Chapter 1: State and Local Government

John W. Delaney

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CHAPTER 1

State and Local Government

JOHN W. DELANEY*

§1.1 Separation of Powers: Legislative-Executive Conflict. During the Survey year, in Opinion of the Justices to the Governor,¹ the Supreme Judicial Court faced a major confrontation between the state’s executive and legislative branches based on the oft-quoted article 30 of the Declaration of Rights of the Massachusetts Constitution²—the separation of powers doctrine. In enacting the state budget for fiscal year 1976, the General Court inserted two sections³ which the Governor felt directly infringed upon his executive powers under the constitution.⁴ The two sections provided that approvals by the House and Senate Committees on Ways and Means were a condition precedent to the lawful appointment of virtually all personnel within the executive branch.⁵ Section 8A of chapter 684 of the Acts of 1975 provided that federal funds received by the Commonwealth would not be available to pay the salary of any position unless the expenditure was approved in advance by the two committees and also was based upon a schedule of positions and salary rates approved by the two committees.⁶ Section 25C of chapter 684 provided that on or after...

*JOHN W. DELANEY is the Executive Director of the Boston Municipal Research Bureau. From 1973 to 1976, he was Assistant Secretary of Consumer Affairs for the Commonwealth.

² MASS. CONST. pt. I, art. XXX. This article provides:
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.
⁶ Id. § 8A. This section provides:
Notwithstanding any provision of general or special law to the contrary, federal funds received by the commonwealth or any department, agency or subdivision of a department shall not be available for the payment of the salary for any position unless such expenditure has been approved in advance by the house and senate committees on ways and means and is based upon a schedule of positions and salary rates approved by said committees, a copy of which shall be deposited with the bureau of personnel. . . .
June 30, 1975 all vacant positions, other than those essential for the care of patients, would remain vacant for the following year, unless the Commissioner of Administration, an executive officer, certified that there was a "critical need" for the position, and that the existence of such a critical need was verified by both committees of the Legislature. The Court was asked by the Governor to determine whether the exercise of the approval power provided in sections 8A and 25C constituted an exercise of executive power, and if so, whether it was proper for the power to be exercised by a committee of each branch of the General Court. Alternatively, the Court was asked whether the power was a legislative power, and again, if so, whether the power could be delegated to committees.

For many years persons had been appointed to positions in the executive branch based on "schedules" of positions released jointly by the House and Senate Ways and Means Committees. The schedules were usually released several weeks or months after the start of the fiscal year. Until the schedules were released, the executive was unable to fill new or reclassified positions. This process had never been challenged, and upon it rested a great deal of legislative power over the activities of the administration. Apparently, the inclusion of this scheduling language in the 1976 fiscal year budget, along with severe restrictions on the expenditure of federal funds and a total ban on the filling of vacant positions, including even department heads, without legislative approval, led to the Governor's request for an opinion from the Supreme Judicial Court.

In a relatively brief opinion, the Court clearly established that the powers to schedule positions of state employees and to verify "critical needs" were executive powers. While recognizing that by exercising its power of appropriation the Legislature could both limit the expenditure of appropriated personnel funds and make an exemption for cases of "critical need," the Court stated that the power to determine when a "critical" need exists could be delegated only to appropriate executive officers.

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7 Id. § 25C. This section provides:
All positions vacant or which become vacant other than positions essential for the care of patients, on or after June thirtieth, nineteen hundred and seventy-five, shall remain vacant during the fiscal year nineteen hundred and seventy-six; provided, that vacancies for which there exists a critical need may be filled upon certification of the critical need by the Commissioner of Administration and verification of said critical need by the house and senate committees on ways and means. No funds shall be allotted for overtime compensation unless it is essential to the safety and care of persons under the care and jurisdiction of the commonwealth.


9 Id.

10 The statements in this paragraph are based upon the experience and observations of the author while serving in state government.

11 Id.

12 Id.

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executive officers. In so concluding, the Court stated that "to entrust the executive power of expenditure to legislative officers is to violate art. 30 by authorizing the legislative department to exercise executive powers."

The Court's opinion precludes the granting of any "approval" powers to legislative committees and suggests that the legislative power of appropriation cannot be delegated to the Committees on Ways and Means, but must be exercised by the Legislature as a whole. The state budget for 1976 included some nineteen statutory provisions where approval, verification, or other similar powers were given to the General Court's Committees on Ways and Means. These included most of the major powers of the Legislature heretofore exercised in connection with appropriations: scheduling of positions, approval of excess quota positions, transfers to and from the main salary subsidiary account to other subsidiaries within an agency's budget, and use of several reserve funds. The validity of these other provisions, therefore, has now been called into question with the likely result that there will be future confrontations in this most sensitive area.

While the executive branch clearly won the confrontation over whether the powers to verify "critical needs" and to schedule state employee positions were legislative or executive, it clearly lost in the case of *The Trustees of the Stigmatine Fathers, Inc. v. Secretary of Administration & Finance*. In that case, the Supreme Judicial Court held that the Governor and the Secretary of Administration may not refuse to allot the funds necessary for the completion of the purchase of property for which funds have been appropriated where there is a valid contract to purchase the land. In 1971, the Board of Trustees of State Colleges (the "Board") agreed to purchase the Stigmatine's land in Dover as a site for the Massachusetts College of Art. The contract was executed subject to the enactment of a capital outlay bill. Subsequently, the Legislature appropriated the necessary funds, subject only to the condition that there be an independent appraisal of the value of the property by a qualified, disinterested appraiser. The appraisal was made, but the Secretary of Administration announced that Commonwealth would not purchase the property because "he had concluded that the site was inappropriate" for the College of Art. The Stigmatines brought suit against the Board demanding

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14 Id. at 224, 341 N.E.2d at 257.
15 Id. at 225, 341 N.E.2d at 257.
16 Id. at 226, 341 N.E.2d at 257.
18 Id.
20 Id., 341 N.E.2d at 664.
21 Id. at 210, 341 N.E.2d at 664.
22 Id. at 210-11, 341 N.E.2d at 664.
performance of the contract.  

A consent decree was entered in that suit, declaring that the contract was valid and that all of its conditions had been met. When the Secretary refused to allot the appropriated funds, the Stigmatines again brought suit, this time against the Secretary.  

A superior court judge ruled that neither the Governor nor the Secretary was authorized to decline, as a matter of discretion, to allot the funds necessary to carry out the contract.  

The Attorney General declined to prosecute an appeal on behalf of the Secretary and, in a major decision discussed in the 1975 Annual Survey of Massachusetts Law, the Court ruled that the Attorney General had the power to so decline. A successor Attorney General, however, allowed the Secretary to appeal. On appeal, the Court found that since the Secretary was bound by the consent decree entered in the Stigmatine's suit against the Board, and the contract's conditions had been met, including a proper appraisal, the Secretary must allot the funds.  

