Chapter 6: State and Local Government

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CHAPTER 6

State and Local Government

JOHN W. DELANEY*

§6.1. Powers of Local Governments: Home Rule Amendment. The division of powers between the Commonwealth and its cities and towns has been a source of litigation throughout the history of Massachusetts. Since the passage of the Home Rule Amendment, designed to give greater autonomy to the cities and towns while reserving major powers to the Commonwealth, there has been a series of cases which draw the sometimes fine lines between what powers communities have and what powers are reserved to the Commonwealth. The tension between the local control and the state's legislative power was apparent in Town of Hadley v. Town of Amherst.

In that case, the Court rejected Hadley's petition for a declaratory judgment voiding a 1912 legislative act which authorized the Town of Amherst to operate a sewer system and take or acquire lands, rights of way and easements in both Amherst and Hadley. Hadley asserted that the act of Amherst's first action under the 1912 statute occurred in 1913 when it made the original taking necessary for the sewer system construction. In 1939, it constructed a sewage disposal plant on land conveyed by Massachusetts State College (now the University of Massachusetts) pursuant to legislative enactment by Acts of 1938, c. 454. In 1963, Amherst constructed a new sewer main on Hadley land, but controversy was avoided through successful negotiations. In 1972, the legislature authorized the university to convey additional land to Amherst for expansion of the 1939 plant. Acts of 1972, c. 726. 1977 Mass. Adv. Sh. at 342 n.2, 360 N.E.2d at 625 n.2.

The plaintiff argued that the two legislative acts subsequent to the original 1912 statute "would be superfluous if Acts of 1912, c. 484 was a continuing grant of authority." Thus,

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§ 6.1.
1 Mass. Const. amend. art. LXXXIX.
3 Id. at 345, 360 N.E.2d at 626.
4 Amherst's first action under the 1912 statute occurred in 1913 when it made the original taking necessary for the sewer system construction. In 1939, it constructed a sewage disposal plant on land conveyed by Massachusetts State College (now the University of Massachusetts) pursuant to legislative enactment by Acts of 1938, c. 454. In 1963, Amherst constructed a new sewer main on Hadley land, but controversy was avoided through successful negotiations. In 1972, the legislature authorized the university to convey additional land to Amherst for expansion of the 1939 plant. Acts of 1972, c. 726. 1977 Mass. Adv. Sh. at 342 n.2, 360 N.E.2d at 625 n.2.

The plaintiff argued that the two legislative acts subsequent to the original 1912 statute "would be superfluous if Acts of 1912, c. 484 was a continuing grant of authority." Thus,
was in any event invalid as to Hadley because of the subsequent passage of the Home Rule Amendment. Hadley argued that the 1912 act was a "special law relating to individual cities or towns" within the meaning of section 9 of the amendment, which provides that such "special" laws will "have the force of an existing town charter." Thus, Hadley contended that section 9 limited the force and effect of the 1912 act to that enjoyed by a town by-law, effective only within Amherst itself.

The Court disagreed, holding that the act was not a "special law" within the meaning of section 9, but rather a general law within the power of the legislature to enact in relation to cities and towns under section 8 of the Home Rule Amendment. Section 8 provides that 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 (towns) not fewer than two." The Court noted that the words "in relation to cities and towns" do not prevent the legislature from "acting on matters of State, regional, or general concern, even though such action may have special effect upon one or more individual cities or towns." It then found that, "like water supply which was stated to fall within the ambit of retained legislative power in Opinion of the Justices, 357 Mass. 831, 835 (1970), sewer systems, with their effect on water quality in a particular area, are a matter

Hadley argued, the subsequent enactments indicate that "the legislature did not intend St. 1912, c. 484, to be a grant of continuing power." 1977 Mass. Adv. Sh. at 345-46, 360 N.E.2d at 626.

The Court rejected this contention. With regard to the first subsequent enactment, Acts of 1938, c. 454, the Court observed that it contained a reference to Acts of 1912, c. 484, leading to the conclusion that both acts could stand in harmony. Although the second subsequent act, Acts of 1972, c. 726, contained no such reference, the Court found that the authority to take University of Massachusetts property was not enumerated in the original legislation, and "[l]ater enactments would be required to allow Amherst to obtain lands from the University which the town was not authorized to take under the original" 1912 enactment and the subsequent 1938 and 1972 enactments result in "a harmonious body of law." 1977 Mass. Adv. Sh. at 346, 360 N.E.2d at 626.

* Id. at 343, 360 N.E.2d at 625.
* Id. Section 9 of the Home Rule Amendment provides:
All special laws relating to individual cities or towns shall remain in effect and have the force of an existing city or town charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four [of the Amendment] and shall be subject to amendment or repeal by laws enacted by the general court in conformity with the powers reserved to the general court by section eight [of the Amendment].

MASS. CONST. amend. art. LXXXIX, § 9.

* Id. at 345, 360 N.E.2d at 626.
* Id. at 344, 360 N.E.2d at 626.
* Id. at 344-45, 360 N.E.2d at 626.

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§6.2 of State, regional, or general concern, and thus an area in which the legislature retained law-making authority." Thus, the Court concluded that the 1912 act was unaffected by the provisions of the Home Rule Amendment.12

§6.2. Intercommunity Contracts—Notice Provision of Chapter 40A. In Town of East Longmeadow v. City of Springfield1 the Appeals Court held that the 60 day notice provisions of section 4A of chapter 40A2 are inapplicable to intercommunity service agreements made pursuant to earlier special acts. Springfield had sold water to East Longmeadow since 1913 by authority of a 1912 special act which required an agreement as to terms between the two communities. The 1913 rate had been increased several times without a written agreement or objection from East Longmeadow.1 When Springfield increased the rate in 1973, however, East Longmeadow objected. East Longmeadow contended that Springfield had not complied with section 4A, which requires a 60 day notice of termination of agreements between two communities to perform or provide joint services. Dismissing this contention somewhat summarily, the Appeals Court stated that "[t]here is nothing in § 4A which, either by specific language or by implication, indicates that that section was intended to supercede the provisions of any earlier special act." Thus, the 60 day notice period required by section 4A "was not present in the [special act], and was not operative as to the present situation." In so concluding, the court cited an earlier case in which the Supreme Judicial Court affirmed the proposition that "[a] statute is not to be deemed to supercede a prior statute in whole or in part in the

