CITY OF BROCKTON AND BROCKTON CITY HALL ADMINISTRATIVE SERVICES ASSOCIATION AND BROCKTON CITY HALL EMPLOYEES UNION, H.L.P.E., MUP-6672 AND 6673 (8/12/92). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

18. Employer
28. Relationship Between c.150E And Other Statutes Not Enforced By Commission
54.6 wages
66. Municipal Employer Bound By Acts Of Its Agents
67.42 reneging on prior agreements
67.61 bargaining with individuals
92.51 appeals to full commission

Commissioners participating:

Maria C. Walsh, Chairperson
Haidee A. Morris, Commissioner
William G. Hayward, Jr., Commissioner

Appearances:

Allan W. Drachman, Esq.	-	Representing the City of Brockton
Mark G. Kaplan, Esq.	-	Representing the Brockton City Hall Administrative Services Association
John J. Keefe	-	Representing the Brockton City Hall Employees Union. H.L.P.E.
Gregory F. Galvin, Esq.	-	Representing the Intervenor Brockton Retirement Board

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

A Commission hearing officer issued a decision and order in this matter on January 13, 1988, finding that the City of Brockton (City), through its agent the Brockton Retirement Board (Retirement Board) violated Sections 10(a)(1) and (5) of G.L. c.150E (the Law) by repudiating the wage provisions of collective bargaining agreements with the Brockton City Hall Administrative Services Association (Association) and the Brockton City Hall Employees Union, H.L.P.E. (HLPE).[1] The City has appealed the hearing officer's decision,[2] and both the City and the Association

[1] The hearing officer's decision is reported at 14 MLC 1423 (H.O. 1988).

[2] The Retirement Board, an intervenor in this case, also filed a notice of appeal.

have filed supplementary statements which have been considered. The sole issue on appeal is whether the City is the c.150E public employer of Retirement Board employees.

Because no party has challenged the hearing officer's findings of fact, we adopt them and briefly summarize the relevant facts as follows:

The Association and HLPE (Unions) have represented a unit of City clerical employees and a residual unit of city employees, respectively, since the 1970's. Until the present case arose, the positions of bookkeeper, principal clerk and administrative assistant in the Retirement Board's offices had been treated by the City and the Unions as included in one of the two bargaining Units represented by the Unions.[3] The incumbents of those positions received the contractual wages and benefits, including life and health insurance and paid union dues.[4] There is no evidence or contention that the Retirement Board ever recognized either Union as the exclusive collective bargaining representative of the employees. Nor did the Commission ever certify either Union as the representative of the Retirement Board's employees.[5] The Retirement Board's office is in the annex of Brockton City Hall, with some other City and School Department offices. It is reached through the same telephone number as other City offices.

The Retirement Board, which operates under G.L. c.32,[6] is composed of three members. The City auditor is a member ex officio, another member is elected by the City's employees, and these two members choose the third member. G.L. c.32 confers fiscal autonomy on municipal retirement systems. The city is obligated to fund

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[3] The bookkeeper and principal clerk positions were considered to be in the Association's bargaining unit; the administrative assistant position in HLPE's bargaining unit. The hearing officer made more detailed findings of fact concerning the Association's positions and its bargaining history with the City and noted that there appeared to be no dispute that HLPE and the City had a similar bargaining history. No party has challenged those findings on appeal.

[4] The Retirement Board's administrative assistant has not authorized the City to deduct HLPE dues or an agency service fee from her salary since December 1986 despite a provision in HLPE's contract with the City requiring such payment as a condition of employment. The city has not complied with HLPE's demand to enforce this requirement.

[5] Neither the City nor the Retirement Board argues that the clerical employees are not public employees within the meaning of G.L. c.150E, Section 1.

[6] G.L. c.32, Section 28(1) - (3), adopted in 1945, authorized cities and towns to accept the provisions of the "Contributory Retirement System for Public Employees."

both the expenses necessary to meet the Retirement Board's pension obligations and the expenses necessary for the administration of the Retirement Board. The Retirement Board maintains its funds in its own account from which it pays its bills, including employees' salaries. Unlike City departments, the Retirement board submits its warrants for payment directly to the City treasurer, rather than to the City auditor.

In June 1987, without notice to either Union, the Retirement Board submitted a budget to the Brockton City Council which included pay raises for the three positions in excess of the salaries provided for by the Union contracts. The City Council appropriated the money for the raises. The Association's president protested the Retirement Board's action to the City's Mayor, who had not previously known of the raises. The Mayor took no action to rescind the raises.