Taken together, the Opinion of the Justices and the Stigmatine Fathers decisions reinforce the Court's history of decisions under article 30. The executive power includes the power to appoint persons to offices in the executive branch and to spend money appropriated by the Legislature for the purposes permitted by law. On the other hand, the power of appropriation is a legislative function, and the executive may not refuse to expend funds simply because it may not like the uses to which they will be put.  

In Opinion of the Justices to the Senate, the Supreme Judicial Court clarified the extent of the Governor's powers with respect to initiative petitions submitted to the General Court. House Bill 4201, which would have established a uniform rate for small electricity users, was submitted by petition to the General Court. The Senate inquired whether under article 48 of the Amendments to the Constitution, the Governor's approval was required if the petition was approved by both the House and Senate and, if it were so approved by both

23 Id. at 211, 341 N.E.2d at 664.  
24 Id.  
25 Id. at 211-12, 341 N.E.2d at 664.  
28 Id. at 214-15, 341 N.E.2d at 666.  
29 Id. at 217-18, 341 N.E.2d at 666-67.  
30 Id. at 209, 341 N.E.2d at 664.  
33 H. 4201 (1976).  
35 Mass. Const. amend. art. XLVIII.  
Houses, whether the Governor could veto such a petition. Article 48 provides that a petition signed by the requisite number of voters and setting forth the text of a proposed law may be filed with the Secretary of the Commonwealth, who must transmit it to the Clerk of the House. If the General Court fails to enact the law before the first Wednesday of May, and additional signatures are filed by the first Wednesday of the following July, the question is placed on the ballot at the next biennial state election.

After referring to the purpose of initiative petitions and the history of the legislation authorizing such petitions, the Court opined both that it was clear that "[t]he role of the Governor in the legislative process is basic to our system of government," and that his approval was required for the "enactment" of such a petition by the General Court. Based on this finding, the Court also held that the Governor could choose to veto the petition, and that the veto could be overridden as if an ordinary bill and not a petition had been vetoed.

Moreover, the Court concluded that in order to effect both the purpose of the initiative petition—enactment of legislation by popular vote—and article 48's timetable provisions for placing a defeated petition on the ballot at the next state election, "all constitutional steps for passage of a law, including the Governor's approbation of legislative action after veto of a measure, must occur before the first Wednesday of May."

The two Opinions of the Justices and the Stigmatine Fathers decisions give substantial guidance to the legislative and executive branches in their dealings with each other. It is the Legislature's province to decide how much money will be spent for a particular activity, but the Governor and executive branch have the authority to spend the funds for the personnel needed to carry out that activity. In light of the decisions, the Governor has much clearer authority to fill positions without, as in the past, getting legislative approval from the Ways and Means Committees, and his role in the initiative petition process has been clarified. However, the Legislature may choose to use its key power of appropriation more aggressively, making clearer the purposes for which it wishes public funds spent and determining the priorities of the Commonwealth through budgetary rather than personnel controls.

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37 Id. at 1121, 347 N.E.2d at 672.
39 Id. pt. V, § 1.
41 Id.
42 Id. at 1127-28, 347 N.E.2d at 674-75.
43 Id. at 1125, 347 N.E.2d at 674.
§1.2. Rights of Public Employees. The Commonwealth's relatively new collective bargaining law has continued to cause problems of interpretation and implementation. The most significant development during the Survey year involved a determination in Labor Relations Commission v. Town of Natick of both the proper collective bargaining agent to represent the employer town of Natick in its negotiations with the police officers and fire fighters of that town, and the scope of bargaining as it related to statutory authority previously given to the police and fire chiefs alone. In two previously surveyed cases, Chief of Police of Dracut v. Dracut, involving the "strong" chief law, and Chief of Police of Westford v. Westford, involving the "weak" chief law, the Supreme Judicial Court had dealt with police negotiations.

§1.2. 1 G.L. c. 150E. This statute went into effect on July 1, 1974. Acts of 1973, c. 1078.
5 G.L. c. 41, § 97A. This section provides:
   In any town which accepts this section there shall be a police department established by the selectmen, and such department shall be under the supervision of an officer to be known as the chief of police. The selectmen of any such town shall appoint a chief of police and such other officers as they deem necessary, and fix their compensation, not exceeding, in the aggregate, the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually and the selectmen may remove such chief or other officers for cause at any time after a hearing. The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of the selectmen to take action thereon within thirty days after they have been submitted to them by the chief of police. The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders. Section ninety-seven shall not apply in any town which accepts the provisions of this section. Acceptance of the provisions of this section shall be by a vote at an annual town meeting.
7 G.L. c. 41, § 97. This section provides:
   In towns which accept this section or have accepted corresponding provisions of earlier laws there shall be a police department established under the direction of the selectmen, who shall appoint a chief of police and such other police officers as they deem necessary, and fix their compensation in an amount not in the aggregate exceeding the annual appropriation therefor. The selectmen may make suitable regulations governing the police department and the officers thereof, and in towns which are not subject to provisions of chapter thirty-one to the contrary may remove the chief and other officers at pleasure. The chief of police shall be in immediate control of all town property used by the department, and of the police officers, who shall obey his orders.
The Court initially noted, however, that since those cases were decided under the old collective bargaining law, the conclusions reached in those cases might be affected by the new law.\(^8\)

The Court agreed with both parties that Natick had a "strong" police chief as defined by the strong chief law and that its fire chief had comparable statutory authority.\(^9\) Nonetheless, the Court held that under the state's new collective bargaining law, the town must bargain collectively with its police officers and fire fighters concerning subjects within the statutory authority of "strong" chiefs.\(^10\) In reaching this decision, the Court noted that section 7 of the new collective bargaining law\(^11\) provides expressly for the collective bargaining agreement to prevail over a number of laws, including the strong chief law.\(^12\) The legislative intent, the Court found, was clear on this matter.\(^13\) The

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\(^9\) Id. G.L. c. 48, §§ 42-44. Section 42 provides:

Towns accepting the provisions of this and the two following sections or which have accepted corresponding provisions of earlier laws may establish a fire department to be under the control of an officer to be known as the chief of the fire department. The chief shall be appointed by the selectmen, and shall receive such salary as the selectmen may from time to time determine, not exceeding in the aggregate the amount annually appropriated therefor. He may be removed for cause by the selectmen at any time after a hearing. He shall have charge of extinguishing fires in the town and the protection of life and property in case of fire. He shall purchase subject to the approval of the selectmen and keep in repair all property and apparatus used for and by the fire department. He shall have and exercise all the powers and discharge all the duties conferred or imposed by statute upon engineers in towns except as herein provided, and shall appoint a deputy chief and such officers and firemen as he may think necessary, and may remove the same at any time for cause and after a hearing. He shall have full and absolute authority in the administration of the department, shall make all rules and regulations for its operation, shall report to the selectmen from time to time as they may require, and shall annually report to the town the condition of the department with his recommendations thereon; he shall fix the compensation of the permanent and call members of the fire department subject to the approval of the selectmen. In the expenditure of money the chief shall be subject to such further limitations as the town may from time to time prescribe.