11 Id. at 345, 360 N.E.2d at 626.
12 Id.

§ 6.2.
2 G.L. c. 40A, § 4A provides in pertinent part:
   Any governmental unit, as hereinafter defined, may enter into an agreement with one or more other governmental units to perform jointly or for such other unit or units any service, activity or undertaking which each contracting unit is authorized by law to perform, if such agreement is authorized by law to perform, if such agreement is authorized by each party thereto, in a city by the city council with the approval of the mayor and in a town or district by a town or district meeting . . . . Any such agreement may be terminated by any party thereto at the end of the fiscal year if such termination is authorized by the terminating unit in the manner foresaid; provided that the notice of such termination is given to each other party to the agreement at least sixty days prior to the date of termination. . . .
   The words "governmental unit" as used herein shall mean a city or town, a regional school district, or a district as defined in section one A (emphasis added).
4 Id. at 226-27, 359 N.E.2d at 1322.
5 Id.
6 Id. at 329, 359 N.E.2d at 1323.
absence of express words or clear implication."

Even given the courts' traditional reluctance to deem one statute as overriding a prior statute, however, the court could reasonably have determined that section 4A "by clear implication" modified the authority to contract found in the special act of 1912. A sufficient basis for such a determination could have been the facial intent of section 4A to apply precisely to the kind of agreements authorized by the prior special act. Moreover, a finding by clear implication of an intent to modify agreements pursuant to the earlier special act would have been supportable in light of the immateriality, for purpose of the policies of fair dealing underlying the notice provision of section 4A, of any distinction between intergovernmental contracts made pursuant to earlier special acts and those not so made. Thus, the holding of *East Longmeadow* appears questionable.

§ 6.3. Limitations on Municipal Action: Conditions on Zoning Permits: Home Rule Amendment. In *Middlesex and Boston Street Railway Co. v. Board of Aldermen of Newton*, the Board of Aldermen ("Board"), acting as the special permit-granting authority under the Newton zoning ordinance, granted the plaintiff a special permit to erect a garden apartment complex. However, several conditions were attached to the permit, one of which ("condition 8") was that five of the 54 units to be constructed were to be reserved, for a period of five years, for the subsidized lease program of the Newton Housing Authority. Apartments reserved for that program were, in turn, to be leased to low income families or low income elderly.

The Supreme Judicial Court held that the Board did not have the power to impose condition 8. The Court first rejected the city's claim that the Home Rule Amendment ("Amendment") reserved such power in municipalities. In rejecting this claim, the Court found that the Zoning Enabling Act ("Act") constituted an occupation of the field by the legislature which "negate[d] any implied power of the municipality in the same area." In so finding, the Court reasoned that the Act consti-

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8 Inspector of Bldgs. of Falmouth v. General Outdoor Advertising Co., Inc., 264 Mass. 85, 89 (1928). An alternative holding of *Town of East Longmeadow* was that c. 40A, § 4A was inapplicable because there was no existing water-supply contract between East Longmeadow and Springfield. Rather, the court endorsed the trial court's finding that the original contract had not been renewed. Thus, with no contract in effect, the provisions of G.L. c. 40, § 4A did not apply.

§ 6.3.
2 Id.
3 Id. at 232, 359 N.E.2d at 1280.
4 Id.
5 Id. at 240, 359 N.E.2d at 1283.

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tuted an exercise of the legislature's reserved powers to enact general laws pursuant to the Amendment. Moreover, the Court implied, the comprehensiveness and general applicability of the Act required the conclusion that it occupied the field.

Having concluded that the Amendment did not reserve in the City of Newton the power to impose condition 8 upon developers, the Court reasoned further that even if the city had such power, it could not be exercised by the Board acting as a special permit-granting authority pursuant to section 4 of the Act. Rather such power could be exercised only by the Board acting in its capacity as the city's legislative body.

Having rejected the Board's Home Rule Amendment related contentions, the Court turned to and rejected what it characterized as the Board's "principal argument," one based on "broad considerations of public welfare." The Board had contended that by imposing condition 8 upon a developer, the Board was furthering a policy of providing housing for low income and elderly persons; and that the furthering of such a policy was both constitutionally permissible and consistent with the Commonwealth's statutory scheme in the housing sphere. The Court agreed that municipalities could act in various ways to further housing for low income and elderly persons. Thus, for example, the Court noted that municipalities could, in the manner provided by law, expend public funds to further such a purpose. However, the Court held that

the administrative board authorized to pass on application for special permits under the zoning ordinance is without power to make the important policy decisions involved in committing a municipality to a program of public housing for low income or elderly persons, and . . . the board may not exact or compel a contribution to the cost of such a program from applicants for special permits.

The Court in Middlesex & Boston Street Railway Company has set important limits on the utilization of a municipality's special permit-granting authority as a vehicle for the furtherance of legitimate and statutorily recognized social policies. Moreover, the Court's general language in rejecting the Board's "home rule" argument, to the effect that zoning legislation "occupied the field," may imply a somewhat broader limitation on a municipality's use of the zoning power to further social

\[\text{\textsuperscript{4} Id. at 238-39, 359 N.E.2d at 1282-83. See MASS. CONST. amend. art. LXXXIX, § 8.}\]
\[\text{\textsuperscript{5} Id. at 239, 359 N.E.2d at 1283.}\]
\[\text{\textsuperscript{6} Id.}\]
\[\text{\textsuperscript{7} Id. at 240, 359 N.E.2d at 1283.}\]
\[\text{\textsuperscript{8} Id. at 240-41, 359 N.E.2d at 1283-84.}\]
\[\text{\textsuperscript{9} Id. at 241, 359 N.E.2d at 1284.}\]

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goals. Clarification of the scope of such a limitation, however, has been left to future cases. In any event, that express and implied limitations on the use of the zoning power do not preclude municipalities from acting in other ways to further social goals is highlighted by the Court's reaffirmance of the power of municipalities to legislate so as to provide adequate housing for elderly and low income persons.\footnote{For a further discussion of this case, see Huber, Zoning and Land Use, infra, § 15.2, at 308-12.}

