1-1-1962

Chapter 18: State and Municipal Government

Richard G. Huber

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the State and Local Government Law Commons

Recommended Citation
A. STATE GOVERNMENTAL FUNCTIONS

§18.1. Organization of state government. A large number of statutes were adopted during the 1962 Survey year that made changes in the structure and functions of the state government and its various offices and units. A number of changes are too minor to note but several are of considerable importance.

With few exceptions most persons believe that a major deficiency in the government of the Commonwealth lies in the limitations upon the Governor's powers. At the time the state Constitution was adopted, the prevailing tradition favored a relatively weak executive and a strong legislature. Modern concepts of efficient government have tended, particularly on the national level, to increase executive power at the expense of the legislative. It is not difficult, and may even be correct, to equate national and state needs. At least, various attempts have been made to create a more efficient administrative structure for the Governor's office, although these changes have only increased gubernatorial power indirectly. Thus, in 1922, the Commission of Administration and Finance was created to aid in handling the financial affairs of the Commonwealth, including budgeting and purchasing procedures. In Acts of 1962, c. 757, the commission is replaced by an executive office for administration and finance, under a single commissioner. This office has, in addition to the financial budgeting and purchasing powers of the original commission, been given somewhat greater powers over the budgeting and administration of all of the executive divisions of the state government. The state superintendent of buildings will serve as head of the Bureau of State Buildings within the executive office for administration and finance. The act makes numerous changes in various chapters of the General Laws to conform them to the new organization. The new act generally improves administrative practice without increasing executive powers, but a more efficient executive, not bogged down with inefficient administration, will free the

Richard G. Huber is Professor of Law at Boston College Law School and Editor in Chief of the Annual Survey.

§18.1. Most of the changes are to Chapter 7, which set up the Commission on Finance and Administration and, under the new act, is the chapter governing the newly created executive office.
§18.2 STATE AND MUNICIPAL GOVERNMENT

Governor for other functions while still keeping him better informed upon the actual state of executive administration. The act represents a step, thus, toward increasing gubernatorial power.

Acts of 1962, c. 68, sets out, in new Section 2A of G.L., c. 4, the powers and duties of special commissions established to make an investigation and study of any matter. Unless exempted from any provisions of the section, it will govern the activities of commissions and provide a desirable certainty as to their powers and duties.

The recent Cuban crisis again has pointed out the problems of continuity of state government in the event of enemy attack. Acts of 1962, c. 767, requires that each of the major officials of the Commonwealth designate five persons in his unit who, successively, would carry out the appointer's duties in the event of his absence or disability. The designees must be approved by the Governor and Council. If enemy attack prevents a quorum of the executive Council from meeting, the Governor may temporarily appoint and remove officials who are subject to his usual appointment and removal powers with Council consent.

Resolves of 1962, c. 146, created a Crime Commission which is given broad powers to investigate crime within the Commonwealth. The Bureau of Corporate Organization and Registration in the Department of Corporations and Taxation was abolished, effective January 1, 1963, by Acts of 1962, c. 750. Its functions will be assumed by the corporation division in the State Secretary's office. Acts of 1962, c. 652, created a Division on Civil Rights and Liberties in the Attorney General's office. This act thus gave legislative confirmation of the position that Attorney General McCormack had maintained in his office. The Attorney General's office was also designated to receive the reports of various charities required under Acts of 1962, c. 425.

§18.2. Code of ethics. A new Chapter 268A of the General Laws was adopted by Acts of 1962, c. 779, to replace the previous code of ethics for public employees adopted by Acts of 1961, c. 610. Admittedly, a legislative code of ethics cannot solve problems of morality and criminality among public employees; it can furnish a guide, however, that can often be of considerable assistance to an individual employee who wishes to conform to appropriate ethical standards but who would be uncertain, in the absence of the statute, as to what behavior is expected of him. In addition, of course, a code of ethics can set forth certain detailed, exactly defined standards, violation of which will subject the offender to criminal punishment, and offenders can include not only the public employees but also those who act as the corrupters. The new code of ethics is designed to accomplish these various purposes.

Two basic solutions to the problem of public ethics have been adopted in this country. In some few cases, an absolute prohibition of all types of activity that bear even slightly upon the public employees' functions has been imposed. This, for example, has been the standard traditionally imposed upon former military officers. This
approach has but one real advantage, that of insuring the appearance and generally the reality of any possible conflict of interests. But this solution is unfair to present and former public employees in many types of situations. Some dependence should be put upon the public officials themselves; the code thus designed may be less likely to insure the appearance of absolute integrity but, if well designed, will insure the reality of it as much as any absolute prohibition of all activity. The legislature wisely has adopted the latter course, and so the code attempts, on the whole successfully, to circumscribe the activities of public employees. Violations of the standards specifically set for state, county and municipal employees, as well as those in a business and family relationship with them, are criminally punishable and, in certain cases, civil liability also exists, as well as the power to rescind and cancel arrangements entered into because of improper influence. The code wisely permits the employee to receive an opinion on the validity of proposed activity from the appropriate officers, the Attorney General, the county commissioners, corporation counsel, city solicitor or town counsel. In addition to the specific prohibitions of the code, Section 23 sets out “standards of conduct” for public employees, the violation of which will subject the offender to appropriate administrative action.

The present code represents a substantial improvement over the one adopted in 1961. While undoubtedly not perfect or complete, this code is sufficiently sound so that changes found necessary can be readily made by later amendment. If a code of ethics is recognized for what it must and can only be, a guide and not insurance against violation or the appearance of violation, the new code is excellent.

Closely related to the code of ethics legislation, Acts of 1962, c. 633, adds a new Section 9A to G.L., c. 268, forbidding testimonial dinners for officials other than elective, whose duties involve law enforcement.

§18.3. Cultural and historic assets. Resolves of 1962, c. 115, sets up an unpaid advisory commission with the functions of setting up a program for inventorying the historical and cultural assets of the Commonwealth, and of recommending which state agencies should have authority over these various assets and which should be acquired and managed by the Commonwealth. Rather too often Massachusetts citizens forget that the state offers a distinctive and satisfying way of life, for which the historical and cultural assets, and the tradition they represent, are largely responsible. The particular “climate for living” is as important an attribute of the state as its business climate or political climate. The best aspects of these climates must be retained, and the present commission represents an initial and vital first step in an important area.

§18.4. Federal tax levy: Liability of Commonwealth. In Commonwealth of Massachusetts v. United States the Federal Government successfully obtained judgments against the former State Treasurer and the Commonwealth for the amounts remaining owing upon

§18.4. 1 296 F.2d 336 (1st Cir. 1961).
§18.6 STATE AND MUNICIPAL GOVERNMENT

accounts for unpaid income taxes of state employees. The Federal Government had served notice of levy upon the State Treasurer, who refused to honor them and paid their salaries to the employees. The treasurer's personal liability was held settled by Sims v. United States, involving a similar suit against the state treasurer of West Virginia. The issue of whether the Commonwealth was liable was not directly settled by the Sims case, but the United States Supreme Court had said that "the subject matter, the context, the legislative history, and the executive interpretation, i.e., the legislative environment, of [the statute] make it plain that Congress intended to and did include States within the term 'person' as used in [the statute]." This statement was considered decisive as to the Commonwealth's liability.

§18.5. Charges of misconduct. Two statutes adopted during the 1962 Survey year relate to different aspects of alleged misconduct. Acts of 1962, c. 798, authorizes the appointing authority of a department, board, commission or agency of the Commonwealth to suspend, if desired, any person employed within the unit for any period during which this person is under indictment for misconduct in his office or employment. Salary and benefits are not paid during the suspension, but amounts withheld are to be later paid if the person suspended is not found guilty of the charges against him. As a major change in policy, the statute provides that any person who retires while under suspension is not entitled to pension or retirement benefits but his own contributions are to be returned to him.

If an employee of the state or any subdivision thereof has incurred expenses in defending himself against an unwarranted discharge, removal, suspension, lowering in rank, or similar position changes, G.L., c. 31, §43(h), provides for reimbursement. Acts of 1962, c. 776, amended the section in some important details. The employee gets no reimbursement except when he has employed an attorney to defend him. The amount is limited to a total of $900 in place of an amount computed upon the basis of the employee's salary. Additional sums are authorized for certain administrative and district court hearings, and for fees and expenses necessary to the defense. Payment must be made within thirty days after submission of an application which includes satisfactory proof of the expenditures.

B. MUNICIPAL POWERS AND FUNCTIONS

§18.6. Enabling acts. In two cases decided during the 1962 Survey year, the Supreme Judicial Court had to determine if an enabling act had been properly accepted by a municipality. Noonan v. Selectmen of Brookline determined that a vote at the regular representative town meeting was effective to accept G.L., c. 41, §25, requiring the appointment of assessors. Assesors had been elected up to this time

under the provisions of Acts of 1890, c. 386. The statutes were held by the Court to require that a change as to the selection of officials had to be made at least thirty days prior to the annual town meeting at which the change is to be effective, but this did not prevent a change at one regular town meeting from becoming effective at the next regular meeting a year later.\(^2\) The Court held, however, that the only change made was as to the method of selecting assessors and the number of assessors remained unchanged. It was the apparent purpose of the warrant to change the system from three elected assessors to one appointed, full-time assessor, but the vote did not accomplish the change in the number of assessors.

In *Minnie v. City of Chicopee*\(^3\) the contention was rejected that the city had not properly accepted G.L., c. 41, §108E, relative to minimum pay for police officers. The case provides an interesting study of how not to present a case before the Supreme Judicial Court, since it required three hearings in the Superior Court involving over nine months of time, before the record was adequate to present the determinative issues. The city council, under the statute and the city charter, had the power to accept the enabling act and did so in December, 1959. The mayor returned the order unsigned but without noting his objections, so that the act was actually accepted under the pertinent laws as of December 21, 1959.

The city also contended that the acceptance was not effective because it failed to comply with the provision in the city charter that requires that no ordinance changing salaries is effective until an appropriation has been made therefor. The Court properly noted that the enabling act set out its own procedure for setting salaries and, in the statutory language, governs “[n]otwithstanding the provisions of any general or special law to the contrary.” Restrictions normally applicable under G.L., c. 44, §33A, governing salary changes that are to be operative for less than three months during the municipality’s financial year, were also not applicable since superseded by the particular statute. Thus the city had to appropriate the funds necessary to pay the salary increases from December 21, 1959, the effective date of acceptance of the enabling act.

*General Laws, c. 4, §4,* setting out the procedure for acceptance by a city or town of a statute, was modified by Acts of 1962, c. 182, to establish as general law the type of provisions now conventionally inserted into each enabling act. It makes acceptance by a city by the council subject to the appropriate city charter provisions, and clarifies acceptance by town meeting to include vote by representative town meeting.

*Commonwealth v. Dobbins*\(^4\) required that the Court determine if the local parking law was authorized by an enabling act. *General Laws, c. 40, §22,* broadly gives power to a municipality to regulate

---

\(^2\) The pertinent statutes were G.L., c. 41, §§2, 7, and Acts of 1890, c. 386, §2.