Section 43 provides that "[t]he chief of the fire department shall act as forest warden in all such towns, and shall have authority to appoint deputy wardens and fix their compensation subject to the approval of the selectmen." Section 44 provides that "[t]he two preceding sections shall not affect the tenure of office nor apply to the removal of permanent and call members of fire departments in towns which have accepted chapter thirty-one or corresponding provisions of earlier laws. Said sections shall not apply to cities."

\(^11\) G.L. c. 150E, § 7. Section 7 provides in pertinent part:

If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and . . . the regulations of a police chief pursuant to . . . [G.L. c. 41, § 97A, or] the regulations of a fire chief . . . pursuant to . . . [G.L. c. 48], . . . the terms of the collective bargaining agreement shall prevail.

\(^13\) Id.
Court's decision can be read to mean that collective bargaining, at both the state and local level, can and undoubtedly will be used to override a number of statutory provisions concerning working conditions, as well as local ordinances, by-laws, rules, and regulations.

In addition to determining that the town must negotiate over matters which heretofore may not have been negotiable, the Court also determined that the proper agent for collective bargaining was the Board of Selectmen, not the police and fire chiefs themselves.\textsuperscript{14} In so ruling, the Court overruled a decision of the State Labor Relations Commission, which had held that the chiefs should bargain concerning employment conditions assigned to them by their respective "strong" chief statutes and that the selectmen should bargain only concerning other permissible bargaining subjects.\textsuperscript{15} In a decision rendered prior to passage of the new collective bargaining law, the Commission had ruled that for the purposes of bargaining, the town had two chief executive officers within the meaning of Section 1781 of chapter 149 of the General Laws.\textsuperscript{16} The Commission would have divided the bargaining responsibility so that wages, hours, benefits, tenure, and similar subjects were the responsibility of the selectmen, while matters such as duty assignments, vacations, and leaves were the responsibility of the chief, who, the Commission said, had been designated the "municipal employer" for bargaining purposes by the town's acceptance of the "strong chief" law.\textsuperscript{17} The Commission applied a similar analysis to the fire department bargaining situation.\textsuperscript{18}

The Court had little trouble in setting aside the Commission's decision and, in so doing, strengthened the hand of municipal officials in bargaining situations. The Court believed that the "Legislature intended that the board of selectmen be the sole representative of the town in bargaining with police officers and fire fighters under G.L. c. 150E."\textsuperscript{19} Furthermore, the Court pointed out that under the "bifurcated negotiations contemplated by the Commission," the give and take involved in bargaining might cause a situation where the selectmen and the chief disagree, notwithstanding that they might have been in agreement at the start of a negotiating session.\textsuperscript{20} Moreover, the Court noted that chiefs as negotiators might have a conflict of interest because their own salaries are usually affected by the salaries negotiated in the bargaining process.\textsuperscript{21}

\textsuperscript{14} Id. at 40, 339 N.E.2d at 905.
\textsuperscript{15} Id. at 33, 339 N.E.2d at 902.
\textsuperscript{16} Id. at 35, 339 N.E.2d at 903. The Commission's decision was issued on October 4, 1973. Id. G.L. c. 149, 1781 was repealed effective July 1, 1974 by the Acts of 1973, c. 1078.
\textsuperscript{18} Id. at 37-38, 339 N.E.2d at 904.
\textsuperscript{19} Id. at 40, 339 N.E.2d at 905.
\textsuperscript{20} Id. at 41, 339 N.E.2d at 905.
\textsuperscript{21} Id. G.L. c. 48, § 57G, as amended, Acts of 1974, c. 415, provides that in any city or town which accepts it, the salary of the fire and police chiefs is a stated multiple of the salary of a fire fighter or police officer, respectively.
The Commission and the Court clearly disagreed on the intent of the Legislature in preserving the independent authority of "strong" chiefs. The Court found that the "statutory goal of achieving entirely open, conclusive negotiations between the chief executive officer (or a selected representative) and the employees' representative is preeminent." The Court noted that the Legislature intended to change the result in circumstances similar to the Dracut case by providing that "strong" chief rules and regulations could be overridden by collective bargaining and by providing that the selectmen may negotiate conclusively on subjects otherwise assigned to the chiefs.

A series of recent cases limiting benefits in such areas as unemployment compensation and public employee pensions indicate that the Supreme Judicial Court and the Appeals Court are cognizant of the escalating costs of public employee benefits. In Gurley v. Town of Bridgewater, for example, for the purpose of computing vacation benefits measured in weeks, the Appeals Court interpreted the word "weeks" in the town's personnel by-law as referring not to calendar seven day weeks, but to work weeks of five days. In reaching its decision, the court relied on the understanding of the parties that vacation weeks were based on a five day work week, and that such an interpretation of vacation weeks had been the practice of the town since 1957. The interesting element of the case is that the court distinguished it from a 1970 case, Holyoke Police Relief Association v. Mayor of Holyoke, in which case Holyoke police officers were awarded vacation weeks of seven days. The Holyoke case turned upon a statutory source of vacation entitlement, an interpretation that noted both that there was no statewide uniformity as to what constituted a work week for police officers, and that the Legislature must have been referring to a calendar week. However, in Bridgewater, the court found a local pattern and "saw no reason to disturb the bargain which the parties struck," although the case probably would not have reached the court had it been clear that the parties had reached such a bargain.

In Gaw v. Contributory Retirement Appeal Board and Gallagher v. Contributory Retirement Appeal, the Appeals Court interpreted statutory language in the former case to restrict the employees' rights to obtain greater benefits, and in the latter case to grant full time retirement

23 Id. at 45, 339 N.E.2d at 906-07.
25 Id. at 299-300, 343 N.E.2d at 888.
26 Id.
28 Id. at 354, 264 N.E.2d at 696.
29 G.L. c. 41, § 111D.
30 358 Mass. at 353, 264 N.E.2d at 696.
benefits to a part-time employee. In *Gaw*, the plaintiff was the widow of the deceased manager of the Town of Reading's municipal light department.\(^{34}\) Her husband had been classified by the local retirement board and the state appeal board as properly belonging in Group 1 of the retirement system.\(^{35}\) Plaintiff argued that her husband should have been classified in Group 4, which classification would have entitled her to substantially larger benefits.\(^{36}\) Group 1 is the category for officials and all employees not otherwise classified.\(^{37}\) Group 4 is the highest category and was originally designed, as the court noted, to include persons who perform hazardous or dangerous occupations.\(^{38}\) It now includes police officers, correction department employees, and "employees of municipal gas and electric companies who are employed as linemen, electric switchboard operators, firemen, oilers, mechanical maintenance men and supervisors of said employees."\(^{39}\) Upon an analysis of Gaw's work, the court found that although as a manager Gaw had occasionally supervised the employees enumerated in Group 4, his supervision had been secondary to his managerial functions.\(^{40}\) Therefore, the court held that the plaintiff was not entitled to the extra benefits due those included in Group 4.\(^{41}\)