§6.4. Separation of Powers: Power of Superior Courts: Pay Increases for Court Personnel. During the Survey year, the Court upheld the statutory power of the judges of the superior court to provide for pay increases for court personnel even in the absence of a legislative appropriation for such increases. At the same time, the Court indicated that before ordering such pay raises the superior court judges should consider carefully the financial problems of the counties involved. In County Commissioners v. Superior Court,\footnote{1976 Mass. Adv. Sh. 2746, 358 N.E.2d 443 (1976).} the superior court judges voted to grant the court stenographers a cost of living raise, contingent on the passage of a legislative act granting a similar increase to certain other county employees. The raises were to be retroactive.\footnote{Id. at 2747-48, 358 N.E.2d at 444-45.} After passage of that act, the judges ordered the county commissioners for the various counties to raise the annual salaries of the court stenographers.\footnote{Id. at 2748, 358 N.E.2d at 445.} The commissioners refused to pay the increase, contending that they could not lawfully comply with the increase order because the legislature had not appropriated funds to cover the increase. The commissioners further contended that the inherent power of courts to provide for reasonably necessary expenditures does not include the power to order retroactive pay increases for their personnel. The commissioners then sought a declaratory judgment from the Court determining the legal effect of the order to pay the salary increases.\footnote{Id. at 2748, 358 N.E.2d at 445.}

The Court concluded that the commissioners were obliged to pay the ordered increase despite the lack of prior appropriation.\footnote{Id. at 2747, 358 N.E.2d at 445.} The Court noted that section 91 of chapter 221 of the General Laws gives the justices of the superior court power to establish the salaries of its stenographers.\footnote{Id.} Examining section 91, the Court found several reasons for inferring a clear legislative intent to give the judges of the superior court exclusive power to determine pay increases for court personnel. First, the Court indicated that where the legislature has intended to limit

\footnote{\textsuperscript{6.4.}}

\textsuperscript{1}\textsuperscript{1976 Mass. Adv. Sh. 2746, 358 N.E.2d 443 (1976).}
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courts' powers to grant salary increases, it has done so expressly.7 Thus, for instance, Supreme Judicial Court reporters' salaries require the prior approval of the Governor; further, the Court clerk's salary is fixed at a certain percent of the salary received by an associate justice.8 Secondly, the Court compared the present section 91 with its predecessor, which provided superior court stenographers' salaries were to be set by statute.9 Thirdly, the Court noted that the language of section 91 is "mandatory, allowing the counties no role in the establishment of salary levels and no choice in the payment of established salaries."10

Having concluded that the superior court judges have plenary power to order increases in stenographers' salaries, the Court nevertheless advised that the superior court judges should "give careful consideration to the fiscal problems of the various counties before ordering pay increases."11 In this case, however, the Court stated that the judges' respect for the problems of county finances was clearly shown in the reasonable size of the increase and the fact that it was contingent on a similar raise for other county employees.12

Finally, the Court considered and rejected the commissioners' argument that payment of the unappropriated increases would violate the county's duty under sections 32 and 34 of chapter 35 not to make expenditures in excess of appropriations.13 The Court reconciled chapter 35 with section 91 of chapter 221. In particular, the Court noted that section 32 of chapter 35 provides that "except as otherwise provided by law," county expenditures may not exceed existing appropriations, and that "[n]o direct drafts against the account known as the reserve fund . . . shall be made, but transfers from said accounts may be made to meet extraordinary or unforeseen expenditures. . . ."14 In light of these provisions, the Court found that in the present case, expenditure in excess of appropriation was justified as required by other law; section 91 of chapter 221.15 Moreover, the Court determined that county reserve funds could be used to meet the salary increases "because a salary increase by order of the judges constitutes an 'unforeseen expenditure'" within the meaning of section 32.16

§6.5. Rights of Public Employees: Arbitration. The growing use of arbitration in public employee disputes was reflected in several cases

7 Id.
8 Id. at 2748-49, 358 N.E.2d at 445.
9 Id. at 2749, 358 N.E.2d at 445-46.
10 Id. at 2748, 358 N.E.2d at 445.
11 Id. at 2749, 358 N.E.2d at 446.
12 Id.
13 Id. at 2750, 358 N.E.2d at 446-47.
14 Id. at 2750-51, 358 N.E.2d at 446-47.
15 Id. at 2751, 358 N.E.2d at 446-47.
16 Id. at 2751-52, 358 N.E.2d at 447.
reported during the Survey year. The Supreme Judicial Court considered various aspects of public employee interest arbitration in School Committee of Boston v. Boston Teachers Union. The source of that case was a long-standing dispute between the school committee ("Committee") and the teachers union ("union") stemming from the parties' failure to resolve their differences in negotiating collective bargaining agreements for the school year 1973-74. The parties had submitted several items of disagreement to interest arbitration. The arbitrator entered an award in favor of the union. In particular, the arbitrator ordered that the administration of a "health and welfare" fund be removed from the control of the Committee and vested in the union; that the Committee grant severance pay to former employees; and that certain remedial reading programs controlled by the Committee be "sufficiently" staffed.

The Committee sought review of the arbitral award in the superior court. The superior court confirmed the award, whereupon the Committee appealed to the Supreme Judicial Court. The Court affirmed. On appeal, the Committee contended that the arbitral award should be vacated on the ground that the arbitrator had exceeded his powers. In particular, the Committee argued that section 9 "interest" arbitration procedures were applicable only to mandatory bargaining matters, and that the award granted by the arbitrator had concerned nonmandatory matters. The Committee based its contention that interest arbitration is limited to mandatory subjects of bargaining on the use of the word "impasse" in the statute. Presumably, the Committee's contention was that an "impasse" can be reached only over matters concerning which the parties are required to bargain by the statute.

On appeal, the Court assumed the matters in dispute to be nonmandatory subjects of bargaining. Thus, the Court examined the Committee's contention that public employee "interest" arbitration proceedings...

§ 6.5.

2 Id. at 1069, 363 N.E.2d at 485-86. In Massachusetts, interest arbitration is governed in part by section 9 of chapter 150E, which provides that:
   Any arbitration award in a proceeding voluntarily agreed to by the parties to resolve an impasse shall be binding on the parties and on the appropriate legislative body and made effective and enforceable pursuant to the provision of [G.L. c. 150C], provided that said arbitration proceeding has been authorized by the appropriate legislative body or in the case of school employees, by the appropriate school committee.

