may not have been intended to provide the benefit the union believes it bargained for. This is an issue you need to discuss with your city solicitor or labor counsel.

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

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From: Rick Fitzpatrick [mailto:rfitzpatrick@ci.quincy.ma.us]
Sent: Thursday, July 10, 2008 10:06 AM
To: DOR DLS Law
Subject: Request for opinion

The City of Quincy's most recent collective bargaining agreement with the police union has the following provision:

"Vacation: Effective 7/1/08 all bargaining unit members shall be entitled to buyback up to one (1) week of vacation time in any calendar year."

I am asking for a legal opinion, as to whether there is state statute that would prohibit the city from thereby paying an individual who so chooses to be paid for vacation, rather than take the time and be paid beyond a 52 week period.

The city has appropriated the funds for this purpose in the departmental personal services budget for 2009. Does this appropriation approval by city council bind the city to agree to this section of the contract? If so, what is the recommended method of authorizing and approving these funds?

Thanks for your assistance in this manner, I have spoken with Jim Crowley and he has recommended I forward my request in writing.

Rick Fitzpatrick
City Auditor
City of Quincy
1305 Hancock Street
Quincy, MA. 02169
617-376-1264



STEPHEN W. KIDDER
COMMISSIONER

EDWARD J. COLLINS, JR.
DEPUTY COMMISSIONER

The Commonwealth of Massachusetts
Department of Revenue
Division of Local Services
200 Portland Street
Boston 02114-1715

August 7, 1989

Sharon L. Summers
Town Accountant
Town of Ayer
P.O. Box 12
Ayer, MA 01432

Re: Special Purpose Appropriations
Our File No. 89-365

Dear Ms. Summers:

You asked how a special purpose departmental appropriation balance may be used by Town Meeting to fund a different departmental or other purpose.

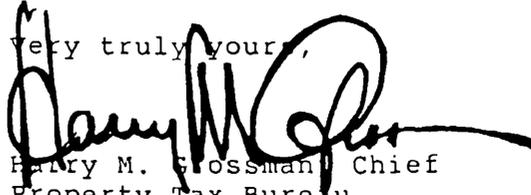
The unencumbered balance of an appropriation for some special departmental purpose, such as the acquisition of capital equipment or a large scale repair project, may be transferred by Town Meeting "to any use authorized by law." G.L. Ch. 44, §33B. In that case, the appropriation balance would be considered a funding source and it would not be necessary for the warrant article to specify the source of the funds for the proposed appropriation, although the article moved and voted must do so. This is because a Town Meeting may vote to appropriate funds for the subject matter of a warrant article from any lawful source, including borrowing, so long as the warrant article indicates in some way that money may be appropriated for that purpose. Kittridge v. North Brookfield, 138 Mass. 286 (1885).

However, if the issue before Town Meeting is not the disposition of any amount remaining after the original purpose of the appropriation has been fulfilled but rather whether the project should be continued, an article must be placed on the warrant in order to advise the townspeople that the Town Meeting will be reconsidering its decision to allocate funds to the purpose in question.

Sharon L. Summers
Town Accountant
Town of Ayer
Page Two

Finally, we believe that the Town Accountant may close out the unencumbered balance of a special purpose appropriation to surplus if notified by the applicable department head or board that the original purpose of the appropriation has been fulfilled and no further expenditures could be lawfully charged against the appropriation. In the normal course of events, this will increase the Town's free cash balance and once certified by the Director of Accounts, these funds can be used by Town Meeting to fund any lawful purpose.

Please do not hesitate to contact me again if I may be of further assistance.