In reaching this decision, the court pointed out that the purpose of Group 4 was to encourage the early retirement of persons in hazardous occupations in order to make room for younger personnel.\(^{42}\) Such a purpose does not pertain to managers who occasionally supervise hazardous occupations, and hence such managers do not fall within Group 4.\(^{43}\)

Although the Appeals Court upheld the Contributory Retirement Appeal Board's classification in *Gaw*, in *Gallagher* the Appeals Court found that the local retirement board and the appeal board had improperly reduced by one third the total number of calendar years and full months actually served by a part-time city solicitor who also maintained his own private law office and practice, thereby improperly reducing the benefits paid to the solicitor's widow.\(^{44}\) The court ordered that the benefits be paid on the same basis as if the employee had served full-time.\(^{45}\) The decision was based on the statutory mandate that "any member in service shall . . . be credited with all service ren-

\(^{35}\) Id. at 484, 345 N.E.2d at 909. G.L. c. 32, § 3(2)(g), establishes the categories for pension benefits.
\(^{37}\) G.L. c. 32, § 3(2)(g).
\(^{39}\) G.L. c. 32, § 3(2)(g) (emphasis added).
\(^{41}\) Id. at 493-94, 345 N.E.2d at 912.
\(^{42}\) Id. at 488-89, 345 N.E.2d at 910-11.
\(^{43}\) Id. at 495, 345 N.E.2d at 913.
\(^{45}\) Id. at 18-19, 340 N.E.2d at 912.
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dered by him as an employee in any governmental unit after becoming a member of the system."46 The court noted that the only authorized reduction in the actual service of a part-time employee is one that is made under rules and regulations adopted by a local board pursuant to the provisions of section 5(3)(c) of chapter 32 of the General Laws, none of which had been adopted by the local board in question.47 The case seems to indicate that communities will be saddled with full-time pension payments for part-time employees unless they enact rules and regulations approved by the division of insurance as required by law. While the Appeals Court felt it had no alternative in the Gallagher case, the door clearly is open for communities to eliminate this expensive pension loophole by enacting the proper rules and regulations.

In yet another decision involving an appeal from a Contributory Retirement Appeal Board's retirement classification, the Supreme Judicial Court in Maddocks v. Contributory Retirement Appeal Board48 rejected the claim of a plaintiff that she should have been classified in Group 2 of the pension system rather than Group 1.49 Mrs. Maddocks was a registered nurse, employed by the Department of Public Health for 31 years. During the final 15 months of her service, she was employed as a chief hospital supervisor. Prior to that she had held several positions in the hospital, including that of attendant, head nurse, hydrotherapist, and supervisor.50 She claimed her duties in those prior positions entitled her to the substantially greater benefits accruing to persons placed in Group 2, even though her position at the time of retirement fell into the catch-all category of Group 1.51 Group 2 employees are those whose "regular and major duties require them to have the care, custody, instruction or other supervision of ... persons who are mentally ill ...."52 The Court read this section of the retirement statute as requiring a determination of a person's status in a group as of the time of retirement and not, as argued, a consideration of an employee's duties during the entire period of her employment.53 Thus, even though most of Mrs. Maddocks' service would have entitled her to benefits at the level of Group 2, and even though she was not notified that acceptance of the promotion would reduce her retirement benefits, the Court ruled that the statute required sustaining the lower court's and the retirement board's decisions denying relief.54 In reaching its decision, the Court stated that

46 Id. at 15-17, 340 N.E.2d at 911. This language is found in G.L. c. 32, § 4(1)(a).
49 Id. at 112, 340 N.E.2d at 506.
50 Id. at 108, 340 N.E.2d at 504-05.
51 Id. at 112-13, 340 N.E.2d at 506.
52 G.L. c. 32, § 3(2)(g).
54 Id. at 114-16, 340 N.E.2d at 507.
"\[t\]he plaintiff accepted of her own free will a promotion in status and an increase in pay without inquiry as to the legal consequences of such a promotion. She may not now be heard to complain, on constitutional grounds, of the inevitable consequences of her voluntary act.\"55

In another case involving public employees decided during the Survey year, Osetek v. City of Chicopee,56 the Supreme Judicial Court held that a city employee does not have the right to receive compensation for two positions in city government.57 Plaintiff was both a Chicopee school teacher and an elected alderman.58 Following the precedent set by its 1965 decision in Callahan v. Malden,59 the Court held that dual compensation was forbidden by section 6A of chapter 39 of the General Laws.60 The Court distinguished Osetek from its 1973 decision in Rugg v. Arlington,61 where the issue was whether a public officeholder who had been duly removed from his appointed public office was barred from running for another office before his appointed term had expired. The Court in Rugg found a serious constitutional question presented by the prohibition against giving up one office in order to be a candidate for another, and therefore read the statute as confined to the obvious purpose of preventing one person from holding two offices at the same time.62 The Court in Osetek, however, clearly indicated that it found no such constitutional question concerning the prohibition against the simultaneous holding of more than one public office.63

The eligibility of a nonpublic employee for unemployment benefits was considered in Keough v. Director of the Division of Employment Security.64 The Division, in a decision affirmed by the District Court of Marlborough, had found that the plaintiff was not eligible to receive benefits because she had placed a restriction on her willingness to accept employment, namely, that her acceptance of any work not within walking distance of her home depended on whether transportation arrangements could be made.65 The Court, using the standard of re-

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55 Id. at 116, 340 N.E.2d at 507.
57 Id. at 968-69, 345 N.E.2d at 897-98.
58 Id. at 968, 345 N.E.2d at 897.
60 G.L. c. 39, § 6A provides:
Notwithstanding the provision of any city charter to the contrary, the mayor and the members of the city council or other legislative body of a city, shall receive for their service such salary as the city council or other legislative body of said city shall by ordinance determine, and shall receive no other compensation from the city.
62 Id. at 268, 303 N.E.2d at 726.
65 Id. at 811, 344 N.E.2d at 895.
view of administrative proceedings set forth in the Administrative Procedures Act, accepted the Commonwealth’s view that availability for work places the responsibility of getting to work upon the claimant and affirmed the Division’s decision that by making her acceptance of work dependent on whether transportation could be arranged, the plaintiff had rendered herself unavailable for work within the meaning of section 24(b) of chapter 151A of the General Laws. Furthermore, in a strong statement of policy, the Court remarked:

Unemployment compensation is not a social welfare program based on need but is specifically directed toward a class of unemployed persons who have been and continue to be attached to the labor force. “Unemployment benefits are not for those who are incapable of working.” ... Under this type of program, availability for work is clearly a valid condition on eligibility for benefits, and the classification of a person unable to transport herself to employment opportunities as “unavailable for work” cannot be considered arbitrary, irrational, or an invidious discrimination.