"carriages and vehicles used therein," and has existed for many years, long before automobiles came into existence. By Acts of 1956, c. 509, however, G.L., c. 40, §21(21), authorized municipal regulation of "parking of any motor vehicle in front of any dwelling house except by the occupant" and directing that signs giving notice be posted. The Court rejected the defendant's contention that the earlier, broad grant was impliedly limited by the later, specific act. While confessing it could find no purpose nor function in the adoption of the later specific act, the Court was unwilling to decide that it limited the earlier act, since much necessary and standard regulation of parking exists under the authority of the earlier statute. The Court admittedly had a most peculiar problem of statutory construction before it. A specific later act would normally govern over a general and older act, and yet the limitations this would impose upon parking regulation in residential areas would be almost nonsensical. The newer act was almost certainly adopted without any consideration being given as to the existence of the older act and thus may be considered merely a legislative aberration.

§18.7. By-laws: Validation. In Loriol v. Keene the Supreme Judicial Court determined that an attempt by the General Court to validate all acts of the selectmen of the town of Burlington relative to actions as to highways and ways was ineffective to validate the acceptance of a way by the town. The way involved admittedly had not been accepted under the provisions of G.L., c. 82, §§22 and 23. The special act could not be read to regularize other than minor, procedural irregularities in acts of the selectmen, and the notice and the layout requirements of the governing statute were indispensable conditions for dedication. Curative statutes that are designed to affect personal or property rights must be precise and clear, particularly when governmental action may involve exercise of eminent domain power. To read the curative act as validating all acts of the selectmen in this subject area, and not just the ambiguous 1931 town vote on the claimed public way, would be unreasonable. The repeal of so many sections of Chapters 79, 80 and 82 as to the town would raise serious constitutional issues if the curative act were interpreted to validate more than minor procedural informalities.

As the Court most properly notes, the expectation of municipalities that they could ignore substantive requirements of statutes over a period of many years and then expect the General Court to validate their improper actions "is hardly conducive to the maintenance of the orderly processes of government." Failure to act within statutory authority, as well as failure to act at all, should ordinarily carry the same result. It is not improper nor overly technical to require that municipalities act within their authority.2

2 Two cases concerned with the adoption of zoning ordinances and by-laws were governed by the provisions of Chapter 40A of the General Laws and are consequently discussed in §19.1 supra.
§18.8. Municipal home rule. The fact that Massachusetts, the traditional home of the town meeting, has in reality very little home rule for its cities and towns has been a source of continuing if largely ineffective dissatisfaction. Resolves of 1962, c. 102, continues the special commission studying home rule. While hope may spring eternal, there is little likelihood that the General Court will severely restrict its traditional powers in this area. The public may object, when they are informed, to the freezing of municipal employees in their jobs and other unhappy cases of interference with local government, but its opinion is seldom felt at the legislative level. The publicity concerning the Police Commissioner of Boston did develop sufficient opinion during the 1962 Survey year to result in the appointing power being shifted from the Governor to the Mayor.¹ In turn, however, in an area which public opinion did not affect, Acts of 1962, c. 350, for example, gives the Director of Civil Defense the power to establish standards for family fallout shelters and exempts these structures from local zoning regulations and building codes. Justification for this particular act, if not for those freezing municipal employees into their positions, can, of course, be found. This type of legislation, even if justifiable, does not, however, auger well for any broad acceptance of home rule within the Commonwealth.

§18.9. Alteration of municipal boundary lines. Some slight acceptance of the home rule concept can be adduced in the amendments to G.L., c. 42, §7, adopted by Acts of 1962, c. 157. As it previously existed, the state Department of Public Works could, with the concurrence of the municipalities affected, propose changes in the boundaries between adjoining towns. The new Section 7 gives the authority to initiate the proposed changes to the towns themselves, the state department’s function being limited to insuring engineering accuracy and clarity. The General Court, however, still retains the final power of disposal and approval of the changes proposed. What general statewide public interest exists in any minor changes of this type, sufficient to require the consideration of the General Court, is nowhere evident. The only possible purpose that can be imagined is that the representatives and senators from the municipalities involved might wish for some reason to thwart the local government; this may seem an important enough purpose to the members of the General Court but is hardly attractive to others.

§18.10. Municipal employees: Powers and duties. In Finance Commission of Boston v. McGrath,¹ the Boston city auctioneer, while under investigation, was served with a subpoena duces tecum requiring him to produce a number of personal financial records. The Superior Court, upon his refusal, ordered him to "produce all records of every description pertaining to such matters as are now being investigated." The Supreme Judicial Court generally upheld the commission’s right

---

¹ Acts of 1962, c. 322.

to have the relevant records produced by the employee. Massachu-
setts income tax returns were excluded under the rule of Leave v. 
Boston Elevated Railway. The recent case of St. Regis Paper Co. 
v. United States, however, required a different test as to the pro-
duction of federal income tax records. The Supreme Judicial Court 
interpreted the federal case to permit discovery of these records upon 
a showing of substantial necessity. On the facts of the McGrath case 
no sufficient necessity was shown. The case indicates, generally, that 
investigatory bodies can be given rights to access to nearly all the finan-
cial records of a public employee that may bear upon his conduct in 
public office.

Two cases relating to charitable trusts were decided during the 1962 
Survey year. In Franklin Foundation v. Collector-Treasurer of Bos-
ton, the Supreme Judicial Court held that the terms of the Carnegie 
donation to the foundation did not permit the principal of the dona-
tion to be spent for the acquiring of additional land at the site of the 
Franklin Institute. City of Salem v. Attorney General held that a 
device of land “to be used forever as Public Grounds” did not, in the 
context of the understanding of all parties, permit the use of a por-
tion of the land for a school site. The land had been accepted in 
trust for park purposes. In both cases the officials controlling the trust 
res were required to comply with the limitations imposed by the gift, 
despite the perfectly valid and desirable purposes of the uses they 
proposed.

At times it is very desirable that public employees be permitted to 
go on private land. Two statutes adopted during the 1962 Survey 
year gave this permission in two differing situations. A new Section 
11A was added to G.L., c. 82, by Acts of 1962, c. 589. The act author-
izes agents and employees of county commissioners to go upon private 
land for necessary surveys and engineering work incident to highways 
and other public projects. Reimbursement for actual injury or dam-
age is required.

General Laws, c. 148, §§5, authorizes fire officials, under certain cir-
cumstances, to make an investigation of conditions that are likely to 
cause fire. Acts of 1962, c. 456, repealed the previous limitation that 
entry could not be made into single-family and two-family dwellings 
without the consent of the occupant. As long as fire danger may exist, 
the former limitation was unwise and its removal promotes both de-
sirable uniformity and preventive fire protection.

Firefighters were also the subject of Acts of 1962, c. 345, which for-
bids their use as police officers or in other than their regular duties 
during an industrial or labor dispute. Acts of 1962, c. 233, amends 
G.L., c. 41, §§13 and 13A, to require that the Commissioner of Cor-

6 Amending G.L., c. 48, §§88.
porations and Taxation set a minimum amount for the bonds of town and city clerks; the local governing officials must set bond at at least this amount.

C. ELECTIONS

§18.11. Campaign expenses. The General Court extensively revised the laws governing campaign expenditures and contributions during the 1962 Survey year. A more sophisticated and realistic definition of campaign contributions was inserted, to include many items beyond money contributions. Three political committees per candidate are set as a maximum number a candidate may authorize. Individual yearly contributions are limited basically to $3000 per candidate. Contributions are to be made in a manner that will avoid disguising the actual originator. Lists of contributors must be filed in a given form at the end of various reporting periods, and expenditures must also be listed. The major candidates and their political committees must appoint a depository for these funds, and contributions must be deposited within three business days after receipt. The new law applies to candidates for nomination as well as candidates for election. The statute represents an excellent and basically sound attempt to avoid the dangers that arise from the needs of candidates for relatively large campaign funds. The possibilities and, more importantly, the appearance of possible undue influence or improper expenditures will largely be avoided. Further sharpening of some features of the law will make it even more effective, but the present statute represents a major and necessary step forward.

An initial amendment to the new law was adopted within a month. Acts of 1962, c. 518, added, as part of the definition of “combination of persons” in G.L., c. 55, §6, the phrase “including a corporation formed under the provisions of chapter one hundred and eighty.”

A problem of interpreting Section 7 of the Corrupt Practices Act was determined in Lustwerk v. Lytron, Inc. The plaintiff sought to enjoin the defendant corporation from expending funds for contributions to committees attempting to influence voters against the adoption of the proposed Massachusetts graduated income tax amendment. Under Section 7 corporations may expend funds for political contributions only if a question submitted to the voters is “one materially affecting any of the property, business or assets of the corporation.” The Supreme Judicial Court held that the proposed expenditure was one permitted under the statute, on the basis that the “question” would include the effect upon a corporation’s business and assets of a new and potentially more burdensome tax system. Whether the prohibited contributions included the present one is admittedly a very close question of statutory interpretation, which the lack of any ade-

§18.11. 1 Acts of 1962, c. 444, amending numerous sections of G.L., c. 55.
2 G.L., c. 55.
§18.14 STATE AND MUNICIPAL GOVERNMENT

quate legislative history made even more difficult of determination. The Court's opinion is persuasive but it cannot be, under the circumstances, positively correct. The failure of the legislature to provide adequate guidelines for the Court is responsible for the feeling one has that the result reached may not have been the one actually desired by the legislature.

§18.12. Absentee voting. Several amendments governing absentee voting were adopted during the 1962 SURVEY year. Acts of 1962, c. 511, a lengthy act, sets out the standards for absentee voting by armed forces personnel, certain employees of the United States and their dependents. The registration of these persons is also governed by the act.1 Other legislation affected minor administrative matters.²

§18.13. Presidential elections. Acts of 1962, c. 437, amends the law relating to voting in presidential elections. Although the requirements for voting remain generally at one year's residence in the Commonwealth and six months in the town or city of residence, a person may vote for presidential electors only, upon proper application, if he has resided in the state and municipality for thirty-two days prior to the election. The act makes necessary and extensive changes in the administrative procedures for registration, voting, protests and other matters so as to effectuate this change in residence requirement.

Resolves of 1962, c. 107, sets up a special commission to study a number of proposed bills relative to presidential primaries, pledging of presidential convention delegates and requirements of voting in presidential elections.

The desirability of some residential requirements before a person may vote in local elections is at least reasonable, if debatable. But the accident of change of residence should hardly disqualify a person from voting in presidential elections, as the new act recognizes. One may well question municipal residential requirements for voting for state offices, as long as state residence is proven. Despite the administrative difficulty, not to say nightmare, in setting up separate systems, the importance of voting in a democratic system is so potent that a person should be deprived of his vote for only the most compelling of reasons.¹

§18.14. Election laws. A number of other statutes affecting elections were adopted by the General Court during the 1962 SURVEY year, some of which deserve noting. Acts of 1962, c. 264, changes the time within which a petition for recount in a primary or preliminary election must be filed from seven days to three.¹ If a municipality decides to discontinue the use of voting machines, it must notify the

§18.12. ¹The act adds new Sections 103B through 103Q to G.L., c. 54, and amends G.L., c. 51, §§50, 51.
²Additional changes in the laws relating to absentee voting were adopted by Acts of 1962, cc. 265, 267. Both dealt with minor administrative matters.
§18.33.

