

MEMORANDUM #14, 2011

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission
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Joseph E. Connarton, *Executive Director*

MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: *Boston Hous. Auth. v. Nat'l Conference of Firemen and Oilers, Local 3*, No. SJC-10569 (Mass. October 22, 2010) & Chapter 21 of the Acts of 2009

DATE: March 1, 2011

The Massachusetts Supreme Judicial Court (“SJC”) has set forth a decision (five in favor, two dissenting) invalidating the majority of contract extension provisions or “evergreen clauses”. Such provisions are commonplace in a public employee collective bargaining agreement (“CBA”).

In its decision, the SJC has invalidated a traditional principle that allows the parties to agree that evergreen clauses be used to extend a CBA after it expires until a new CBA is agreed to by the parties. The SJC held that G.L. c. 150E, § 7(a) limits a CBA’s term to three years and that evergreen clauses which lengthen the contract past three years are null and void.

The SJC explains that “[w]e recognize that an evergreen clause is designed to maintain the status quo in labor relations and provide for a continuing code of conduct while parties negotiate a new bargaining agreement.” Moreover, the SJC cites G.L. c. 150E, § 9 which provides that “nothing contained herein shall prohibit the parties from extending the terms and conditions of such a collective bargaining agreement by mutual agreement for a period of time in excess of the aforementioned time.” The SJC maintains that parties can enter into a bridge agreement extending the terms of the current CBA, but only after the original CBA’s expiration “maintaining the status quo while negotiations for a new CBA are ongoing.” Accordingly, evergreen clauses are not allowed to extend the contract beyond its three-year term automatically.

The SJC’s decision in *Boston Hous. Auth.*, may have a substantial effect on the recently enacted Chapter 21 of the Acts of 2009, An Act Providing Responsible Reforms in the Pension System.

Please refer to Section 23 of Chapter 21 of the Acts of 2009, which reads as follows:

[n]otwithstanding any special or general law to the contrary, any amount, benefit or payment included in the definition of “regular compensation” by law or by regulation prior to the effective date of this act and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of “regular compensation” during the term of that collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after June 30, 2012 shall not be considered regular compensation.

This section provides that any benefit or payment in a CBA that was considered regular compensation prior to the passage of Chapter 21 of the Acts of 2009 will continue to be regular compensation until June 30, 2012 only if the member was covered under a CBA in effect on May 1, 2009. Prior to *Boston Hous. Auth.*, any member who was covered by an evergreen clause of a CBA on May 1, 2009 was entitled to receive regular compensation for any benefit or payment pursuant to Section 23 of Chapter 21 of the Acts of 2009. However, the SJC's decision in *Boston Hous. Auth.* may affect any member covered under an evergreen clause of a CBA, which expired as of May 1, 2009. Any member who was in a contract in effect on May 1, 2009 not by way of an evergreen clause is entitled to have any benefit or payment considered regular compensation pursuant to the provisions of Section 23 of Chapter 21 of the Acts of 2009.

Currently there is an active appeal of a case in which the Superior Court, relying on the *Boston Hous. Auth.* case ruled that clothing allowances are not regular compensation. An appeal has been filed with the Court of Appeals in *Picone v. City of Leominster, Public Employee Retirement Administration Commission and the Leominster Retirement Board*; Worcester Superior Court Civil Docket No. WOCV2010-02153C. The Commission also understands that multiple public safety organizations are attempting to take legislative initiatives that may change the effect of the SJC's decision.

The Commission advises all retirement boards to wait until it provides further guidance on this issue before taking any action at this time.