The vehemence of the Court’s conclusion may be related to the presence of a strong but “respectful” dissent by Justice Quirico. Justice Quirico, applying “de novo judicial review” to the Division’s findings, instead of substantial evidence standards of review, argued that the plaintiff was available for work within the meaning of the statute. In reaching this conclusion, Justice Quirico likened the plaintiff’s position to that of the plaintiff in Raytheon Co. v. Director of Division of Employment Security, where the Court held that an employee who had left her night-shift job when a co-worker who had been providing her with transportation was laid off, and who had unsuccessfully sought work on other shifts, was not disqualified from receiving employment compensation. The majority distinguished the Raytheon decision on the ground that the issue therein was whether the employee voluntarily left her job and not whether the claimant

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66 G.L. c. 151A, § 42, provides in pertinent part that the “findings and decisions of the board shall be reviewed in accordance with the standards for review provided in [G.L. c. 30A, § 14(7)].” G.L. c. 30A, § 14(7), provides that a board decision may be set aside or modified if the court determines that substantial rights of any party have been prejudiced because the decision violates a constitutional provision, is based on an error of law, or is unsupported by substantial evidence.

67 1976 Mass. Adv. Sh. at 813-15, 344 N.E.2d at 896. G.L. c. 151A, § 24(b), provides that in order for an individual to be eligible for unemployment benefits he shall “[b]e capable of and available for work and unable to obtain work in his usual occupation or any other occupation for which he is reasonably fitted ....”


69 Id. at 818, 344 N.E.2d at 897.

70 Id. at 822-23, 344 N.E.2d at 899.


72 Id. at 137-38, 307 N.E.2d at 333.
was available for work.\textsuperscript{73}

\textbf{§1.3. State Administrative Agencies and the Scope of Judicial Review.} In an interesting series of cases involving state administrative agencies, the Supreme Judicial Court and the Appeals Court have made it very clear that individual rights are not going to be infringed when the agency fails to act in accordance with proper procedures and regulations. In \textit{Delf v. Commissioner of Public Welfare},\textsuperscript{1} the plaintiff appealed the Department of Public Welfare's (the "department") denial of assistance under the federal Aid to Families with Dependent Children (AFDC) program,\textsuperscript{2} which is financed on a matching fund basis\textsuperscript{3} and subject to regulations issued by the Secretary of the Department of Health, Education, and Welfare.\textsuperscript{4} The plaintiff had sought assistance to cover transportation costs and child care services related to her participation in a graduate program at the University of Massachusetts.\textsuperscript{5} The Supreme Judicial Court reversed the department's decision and remanded to the superior court with instructions to remand the case to the department.\textsuperscript{6} The Court reasoned that the department's decision was procedurally defective because it failed to conform to federal regulations\textsuperscript{7} by identifying the departmental regulations that supported its decision.\textsuperscript{8}

Three state registration boards also found that their actions in attempting to suspend licenses ran afoul due to faulty procedures or regulations. In \textit{Finklestein v. Board of Registration in Optometry},\textsuperscript{9} the Supreme Judicial Court dealt not only with the lack of a relevant regulation, but also with the attempt by the Board of Registration in Optometry to restrict plaintiff's occupation. The plaintiff worked during the day as a properly registered optometrist, examining eyes and writing prescriptions. In the evenings he worked as a licensed dispensing optician in a store where he owned an optical shop, limiting himself solely to fitting customers with frames and lenses based on the prescriptions they presented to him.\textsuperscript{10} His license was suspended by the Board for violation of Board Rule 6(f), which made it an unprofessional practice for an optometrist to "[advertise] or [hold] himself forth, in any manner as an optician ... while actively engaged in the practice of optometry."\textsuperscript{11} The Court had little patience with either the


\textsuperscript{3} Id.


\textsuperscript{6} Id. at 3661, 339 N.E.2d at 192.

\textsuperscript{7} 45 C.F.R. § 205.10(a)(15) (1974).


\textsuperscript{10} Id. at 1548-49, 349 N.E.2d at 347-48.

\textsuperscript{11} Id. at 1549, 349 N.E.2d at 348.
rule or its interpretation in this case. The Court seriously doubted whether the plaintiff had transgressed any Board rule.\textsuperscript{12} While it noted that ordinarily an agency's interpretation of its own rule is given great weight, it also noted that this principle is one of deference, not abdication, and that courts do not hesitate to overrule agency interpretations when they are arbitrary, unreasonable, or inconsistent with the plain terms of the rule itself.\textsuperscript{13} Examining the Board's rule, the Court found that it ostensibly was designed to deal with advertising. Since there was no evidence in the record that the plaintiff advertised as the term was defined in another Board rule, the Court found that the Board simply had determined that the plaintiff, as a licensed optometrist, was foreclosed from a separate practice as an optician.\textsuperscript{14} Furthermore, the Court concluded that the Board's rule could not be interpreted, as the Board had done, so as to prohibit a licensed optometrist from engaging in a separate optical practice.\textsuperscript{15} According to the Court:

If the board wished to prohibit practicing optometrists from working as dispensing opticians, it could have used language better designed to make its intention clearer than that of Rule 6(f). It would appear that the board in this case has given a strained interpretation to Rule 6(f) and that the plaintiff's activities cannot be included fairly within its prohibitions.\textsuperscript{16} In reaching its decision that the Board had improperly suspended the plaintiff's license, the Court noted that the only reason the Board had disapproved of the plaintiff's "moonlighting" as an optician was because they thought such a practice "degrades the profession" of optometry.\textsuperscript{17} The Court wryly noted that "[w]e do not discern the elements of this degradation, at least in any sense relevant to the protection of the public health and welfare which is the object of proper regulation of the practice of optometry."\textsuperscript{18} Further, the Court noted that it did not read the statute vesting authority in the Board to make rules governing the practice of optometry\textsuperscript{19} as allowing the Board to promulgate rules preventing an optometrist from also being a licensed, practicing optician.\textsuperscript{20} The Court did suggest, however, that the Board could suspend an optometrist who also was a licensed, practicing optician if it could be demonstrated that working as a dispensing optician "infected" his practice of optometry.\textsuperscript{21}

\textsuperscript{12} \textit{Id.} at 1550, 349 N.E.2d at 348.
\textsuperscript{13} \textit{Id.} at 1550-51, 349 N.E.2d at 348.
\textsuperscript{14} \textit{Id.} at 1552, 349 N.E.2d at 348-49.
\textsuperscript{15} \textit{Id.}, 349 N.E.2d at 349.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 1555, 349 N.E.2d at 350.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} G.L. c. 112, § 67.
\textsuperscript{21} \textit{Id.}
The Board of State Examiners of Plumbers fared no better in its attempt to suspend the license of a plumber. In *Rhodes v. State Examiners of Plumbers*, the failure of the Board to state the reasons for its decision and the absence in the record of any finding to guide the Appeals Court in its review, led to a quick reversal and remand to the Board.