§18.14. ¹Amending G.L., c. 54, §135, 1st par.
State Secretary within four days of the action and, under Acts of 1962, c. 376, at least thirty days prior to any primary or election. The Acts of 1962, c. 315, establishes the new congressional districts for the state pursuant to the reduction of the Massachusetts delegation from fourteen to twelve. The protracted history of this redistricting is well known. The main advantage of the act adopted was that it tended to create the least disturbance for the congressional delegation and, as proved true in the elections, preserved the two congressional vote advantage of the Democratic Party. If this motive does not appeal to those favoring reduction of gerrymandering, it at least recognized political realities and assured that elections would not be held at large.

Acts of 1962, c. 272, amends G.L., c. 53, §34, to remedy an oversight when Section 34 was amended by Acts of 1961, c. 261. The provisions for the arrangement and form of the ballot in primaries are made applicable to preliminary elections in cities unless charter provisions govern. Acts of 1962, c. 358, amends G.L., c. 54, §43A, so that the office of Attorney General immediately follows the Lieutenant Governor on ballots and voting machine labels. The Attorney General’s position was advanced over the next three constitutional officers of the Commonwealth.

§18.15. Municipal elections. Acts of 1962, c. 260, amended G.L., c. 51, §19, to clarify provisions concerning removal of a registrar of voters when the political parties are unequally represented on the board. The registrar to be removed to avoid excess representation of one political party is the one whose remaining term is the shorter. Election officers in towns are appointed from lists submitted to the local appointing agencies. Acts of 1962, c. 266, amends G.L., c. 54, §12, to provide that if the usual appointing agency, the board of selectmen, does not act within the prescribed period, the appointments are to be made by the board of registrars of voters.

Two changes concerning nomination papers for city and town primaries were adopted during the 1962 survey year. Acts of 1962, c. 249, requires that, if the statute is accepted by a city or town, nomination papers to be issued are limited to those that will contain five times the signatures required for nomination. The papers must be taken out by the candidate or a person specifically authorized by the candidate, indicating the post for which election is sought and the address of the candidate. Acts of 1962, c. 269, amends G.L., c. 53, §59, to require that only one candidate be listed on nomination papers in cities, although the prior provision that the names of candidates equal to the number of offices to be filled may still be used upon nomination papers for town offices.

A biennial census of enrolled and unenrolled voters is henceforth

2 Amending id. §34.
3 Amending id., c. 57, §1.

§18.15. 1 This act adds a new Section 9A to G.L., c. 53, and amends Sections 17 and 58 of the chapter.
2 General Laws, c. 53, §60, is amended to conform to the new requirement.
§18.17 STATE AND MUNICIPAL GOVERNMENT

to be submitted to the State Secretary by the various local boards of registrars of voters. The State Secretary is required to issue a report on this census.³ City and town clerks may now destroy voting lists after two years, rather than the five years previously required.⁴

D. Finance

§18.16 Salaries of members of General Court: Referendum. Murray v. Secretary of the Commonwealth,¹ a petition for a writ of mandamus, sought to require the respondent to distribute ballots for the November, 1962, election that did not include as a referendum question the repeal or retention of the act increasing the salaries of members of the General Court.² The salary act was adopted November 23, 1960, and was made effective by emergency preamble as of January 4, 1961. The present petition contended that the salary act was an appropriation law which, under Amendment Article 48 of the Massachusetts Constitution, is not subject to referendum.

The Court rejected the contention. It first noted that the emergency preamble would have been unnecessary, under Amendment Article 48, if the act had been an appropriation bill. The Court also noted that Amendment Article 63, §3, speaks of the General Court providing for its "salaries, mileage, and expenses and for necessary expenditures in anticipation of appropriations. . . ." This section indicates that the General Court can make provision for its own salaries "in anticipation of appropriations" and that this provision need not, at least necessarily, be in form or in substance an appropriation. Thus the 1960 salary bill did not need to be an appropriation bill. The Court determined that the bill was not an appropriation, the necessary appropriation for these salary increases being adopted by another act enacted later the same day.³ The distinction between fixing salaries and appropriating money for their payment is longstanding in the Commonwealth.⁴ The Court thus dismissed the petition and, as is known, the referendum was submitted to the voters, who rejected the salary raise act.

§18.17 Municipal finance. Much municipal finance relates to the problem of municipal taxation, which is covered in another chapter of the SURVEY.¹ Certain legislation concerning finances should, however, be noted. General Laws, c. 44, §53, has provided that moneys received by towns and certain districts are to be turned into their respective treasuries and, except for highways and several other pur-

³ Acts of 1962, c. 375, inserted a new Section 38A to G.L., c. 53.
² Acts of 1960, c. 723.
³ Id., c. 786.
¹ See Chapter 17.
poses, are not to be disbursed except upon specific appropriation. Acts of 1962, c. 246, extended the provisions of this section to cities.

General Laws, c. 44, §7, setting forth the purposes for the borrowing of money within the debt limit, was amended by Acts of 1962, c. 380, to permit cities and towns to make a single appropriation of twenty-five cents for one thousand of assessed valuation (in Boston ten cents) for road and sidewalk repair and construction and work on walks and curbings.

Acts of 1962, c. 257, liberalized the investment of large trust funds held by municipalities other than Boston. If the aggregate of these trust funds exceeds $2 million, G.L., c. 44, §54, now permits investment in securities, other than mortgages and collateral loans, that are legal for savings bank investment. A limitation on bank and insurance company stocks to a total of 15 percent of the trust funds, no more than .5 percent to be in any one institution, is also imposed.

General Laws, c. 44, §68, sets out the purposes for which funds received on the sale or other disposal of real estate owned by a municipality can be used. Acts of 1962, c. 377, amended the section to state specifically that the provisions of the section apply to proceeds received from the taking of municipal property by another government unit under eminent domain.

Acts of 1961, c. 450, further amended Acts of 1933, c. 49, creating the Emergency Finance Board and setting out the provisions for borrowing funds by municipalities from the Commonwealth, to permit somewhat broader borrowing. The law was further amended by Acts of 1962, c. 538, relating to the State Treasurer's power to extend the final maturity of notes issued under Acts of 1962, c. 450. Acts of 1962, c. 502, authorizes cities and towns to borrow for public welfare or veterans' benefits expenditures, subject to the Emergency Finance Board law.

E. PUBLIC CONTRACTS

§18.18. Larceny by false pretenses. Two cases decided during the 1962 SURVEY year related to convictions for larceny by false pretenses from the Commonwealth by those who had entered into a contractual relationship with the Metropolitan District Commission. In Commonwealth v. Louis Construction Co.,1 the Supreme Judicial Court reversed the verdicts of guilty against the defendants. The case arose out of the bills submitted for dismantling a summer theatre tent roof. The supporting bills for the total charge included a duplicate bill for labor of the same men and an overcharge on the insurance premiums which occurred because of a change in the rate after the policy was initially issued and after the basic bill had been submitted. The Court noted that the evidence was as likely to be explainable on the basis of careless checking as upon any intent to defraud, and the evidence as a whole could not support an intent to defraud beyond a

reasonable doubt. The question of guilt was left to surmise and the verdict could not stand. The Court stated that the Commonwealth’s remedy is civil to recover the several hundred dollars of overcharges.

In Commonwealth v. Iannello the conviction of one of the defendants was sustained and that of the other reversed. The evidence at the trial showed that the defendant Charles Iannello signed vouchers stating that the sidewalk repairs contracted for were completed, Iannello signing the name of his wife. The Court found that the statement was false and that the jury could find it was made by the defendant husband knowing it to be false. The necessary intent that the false statement be relied upon, which was a basis for the reversal in the Louis case, was found to be existent in the Iannello case, at least to the extent that a jury finding of this intent was based on sound evidence. Other contentions were resolved against Iannello, but the Court found his wife’s conviction could not stand. There was no proof of her knowledge of the falsity of the statements made by her or in her name, and her husband’s knowledge could not by virtue of their relationship be imputed to her.

By Resolves of 1962, c. 37, the Judicial Council was directed to report on a house document that would provide, if adopted, that a contractor who diverts funds is guilty of larceny. It may be desirable that a separate statutory criminal code be set up to govern the relationship of contractor and Commonwealth. This may not be needed for the purpose of changing criminal liability, but the greater precision possible in a carefully drafted act devoted to this sole relationship might clarify areas of doubt as yet unsettled by general statutes and the decisions interpreting them.

§18.19. Recovery upon failure to make payments. In Marinucci Bros. & Co. v. Semper Construction Co.,1 the plaintiff sought to recover upon a subcontractor’s bond, the subcontractor having failed to pay several of its own subcontractors. The bond furnished by the original subcontractor required notice within a defined ninety days and suit within a year after the subcontractor ceased work under the contract. These conditions were not fulfilled and the plaintiff did not join any claimants under the subcontractor’s bond, as was necessary if it was to require enforcement of the bond rights. Marinucci was therefore liable upon its statutory bond, under the law then applicable,2 and did not have recourse over against the subcontractor’s bond.

Pioneer Steel Erectors, Inc. v. Commonwealth3 was a proceeding by an unpaid subcontractor under a highway project for recovery from the Commonwealth of the amount owed. General Laws, c. 30, §39F, provides in substance that if a subcontractor has not received payment, 21962 Mass. Adv. Sh. 1241, 184 N.E.2d 964.

2 The applicable statute, G.L., c. 30, §39, was repealed by Acts of 1957, c. 682, and the bond liability of contractors is now governed by G.L., c. 149, §29.

http://lawdigitalcommons.bc.edu/asml/vol1962/iss1/21 14
less certain retentions, within a period of time after it has completed
its work, the awarding authority is to pay the amount out of sums
it owes the general contractor. The Commonwealth contended this
obligation was not of a kind for which, under G.L., c. 258, it had con-
sented to be sued. The Court held, however, that this contention was
without merit. The claim was for services rendered and materials
furnished, which is a type of claim governments consistently recognize.
The Court considered that *Nash v. Commonwealth* basically con-
trolled on the controverted issues; the fact that the claim was not a
direct obligation of the Commonwealth to the subcontractor was, re-
ferring to *Nash*, resolved by the holding that the Commonwealth held
the funds as trustee for the subcontractor. The Court further rejected
the state’s argument based upon a change in the specified security for
payment of subcontractors to a surety bond alone, under G.L., c. 149,
§29, whereas prior to 1957, it was based upon a bond or other security
under G.L., c. 30, §39. The Court believed this did not reject the
right under Section 39F, and just means that recovery against retained
funds can now be attained only under this section. In the absence
of express reference to its sovereign immunity, the intent to provide
for payments of this type creates an obligation for which the Com-
monwealth may be sued.