OPINION OF CHAIRPERSON WALSH[7]

The issue of whether the City of the Retirement Board is the employer of the three clerical employees involved in this case is crucial to determining whether the City violated c.150E when the Retirement Board raised employee salaries.

G.L. c.150E, Section 1 defines "public employer" as "...any county, city, town, district, or other political subdivision acting through its chief executive officer...". The Commission's long-standing policy of including employees in the largest practicable bargaining units, see, e.g., Massachusetts Board of Regents, 12 MLC 1643 (1986), and the fact that by tradition in Brockton, the Retirement Board clerical employees have been treated as employees of the City, contributed to the hearing officer's conclusion that the Retirement Board employees are employees of the City. The hearing officer also relied on the Commission's holding in a comparable representation case involving retirement board employees, that two clerical employees of the Malden Retirement Board were appropriately included in a city clerical unit for purposes of collective bargaining.

Malden relied heavily on the lack of a "tradition of independent action" on the part of the retirement board and the "virtually total application of City employment policies" to the retirement board clerical employees. City of Malden, 9 MLC at 1078. Malden also concluded that the method by which the retirement board's budget "proceeds through City funding mechanisms is not more determinative of employer status than is the fact that the City water department pays for itself through customer charges." Id. at 1079.

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[7] Although all three Commissioners participated in the deliberation and decision in this case Chairperson Walsh signed her opinion separately in order to record her opinion prior to taking a short leave of absence.

Malden made sense from a labor relations perspective because it created a broad collective bargaining unit of employees performing similar work. The parties' consistent application of city personnel policies to the retirement board clerical employees demonstrated that, as a practical matter, there was no inherent impediment to treating retirement board and city employees similarly in terms of wags, hours and other terms and conditions of employment.[8] From a fiscal point of view, municipal resources could be used efficiently[9] and the city and its retirement board would not incur separate expenses for the costs associated with collective bargaining. Additionally, Labor Relations Commission v. Town of Natick, 1369 Mass. 431 (1976) (hereafter Natick) had explicitly rejected a "compromise" two-part bargaining structure in cities and towns which had adopted statutes giving broad authority to police or fire chiefs. Natick held that a town's board of selectmen is the town's "chief executive officer" with exclusive authority to bargain concerning subjects which otherwise would be within the authority of the respective chiefs. Natick makes a strong statement that there should be only one locus of a municipality's bargaining authority. Natick, 369 Mass. at 439. The application of these policies in Malden resulted in a decision that the retirement board clerical employees were appropriately included in the overall city clerical unit.

Now, however, there are compelling reasons to re-examine the 1982 Malden analysis in the context of this prohibited practice case and the remedial order requiring the City to take all necessary steps to cease paying the wage increases granted to the three employees of the Retirement Board. Chief among these reasons is the Appeals Court's opinion in Everett Retirement Board v. Board of Assessors of Everett, 19 Mass.App.Ct. 305, 306 (1985), (hereafter Everett), which held that the expense fund component of retirement system budgets is not subject to municipal control. Everett is particularly instructive because the issue giving rise to the dispute was the retirement board's addition of a $20,000/year administrative

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[8] County retirement boards are required to "classify and approve [their] employees in accordance with the general personnel guidelines and pay scales adopted for county personnel." G.L. c.32, Section 20(3)(d). No similar provision applies to retirement boards for cities and towns.

[9] If the members covered by the particular municipal retirement system are all employees of the municipality, the expenses of the retirement board are funded wholly from general municipal tax revenues. Where the municipal retirement system also encompasses other autonomous entities, e.g., a housing authority, the expenses are apportioned according to the number of members of each entity covered by the system. County retirement systems generally cover both county employees and employees of other government units, such as cities and towns which lack their own retirement systems, and certain districts within the county. The expenses of a multi-employer system are proportionally allocated to each government unit. G.L. c.32, Section 22(79(c).

secretary position to its budget. The mayor objected to the increase and rejected from the budget submitted by the board almost $40,000 of the retirement board's administrative expenses. The Appeals Court held that the mayor's action was invalid and that neither the operation of "proposition 2-1/2"[10] nor the provisions of the municipal finance law[11] apply to retirement boards. The Court specifically concluded that municipal retirement boards are not "municipal departments," and noted that the only restrictions on retirement board spending are through operation of the Public Employee Retirement system and the powers conferred by G.L. c.32, Section 21(4).[12]

In the present case, the City relies on Everett and argues that because it cannot control the Retirement Board[13] it cannot comply with the hearing officer's

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10 G.L. c.59, §20A.