When the Board of Registration in Pharmacy attempted to suspend the license of a pharmacist and a pharmacy, it apparently failed both to give advance notice of the rules and regulations upon which the charges were based to the pharmacist and to give any notice to the pharmacy. The failure to give proper notice led to a remand and a dismissal in *Kearney v. Board of Registration in Pharmacy*. The Appeals Court found itself unable to determine whether the Board's decision was even accompanied by a statement of reasons, including a determination of the issues of fact and law, since no rules or regulations had been set out in the evidence or the transcript of the Board's proceedings or had been brought to the attention of the superior court. With some exasperation, the Appeals Court "trusted" that the Attorney General would participate in the further proceedings and advise the Board of its burden of proof.

While these three registration board cases indicate that an agency decision based on faulty procedures or regulations will not withstand judicial review, *Gillis v. Mass. Cablevision* suggests that an administrative agency that follows proper procedures and documents its case often meets with success on appellate review. In *Gillis*, the views of the intervenor, the Community Antenna Television (CATV) Commission, were relied upon heavily in the Supreme Judicial Court's interpretation of the 1971 law establishing regulation of cable television insofar as that law applied to pre-existing licenses. This interpretation was central to the *Gillis* decision since the superior court judge had ruled that the defendant's license, which had been issued prior to the passage of the 1971 legislation, was not a license within the meaning of that legislation's grandfather clause. The Commission's documentation of practices prior to the effective date of the 1971 statute and its interpretation of the grandfather clause were dispositive of the case. The Court stated that it thought the Commission's interpretation was a permissible one and adopted it. Moreover, Justice Kaplan, concur-

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23 *Id.* at 2, 340 N.E.2d at 510.
25 *Id.* at 46, 340 N.E.2d at 518.
26 *Id.* at 43-44, 340 N.E.2d at 516-17.
27 *Id.* at 45, 340 N.E.2d at 517.
29 G.L. c. 166A, § 1 *et seq.*
31 *Id.* at 166, 340 N.E.2d at 875.
§1.4 STATE AND LOCAL GOVERNMENT

ring, agreed with the result apparently solely on the basis of the Commission's reading of the law. Justice Kaplan took the position that:

Left without the aid of such a judgment on the part of the regulatory agency, I am frank to say I would be reluctant to [come to the conclusion of the case]. That interpretation . . . is, however, a permissible one textually, and I am bound to pay attention to the views of a commission presumptively knowledgeable in the field and charged with protecting the public interest.32

The lesson for administrative agencies from the Survey year is clear. If an agency's decision affecting individual rights is not based on clearly stated reasons, pursuant to proper rules and regulations, it will be quickly reversed and chastised. On the other hand, if the agency's decision is a reasoned exposition of its position and is based on reasonable statutory interpretation and properly drafted regulations, it is likely to fare well on judicial review.

§ 1.4. Conflict of Interest. There seems to be a never ending series of cases concerning the rights of elected municipal employees to participate in activities that have direct or indirect effects on them or members of their immediate family.1 In Graham v. McGrail,2 the Supreme Judicial Court again interpreted the Commonwealth's conflict of interest law.3 The conflict in Graham concerned the role a school committee member should play in formulating the school budget when a member of his immediate family is an employee of the town's school department.4 Two of the five members of the school committee had children who were teachers in the system, and a third member had a son employed in the maintenance department.5

The Court initially commended the plaintiff, who was one of the two members of the school committee who did not have a family member employed by the school department, for seeking declaratory relief, noting that the plaintiff could have brought a criminal

32 Id. at 171, 340 N.E.2d at 876.


3 G.L. c. 268A, § 19(a). This section provides:
[A] municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.


5 Id. at 1002-03, 345 N.E.2d at 890.
complaint. In this context, the Court stated that "[i]n such a situation it may well be the part of wisdom for a responsible official to seek judicial clarification without subjecting his colleagues to the hazard and discomfort of criminal litigation." Turning then to the key statutory language, section 19(a) of chapter 268A of the General Laws, the Court noted that it prohibits a municipal employee from "[participating] as such an employee in a particular matter in which to his knowledge ... his immediate family ... has a financial interest." The Court interpreted "participating" to include more than the act of voting. It also found that presiding over a vote and participation in the formulation of a matter to be voted on was participation within the meaning of the statute. Moreover, the Court stated that such a person cannot be counted in order to make up a quorum. The Court advised persons in a conflict situation that the wise course is to leave the room. If a majority of a body is disqualified, however, the Court suggested that, depending on the circumstances, several alternative courses of action are available: (1) to participate despite disqualification under a rule of necessity; (2) to decide without a quorum; or (3) to decide that the body lacks power to make a decision. However, the Court expressly did not reach a decision as to possible alternatives in the Graham case due to its interpretation of the statute's scope. The Court held that where, as in the Graham case, it was possible to give separate consideration to particular budget items, the particular member whose immediate family member has a financial interest must withdraw during consideration of that item. In so concluding, the Court stated:

The school committee must give separate consideration to particular budget items. Once an item has been approved by a majority vote of a qualified quorum, it may be included in a consolidated vote on part or all of the budget, and a member who withdrew during the separate consideration may participate in the consolidated vote, unless there is reconsideration of the item separately considered.

The rule of procedure set forth in Graham makes eminent sense and ought to resolve future conflict issues which are very common on local boards and commissions. However, one aspect of the opinion is troubling. The Court noted that both the language and policy of section 19(a) prohibit a member from participating in the decision when his child's private right is directly and immediately concerned, "at

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6 Id. at 1006-07, 345 N.E.2d at 891.
7 Id. at 1007, 345 N.E.2d at 891.
8 G.L. c. 268A, § 19(a).
10 Id., 345 N.E.2d at 891-92.
11 Id. at 1009, 345 N.E.2d at 892.
12 Id. at 1012, 345 N.E.2d at 893.
13 Id.
least if there is any controversy over the decision."\(^{14}\) This caveat is troubling in that it suggests that it may be permissible to vote on these matters, but as soon as anyone raises the issue, the member had better immediately stop all participation in the matter and the leave the room. This opinion could lead to some amusing confrontations in municipal buildings on cold winter nights.

§ 1.5. **Powers of Local Governments: Home Rule Amendment.**

The powers of local governments under the Home Rule Amendment\(^1\) and their powers vis-a-vis state and federal statutory and constitutional requirements were dealt with in a series of cases during the Survey year. In *Board of Selectmen of Braintree v. Town Clerk of Braintree*,\(^2\) the Supreme Judicial Court clarified the difference between the two methods provided for in the Home Rule Amendment for amending a town's charter. One method is for the town to petition the General Court for an amendment.\(^3\) The second method is for the town to create a charter commission to report amendments to the town's voters for their approval.\(^4\) The Braintree selectmen opposed a

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\(^{14}\) *Id.* at 1011, 345 N.E.2d at 893.