Under a contract to build a part of an interstate highway, the de-
fendant contractor in *City of Medford v. Marinucci Bros. & Co.* employed
the defendant Boston and Maine Railroad to transport neces-
sary fill to a location within the plaintiff city. The plaintiff city
sought to prevent the contractor from building and using storage and
operating facilities for the fill, and to prevent the railroad from using
its trackage and equipment to deliver and dump the fill, upon the
authority of its zoning ordinances and building code. The Supreme
Judicial Court rejected the city’s theories, largely upon the basis of
*Teasdale v. Newell & Snowling Construction Co.*, in which the Court
had held that a general law for the regulation of citizens does not
apply to a use of property by the Commonwealth under a specific
statute giving it power to act to carry out the purposes for which the
land is designated. Marinucci, although not the Commonwealth, was
the agent through which the state acted in carrying out this essential
highway building function. Thus it was not bound by the single
residence zoning limitation or by its failure to obtain building permits
for the hoppers used in unloading the fill.

The contractual requirement between Marinucci and the Common-
wealth required the contractor to comply with all municipal ordi-
iances and regulations. The Court pointed out that this obligation,
even if possibly enforceable by the city, who was not a party to the
contract, “did not contemplate compliance with municipal ordinances
and regulations which would be otherwise inapplicable to the contractor in land of the Commonwealth, and which would frustrate, or even only hinder, performance of the contract." This limitation upon the coverage of the contractual provision makes new law, and eminently reasonable law, in the state. As a matter of state policy, it is certain that the state should not be considered as having made the carrying out of its function difficult or impossible unless this intent is clearly expressed.  

§18.21. Municipal contracts. The Supreme Judicial Court decided three cases relating to municipal contracts during the 1962 Survey year. In Deary v. Town of Dudley1 the town awarded a contract for a new sewer to the higher of two responsible bidders. The local by-law only provided for advertisement for proposals, and the particular advertisement involved in this case reserved to the town the right to reject any or all proposals. The Court held that the lower court properly sustained a demurrer to this petition of fifteen taxable inhabitants. In the absence of provisions that require contracts to be awarded to the lowest responsible bidder, the appropriate municipal officers, exercising reasonable judgment, may accept any proposal. The Court stated that G.L., c. 149, §44A, requiring contracts for public buildings to be awarded to the lowest responsible bidder, did not apply since the sewer in the present case was not a "building" under the statute.  

Water Works Supply Corp. v. Cahill2 involved the rights of subcontractors of a bankrupt contractor against the statutory bond. The original complaint sought recovery from the city of Quincy from the funds it had retained under the contract and from the bonding company any balance not payable out of the retained funds. The Supreme Judicial Court noted that this type of allegation was correct under G.L., c. 149, §29, before its amendment by Acts of 1955, §702, but that this amendment caused the bond to become the only statutory security for the benefit of those listed. The petition was properly interpreted to be a claim against the statutory security, whatever it was, and this security is now limited to the bond. The bonding company itself might have had certain equitable rights in the funds retained by the city, under G.L., c. 30, §39F.3 The company had not, however, sought to establish any such rights it may have had, and the lower court was not required, even if it had the right to do so, to keep the petition alive once the issue raised by the petitioning subcontractors was determined. Dismissal of the suit against the city was, therefore, sustained.  

A further issue related to the effect of the amendment of G.L., c.  

---

149, §29, by Acts of 1957, c. 682, relative to the time creditors had to intervene in an action upon the statutory bond. The Supreme Judicial Court, studying the 1957 language in the light of the prior statutory requirements and the legislative history, determined that creditors who had filed within the statutory period did not need to intervene in an action against the debtor within a year after the filing, which was clearly required by the prior law. Present law requires no formal intervention and sets no specific time limit for it.

§18.22. Legislation. Several statutes governing contracts were adopted during the 1962 survey year. Acts of 1962, c. 290, amended G.L., c. 8, §10A, to exempt from the requirements of public bids for leases to the Commonwealth, leases of premises owned or under the control of the United States or any political subdivision of the Commonwealth. Acts of 1962, c. 754, sets out new requirements for those authorized to bid upon contracts under the Department of Public Works. Acts of 1962, c. 662, requires that plans and specifications for public buildings include, when feasible, adequate facilities for the handicapped.

General Laws, c. 149, §29, concerns the statutory bonds required in all but a few cases of work on public buildings and public works. Acts of 1962, c. 696, amended the section to include within its coverage security for transportation charges that may be payable under the basic contract for the public construction involved. Thus the extent of the statutory bond is to be determined by these transportation costs in addition to the numerous other factors that affect it. Transportation costs involved include those for materials used by the contractor and any direct subcontractor, and those involved in the rental and hire of construction equipment. The claim for such charges must, in general, be given in written form to the contractor within seventy days after delivery or, if demurrage charges are involved, within sixty-three days from the release of the transportation equipment.

F. Public Welfare

§18.23. Old-age assistance. The liability of a municipality for its financial share of old-age assistance depends in most cases upon the legal residence of the recipient. In City of Boston v. City of Chelsea the question was whether the now deceased recipient kept her Chelsea settlement although she took up residence in a charitable institution located in Boston. The Supreme Judicial Court sustained the lower court's determination that the legal residence remained in Chelsea. General Laws, c. 116, §2, provides that a person residing in an incorporated charitable institution does not lose his residence. The city

1 See brief discussion of this new Section 8B of G.L., c. 29, in §18.50 infra.
2 The section was important in the decisions in cases noted in §§18.19 and 18.21 supra.

of Chelsea contended, however, that G.L., c. 118A, §1, should control. This section, inter alia, provides that assistance shall be given to recipients in, among other places, boarding homes and adds that "any person who, while such an inmate, has lost his settlement . . . shall be deemed to have no settlement in the commonwealth." The Court, certainly correctly, held that the recipient in the present case could not lose her settlement in Chelsea under G.L., c. 116, §2, and thus G.L., c. 118A, §1, had no application.

Acts of 1962, c. 411, amended the residence requirement for old-age assistance in the Commonwealth. The provision of prior law that the recipient must have resided in the state for three years during the nine-year period immediately preceding application was deleted. It is now only required that the recipient have resided in the state for one year immediately preceding application. This change is desirable since, often, aged persons may have to move to be near relatives or others who can assist them, and undue limitations upon assistance work an unnecessary hardship with no valid countervailing benefits. The one-year limitation will sufficiently discourage most cases of those persons moving just to obtain high benefits. Acts of 1962, c. 412, amends G.L., c. 118A, §8, to provide that continuation of assistance to recipients moved to certain hospital and other medical care institutions shall be as provided under medical assistance for the aged, as adopted by Acts of 1962, c. 781, rather than under regular old-age assistance.

Section 2A of G.L., c. 118A, governs the tests in determining a child's ability to support an aged parent under old-age assistance. Acts of 1962, c. 597, increases the amounts of exempt annual income of a child. An employed single child living with the parent now is entitled to exempt yearly income of $2450, an employed single child living apart from the parent is entitled to $2700, and an employed married child living apart is entitled to $4750. The act also amends Section 30 of the chapter to conform. The new limits thus recognize more reasonable standards of income required by the children liable for a portion of their aged parent's aid.

In *Boudakian v. Town of Westport* the town sought reimbursement from the estate of a deceased recipient of old-age assistance. The deceased died of injuries received in an accident, and a suit for conscious suffering and wrongful death was settled for $12,000. The executrix defendant allocated $3500 of the lump sum to the conscious suffering count. The estate of the decedent thus only amounted to somewhat over $4300. The town had furnished assistance including hospital payments during the twenty-five days between the accident and death. Under the executrix's account the town would receive no reimbursement. The Supreme Judicial Court supported the Probate

2 Amending G.L., c. 118A, §1.
3 The 1960 act now appears as Sections 13 through 32 of G.L., c. 118A.
5 Under G.L., c. 118A, §4A.
Court's approval of the amount allocated to conscious suffering by the executrix, pointing out the impossibility of determining damages on this ground with any precision. The case was sent back for a correct determination of funeral and hospital expenses, which were improperly computed in the account. An issue, raised by the executrix, that the town was not a "party aggrieved" under G.L., c. 215, §9, was decided in favor of the town. The Court pointed out that the decree allowing the account clearly affected the town's right to reimbursement, and it had a direct financial interest in the correctness of the determination of the amounts in the account.

Acts of 1962, c. 653, amends G.L., c. 118A, §1, to increase the transportation allowance of aid recipients from four to five dollars.

§18.24. Hospital care for needy individuals: Support by municipality. Acts of 1959, c. 584, added a new Section 24A to G.L., c. 117, that provides in effect that the municipality of residence is responsible for hospital expenses of a person in need of public assistance. Interpretation of this provision was the crux of two cases with the same name, Massachusetts General Hospital v. City of Chelsea,1 both decided during the 1962 Survey year. In these two cases the hospital sought recovery for hospitalization expenses of residents of the city. The defense was that neither resident was a needy person under the intendment of the statute, and the Boston Municipal Court so held in both cases. The evidence clearly showed that each of the two persons had transferred property of considerable value to others shortly before he was admitted to the hospital. The Supreme Judicial Court found the cases controlled by Symmes Arlington Hospital, Inc. v. Arlington,2 which interpreted similar provisions in G.L., c. 117, §24. The city or town is immediately liable for expenses of a person seriously ill or badly injured, since the hospital is entitled to act upon appearances and the claims of the patient. But the patient need not be held to be in distress and in need of immediate relief during the entire hospital stay. The plaintiff hospital had to prove that the need continued before it could recover for the full time of the hospital stay, and it did not meet its burden in these two cases. The cases were returned with directions to find that the hospital was entitled to recovery for at least one day and such further time as the judge concludes was encompassed within the emergency under which the hospital acted.

§18.25. Aid to the blind. Acts of 1962, cc. 503 and 505, both amended G.L., c. 69, §23, which concerns in part the determination of need in aiding blind persons. The first act raised the income exemption of $50 to a direction that the first $85 of earned income and one half of all earned income over $85 is to be disregarded by the director in determining need in furnishing aid to the blind. The second act changed the maximum allowable funeral expense reimbursement from $200 to $350. Acts of 1962, c. 611, amended Acts of

1957, c. 669, to change the rate of retirement payment for certain blind persons who had been employed in a workshop for the blind.

§18.26. Assistance to disabled persons: Parent's duty of support. In Fenton v. Department of Public Welfare, the department sought to include the parent's assets and income in its determination of a disabled child's need for financial assistance. The department rule has been adopted to carry out the policy of G.L., c. 118D, §8, which provides that certain parents are obligated to support their disabled children. The Supreme Judicial Court noted that the statutory provision gave the city or town the right to obtain reimbursement from a parent but does not give a disabled child this right. Thus, in the present case, in which a father refused to give information on his resources and income to the local board, the disabled child could not force him to do so, nor could she require him to support her. The Court noted that the basic policy of this and similar statutes is to provide assistance as promptly as possible. The department's administrative ruling resulted necessarily in delays and uncertainties.