4 Id. at 1074, 363 N.E.2d at 488. G.L. c. 150C, § 11 provides: "(a) Upon application of a party, the superior court shall vacate an award if: . . . (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act prohibited by law."
5 Id. at 1074-75, 363 N.E.2d at 488.
6 Id. at 1075, 363 N.E.2d at 488.
were implicitly limited in scope to include only mandatory subjects of bargaining. Rejecting this contention, the Court held that there was no such limitation in the state's public employee collective bargaining law and affirmed the arbitration awards.\footnote{Id. at 1076, 363 N.E.2d at 489.}

The Court reasoned that the absence of any words confining voluntary interest arbitration to mandatory subjects of bargaining represented a legislative judgment that such arbitration was not so limited.\footnote{Id.} Moreover, the Court found merit in such a legislative judgment, stating that it was reflective of the drafters' "practical good sense."\footnote{Id.} If interest arbitration were to have utility or appeal to the parties and carry out its purpose of avoiding protracted labor strife, the Court reasoned that it must "optimally imitate the range of the negotiation which it supersedes."\footnote{1977 Mass. Adv. Sh. at 1077, 363 N.E.2d at 489.} The Court further observed that in the instant case, the parties had apparently assumed that all the matters voluntarily submitted to "interest" arbitration could in fact be dealt with by the arbitrator. Without this assumption, the Court questioned why the parties would have submitted the items for "interest" arbitration in the first instance.\footnote{Id.} In addition, the Court observed that parties involved in arbitration can voluntarily limit the scope of arbitration by agreement,\footnote{Id. at 1077, 363 N.E.2d at 489.} but that in the instant action the parties had failed to do so.\footnote{Id.}

The Committee argued in the alternative that even if nonmandatory bargaining matters did fall within the statutory "interest" arbitration proceedings, some mandatory matters, including those presented in the instant case, should nevertheless be exempt from interest arbitration "because they are so central to educational policy that a school committee cannot relinquish control over them even with its own consent and even to an impartial arbitrator."\footnote{Id.} The Court recognized this contention to be at the cutting-edge of two conflicting labor law policies: the general policy favoring voluntary arbitration because its presence "will tend to

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The Court similarly found that principles of school committee prerogative and educational policy did not bar the arbitral order that the Committee provide sufficient staffing of an existing remedial reading program. The Committee had contended that this order constituted a curriculum innovation involving educational policy, thus usurping the exclusive prerogatives of the Committee. However, the Court did not view the award as fixing educational policy, but merely as determining the "level of need for the kind of instruction required and providing adequate teaching personnel to meet it."21

In addition, the Court rejected the Committee's contention that the award of severance pay for former teachers was improper as infringing upon the Committee's managerial prerogative. Thus, the Court held that severance pay for former employees was a proper subject of interest arbitration.22

*Boston Teachers Union* clearly reflects the Court's policy of encouraging public employee arbitration. The Court refused to impose artificial
limitations upon the Massachusetts "interest" arbitration statute. Rather, it made clear that the parties involved in interest arbitration proceedings are the sole architects of the arbitral process, and as such can agree to submit both mandatory and nonmandatory arbitration items. But the Court did recognize that, notwithstanding the general presumption of arbitrability, matters which do not primarily involve the employment relationships of the parties, but principally involve basic considerations of educational policy, may be exempt from the arbitrator's concern. The Court refused to elucidate a standard definition of these exempt items, instead adopting a pragmatic case by case approach for this determination.

The scope of judicial review of an arbitrator's findings in public sector labor disputes was considered by the Supreme Judicial Court during the Survey year in Commissioners of Middlesex County v. American Federation of State, County & Municipal Employees Local 414. The case arose from a dispute which followed the discharge of fifteen union members by the county commissioners. The employees were discharged "for leaving their employment (1) without 'punching out,' (2) without permission of their supervisor, and (3) before completing their tours of duty." Another non-tenured supervisor was discharged for allowing the employees to leave without punching out.

Pursuant to a collective bargaining agreement, the union sought arbitration on behalf of the discharged employees. The agreement provided for arbitration of grievances, but stipulated that the "arbitrator shall not have any authority to change, modify or alter any provisions of [the] Agreement nor shall any arbitrator have any authority to impose any obligation upon the County unless clearly required by the application of an express provision of [the] Agreement ...." In addition, the agreement provided for discharge of employees for "just cause," and stated that "just cause" was to be determined by the county unless it could be shown that there was "no reasonable basis for the findings of fact or the decision of the County."

The arbitrator's award directed reinstatement and the county commissioners moved to vacate the award. The motion to vacate was allowed in the superior court, where the judge ruled that "[t]he conclusion of the Arbitrator that the decision of the County to discharge the employees had no reasonable basis because 'progressive discipline' was the appropriate procedure amounts to a substitution of the Arbitrator's judgment for that of the County—this was not authorized by the collective bargaining agreement." On direct appeal, the Supreme Judicial

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22 Id. at 879-80, 362 N.E.2d at 524.
23 Id. at 880, 362 N.E.2d at 524.
24 Id. at 881, 362 N.E.2d at 525.
Court reversed the superior court's judgment and ordered reinstatement of the employees. The Court held "that the arbitrator's decision was within the scope of his authority under the collective bargaining agreement." 27

The Court found that the agreement gave the arbitrator the dual authority to make determinations of (1) whether there was a reasonable basis for the county's findings of fact, and (2) whether there was a reasonable basis for the county's decision to discharge the employees. The Court held that the arbitrator had made these determinations without fraud or bad faith. Thus, "whether or not he substituted his judgment for that of the county, he did not exceed his powers." 28

Local 414 is significant in that it indicates that an arbitral award with a reasonable basis in fact will not be overturned on appeal even if the arbitrator effectively substituted his own judgment for that of the employer. In thus recognizing the broad scope of an arbitrator's authority in public sector grievance arbitration, Local 414 can be viewed as an extension of the private sector scope of review standard to public sector arbitral proceedings.