Very truly yours,

Harry M. Grossman, Chief
Property Tax Bureau

HMG/kc

Municipal Unemployment Task Force Report

PowerPoint Presentation

***Municipal Unemployment
Task Force Report***

- Convened to review Unemployment Insurance (UI) issues raised by c/t's (see Town of Lynnfield case)
- Reviewed current state and federal law, US DOL mandates, c/t practices, DUA practice and policies, impact on both employees and c/t employers
- Report issued on November 15, 2012

***Municipal Unemployment
Task Force Report
Areas Identified:***

- Retirees
- School-Based Employees
- Seasonal Employees
- Election Day Workers

***Municipal Unemployment
Task Force Report
Areas Identified:***

- Election Workers
- On-Call Employees
- Method of Contribution to UI System by Municipal Employers
- Process, Policy and Practice
- Summary and Conclusion

***Municipal Unemployment
Task Force Report***

- **RETIREES:**
- Issue – Payment of UI benefits to 960 and “critical needs” retirees who return to prior c/t employer
- Issue – Public employees who apply for and receive UI benefits upon reaching mandatory retirement age of 65

***Municipal Unemployment
Task Force Report***

- **RETIREES:**
- Solution Identified – New Legislation:
- To reduce UI benefits of all public and private retirees receiving a defined benefit pension
- Reduce UI benefits by 65% of the retiree’s weekly pension payment

***Municipal Unemployment
Task Force Report***

- **RETIREES:**
- Outcome: Covered retirees with annual pension of \$53,920 or higher would not received any UI benefits
- Pension offset would surpass UI benefits
- Retirees earning below threshold would receive little UI, due to formula

***Municipal Unemployment
Task Force Report***

- **SCHOOL-BASED EMPLOYEES:**
- Issue – Non-tenured teachers who are pink-slipped, uncertain about next year
- Issue – School-based employees who are paid directly by c/t, e.g., crossing guards, nurses
- Issue – Substitute teachers

***Municipal Unemployment
Task Force Report***

- **SCHOOL-BASED EMPLOYEES:**
- Solution:
- For school-based employees paid by c/t, new legislation making them ineligible for UI when no school
- Would include them in definition of “reasonable assurance,” same as for school employees

***Municipal Unemployment
Task Force Report***

- **SCHOOL-BASED EMPLOYEES:**
- Solution – Substitute teachers would also come under def. of “reasonable assurance” policy
- Outcome – All public employees providing service to a school with a “reasonable assurance” of continuity not eligible for UI benefits

***Municipal Unemployment
Task Force Report***

- **SEASONAL EMPLOYEES:**
- Issue – How to ensure “seasonal certification exemption” from UI benefits is properly managed
- Solution – DUA must clarify its rules and procedures to ensure uniformity
- Outcome – Would allow c/t’s more flexibility to use seasonal employees

***Municipal Unemployment
Task Force Report***

- **ELECTION DAY WORKERS:**
- Issue – Individuals who work only elections and are UI eligible
- Solution – Recommends statutory change to exempt election day work from UI, if wages received are less than \$1k/ year
- Outcome – No UI liability for < \$1k

***Municipal Unemployment
Task Force Report***

- **ON-CALL EMPLOYEES:**
- Two categories:
- 1) On-call firefighters & EMT’s (who are statutorily exempt from UI)
- 2) General group of on-call employees, such as substitute teachers

***Municipal Unemployment
Task Force Report***

- **ON-CALL EMPLOYEES:**
- **Solution – For on-call firefighters & EMT's, DUA recommends c/t's "properly identify them" for UI claims**
- **Solution – For other on-call personnel, recommends DUA uniformly apply the rule that p-t, intermittent employees not eligible for UI if work > 1 hour/week**

***Municipal Unemployment
Task Force Report***

- **C/T CONTRIBUTIONS TO UI SYSTEM:**
- **Issue – Should c/t's opt to contribute to UI Trust Fund or self-insure?**
- **Recommendation – Keep present system**
- **Outcome - Most c/t's self-fund, still more economically preferable than contributing to UI Trust Fund**

***Municipal Unemployment
Task Force Report***

- **PROCESS, POLICY AND PRACTICE:**
- **Task Force recommends DUA make many policy, procedural changes to ensure better access by c/t's, uniform internal policies, enforcement, create DUA c/t unit, training to c/t's**
- **Task Force recommends c/t's better manage their UI issues internally**

*Municipal Unemployment
Task Force Report*

- SUMMARY AND CONCLUSION:
- Task Force hopes combination of legislative changes, DUA policy changes, commitment to uniformity, and c/t recognition of their need to better manage their UI costs will provide economic relief to c/t's
- Hopes remain to be seen