11 G.L. c.44, §§31, 31A and 32.

12 G.L. c.32, §21(4) provides that: "[t]he commissioner of public employee retirement shall promulgate such rules and regulations as he may deem necessary from time to time to effectuate the purposes of this chapter, and he or his agent shall approve any by-laws, rules, regulations, prescribed forms or determinations of any board in order to effectuate such purposes." By regulation the Public Employee Retirement Administration (PERA) requires retirement boards to file reports, designates certain information as confidential, requires PERA approval of specific decisions on retirements, death benefits, veterans benefits and the like and specifies appropriate investments. See generally, 840 CMR. 840 CMR 25.00 contains PERA's rules for the conduct of field examinations of contributory retirement systems. Among the questions posed by field examiners are: "Are all administrative expenses approved and authorized by the retirement board?" 25.15(3); "Does the number of employees appear to be sufficient to perform all of the duties necessary to operate the retirement system? Do the current employees appear to be technically competent?" 25.34(6). The review authority of the commissioner has been broadly construed. See, e.g., Plymouth County Retirement Association v. Commissioner of Public Employee Retirement, 1410 Mass. 307 (1991).

13 The City, relying on Town of Marblehead, 7 MLC 1240 (1980), argues that the appropriate legal test is whether the City can control the Retirement Board through ordinance or by-law. In Marblehead, the Commission determined that the Marblehead Light Commission was the chief executive officer of the Town for the purpose of bargaining with light department employees. Although the Hearing Officer, at 6 MLC 1981 (1980), relied in part upon the inability of the town to restrict or limit the Light Commission by ordinance or by-law, the Commission looked primarily to other factors, including the exclusive control exercised by the Light Commission over employees' wages, hours and other terms and conditions of employment, and noted that by tradition and practice, the Light Commission "has

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order to "take whatever steps are necessary to cease paying the wage increases granted to...[the retirement board clericals]...and to return those employees to their contractual wage rates."[14] Because Everett does not address issues arising under c.150E, it does not expressly determine the respective obligations of the City and the Retirement Board under the public employee collective bargaining law.[15] Nor does other case law describing the relationship between a retirement board and its corresponding government entity assist to determine whether a retirement board or the county, city or town to which it is related is the c.150E public employer of the retirement board employees. Buteau v. Norfolk County Retirement Board, 8 Mass. App.Ct. 391 (1979), describes the functioning of a county retirement board on the one hand as similar to a municipal board, both of which are "part of the administration" of the governmental unit, and not "agencies" as defined in G.L. c.30A, Section 1(2). On the other hand, Buteau also describes the county retirement system "in general [as] an independent unit having its own separate assets and liabilities." at 393. County commissioners of Norfolk County v. Board of Norfolk County Retirement System, 377 Mass. 696,698 (1979), requires at least minimal accountability by a county retirement system, holding that the retirement board must submit a detailed explanation of its expenditures to the county commissioners pursuant to a statute requiring such action by every board or agency "supported wholly or in part by county funds." However, that decision does not suggest that the county commissioners possess the authority to disallow or change the retirement board's expense budget.

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been regarded...as the chief executive officer of the Town with regard to light department employees." at 1242. The ability to control a board or other entity by ordinance or by-law is only one of the relevant factors in our determination of whether the board is independent of its host municipality.

14 The Association argues that the Mayor could influence the Retirement Board to take action consistent with the collective bargaining agreement by instituting removal proceedings against the City Auditor, an ex officio member of the Retirement Board. Other than this action against one of the three Retirement Board members, the Unions have not suggested any method by which the City could comply with the Hearing Officer's order in a manner consistent with Everett.

15 The City also argues on appeal that the Hearing Officer erred by allocating to the City the burden of proof on the issue of whether the City can "control" the Retirement Board. The Hearing Officer found that the Unions had met their burden of proof on the issue of whether the Retirement Board is an agent of the City by introducing evidence of the "City's long history of bargaining on behalf of the Board..." 14 MLC 1324, 1429-30, n.8. Because the issue of the relationship between the City and Retirement Board arises in a unique statutory context, and because the outcome of this case necessarily affects other municipal retirement boards, this issue is best not decided strictly on burden of proof grounds. Instead, this opinion relies on other considerations than the proper allocation of burden of proof.