In a series of private sector cases, the Court has established that few occasions arise permitting judicial interference with arbitral awards. Thus, the Court has held that in the absence of fraud or bad faith, even a grossly erroneous arbitral decision is binding and that there exists no requirement that the arbitrator give a statement of the factual and legal basis for his award. 29 It has additionally held that an arbitral decision based upon an error of law or fact will not, absent fraud, be upset upon review. 30

While the instant case stops short of explicitly extending these principles wholesale to the public sector cases, the brevity of the opinion and its unqualified rejection of the superior court's reversal of the arbitral decision seem clear indications of the Court's protective approach toward public sector arbitration. In particular, this case continues the Court's trend of insulating arbitrator's decisions from judicial interference and upholding the integrity of the public sector arbitral process. Accordingly, Local 414 can be viewed as another judicial step in the development of an independently functioning public sector arbitration system.


27 Id. at 879, 362 N.E.2d at 524.
28 Id. at 881-82, 362 N.E.2d at 525.
Chief of Police of Lexington, the Supreme Judicial Court considered whether police investigative reports were available to the public under the 1973 public records law, G.L. c. 66 § 10. In Bougas, the plaintiffs had been charged with misdemeanors resulting from an incident which had occurred in Lexington. The incident was the subject both of police investigative reports from several neighboring departments whose officers were present at the incident, as well as letters from other citizens about the incident. Plaintiffs sought these files as public records, the request was denied, and they brought suit. The superior court determined that the records were "investigatory materials necessarily compiled out of the public view by law enforcement officials and that the disclosure would prejudice the possibility of effective law enforcement." The court ruled that the police chief had overcome the presumption that the record sought is public and had proved that the reports qualified under the exemption for investigatory materials, contained in G.L. c. 4, § 7, clause 26(f). The Supreme Judicial Court affirmed.

The Court first noted the strong public policy requiring police reports be confidential in order to provide effective law enforcement. The Court recognized that private citizens must be encouraged to report to the police on possible illegal activity and that a lack of confidentiality would discourage them from coming forward. The Court further noted that disclosure of this type of material, even after criminal proceedings were completed, would still be harmful to effective investigation. The Court also ruled that even though portions of the reports had been shown to the editor of the local newspaper and portions of them had been printed, the exemption was not lost. Finally, the Court stated that merely because the plaintiffs were potential criminal defendants, they had no special status under the public records law, which is designed to let any citizen obtain access to public records. Rather the Court pointed out that discovery for a criminal case should "follow normal procedures where its availability lies within the discretion of the trial judge under standards developed by this court." Finally, the Court rejected plaintiffs' argument that the judge must make an in camera inspection of the documents and ruled that the superior court judge was correct in basing his findings and ruling on oral testimony. The Court feared that adopting the plaintiffs' position would cause an inordinate burden upon the already overworked superior court judges. Further, the Court noted that

§ 6.6

2 Id. at 2238, 354 N.E.2d at 875.
3 Id. at 2240, 354 N.E.2d at 876.
4 Id. at 2241, 354 N.E.2d at 877.
5 Id. at 2242, 354 N.E.2d at 877.
6 Id. at 2243, 354 N.E.2d at 878.
the United States Supreme Court's interpretation of the Federal Freedom of Information Act finds in camera inspection "necessary and appropriate in some situations, [b]ut it need not be automatic." While adopting a restrictive view of the scope of the public records law, the Court was very careful to limit its holding to only the police reports and letters from private citizens concerning the incident. There was testimony that the file on the incident in question contained "various other documents and material." The Court remanded the case for a determination of whether any of the other documents came within this or any other exemption, as this issue had not been considered by the superior court.

**STUDENT COMMENT**

§6.7. Elections: Independent Candidate Ballot Access: McCarthy v. Secretary of the Commonwealth. Several months prior to the 1976 general elections, Eugene J. McCarthy and independent candidate for the office of President of the United States, sought to have his name included on the Massachusetts ballot. To that end McCarthy filed nomination petitions with the Secretary of the Commonwealth ("Secretary") as required by section 6 of chapter 53 of the General Laws. Section 6 provides that to be placed on the general election ballot, an independent candidate must file with the Secretary nomination petitions "signed in the aggregate by not less than such number of voters as will equal two percent of the entire vote cast for governor" in the preceding biennial election. At least seven days prior to the final date for filing nomination petitions with the Secretary, the petitions are required to be submitted for signature certification to the local registrars.

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Id. at 2244, 354 N.E.2d at 878.

Id. at 2245, 354 N.E.2d at 878.

Id.

§6.7.


"An independent candidate is one who is not affiliated with a political organization recognized in the Commonwealth as a political party [under G.L. c. 50, §1]." 1977 Mass. Adv. Sh. at 3 n.3, 359 N.E.2d at 294 n.3. See also G.L. c. 53, §§ 48, 48A.


Id. at 4-5, 359 N.E.2d at 295. Independent candidate ballot access is governed by G.L. c. 53, §§ 6-10, 47-48A.

of voters of the municipalities in which the signatures have been
gathered. The certification process requires the local registrars to
check the signatures on the petitions against the names of registered
voters on local official voting lists. Only those names on the petitions
which also appear on the voting lists are certified. After certification
by the registrars, the petitions are returned to the candidate who in
turn files them with the Secretary.

McCarthy submitted approximately 8,000 nomination petitions with
approximately 50,000 signatures to the registrars of voters of some 275
municipalities. After the petitions were certified and returned to
McCarthy, he filed them with the Secretary on July 6, 1976, and on July
8, 1976 was informed that the petitions he submitted contained 2,162
fewer signatures than the 37,096 required by law for access to the No-

vember 1976 ballot. Therefore, the Secretary informed McCarthy that
his name would not be placed on the ballot.

McCarthy immediately filed an objection with the State Ballot Law
Commission ("Commission") seeking review of the Secretary's refusal
to certify his candidacy. The Commission granted a hearing, but
McCarthy requested and was granted a continuance of the hearing date
in order to allow McCarthy's workers time to review the noncertified
signatures. Prior to July 23, 1976, the time of the continued hearing,
McCarthy's workers reviewed some 1,257 noncertified signatures in
three municipalities and concluded that 419 of those signatures should
have been certified initially. At the hearing before the Commission,
McCarthy sought to prove that these signatures should have been certi-
fied and offered to submit expert testimony regarding "the statistical
inferences which could be drawn from the data regarding the projected
Statewide error rate in noncertification." The Commission refused to
admit such evidence and concluded that McCarthy had not submitted
sufficient credible evidence demonstrating that his petitions contained
the required number of certified signatures. Accordingly, the Commis-
sion ordered that McCarthy's name not be placed on the November
ballot.