§1.5. 1 **MASS. CONST. amend. art. II, § 1 et seq.**


\(^3\) **MASS. CONST. amend. art. II, § 8.** Section 8 provides:

The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or establish with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election; provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three.

\(^4\) *Id.*, §§ 3, 4. Section 3 provides:

Every city and town shall have the power to adopt or revise a charter in the following manner: A petition for the adoption or revision of a charter shall be signed by at least fifteen per cent of the number of legal voters residing in such city or
law, passed after the town meeting had approved the filing of a home rule petition with the General Court, which law increased the membership of the board from three to five. They argued that the provisions of section 4 of the Home Rule Amendment,\(^5\) providing that

town at the preceding state election. Whenever such a petition is filed with the board of registrars of voters of any city or town, the board shall within ten days of its receipt determine the sufficiency and validity of the signatures and certify the results to the city council of the city or board of selectmen of the town, as the case may be. As used in this section, the phrase "board of registrars of voters" shall include any local authority of different designation which performs the duties of such registrars, and the phrase "city council of the city or board of selectmen of the town" shall include local authorities of different designation performing the duties of such council or board. Objections to the sufficiency and validity of the signatures on any such petition as certified by the board of registrars of voters shall be made in the same manner as provided by law for objections to nominations for city or town offices, as the case may be.

Within thirty days of receipt of certification of the board of registrars of voters that a petition contains sufficient valid signatures, the city council of the city or board of selectmen of the town shall by order provide for submitting to the voters of the city or town the question of adopting or revising a charter, and for the nomination and election of a charter commission.

If the city or town has not previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to frame a charter for (name of city or town)?" If the city or town has previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to revise the charter of (name of city or town)?"

The charter commission shall consist of nine voters of the city or town, who shall be elected at large without party or political designation at the city or town election next held at least sixty days after the order of the city council of the city or board of selectmen of the town. The names of candidates for such commission shall be listed alphabetically on the ballot used at such election. Each voter may vote for nine candidates.

The vote on the question submitted and the election of the charter commission shall take place at the same time. If the vote on the question submitted is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.

Within ten months after the election of the members of the charter commission, said commission shall submit the charter or revised charter to the city council of the city or the board of selectmen of the town, and such council or board shall provide for publication of the charter and for its submission to the voters of the city or town at the next city or town election held at least two months after such submission by the charter commission. If the charter or revised charter is approved by a majority of the voters of the city or town voting thereon, it shall become effective upon the date fixed in the charter.

Section 4 provides:

Every city and town shall have the power to amend its charter in the following manner: The legislative body of a city or town may, by a two-thirds vote, propose amendments to the charter of the city or town; provided, that (1) amendments of a city charter may be proposed only with the concurrence of a mayor in every city that has a mayor, and (2) any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager shall be made only by the procedure of charter revision set forth in section three.

All proposed charter amendments shall be published and submitted for approval in the same manner as provided for adoption or revision of a charter.

\(^5\) Id., \S 4.
charter changes relating to membership on the board of selectmen could only be made by the charter revision procedure provided in section 3 of the Amendment,6 operated to prevent the town from making the change in board membership by the home rule petition procedure.7 The Court rejected the claim, noting that although section 4 provides procedures through which the town could have amended its charter without resort to the General Court, it does not restrict the General Court's power to act under section 8 pursuant to a properly filed home rule petition.8 Section 4 of the Home Rule Amendment “is merely a limit on a power conferred on cities and towns to make law for themselves at the charter level,”9 and not a limitation on the power of the General Court to approve properly filed home rule petitions from cities and towns.

The power of a city council to enact ordinances regulating the conduct of persons on premises licensed for the sale and consumption of alcoholic beverages was upheld by a divided Supreme Judicial Court in City of Revere v. Aucella.10 The Court was presented with two questions: (1) is section 16 of chapter 27 of the General Laws, prohibiting “open and gross lewdness and lascivious behavior”11 unconstitutional as applied to a nude “go-go” dancer in a bar? and (2) can a city council by ordinance regulate such conduct?12 The Court held that section 16 as applied in this case was unconstitutional.13 However, the Court was sharply divided over the issue of whether the city council had the power to enact an ordinance regulating conduct of persons in or on licensed premises. The Court faced two objections to the power of the city council to act: (1) since the power to promulgate such regulations had been granted by statute to the state Alcoholic Beverages Control Commission, the state had preempted the field; and (2) if any local agency has the power to prescribe additional terms and conditions, such as were contained in the ordinance, under which a license may be revoked or denied, it is the city licensing board and not the city council.14 The Court rejected the first argument,15 stating that it had been disposed of in the case of Boston Licensing Board v. Alcoholic Beverages Control Commission.16 As to the second objection, the Court was inclined to agree that since the local licensing board derived its authority from the Commonwealth, it could not be controlled by local ordinances.17 However, the Court went on to note that in the 1973

6 Id., § 3.
8 Id. at 978, 345 N.E.2d at 701.
9 Id. at 979, 345 N.E.2d at 701.
11 G.L. c. 272, § 16.
13 Id. at 3354-5, 338 N.E.2d at 819.
14 Id. at 3356-57, 338 N.E.2d at 819.
15 Id. at 3357, 338 N.E.2d at 819.
case of *Bloom v. Worcester*,¹⁸ it had stated that a municipality may act "unless the state legislation so broadly encompassed the field as to indicate a clear intention to preempt the matter as an area of complete state concern . . . ."¹⁹ The Court found that the state legislation establishing local licensing boards²⁰ was not so encompassing as to preempt the area.²¹ The Court noted that while local licensing boards do have regulatory power, their responsibilities are limited to licensing: criminal enforcement of local regulations is the responsibility of others, and there is no provision for licensing board enforcement against persons other than a licensee.²² Further noting that the challenged ordinance was enforceable only by fines and not by suspension of the license, the majority concluded that the ordinance was not "inconsistent with . . . laws enacted by the general court,"²³ and therefore it could withstand the test for invalidity under section 6 of the Home Rule Amendment.²⁴

Justice Kaplan, in a dissent in which Chief Justice Tauro joined, argued that the city council should be held to be without power to enact the ordinance.²⁵ He believed that the subject matter had been given by the provisions of the alcoholic beverages control laws to both the Alcoholic Beverages Control Commission and the local licensing commission.²⁶ Indeed, he noted that the challenged ordinance was nearly identical to one sustained as proper under the authority of the licensing board in *Boston Licensing Board v. Alcoholic Beverages Control Commission*²⁷ as a "reasonable requirement" with respect to the conduct of business by a licensee.²⁸ Justice Kaplan found support for his argument that the city council lacked the power to pass the ordinance in the fact that the ordinance entered the field of censorship.²⁹ In such cases, he reasoned, a clear warrant of authority to legislate should be demanded. In his view, there was no such warrant. Finally, Justice Kaplan would have found the ordinance unconstitutional on its face under the Declaration of Rights of the Massachusetts Constitution—a claim not disposed of in the *Boston Licensing Board* case.³⁰

*Aucella* is likely to significantly expand the lawmaking power of local authorities, even in areas as constitutionally sensitive as obscenity. A

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¹⁹ *Id.* at 156 n.15, 293 N.E.2d at 281 n.15.
²² *Id.* at 3360, 338 N.E.2d at 820-21.
²³ *Id.* at 3361, 338 N.E.2d at 821.
²⁴ *MASS. CONST.* amend. art. II, § 6.
²⁶ *Id.*
²⁸ *Id.* at 1618, 328 N.E.2d at 853.
³⁰ *Id.* at 3366-67, 338 N.E.2d at 823.
majority of the Court apparently is willing to allow local authorities to enact ordinances or by-laws unless there is a clear legislative determination that the field is intended to be exclusively occupied by the state.