City of Brockton and Brockton city Hall Administrative Services Association and Brockton City Hall Employees Union, H.L.P.E., 19 MLC 1139

Commission case law under G.L. c.150E, other than Malden, fails to provide a clear-cut test applicable to the unique structure of retirement boards. Over the years, several cases have presented the issue of whether a city of town is the c.150E public employer of employees of a public entity or board with some degree of autonomy. The Commission consistently has sought to reconcile the policy of a single municipal employer, expressed in c.150E, §1, with diverse funding, administrative and statutory structures. Thus in City of Springfield, 2 MLC 1233, 1236 (1975), the Commission found that employees employed under the Comprehensive Employment and Training Act of 1973 (CETA) were employees of the city which was part of a consortium of municipalities acting as the CETA prime sponsor because the city controlled the employees' working conditions. In another CETA case, the Commission found that a consortium of municipalities, rather than the town in which the employee performed his duties, was the public employer because the town exercised little, if any control over the employee's working conditions. Town of Grafton, 5 MLC 1833, 1834 (1979).

As noted earlier, the Commission has determined that a light commission, which exclusively controlled the wages, hours and terms and conditions of employment of light department employees, was the "chief executive officer" of the municipality for the purpose of bargaining with the employees. Town of Marblehead, 7 MLC 1240, 1242 (1980). But see, Town of Cohasset, 1 MLC 1184, 1186 (1974) (Board of Selectmen, not elected department heads, are "chief executive officers.") The commission also found that an elected board of sewer commissioners was "the designated representative" of a municipality within the meaning of Section 1 of c.150E. Town of Wareham, 2 MLC 1547, 1548 (1976). These and other cases have been based upon the necessity of reconciling the policies of c.150E with the wide variety of statutory and regulatory vehicles for delivering municipal services.

Although Natick instructs that municipal collective bargaining authority should be vested in a single municipal chief executive, it reached that conclusion in the context of specific statutory authority. Natick notes that Section 7(d) of c.150E provides that statutes authorizing police or fire chiefs to direct the operations of their respective departments are expressly overridden by the conflicting terms of a collective bargaining agreement. In addition, Natick noted a potential for a conflict of interest if police or fire chiefs, whose salaries often are set at some multiple of the salary of a police officer or firefighter, were to bargain autonomously about employees' wages.

No similar statutory scheme is applicable to retirement boards. G.L. c.32 is not one of the statutes overridden by the conflicting terms of a collective bargaining agreement under Section 7(d) of c.150E,[16] and neither c.32 nor the

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[16] See Martell v. Teachers Retirement Board, 20 Mass.App.Ct. 188, 189-190 (1985) (clause in collective bargaining agreement providing that laid off teachers be placed on involuntary leave of absence for 15 month recall period does not (continued)

record in this case indicates that there would be any relation between compensation paid to retirement board members and wages paid to the board's employees.[17]

Moreover, a statutory provision unique to retirement boards lends additional weight to the argument that the City cannot be the c.150E employer of retirement board employees. G.L. c.32, Section 16 provides for a right to a hearing before the applicable retirement board for any member of a retirement system who is involuntarily retired or discharged.[18] Under this provision, therefore, a retirement board has statutorily mandated appellate review responsibility for personnel actions taken by the municipal employer.[19] Although this responsibility has been rather narrowly construed by the courts,[20] it demonstrates a potential conflict between a retirement board and the municipal employer in the area of labor relations or personnel administration.[21]

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16 (continued)
preclude retirement benefits under G.L. c.32 because contract terms do not override the provisions of contributory retirement law).

17 G.L. c.32, Section 20(4)(d) provides that municipal retirement board members serve without compensation (except for up to $1500 for a city auditor or other officer), and are only reimbursed for expenses.

18 G.L. c.32, Section 16(1)(c), applicable to involuntary retirements, provides: "If the [retirement] board finds that any member should be retired under the provisions of this subdivision, he shall receive the same retirement allowance as he would have received had the application been made by himself. If the board finds that such member should not be retired, he shall continue in his office or position without loss of compensation, subject to the provisions of sections one to twenty-eight inclusive, as though no such application had been made." G.L. c.32, Section 16(2), applicable to removal or discharge, provides in relevant part: "...Unless the [retirement[board shall find that such removal or discharge was justified, such member shall forthwith be restored to his office or position without loss of compensation."