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McCarthy thereupon brought an action in the superior court pursuant to section 59 of chapter 56 of the General Laws, which gives the superior court and the Supreme Judicial Court general equity jurisdiction to enforce the election laws, including the provisions of chapter 53. This action sought injunctive relief ordering the Secretary to place McCarthy's name on the November ballot. McCarthy also sought a declaratory judgment that he had met the substantive requirements of chapter 53 of the General Laws or, in the alternative, that the Massachusetts nomination by petition system was unconstitutional for failing to provide meaningful judicial review of registrars' certification decisions.

After filing suit in superior court, McCarthy continued rechecking noncertified signatures and by August 26, 1976 had rechecked approximately 10,000 of the total of approximately 15,000 noncertified signatures. On the basis of this rechecking, McCarthy asserted in the superior court hearing that 2,547 noncertified signatures had been certifiable in the first instance. The Secretary had examined the same documents as had McCarthy, and the Secretary stipulated in the superior court hearing that 2,470 signatures were substantially as registered, but not necessarily certifiable.

The superior court ordered McCarthy's name placed on the November ballot, finding that the 2,470 signatures stipulated by the Secretary to be substantially as registered were certifiable in the first instance. In so ordering, the court determined that McCarthy had met the substan-

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21 The other plaintiffs in the action were John H. Stouffer, McCarthy's Vice-Presidential running mate, Michael B. McInerney, an elector for the candidates, and Jay J. Hochberg, a registered voter of the Commonwealth. Id. at 1 & n.2, 359 N.E.2d at 294 & n.2. Throughout this note the plaintiffs will be collectively referred to as McCarthy.

22 Id. at 6, 359 N.E.2d at 296. McCarthy in fact brought two actions which were consolidated for trial. Id. The second action was brought under G.L. c. 30A, § 14, and sought judicial review of the State Ballot Law Commission's decision. Id. It was dismissed by the superior court. Id. at 7-8, 359 N.E.2d at 296.

23 Id. at 6, 359 N.E.2d at 296.

24 Id. at 6-7, 359 N.E.2d at 296. The defendants named were the Secretary of the Commonwealth and John Robinson, chairman of the Boston Board of Election Commissioners. Mr. Robinson was named in both an individual and class representative capacity. The named class was that of all officials charged with performing the certification procedure under G.L. c. 53, § 7 (i.e. the municipal clerks and registrars). 1977 Mass. Adv. Sh. at 6, 359 N.E.2d at 296. Class certification was denied by the superior court, Id. at 6 n.5, 359 N.E.2d at 296 n.5. The Supreme Judicial Court later held that a registrar is not a necessary defendant to such an action. Id. at 14, 359 N.E.2d at 299.

25 Id. at 7, 359 N.E.2d at 296. The task involved approximately 800 hours of work. Id. at 18, 359 N.E.2d at 300-01.

26 Id. at 7, 359 N.E.2d at 296.

27 Id.
tive requirements of chapter 53. Moreover, the court found that the applicable provisions of chapters 53 and 6 were unconstitutional as applied to McCarthy because they denied McCarthy meaningful review of the certification process.

The Secretary then applied to the superior court for a stay pending appeal, which the court denied. When the Secretary filed a similar application with the Supreme Judicial Court, the Court transferred the case to the Appeals Court for a hearing before a single justice. The justice allowed the motion to stay the superior court order, reasoning that the local registrars were necessary defendants in a review of the certification process and that, because the registrars were not joined in the action, the superior court order was not likely to be upheld on appeal.

On application of all the parties, the Supreme Judicial Court granted direct appellate review of the superior court order. The Court affirmed the order and, without opinion, ordered the Secretary to place McCarthy's name on the ballot in time for the November election. Explaining its order in a four to two decision rendered three months after the order's issuance, the Court HELD: that the jurisdiction of the State Ballot Law Commission encompasses only objections to apparently valid nominations, and does not extend to a candidate's objection to the Secretary's refusal to place his name on the ballot on grounds that his papers do not conform to statutory requirements; that an equity action in the superior court is the proper method to obtain review of whether noncertified signatures on nomination petitions should have been initially certified by local registrars; that the only necessary defendant in such a superior court action is the Secretary; and that once an independent candidate has submitted nomination petitions with a total number of signatures exceeding the number required by law, the burden shifts to the Secretary to demonstrate that less than the required number of signatures are in fact certifiable. In addition, the Court indicated that local registrars must certify particular signatures unless they have substantial doubt that the signer was a registered voter eligible to sign.

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29 Id.
30 Id.
31 Id. at 8, 359 N.E.2d at 296.
32 Id.
33 Id.
34 Id.
35 Id. at 1-2, 359 N.E.2d at 294.
36 Id. at 8-12, 359 N.E.2d at 296-98.
37 Id. at 14, 359 N.E.2d at 299.
38 Id.
39 Id. at 23, 359 N.E.2d at 302.
40 Id. at 22, 359 N.E.2d at 302.
Finally, the Court ruled that registrars must provide a reason for rejecting a signature as noncertifiable, and their failure to provide such a reason may be some, although not conclusive, evidence that a signature was certifiable in the first instance.\(^\text{41}\)

The dissent agreed with the majority that an equity action in the superior court is the appropriate method by which to obtain review of local registrars' certification decisions.\(^\text{42}\) However, the dissent concluded that in the superior court action the candidate should have the burden of proving any alleged certification irregularities.\(^\text{43}\) Moreover, the dissent would have held that the local registrars are necessary defendants in the certification review action.\(^\text{44}\)

In holding that the Commission had no jurisdiction over the case, the Court initially noted that the Commission's jurisdiction is controlled by sections 11-12A and 14 of chapter 53 of the General Laws.\(^\text{45}\) The Court found that section 11 grants the Commission jurisdiction to consider objections made with respect to papers filed with the Secretary which appear sufficient to support a valid nomination and which would entitle the candidate to have his name placed on the ballot.\(^\text{46}\) Moreover, the Court noted, section 12 provides that objections to nominations made under section 11 must be sent by the Commission to candidates affected thereby.\(^\text{47}\) This notice provision, the Court reasoned, "clearly contemplates a situation in which a third party objects to a nomination which has been validated by the Secretary."\(^\text{48}\) Taking the language of sections 11 and 12 together, the Court concluded that the Commission has jurisdiction only in cases involving objections to apparently valid nominations.\(^\text{49}\) In cases similar to McCarthy's, in which the candidate's nomination papers are in apparent non-conformity with statutory requirements, the Court held that the Commission does not have jurisdiction.\(^\text{50}\)

In addition to holding that the Commission lacked jurisdiction over the case, the Court found Commission jurisdiction unnecessary in light

\(^{41}\) Id. at 23, 359 N.E.2d at 302.