Another confrontation between a city council and a local authority whose powers are derived from the state was resolved in Board of Health of North Adams v. Mayor of North Adams. On January 2, 1969, the state deputy commissioner of public health had notified the North Adams board of health that the fluoride content of the city’s public water supply was below optimum level. In response, the North Adams board of health approved an order to augment the fluoride content in the city’s water supply. This order was then published in the local newspaper. In the November 2, 1971 city election, the citizens of North Adams approved this order. Subsequently, the board of health sought funds from the mayor and city council to implement its order. When the council refused to appropriate the funds, litigation ensued.

Resolution of the litigation turned on the Supreme Judicial Court’s interpretation and reconciliation of a then relevant state statute, section 8C of chapter 111 of the General Laws, with section 50 of chapter 43 and section 31 of chapter 44 of the General Laws. Section 8C at that time set forth the procedures for instituting water fluoridation. These procedures were followed by the state and North Adams health departments. Section 50 vests the power to appropriate funds in the city council, and section 31 provides that “[n]o department . . . of any city or town, except Boston, shall incur a liability in excess of the appropriation made for use of such department, each item recommended by the mayor and voted by the council in cities . . . being considered as a separate appropriation.” The Court found that these laws were reconcilable. It noted that the Commonwealth can order a municipality to pay out funds for public purposes required by state law. The test in each case is “whether the state enactment is fairly to be read as intending to require municipal outlay. If it is, the arrangement of municipal functions under the city charter or town government can have no effect on the result.” Furthermore, the Court stated that while section 31 of chapter 44 of the General Laws is an important control on irresponsible spending by local governments, “its...
function is not to bar local spending that is required by a valid state program." They turned then to the question of whether section 8C mandated local spending, the Court held that it did, reasoning that the purpose of the statute would be defeated if it were not interpreted to comprehend the power to compel appropriation. Thus, the Court viewed the board of health as a state agent with derivative power to compel funding for the particular purpose of fluoridation.

Dissenting, Justice Quirico stated that the board of health in this case had been given the same type of fiscal autonomy enjoyed by school committees. He pointed out, however, that while the school committee autonomy is based on an express statute, the fluoridation statute lacked an express command to municipalities to provide funds for fluoridation when requested by the local board of health. The North Adams decision should warn local officials that when the General Court delegates powers to local boards and commissions to implement state policy, appropriations by local authorities may be required even without their consent.

Two final cases concerning the power of cities to enact ordinances show that the Supreme Judicial Court will not hesitate to step in and invalidate that which is inconsistent with a state policy or which tramples on constitutional rights. In New England Telephone & Telegraph Co. v. City of Lowell, the telephone company challenged a city ordinance requiring that permits for street and engineering work in the city be approved by a registered land surveyor and/or registered professional engineer. The telephone company argued that its employment of independent registered land surveyors and professional engineers, as required by the ordinance, was unnecessary, since it had its own engineers and was regulated by the state Department of Public Utilities. The Court found that section 25 of chapter 166 of the General Laws, which authorizes cities to establish regulations governing the erection and maintenance of telephone, telegraph, and television lines, does not prevail over section 81R(1) of chapter 112 of the General Laws, which exempts engineers and land surveyors from the requirements of licensing if they perform engineering work for a firm subject to the

42 Id.
43 Id. at 2725-26, 334 N.E.2d at 42.
44 Id. at 2727, 334 N.E.2d at 43.
45 Id. at 2730, 334 N.E.2d at 44.
46 G.L. c. 71, § 34.
48 Compare City of Marlborough v. Cybulski, 1976 Mass. Adv. Sh. 1038, 1041, 346 N.E.2d 716, 717, where the Court found that G.L. c. 44, § 31 barred payment by the city to an architect of a sum, authorized by an arbitration award, which was in excess of the amount appropriated by the city for payment of the obligations incurred under such contract. Mr. Justice Quirico wrote for the Court.
50 Id. at 612, 343 N.E.2d at 406.
51 Id. at 613-14, 343 N.E.2d at 406-07.
jurisdiction of the Department of Public Utilities. \(^{52}\) Stressing the importance of uniformity of standards applicable to regulated utilities, the Court found that the burden for the company created by the Lowell ordinance was inappropriate. \(^{53}\) Thus, in this case, unlike in the Aucella case, the Court found that the regulatory program set forth in the state laws licensing engineers \(^{54}\) was quite comprehensive, the exemption for engineers employed by companies regulated by the Department of Public Utilities was an integral part of that statutory scheme, and the city's ordinance was an impermissible interference with a statutory plan that was quite clear. \(^{55}\)

In the final case reviewed during the Survey year, City of Fitchburg v. 707 Main Corp., \(^{56}\) the Supreme Judicial Court showed little patience with a city ordinance that allowed the mayor to grant licenses for the showing of motion pictures. \(^{57}\) The ordinance provided that the mayor could impose conditions upon the license relating to the public safety, health, or order, but it provided no objective standards to limit the mayor's discretion in selecting the policies to be followed in granting or denying applications. \(^{58}\) The Court noted that the words safety, health, and order might be upheld where there is no evidence that the statute has been administered in an unfair or discriminatory manner. \(^{59}\) The facts of the case, however, showed that neither the mayor nor the city knew what standards should be met or that any were established. \(^{60}\) Therefore, since there was ample indication of arbitrary and capricious administration of the ordinance, the Court held that it was void for vagueness both on its face and as applied. \(^{61}\)

\(^{52}\) Id. at 617, 343 N.E.2d at 407.

\(^{53}\) Id. at 615, 343 N.E.2d at 407.

\(^{54}\) G.L. c. 112, §§ 81D-81T.


\(^{57}\) Id. at 492 n.2, 343 N.E.2d at 151 n.2.

\(^{58}\) Id. at 497, 343 N.E.2d at 153.

\(^{59}\) Id. at 498, 343 N.E.2d at 153.

\(^{60}\) Id. at 498-99, 343 N.E.2d at 153.

\(^{61}\) Id. at 499, 343 N.E.2d at 154.