§18.27. Aid to dependent children. The basic provisions of the aid to dependent children financial assistance program were modified during the 1962 Survey year. Acts of 1962, c. 556, amended G.L., c. 118, §2, to remove the requirement that the parent must be determined to be fit to bring up the child before aid can be granted. Section 3 of G.L., c. 118, was also amended by the act to again remove the requirement of parental fitness. The board of public welfare had in the past the duty of securing all necessary aid from relatives, organizations and individuals; the new act limits this duty to relatives and organizations only. The policy that aid shall be granted as promptly as possible is effectuated by a removal from the standards of a determination that aid cannot be obtained from other sources. The primary obligation to furnish aid thus rests upon the board itself, not outside sources.

Acts of 1962, c. 535, makes certain by specific statement that the duty of the Department of Public Welfare to provide foster care for children includes "financial responsibility." It amends G.L., c. 119, §23.

§18.28. Financial aid to needy dependents of persons on active service in the armed forces. Acts of 1962, c. 759, sets up a program to provide aid when necessary to dependents of armed forces personnel. The program affects only a limited number of persons but was considered necessary because of the calling up of a number of Massachusetts national guard and reserve personnel to active duty.

G. HEALTH, SAFETY AND WELFARE

§18.29. Common Day of Rest Law. A complete rewriting of G.L., c. 136, was accomplished by Acts of 1962, c. 616. The title of the chapter was changed from "Observance of the Lord's Day" to "Ob-
servance of a Common Day of Rest and Legal Holidays,” indicating the shift of emphasis in the purpose of the statute that was indicated by the United States Supreme Court to be the acceptable basis for this type of statute in Gallagher v. Crown Kosher Super Market of Massachusetts.\(^1\) The statute represents more of a rewriting of the older law than any major change in concept or application. The difficulty in developing a satisfactory substitute for the prior, admittedly antiquated chapter was obvious from the report of the Sutherland Commission and the exchanges between the Governor and the President of the Senate. The new chapter can be said to represent some improvement in form and theory, but does not contain the radical revisions and excisions many persons would prefer. The act contains the clause that the invalidation of any one section as unconstitutional shall not affect the remaining sections. This clause, only occasionally used in Massachusetts legislation, reflects the present uncertainty of this type of law’s being always held to be constitutional. The grafting of the numerous exceptions to the application of the general prohibition of activity, in Section 5 of the new chapter, onto the statute raises serious problems of classification under equal protection, even assuming that the religious historical background of the legislation will continue to be treated as constitutionally non-crucial.

§18.30. Health and safety legislation. A number of new laws affecting health and safety were adopted during the 1962 Survey year, although few of them were of any general importance. Acts of 1962, c. 350, requires the Director of Civil Defense to set up standards for fallout shelters. Any shelter for a family unit, built in accordance with the prescribed standards and used exclusively for fallout shelter purposes, is declared to be an accessory use under zoning laws and can be built at any location on the property without violating local zoning regulations. The prescribed standards will also prevail over building code standards, although the administrative provisions of the local building code must still be complied with.

Fluoridation of water supplies remains an emotional as well as medical issue in the state. General Laws, c. 40, §41B, has provided that the question of adoption of fluoridation is to be put upon the ballot by the board of water commissioners or their local equivalent. Acts of 1962, c. 485, provides that a petition of 5 percent of a municipality’s registered voters will henceforth be required before the question of whether to adopt fluoridation is put upon the ballot. This amendment to G.L., c. 40, §41B, is supplemented by a new Section 41C, providing that the question of defluoridation be put upon the ballot if 5 percent of the unit’s registered voters so request. On balance, this change in the statute seems to help those opposed to fluoridation for, unless considerable interest is generated, the question is now not too likely to get put upon the ballot.

Resolves of 1962, c. 101, provides for a study by the Judicial Council

§18.32 STATE AND MUNICIPAL GOVERNMENT

of the problems of indemnifying state and municipal employees for any liabilities they incur under actions arising out of their use of sources of ionizing radiation.

The fire hazards of space heaters are obvious to all who read the newspapers. Regulation of these units has been improved under Acts of 1962, c. 688. General Laws, c. 148, has a new Section 25A forbidding the sale of secondhand space heaters or installation of any such heaters in buildings in which persons reside. A new Section 25B prohibits, effective July 1, 1965, the use of these space heaters in any building used in whole or in part for human habitation.


Resolves of 1962, c. 138, created a special commission to study nursing homes. The major and growing importance of these institutions, and in some cases their shabby reputation, makes this full study advisable.

H. CIVIL SERVICE

§18.31. Power to regrade examination. In Ferguson v. Civil Service Commission1 the plaintiff and another had taken an examination for promotion in the Quincy police department. The other person examined requested the director to remark one of his answers and, on being refused, sought and obtained the remarking from the defendant commission. The plaintiff, because of the remarking, was placed below the other person on the promotion list. The present action was a writ of certiorari that sought to have the commission's remarking action quashed, basically upon the contention that the other candidate's answer was wrong as a matter of law. The Court found that the credit to be given to the answer was "a matter within the commission's sound and honest discretion, in the light of all relevant factors, including its experience in giving similar examinations to persons of comparable training and qualifications." The grading was not arbitrary or devoid of logic or reason, and thus the commission's action in remarking the question was not to be disturbed by the courts. The further issue of whether certiorari was the proper means of seeking review of the commission's action was not, as it did not need to be, decided. The issue is, however, an interesting and very close one.

§18.32. Civil service legislation. The appeals to the Civil Service Commission from action of the director have in the past been heard under G.L., c. 31, §2(b), before less than a majority of the commission. Acts of 1962, c. 270, created a change in this rule, requiring a majority of the commission to act when the appeal involves the marking of examination papers, unless the appeal concerns ineligibility for failure to meet entrance requirements. All other appeals may still be heard by less than a majority.

The provisions concerning appointments and transfer of civil service personnel were twice amended during the 1962 Survey year. Acts of 1962, c. 743, requires that the director shall not authorize a provisional appointment until the duties of the position are set out on a detailed form. Acts of 1962, c. 236, further amends G.L., c. 31, §15, and forbids a provisional appointment or temporary transfer as long as any name remains on the examination eligibility list for the position, except upon good cause. Acts of 1962, c. 743, also gives the Director of Civil Service certain discretionary powers relative to time limits imposed upon provisional appointments and temporary transfers. Acts of 1962, c. 510, amends G.L., c. 31, §15D, regulating determination of seniority, by setting up a distinct and new rule for transfers, while retaining the old rule for appointments and promotions.

Acts of 1962, c. 205, amends G.L., c. 31, §43(b), relating to hearings upon discharges, removals, transfers, or reductions in rank of civil service employees who have tenure. The time provisions, requiring the hearing to be completed in thirty days, were amended so that a continuance as deemed necessary or advisable can be authorized by the hearing officer at his discretion. Acts of 1962, c. 690, relates to appeals from classification by state employees, under G.L., c. 30, §49. The new act provides for an appeal from a division decision to the personnel appeals board set up under G.L., c. 30, §54.

I. Employee Compensation

§18.33. Municipal employee: Rate of pay when holding two positions. In Amelotte v. City of Worcester1 the Supreme Judicial Court had to determine if an employee, regularly employed in two full-time jobs, as a nurse-anesthetist and a nurse-supervisor, was entitled to step rate increases based upon service in the earlier held job for the second job, and if he was entitled to the overtime rate of pay for the second job. The contention concerning step rate increases was determined against the employee upon the basis of the applicable city ordinance defining pay scales for various classifications of employment. The plaintiff's claim for overtime pay for the second job was based upon G.L., c. 149, §33B, which had been accepted by the city. The section provides that overtime rates of pay are to be paid to employees who perform excess service as authorized by a city official, describing the excess service as "such additional service." The Court read this section narrowly, limiting the additional service to that authorized by the person under whom the employee works. The employee here had simply succeeded in obtaining two jobs from the city. The second job was not additional service authorized by the plaintiff's senior.

§18.34. Municipal employee: Raise in salary. In Councillors of Brockton v. Gildea,1 the Supreme Judicial Court upheld a Superior

§18.32. 1 Amending G.L., c. 31, §15.


§18.37 STATE AND MUNICIPAL GOVERNMENT

Court determination that an attempted raise in a city manager's salary was not effective. The Superior Court had properly held that a salary increase for the city manager could only be made by a city ordinance adopted by a two-thirds vote, and that the budget appropriation, passed by a two-thirds vote, was not the legal equivalent of a city ordinance. General Laws, c. 44, §33A, provides that the budget shall include sums sufficient to pay salaries as fixed by law or ordinance. No ordinance had been passed in this case raising the manager's salary, and he was thus limited to the $10,000 salary set by a prior ordinance, not the $13,000 authorized in the budget.

§18.35. Police officers and firefighters. Several amendments to the statutes regulating the compensation of police officers and firefighters were adopted during the 1962 Survey year. Acts of 1962, c. 520, added a new Section 108F to G.L., c. 41, and set new minimum salaries for firemen in those cities or towns that accept the provisions of the section. Acts of 1962, c. 517, adding new Section 57D to G.L., c. 41, and Acts of 1962, c. 318, amending Section 17A of G.L., c. 147, provide that firefighters and police officers, respectively, shall receive either an additional day off or an additional day's compensation if they work on prescribed holidays. Acts of 1962, c. 321, provides that a police officer whose employment is terminated without fault shall be compensated for any special pay he may have been entitled to under various provisions of the law governing overtime pay and additional days off. The law governing indemnification of police officers and firefighters, G.L., c. 41, §100, was rewritten by Acts of 1962, c. 580. The provisions of the section are now more detailed, specifically providing for the indemnification of hospital, medical, surgical, nursing, pharmaceutical, prosthetic and related expenses incurred because of accident or hazard while performing assigned duties. A procedure for appeals from adverse decision is also set out.

§18.36. Other compensation statutes. Acts of 1962, c. 514, provides for certain fees to be paid to those requested by a district attorney to aid in the investigation of a crime. General Laws, c. 31, §47E, was amended by Acts of 1962, c. 579, setting out new provisions concerning compensation for municipal public welfare employees. Overtime is not to be paid to employees of the Commonwealth who are on a travel status, under the amendment to G.L., c. 149, §30B, adopted by Acts of 1962, c. 748.

J. RETIREMENT, PENSIONS AND INSURANCE

§18.37. Contributory retirement: Removal of “official.” In Welch v. Contributory Retirement Appeal Board ¹ the Supreme Judicial Court had to determine if an employee's removal was governed by the

---

¹ The act refers to G.L., c. 41, §111H, and G.L., c. 147, §§17A-17C, and amends G.L., c. 147, §§17E, 1111.

¹ Amending G.L., c. 262, §29.

Contributory Retirement Law or by the Plan E charter of the city of Medford. General Laws, c. 32, §16(2), governing removals of certain employees under the contributory retirement system, requires notice and a statement of reasons for removal, with provisions for hearings and a final board determination that the removal was justified. The Court held this provision was superseded in the Welch case by G.L., c. 43, §§104 and 105, giving the city manager the right of removal. The Court's decision was based primarily upon Williams v. City Manager of Haverhill, and it reconsidered and affirmed its more recent holding in Regan v. Commissioner of Insurance. The Contributory Retirement Law, being a general act, was superseded by the special act, the Plan E charter law, upon the same subject.