\(^{42}\) Id. at 30, 359 N.E.2d at 305 (Quirico, J., dissenting).

\(^{43}\) Id.

\(^{44}\) Id. at 31, 359 N.E.2d at 305 (Quirico, J. dissenting).

\(^{45}\) Id. at 8, 359 N.E.2d at 296.

\(^{46}\) 1977 Mass. Adv. Sh. at 9, 359 N.E.2d at 297. G.L. c. 53, § 11 provides in part that "\[w\]hen certificates of nomination and nomination papers have been filed, and are in apparent conformity with law, they shall be valid unless written objections thereto are made. Such objections shall be filed as to state offices with the state secretary . . . . Objections so filed with the state secretary shall forthwith be transmitted by him to the state ballot law commission."


\(^{48}\) Id. at 10, 359 N.E.2d at 297.

\(^{49}\) Id. at 11, 359 N.E.2d at 298.

\(^{50}\) Id. at 12, 359 N.E.2d at 298.
of the availability of an alternate review mechanism. The Court concluded that the appropriate method for obtaining review of certification decisions is to bring an action in the superior court under section 59 of chapter 56 of the General Laws, which grants the court general equity jurisdiction to enforce the election laws. To reach this conclusion, the Court inferred from the section 59 grant of general equity jurisdiction an authorization to the superior court to conduct de novo hearings with respect to certification disputes. Further, the Court emphasized that because no court may order registrars to recheck petitions or to certify previously noncertified signatures, the only relief available to a candidate in McCarthy’s position is an order to the Secretary to place the candidate’s name on the ballot if his petitions are in fact in compliance with statutory nomination requirements. Since the superior court may appropriately grant such relief under section 59, the Court concluded that the equity procedure is the most appropriate mechanism for obtaining review of certification decisions.

Having determined that jurisdiction of the Commission was not only unauthorized by statute but also unnecessary in light of the availability of review in the superior court, the Court then held that the only necessary defendant in the superior court action is the Secretary. In so holding, the Court rejected the argument that an action for review of certification decisions could not be maintained unless the local registrars whose actions are challenged are joined as defendants. The Court reasoned that no purpose would be served by joining the registrars as defendants because of the registrars’ limited role in the certification process. In particular, the Court noted, under section 7 of chapter 53 of the General Laws registrars can review petition signatures only once and are barred from reversing their decisions regarding particular signatures. Moreover, the Court construed section 7 as necessarily implying that no officer, administrative body, or court may order registrars to certify particular signatures. Thus, the Court concluded that the local registrars were not necessary parties, since the superior court could not

51 Id. at 14, 359 N.E.2d at 299.
52 Id. at 12-13, 359 N.E.2d at 298.
53 Id. at 15, 359 N.E.2d at 299.
54 Id. at 13, 359 N.E.2d at 298-99.
55 Id. at 13, 359 N.E.2d at 299.
56 Id. at 14, 359 N.E.2d at 299.
57 Id.
58 Id.
59 Id. at 15-16, 359 N.E.2d at 299.
60 Id. at 15, 359 N.E.2d at 299.
61 Id. The Court’s construction of G.L. c. 53, § 7 was based on an inference taken from the § 7 provision that “[n]ames not certified in the first instance shall not thereafter be certified on the same nomination papers.” 1977 Mass. Adv. Sh. at 15, 359 N.E.2d at 299.
compel them to take action to correct certification errors. In contrast, the Court found, the superior court could effectively eliminate the effects of certification errors by ordering the Secretary to place a candidate’s name on the ballot if the candidate were found to be in compliance with nomination requirements. Therefore, the Court held that the only necessary defendant in the equity review action is the Secretary.

Having thus resolved the issues of jurisdiction and necessary parties, the Court turned to the issue of allocating the burden of proof in the superior court review proceeding. The Court concluded that it is the obligation of the Secretary to demonstrate that an insufficient number of signatures are in fact certifiable. Thus, once a candidate has submitted nomination petitions with a total number of signatures exceeding the number required, he is presumptively entitled to a place on the ballot.

In allocating the burden of proof to the Secretary, the Court was responding to McCarthy’s argument that the Massachusetts nomination by petition system was unconstitutional for failing to provide meaningful review of the registrars’ certification decisions. In order to avoid a direct confrontation with this constitutional challenge, the Court construed the superior court equity review action as affording candidates meaningful judicial review. Meaningful judicial review is available only if the Secretary bears the burden of proving noncertifiability, the Court concluded, because of two factors: first, the stringent time constraints and great number of man-hours involved in the process of rechecking noncertified signatures imposes severe burdens on candidates trying to prove that noncertified signatures were certifiable in the first instance; and, second, the legislature has expressed a preference for nomination once the required modicum of support is demonstrated by a candidate.

Regarding the burdens imposed on the rechecking process, the Court noted that McCarthy workers devoted approximately 800 hours to recheck only sixty percent (approximately 10,000) of the noncertified signatures. Further, the rechecking had to be accomplished in the forty-nine days between the time McCarthy was informed that he had submitted an insufficient number of certified signatures and the date of the
superior court hearing. Because of these time and man-hour strictures, the Court concluded that the candidate’s burden of proving certification error is “difficult in the extreme, if not impossible.”