19 The mandatory nature of a retirement board's review distinguishes that body from any voluntary personnel review committee that may be established by a municipal employer.

20 The municipal employer's decision generally prevails unless the retirement board finds that the reasons advanced by the employer are arbitrary or irrational. Cf. School Committee of Brockton v. Teachers' Retirement Board, 393 Mass. 256, 264 (1984).

21 Administrative notice can be taken of the fact that at the state level, employees of the state employees' retirement system are within the department of the state treasurer and exempt from c.150E by operation of Section 1, although employees of the teachers' retirement system are included in appropriate state employee collective bargaining units.

It is a municipality's absolute lack of control over the administration and expenditures of retirement boards, however, that is the most striking departure from the structure of other municipal departments and the control exercised by the municipal authority in other contexts. As a general matter, the chief executive officers of cities and towns have been held to have broad powers over appropriations. In some forms of city government, for example, a mayor's obligations under the municipal finance act supersede requirements established by ordinance. See, e.g., Whalen v. Holyoke, 13 Mass.App.Ct. 466, 454-455 (1982), fur. rev. den. 386 Mass. 1104(1982) (Mayor permitted to refuse to include funding in his budget recommendations for the full extent of department personnel provided by ordinance enacted under the authority of a board of aldermen). A mayor's budgetary powers may even extend to legislative employees, Id. at 454, citing Mayor of New Bedford v. City Council of New Bedford, 13 Mass.App.Ct. 251 (1982). In sharp contrast, Everett establishes that a retirement board's absolute fiscal autonomy precludes even indirect municipal control through the appropriation or budget process. Natick's preference for a single municipal employer within the meaning of c.150E cannot override the mandated autonomy of the Retirement Board as provided by c.32 and interpreted in Everett. Instead, the Retirement Board must be recognized as a separate entity, independent of the municipality for administrative and fiscal purposes; and, therefore, independent of the municipality for the purposes of collective bargaining.

As the Unions in this case acknowledge, the Mayor's only ability to control the Retirement Board is limited to the authority to change the City Treasurer, thereby controlling one of the three Retirement Board votes. The ability to influence the vote on only one member of a three member Board, however, is insufficient to vest control of the board with the Mayor. If the board or commission membership served at the chief executive's pleasure it would b easier to classify the lines of authority by referring to traditional concepts of agency.[22] But even where local officials, who have direct authority to hire and fire employees, are elected, the employing entity in the vast majority of cases is still the municipality which controls the administration and budget of the board or commission. In most situations the chief executive officer of the municipality retains sufficient authority over funding, and, therefore, over administration to engage in collective bargaining. See, e.g., Town of Cohasset, 1 MLC 1184 (1974). (Fact that highway superintendent, water commissioners and sewer commissioners were elected does not determine whether town's selectmen are chief executive officers under c.150E for employees of highway, water and sewer departments.) Thus, the chief executive's ability to remove a "department head" is not the sole determinant of the city's status as employer of the retirement board employees, although it is a factor to

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22 Where a public employer has delegated part of the functions of a "chief executive officer" to another individual or body, it may not use this delegation to avoid its bargaining obligations. City of Boston, 4 MLC 1202, 1216 (1977).

consider along with the more important issue of fiscal and administrative autonomy.[23]

Therefore, because of its total fiscal and administrative autonomy from the City, and because of the absence of other means to control the administration, staffing and expense fund component of the Retirement Board, the Brockton Retirement Board, and not the City of Brockton, is the statutory employer of the employees of the retirement board. Accordingly, the employees of the Brockton Retirement Board could neither be included in the collective bargaining units of City employees[24] nor represented as members of those units by the Unions. Since the Unions did not represent the employees of the Retirement Board at the time of the alleged pay increase neither the City nor the Retirement Board had any obligation to notify or bargain collectively with the Unions concerning the employees' pay. The City, therefore, did not violate the Law when the Retirement Board increased the salaries of its employees. The complaint against the City in this matter is thus dismissed.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON

HAIDEE A. MORRIS, COMMISSIONER

WILLIAM G. HAYWARD, JR., COMMISSIONER

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[23] This conclusion relies upon the fact that it is a state statute that creates the retirement board's structure and autonomy; rather than a municipal ordinance that could be changed at the municipal level.

[24] No contention was raised in this case that the Retirement Board and the City constituted a multi-employer bargaining collective.