§18.38. Contributory retirement: Liability under mutual aid plan. The cities of Everett and Revere, along with Chelsea, some years ago entered into a mutual aid plan which provided that each should supply certain firefighting services to the other in accordance with prearranged plans. In City of Everett v. City of Revere, the plaintiff city sought reimbursement for accidental disability pension payments, paid to a member of its fire department who suffered a heart attack while carrying out his prearranged duties at a fire in the defendant city. The lower court had agreed with the plaintiff city's contention that G.L., c. 32, §7(4)(a) and (b) controlled, which section imposes a mandatory reimbursement requirement on the aided governmental unit when an employee of the aiding municipality is injured in carrying out his duties. The statute is general in application and refers to all types of aid.

The defendant city's contention, upheld by the Supreme Judicial Court, was that G.L., c. 48, §59A, controlled. Section 59A governs aid by one governmental unit to another in case of fire, and its provisions make reimbursement for injuries and death permissive, not compulsory, upon the aided city. The apparent inconsistency between the two statutes' reimbursement provisions was settled by preferring the specific act governing firefighting aid over the general act governing aid of all types. To hold to the contrary would have rendered the specific legislation nugatory, which the Court thought unreasonable, particularly since that statute had been amended as late as 1960.

§18.39. Contributory retirement: Death benefits and cause of death. Two 1962 Survey year cases involved the question of whether death benefits were payable to survivors. These benefits are payable under G.L., c. 32, §9(1), only when death was a natural and proximate result of personal injury sustained or a hazard undergone as a result of and while in performance of the decedent's duties at some definite time and place. In Cataldo v. Contributory Retirement Appeal Board, the defendant city's contention, upheld by the Supreme Judicial Court, was that G.L., c. 48, §59A, controlled. Section 59A governs aid by one governmental unit to another in case of fire, and its provisions make reimbursement for injuries and death permissive, not compulsory, upon the aided city. The apparent inconsistency between the two statutes' reimbursement provisions was settled by preferring the specific act governing firefighting aid over the general act governing aid of all types. To hold to the contrary would have rendered the specific legislation nugatory, which the Court thought unreasonable, particularly since that statute had been amended as late as 1960.

§18.39. Contributory retirement: Death benefits and cause of death. Two 1962 Survey year cases involved the question of whether death benefits were payable to survivors. These benefits are payable under G.L., c. 32, §9(1), only when death was a natural and proximate result of personal injury sustained or a hazard undergone as a result of and while in performance of the decedent's duties at some definite time and place. In Cataldo v. Contributory Retirement Appeal Board, the defendant city's contention, upheld by the Supreme Judicial Court, was that G.L., c. 48, §59A, controlled. Section 59A governs aid by one governmental unit to another in case of fire, and its provisions make reimbursement for injuries and death permissive, not compulsory, upon the aided city. The apparent inconsistency between the two statutes' reimbursement provisions was settled by preferring the specific act governing firefighting aid over the general act governing aid of all types. To hold to the contrary would have rendered the specific legislation nugatory, which the Court thought unreasonable, particularly since that statute had been amended as late as 1960.

§18.39. Contributory retirement: Death benefits and cause of death. Two 1962 Survey year cases involved the question of whether death benefits were payable to survivors. These benefits are payable under G.L., c. 32, §9(1), only when death was a natural and proximate result of personal injury sustained or a hazard undergone as a result of and while in performance of the decedent's duties at some definite time and place. In Cataldo v. Contributory Retirement Appeal Board, the defendant city's contention, upheld by the Supreme Judicial Court, was that G.L., c. 48, §59A, controlled. Section 59A governs aid by one governmental unit to another in case of fire, and its provisions make reimbursement for injuries and death permissive, not compulsory, upon the aided city. The apparent inconsistency between the two statutes' reimbursement provisions was settled by preferring the specific act governing firefighting aid over the general act governing aid of all types. To hold to the contrary would have rendered the specific legislation nugatory, which the Court thought unreasonable, particularly since that statute had been amended as late as 1960.


§18.39. 1 343 Mass. 312, 178 N.E.2d 480 (1961), also noted in §12.2 supra.
the Supreme Judicial Court sustained the board’s determination that an employee’s death as a result of a heart attack suffered while working as a power plant engineer was not a result of physical injury or occupational hazard. The claimant did not sustain her burden of proof. The same result was reached in *Mullen v. Contributory Retirement Appeal Board,* in which the Court also sustained the board’s finding that the heart attack of which the decedent died was not a result of personal injury sustained in the performance of his duties. The mere fact alone that a heart attack occurred while the decedent fire chief was preparing to answer a call did not require the conclusion that the heart attack was caused by physical exertion or emotional excitement.

§18.40. Contributory retirement: Federal income taxes. In *Corkum v. United States* the taxpayer sought a refund on federal income taxes paid by him on a disability allowance payable to him under the contributory retirement law. The taxpayer claimed that the amount received was non-taxable as income received while absent from work on account of sickness, under Int. Rev. Code of 1954, §105(d). The Court rejected this argument, determining that the taxpayer had under the contributory retirement law, G.L., c. 32, §5, reached retirement age. Therefore, the federal tax law, as interpreted by the Treasury Regulations, removed the taxpayer from the group entitled to the sick pay exclusion.

§18.41. Contributory retirement: Statutory changes. Acts of 1962, c. 548, amended G.L., c. 32, §3(5), to include among those who may take advantage of the credit system for prior uncovered service, a person who had been in a temporary, provisional or substitute position, ineligible for membership in the system. Section 4 of G.L., c. 32, was amended by Acts of 1962, c. 584, which added a new paragraph governing qualifications for creditable service, to include a group of persons who received certain disability payments prior to 1951 under G.L., c. 152, and who returned to their former employment upon termination of their disability.

Acts of 1962, c. 516, allows an additional retirement allowance of fifteen dollars for each year of creditable service to those who qualify as veterans. The amendment to G.L., c. 32, §10(2)(a), is retroactive. Acts of 1962, c. 606, provides an alternative method of computation of veterans’ allowance under the retirement law in place of the amount determined by G.L., c. 32, §12. An allowance to certain widows is also provided under Acts of 1962, c. 506, in cases in which a survivorship option was not originally elected. Acts of 1962, c. 646, increased benefits payable to former employees accidentally disabled.

Two amendments to G.L., c. 32, §16, were adopted during the 1962 Survey year. Acts of 1962, c. 114, requires that a veteran need only ten years of creditable service prior to his entitlement to notice and

---


§18.41. 2 *343 Mass. 641, 180 N.E.2d 452 (1962).*

hearing upon removal or discharge. Non-veterans must still have fifteen or twenty years of service, depending upon their age, prior to having a right to a hearing. This same specific veteran service requirement is inserted by the act into the section concerning review of a removal or dismissal by the District Court. Acts of 1962, c. 391, amended Section 16 to require the Contributory Retirement Appeal Board to pass upon an appeal to it within six months after a hearing. This six-month limitation is designed to speed board decisions.

Acts of 1962, c. 682, amended G.L., c. 32, §25, to permit a government unit who has accepted or does accept the special provisions governing veterans of the Spanish and World Wars to apply the Section 25 veterans' benefits to those qualified. Prior to this act, the Section 25 provisions only applied if the Spanish and World War veterans' provisions were adopted prior to 1946.

A new Section 94A was added to G.L., c. 32, by Acts of 1962, c. 164, which provides a conclusive presumption that impairment of health caused by diseases of the lungs or respiratory tract in the case of firefighters who had successfully passed a physical exam upon entry into this service was suffered in the line of duty. This presumption is similar to that involving firefighters and policemen as to hypertension or heart disease under G.L., c. 32, §94. The two sections apply to retirements under the accidental disability retirement law.

§18.42. Group insurance. The rather special issue of whether a municipal light commission was a "district" entitled to accept the group insurance law was involved in Municipal Light Commission of Taunton v. State Employees' Group Insurance Commissioner. Gen. Laws, c. 32B, §2, includes districts, as therein defined, as an appropriate unit to accept the insurance law. The plaintiff municipal light commission was held by the Court not to be a district but a department of the city, since it did not meet the definition of "other . . . public unit created within one or more political subdivisions of the commonwealth for the purpose of providing public services or conveniences. . . ." There is a strong policy in the group insurance statute to gather employees in large groups.

Acts of 1962, c. 647, amends G.L., cc. 32A and 32B, to provide for contributory group hospital, surgical and medical insurance to elderly persons retired from service in the Commonwealth and its political subdivisions. The State Employees' Group Insurance Commission is empowered to purchase general and blanket insurance to provide this coverage, by the insertion of new Section 10B in G.L., c. 32A, this new section also prescribing the administrative details. General Laws, c. 32B, is amended by inserting a new Section 11B that governs acceptance of the plan by political subdivisions of the state. Section 10 of G.L., c. 32B, is further amended to exclude this new provision from the general acceptance provisions which require acceptance by the registered voters of a general group insurance plan for a political subdivision. This section was also amended by Acts of 1962, c. 150, which

§18.43 STATE AND MUNICIPAL GOVERNMENT

made clear that general acceptance of the plan did not include acceptance by the subdivision of a contribution by the subdivision of a part of the premium to retired employees and the additional insurance permitted by Section 11A of G.L., c. 32B. Section 11A was also itself amended during the 1962 Survey year. The optional amounts permissible in each wage category became a prescribed instead of a maximum amount, and the requirement of a 75 percent participation before the additional insurance can be carried by a political subdivision was repealed.

K. DISMISSAL AND REMOVAL

§18.43. Involuntary separation: Powers of Commissioner of Insurance. In two cases decided during the 1962 Survey year, the power of the Commissioner of Insurance to separate certain employees from their positions was upheld. Cieri v. Commissioner of Insurance1 was a petition for a writ of mandamus to compel the commissioner to restore the petitioner to his position as a member of the board of appeal on motor vehicle liability policies and bonds. The petitioner's original appointment was made effective "during the period of time this designation remains unrevoked." As a veteran with over three years' service, he claimed that the procedures of the Veterans' Tenure Act (G.L., c. 30, §9A) controlled the procedure for his separation and, as it was not followed, he was improperly removed. The Court rejected this contention. The petitioner was a representative of the appointing commissioner, his tenure ceased with the termination of the commissioner's tenure and this period was less than the three-year period required for veterans' tenure. Service after the date of the new commissioner's appointment was merely a holding over for public convenience.

The Court went further, however, and held that the type of position the petitioner occupied was not within the coverage of the Veterans' Tenure Act. The position was one of the main responsibilities of the commissioner, and the appointment of a representative to sit in his place is strictly a personal prerogative. The fact that G.L., c. 30, §9A, lists certain exclusions from the Veterans' Tenure Act does not mean those exclusions are the only permissible ones. The functions of this particular position are so primarily the responsibility of the commissioner, under G.L., c. 26, §8A, that tenure in the office would be unacceptable and could not be presumed.

In Regan v. Commissioner of Insurance2 the petitioner sought restoration to the office of assistant chief examiner of the department. He had been appointed in 1949 and served until suspended in 1954. Later in 1954 the commissioner submitted another person for the post and this appointment was approved by the Governor and Council. The commissioner is given, by G.L., c. 26, §7, the power to appoint

§18.43. 1 343 Mass. 181, 178 N.E.2d 77 (1961), also noted in §16.5 supra.
and remove various officials, including those in the post held by the petitioners, with the approval of the Governor and Council. The Court construed this provision according to its terms to mean that no cause need be given by the commissioner. The petitioners were thus held not entitled to the rights given under G.L., c. 32, §16(2), governing removal and discharge of those in the status of civil service employees.

§18.44. Termination of employment: Retroactive effect of statute. In Welch v. Mayor of Taunton\(^1\) the plaintiff sought a declaration that he had been improperly removed by the defendant upon charges of malfeasance in office. The statute giving the mayor the power of removal was enacted in 1960 as an amendment to G.L., c. 164, §56E.\(^2\) The plaintiff had been appointed to the position of member of the municipal light commission prior to the date of the enactment of this statute and, more crucial, the claimed malfeasance had also occurred prior to this date. The Court determined that the statutory power of removal merely went to remedy and thus could be construed retroactively to cover situations that occurred prior to its adoption. The remedial nature of the statute, as it fills a gap in the statutory scheme, indicates a legislative intent not to limit the statute to prospective actions. No private right was adversely affected since, although the plaintiff may suffer additional consequences because of his wrongdoing, he has no right, after having done wrong in office, to have the laws governing dismissal remain unchanged.

L. Education

§18.45. Higher education. The University of Massachusetts has in the past been unusual although not unique among state universities in not being largely self-governing. Acts of 1962, c. 648, has given the university this power of self-government. New Sections 1 through 15 of G.L., c. 75, give the trustees adequate power to administer the university, with authority to delegate certain of these powers to the president and other university officials. Budgetary, financial and auditing control remain basically in the state government. This statute, if not perhaps ideal, represents a great step forward in the development of the state university, giving it an administrative and policy-making flexibility that should facilitate further advances over those already great ones the institution has taken in recent years. Acts of 1962, c. 786, further combined the development program of the university by the authorization of a medical school. The same act increased the number of university trustees to seventeen, none of whom can be affiliated in any capacity with a private medical school. This membership limitation is unfortunate, since it would seem to be rather difficult to find persons who know more of medical education than medical edu-

\(^1\) 343 Mass. 485, 179 N.E.2d 890 (1962).
§18.46  STATE AND MUNICIPAL GOVERNMENT  253

cators. Presumptively, however, their advice would be obtainable on
a consultive basis.

Chapter 553 of the Acts of 1962 details additional powers to the
state Board of Education over the state colleges and the appointment
of personnel to their staffs. Acts of 1962, c. 559, authorizes summer
sessions at state colleges on a no-expense-to-Commonwealth basis.

Budgetary problems of state educational institutions have always
been difficult ones. To help solve this problem, an Advisory Board
of Higher Education Policy was created, with the duty to report to the
Governor or General Court each year as to their recommendations on
the division of funds among state institutions of higher learning.1

§18.46. Secondary and primary education: Teachers. The Su-
preme Judicial Court decided two relatively minor cases concerning
teachers' rights during the 1962 SURVEY year. In O'Day v. School Com-
mittee of West Brookfield,1 the Court reiterated its earlier holding in
Duncan v. School Committee of Springfield.2 that the statutory review
of dismissal, set out in G.L., c. 32, §16, must be complied with by a
dismissed teacher before review of such action by mandamus can be
sought. The teacher in the present case, by failing to bring her peti-
tion for review within the required thirty-day period, had not ex-
hausted her statutory remedies.

The plaintiff in Dimlich v. School Committee of Andover3 was
principal of a junior high school for the academic year 1949-1950 and
was again appointed principal for the three-year period, 1957-1960. In
1960 he was not reappointed and was retained as assistant principal
and teacher at some reduction of salary. General Laws, c. 71, §42A,
provides tenure to principals and supervisors who have more than
three years' duty in their positions. The Court reversed the Superior
Court determination that the plaintiff had tenure, holding that, de-
spite differing facts, Kelley v. School Committee of Watertown4 re-
quired that the "for over three years" statutory requirement referred
to consecutive, not interrupted, service.

Under the provision of G.L., c. 71, §43, it had been held, in McCartin
v. School Committee of Lowell,5 that reduction in salary of a principal
upon demotion was forbidden. The plaintiff in the Dimlich case argued that the McCartin case required a restitution of the salary re-
duction he had suffered upon demotion to assistant principal. The
Court disagreed, finding that the adoption after the McCartin case of
G.L., c. 71, §42A, changed the statutory scheme as to principals, and
a principal without tenure under Section 42A was not protected by
the salary reduction provisions of Section 43.

While these two cases settled points of law of interest to some

§18.45.  1 Acts of 1962, c. 429.
teachers, the enactment by Acts of 1962, c. 594, of a new minimum salary was of importance to a considerably greater number. The minimum was raised, except for those in training and temporary substitutes, from $4000 to $4500. Ideally, the setting of salary scales for teachers should be done locally, but a state-set minimum maintained at some reasonable relation to that required to attain moderately well-qualified teachers is certainly acceptable. The state, too, has a direct interest, even above the financial, in the education of its citizens, and a minimum teacher's salary at least is one means by which the state's interest and policy can be effectuated. Acts of 1962, c. 519, removes the local option aspect of this minimum salary provision, which prior to this act only applied to those employing units that had accepted it. This amendment to G.L., c. 71, §40, adopted over gubernatorial veto, will aid in the effectuation of state policy of encouraging adequate educational standards.

Acts of 1962, c. 175, permits a teacher to authorize a payroll deduction for payment of dues to an association of teachers. Deductions are payable by the local treasurer to associations whose treasurers have given a bond for the faithful performance of their duties in an amount satisfactory to the local treasurer. This act does not take effect until accepted by a city, town or school district.

§18.47. Secondary and primary education: Local boards. No vitally important legislation concerning school board duties was enacted during the 1962 Survey year. The minimum salary provisions discussed above will require action by a few local boards. Acts of 1962, c. 11, increased the number of days during which public elementary schools must be maintained open from 160 to 180 days. Acts of 1962, c. 410, related to the financial penalties on towns that fail to submit educational reports. It amended G.L., c. 72, §6, to omit a specific penalty of $200 in cases in which a town is not entitled to distributions from the state school fund. Since few, if any, towns would not receive school fund grants, the effect of this amendment is minimal. Acts of 1962, c. 555, adds a new Section 46J to G.L., c. 71, to permit school units and districts to join together in providing the educational facilities for emotionally disturbed children authorized in Section 46H of the chapter.

General Laws, c. 71, §7A, provides for the awarding of school bus contracts. Acts of 1962, c. 729, extensively amended this section to require assurance of adequate salary scales for the drivers of these buses. The Commissioner of Labor and Industries will furnish to the school committee of each city or town of at least sixteen thousand population a schedule of rates of wages determined by the rate paid under collective bargaining agreements in the municipality to operators of motor buses. This schedule is to be incorporated into the bid and into any contract awarded, and violation of the wage rate scale is criminally punishable.

§18.47. ¹ See discussion in §18.46 supra.
² Amending G.L., c. 71, §1.
§18.48. Day care. General Laws, c. 111, §§58-62, governing the licensing of day care services for children, was extensively revised by Acts of 1962, c. 719. Prior to the new act, licensing was in the hands of local boards of health. Under the new provisions, the state Department of Health becomes the primary licensing agency, with the proviso that it may delegate this function to a consenting local board of health that meets department standards. Department standards are to be the minimum, and any local board may set higher requirements. The sanctions for maintaining an unlicensed school have been drastically increased, and now include the possibility of a six months' imprisonment. The new law contains a number of details that differ from prior legislation, and must be consulted by anyone planning on any type of day care or educational institution for children under regular school age.\(^1\)

Acts of 1962, c. 720, continues the new pattern of state regulation of health and safety standards of day care institutions. This new statute modifies Chapter 15 of the General Laws so that day care institutions must meet building safety requirements. A certificate of such compliance is required before the institution can be licensed under new G.L., c. 111, §59.

§18.49. Improvements in education. Acts of 1962, c. 585, sets up in the Department of Education an Advisory Commission on Academically Talented Pupils, designed to provide recommendations for the improvement of the education of academically talented students. The goal is a worthy one but points out the present retreat from the educational theory that students should each, as independent persons and not as members of a special group, be trained to make maximum use of their abilities in a social setting. Once students are categorized as a member of one or another group, a stratification occurs that may not be fully desirable in our educational system.

More importantly, or at least hopefully so, Resolves of 1962, cc. 108 and 145, create an unpaid special commission to restudy the educational system of the Commonwealth. The program of the commission is too big for ready solution but should at least make possible a good beginning toward rethinking the major elements of the state's educational program. A broad consideration of the entire educational philosophy of the state is in order, and not because of any drastic deficiencies but because certain aspects of the programs tend, if not to conflict, at least not to coordinate with each other.

M. HIGHWAYS AND MOTOR VEHICLES

§18.50. Highway construction. One of the major difficulties occurring in highway and other large government construction projects has been the possibility of the successful bidder not being equipped to carry out construction of the entire project. To alleviate this possi-
bility, Acts of 1962, c. 748, adds a new Section 8B to G.L., c. 29.1 Under this new law, a bidder must set forth his qualifications to perform the work. The information, maintained confidentially, is to be used to determine if a bidder is qualified to perform specific work under bid proposals. The act sets up a number of limitations upon the Commissioner of Public Works' power and provides a grievance procedure.

Traffic control agreements between federal and state governments are an important aspect of the federally aided state highway programs. In addition the state Department of Public Works has set up official standards for traffic control. Acts of 1962, c. 603, requires that cities and towns comply with these two types of standards, and failure to do so will result in the withholding or withdrawal of highway funds from the offending city or town.2

General Laws, c. 44, §§6 and 6A, permit a city or town to borrow funds in anticipation of reimbursement by a county or the Commonwealth for land damages and highway construction. Notes on these borrowings have been limited to a one-year term, but Acts of 1962, c. 607, permits two-year terms.3

Acts of 1962, c. 610, amends G.L., c. 81, §7E, so that excess lands not needed in connection with a limited access highway may be sold by the Department of Public Works although the land sold was not paid for by the department. This gives the department some additional flexibility in its disposal of excess lands, although a more extensive program of such disposal is needed in the Commonwealth. Acts of 1962, c. 587, adds a new Section 7I to G.L., c. 81, and provides for agreements between a railroad and the department when relocation or alteration of railroad facilities is required in connection with highway construction. It authorizes the department to advance Commonwealth funds to railroads to cover work in progress for which the state has partial financial responsibility.

In planning for highways and city and town ways it is often desirable that the planners be permitted to go onto privately owned land for surveys, inspections and soundings. Acts of 1962, c. 589, adds a new Section 11A to G.L., c. 82, permitting county commissioners to go upon private land, after adequate notice. The entry upon the land does not constitute a trespass or an entry under eminent domain, but the section provides for reimbursement of the owner for any damages he may suffer from the entry.

Acts of 1962, c. 228, remedied the defect in the 1961 legislation that permitted excess gross weights of certain motor vehicles. The new limitation conforms to federal requirements and insures that the

1 The act also applies to municipalities on contracts covered by G.L., c. 90, §34.
2 Amending G.L., c. 81, §26, and c. 90, §34(a)(2).
3 The act also amends G.L., c. 44, §17, governing the procedure for making temporary loans.
Commonwealth can, on this issue, continue to receive federal highway grants in aid.

§18.51. Motor vehicles: Taxes. The difficulties that had arisen because all automobiles had been assessed for tax as if they had automatic transmissions prompted the enactment of two statutes during the 1962 Survey year. Acts of 1962, c. 230, extended the time for applications for abatements for these taxes. Acts of 1962, c. 231, requires that applications for registration of motor vehicles henceforth include information on the type of transmission of the car being registered. This same information is then, under the act, forwarded to the Commissioner of Corporations and Taxation.

§18.52. Motor vehicles: Traffic offenses. The concept of a “no-fix” traffic law was in part adopted under Acts of 1962, c. 789, which created a new Chapter 90C of the General Laws. The main objection that has been raised to this legislation is that it permits a senior police officer to determine what disposition is to be made of the citation given by the arresting or citing officer. The law as enacted should partially remedy the problem of ticket fixing, but cannot do so completely as long as discretion exists, in other than a court, to determine action to be taken once the ticket has been issued.

Acts of 1962, c. 786, gives greater powers to the cities of Boston and Cambridge to fix fines for minor traffic offenses. It amends G.L., c. 90, by adding new Sections 20C and 20D and removing those cities from the general provisions of Section 20A, governing non-criminal disposition of parking violations.

A number of states have, for safety reasons, adopted various types of legislation that recognize the commission of traffic offenses in other states and give at least some effect to another state’s actions concerning the offense. General Laws, c. 90, §22, was amended by Acts of 1962, c. 261, to require the Registrar of Motor Vehicles to suspend a Massachusetts resident’s license when the resident has been convicted in another state of operating under the influence of narcotic drugs and has had his right to operate in this other state suspended.

§18.53. Motor vehicles: Junior operator’s licenses for minors. The problem of the high accident rate of younger drivers recurs in many contexts, and numerous proposals have been made for various types of remedies. Acts of 1962, c. 687, adopts one of these proposals and, in effect, imposes a 1:00 to 5:00 A.M. curfew on licensed drivers under eighteen years of age. Admitting that the problem is a very serious one, this particular solution seems undesirable. It imposes what may be in some cases a difficult limitation upon careful young drivers without insuring that the high accident rate of young drivers as a group will be reduced. The legislation may be understandable as an experiment but, unless it produces the result of reducing accidents of drivers in the age group covered, it should be reconsidered and other methods based upon better law enforcement and driver education applied.
§18.54. Discretion in denying licenses. In *Turnpike Amusement Park, Inc. v. Licensing Commission of Cambridge*, the Supreme Judicial Court had to determine if the defendant commission was entitled to refuse to license any pinball machines for a year's license period. General Laws, c. 140, §177A, provides, inter alia, that the licensing authority "may grant... a license to keep and operate an automatic amusement device," including pinball machines. The Court held that the defendant commission exceeded its discretionary authority in the blanket denial of any pinball licenses. Each application had to be considered upon its own merits. In turn, however, the Court rejected the plaintiff's contention that the only standard of judgment was whether the applicant was a proper person to be licensed. The use of "may grant" in the statute indicates that the local authority may properly consider all moral and welfare problems that might be created by the issuance of pinball licenses. The statute, while accepting pinball machines as valid devices, cannot be read as suggesting that all requests by proper persons must be granted. The discretion given to the licensing board is sufficiently broad so that all pertinent police power factors may be considered.

In *Silverman v. Board of Registration in Optometry*, the Court upheld a board rule that licenses to practice optometry will not be granted for a location in which "a commercial or mercantile establishment is the primary business being conducted." The Court found in G.L., c. 112, §67, broad powers to govern "the practice of optometry," and refused to limit this phrase to the regulation of the relationship of optometrist and patient.

The plaintiff also contended that, if the regulation is valid under the statute, it is unconstitutional as being beyond the state's police power. This contention was rejected by the Court, on the basis that the regulation may fairly be interpreted as a method of avoiding the vice of commercialism in the profession, in the same sense that no-advertising regulations are sustained. The Court stated it was not concerned with the wisdom of the regulation but merely its reasonableness. The prohibition against location in commercial establishments may reasonably be construed to tend toward the maintenance of professional standards.

§18.55. License revocation proceeding: Procedure. *Harris v. Board of Registration in Chiropody (Podiatry)* upheld, with some hesitation, the manner of adoption and the type of rules adopted by the defendant board for the conduct of its hearings, but found that the actual hearing given to the petitioner was not impartial. The board had revoked the petitioner's license after a hearing at which a marked lack

§18.54. 1 343 Mass. 435, 179 N.E.2d 322 (1962), also noted in §12.14 supra.


§18.55. 1 343 Mass. 536, 179 N.E.2d 910 (1962), also noted in §12.11 supra.

Published by Digital Commons @ Boston College Law School, 1962
of decorum existed. If the atmosphere was partly the result of the comments of the petitioner and his lawyer, it was also in part the result of the board's lack of understanding of the legal points involved and the acrimony of at least one of the members. The Court did not have to determine if the manner of conducting the hearing would alone call for a reversal, however, since it had additional grounds in the consideration by the board of evidence, or at least a suggestion, of misconduct in addition to that charged by the specifications, and the consideration of testimony at a prior informal hearing without adequate notice being given the petitioner.

The regulations of the board designed to govern hearings before it were not adopted until after the petitioner had already received his first notice of a hearing against him. The board did not give notice or a chance to be heard in respect of the adoption of its rules, which was within its authority, but the Court at least indicated its belief that an opportunity to be heard should have been given, even if failure to do so did not amount to an error of law. The Court felt the regulations adopted were "scarily adequate to serve the purposes" contemplated by the Administrative Procedure Act, but found the petitioner not prejudiced by "their insignificance."

*Bay State Harness Horse Racing and Breeding Assn. v. State Racing Commission* ² upheld the decision of respondent commission as to the number of racing days it authorized for the petitioner. The case, under the same name, had been before the Court earlier, in which it held that the commission's procedure was inadequate and its decision unsupported by adequate findings of subsidiary facts.³ The present decision of the commission was held to be in full compliance with this prior opinion.

§18.56. Hawkers and peddlers. In an important decision the Supreme Judicial Court held the hawkers and peddlers licensing provisions, G.L., c. 10, §22, unconstitutional as applied to a bakery that conducted a house-to-house business. In *Hall-Omar Baking Co. v. Commissioner of Labor and Industries*¹ the Court found that the baking business being conducted by the plaintiff was basically so similar to the usual home delivery dairy business that the licensing requirement — and the high license fees — constituted an unreasonable discrimination. The Court did, however, reject the bakery's contention that its business was not of a type that could be regulated by a licensing statute, since it is inherently different in nature from similar businesses conducted from a fixed location. The case is thus limited in its holding to the type of business conducted by the plaintiff and does not relieve bakery businesses that may be conducted in different manners from the statutory coverage.

The hawkers and peddlers act was also amended during the year by


Acts of 1962, c. 541, which adds a new Section 22A to G.L., c. 101. The new section forbids the issuance of a license for the mobile sale of prepared, ready-to-eat foods, unless the business preparing the food has been licensed by the Department of Public Health under G.L., c. 94, §305C.2

O.Authorities

§18.57. Audit. Acts of 1962, c. 733, amends G.L., c. 11, §12, to add to the list of entities to be audited by the state auditor the various authorities and districts created by the legislature. This act goes far to provide for public disclosure of the activities of these agencies. Arguments concerning this legislation seem to have taken on the coloration of the way persons feel about the Massachusetts Turnpike Authority and its chairman. The issue is much broader, however, and really reaches to the question of the amount of public disclosure to be required by any agency or corporation that has obtained its full power from the Commonwealth and that performs functions that are normally those of the Commonwealth.

§18.58. State labor laws. Acts of 1962, c. 760, was another piece of legislation also interpreted by many as directed against the Turnpike Authority. It provides that this authority, along with the Port, Parking and Steamship Authorities, is bound by the provision of the state law on labor relations, G.L., c. 150A. The pertinent sections require collective bargaining, define unfair labor practices, govern certification and entitle parties to a review procedure.

§18.59. Metropolitan Transit Authority. Public interest in the operations of the Massachusetts Turnpike Authority may be quite general, but this interest is limited compared to the public's interest in the Metropolitan Transit Authority. The great interest is reflected in considerable legislation as well as one case of considerable importance.

In Hansen v. Commonwealth1 the Supreme Judicial Court, in sustaining a restraining order against a strike or work stoppage by members of the M.T.A. carmen's union local, held that the carmen were public employees. This determination removed the lower court's action from the restraints of the state Anti-Injunction Act, G.L., c. 214, §9, and the three-judge requirement of G.L., c. 212, §30. The actual decision upheld the adjudgment of contempt against eight members of the union who had refused to work. The major importance of this case lies in its determination that the M.T.A.'s functions are sufficiently

2 A large number of changes in licensing provisions were adopted by the legislature during the 1962 SURVEY year. The more important ones are as follows: Acts of 1962, c. 521, regulating pesticides; Acts of 1962, c. 500, governing appeals on the granting by local licensing authorities of liquor licenses; Acts of 1962, c. 670, regulating collection agencies; Acts of 1962, c. 775, requiring one-year residence for a real estate broker's license.

public in nature so that its employees are public employees. While the opinion does not suggest that the employees of all state-created authorities would be so designated, it at least points out the need for a re-evaluation of each authority's function in the light of the principles held determinative.

Arising from the same dispute that gave rise to the *Hansen* case, Acts of 1962, c. 307, gives the Governor extensive powers to declare an emergency in the M.T.A.'s operations and take over management for up to forty-five days.

The need for conforming M.T.A. procedures to those typical of agencies more directly governmental resulted in the enactment of three acts during the 1962 Survey year. Acts of 1962, c. 319, requires the trustees to submit an annual estimate of income and expenditures to the members of the advisory board. The open meeting law was made applicable to the meetings of the M.T.A. trustees by the amendment of G.L., c. 30A, §11A, by Acts of 1962, c. 331. Acts of 1962, c. 660, requires the trustees of the M.T.A. to award contracts for supplies, materials, equipment and services to the lowest responsible bidder, after advertising, unless certain prescribed conditions exist. Concessions and leases are to be awarded to the highest responsible bidder.

Acts of 1962, cc. 592 and 650, regulated the borrowing of the State Treasurer in anticipation of the receipt of assessments against cities and towns in the M.T.A. district.