In addition to finding the candidate’s burden extremely severe, the Court inferred a legislative preference for nomination once a candidate demonstrates the required modicum of support. In inferring such a preference, the Court first noted that the certification process as described in section 7 of chapter 53 of the General Laws contemplates a simple comparison between the signatures on the nomination petitions and the voting lists. The Court then construed a 1971 amendment to section 7 as intended to liberalize the standard employed in the signature comparison. Under prior case law, the standard was that signatures had to conform exactly to the voting lists, or they were noncertifiable. This standard was based on the language of the former section 7 requiring voters to sign petitions with their names “as registered.” The 1971 amendment to section 7, however, had added the words “or substantially as registered,” and had also added a provision stating that signatures omitting or including a middle initial are deemed to be “substantially as registered.” The Court found that these changes were intended to eliminate the exact conformity standard, and thus demonstrated a legislative intent to facilitate signature certifiability. Implicit in this intent, the Court found, was a legislative preference for nomination once the required modicum of support is shown by a candidate.

Given this legislative preference for nomination, and given the severity of the time and man-hour burdens imposed on the signature rechecking process, the Court concluded that it would be unreasonable to place upon the candidate the burden of proving that the registrars had erred. Rather, the Court held that the Secretary has the burden of demonstrating that less than the required number of signatures are in fact certifi-
ble. Thus, the candidate would not be unduly burdened and would receive meaningful review of the certification process.

Impliedly recognizing the potentially heavy administrative onus which its burden of proof holding imposed upon the Secretary, the Court stated: "The Secretary will be aided by our further conclusion that the Legislature did not intend that local registrars be free to reject signatures without giving the reason for such rejection." Thus, the Court stated that local registrars must develop a system whereby reasons for rejection would be indicated on the petition for each noncertified signature. The Court reasoned that a system of shorthand notations could be easily developed. Such a system, the Court indicated, would greatly facilitate review of the petitions by the Secretary. In particular, with the notations in place a comparison of petition and voting list would "immediately indicate whether a signature was validly rejected." As a final measure to improve the certification process, the Court stated that during certification the registrars must certify particular signatures unless they have "substantial doubt" that the signer was a registered voter eligible to sign. In reaching this determination, the Court applied its earlier finding that the 1971 amendments to section 7 were intended to eliminate the prior exact conformity standard for comparing petition signatures and names on voting lists, and thereby to facilitate the certifiability of signatures. This intent, the Court deter-

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\[\text{id.}\]

\[\text{Id.}\] In contrast to the majority opinion, the dissent felt that sections 6-7 of chapter 53 of the General Laws require that the registrars be defendants in any certification review action, \text{id.} at 31, 359 N.E.2d at 305 (Quirico, J., dissenting), and that the candidate bear the burden of proving alleged errors in the certification process. \text{id.} at 29-30, 359 N.E.2d at 305 (Quirico, J., dissenting). The dissent reasoned that because the statutes require candidates to file a certain number of certified signatures with the Secretary in order to be duly nominated, the candidate bears the responsibility of ensuring that the proper number of certified signatures are in fact filed. \text{id.} at 28, 359 N.E.2d at 304 (Quirico, J., dissenting). Therefore, a candidate alleging that signatures were improperly denied certification must prove that allegation in order to meet the requirement of filing the proper number of certified signatures. \text{id.} at 28-29, 359 N.E.2d at 304-05 (Quirico, J., dissenting). Thus, in the dissent's view, the dispute is between the candidate and the registrars, who should be the only necessary parties in the certification review action. \text{id.} at 28-30, 359 N.E.2d at 304-05 (Quirico, J., dissenting).

\[\text{id.}\] The Court envisioned a system in which the most common reasons for rejection would be assigned a shorthand notation symbol. Appropriate symbols would be placed next to the rejected signatures. Failure to so indicate rejection reasons would be some, although not conclusive, evidence that a signature is certifiable. \text{id.}
mired, required the creation of the new "substantial doubt" standard which demands that signatures be certified when a comparison suggests little doubt that the petition signer and the registered voter are in fact the same person.82

I. ANALYSIS OF THE MCCARTHY DECISION

In McCarthy the Supreme Judicial Court resolved a broad range of issues regarding ballot access procedures for independent candidates. That the scope of the opinion was considerably broader than was required to justify the result reached is evident in light of two considerations. First, of the many issues resolved in McCarthy, only two appear to have been dispositive of McCarthy's claim that he was entitled to be placed on the ballot: whether local registrars were necessary defendants, and whether McCarthy or the Secretary bore the burden of proof as to the certifiability of petition signatures. The other issues addressed by the Court were not dispositive of McCarthy's claim.83 Second, even as to one of the dispositive issues, that of the burden of proof, the Court could have rested its holding on narrower grounds.

To some extent, the breadth of the opinion is justified since several of the holdings in McCarthy are consistent with the legislative intent behind the election laws,84 and the Court has provided needed guidance in the area. Nevertheless, with regard to other of the holdings, such as that concerning the burden of proof, grounds for criticism emerge when the breadth of the opinion is viewed in conjunction with the somewhat questionable basis in legislative intent for those holdings.85 More particularly, the opinion gives rise to the question whether the Court exceeded its proper role by resolving issues appropriately reserved for the legislature.86

In its burden of proof holding, the Court broadly concluded that the burden of proof as to signature certifiability is on the Secretary in all cases in which the candidate's total number of signatures exceeds the

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82 Id. at 22, 359 N.E.2d at 302.
83 It was unnecessary for the Court to address the issues of the State Ballot Law Commission's jurisdiction and the appropriateness of holding judicial review of registrars' certification decisions in an equity action in the superior court. Neither party nor the dissent argued that the action then in front of the Court had improperly begun in the superior court. Further, after placing the burden of proof on the Secretary and thereby guaranteeing McCarthy a place on the ballot, the Court's dicta regarding the signature certification process was mere surplusage, and did not affect the outcome of the case. On the other hand, these holdings do provide needed guidance for all parties concerned with ballot access.
84 See notes 108-111 infra.
85 See text at notes 97-107 infra.
86 See note 106 infra.
number required by section 6 of chapter 53. However, in another part of the opinion the Court signalled that the burden of proof issue could have been decided on a narrower basis. Specifically, in purporting to apply its newly-announced standards to McCarthy's claim, the Court stated that "[t]he burden of proof was on the Secretary . . . to rebut the presumption of validity created by his stipulation [that 2,470 of the contested signatures were 'substantially as registered']." Thus, the Court indicated that it could have upheld McCarthy's claim on the narrow basis that the burden of proving noncertifiability shifts to the Secretary when the candidate files the required number of signatures which the Secretary and the candidate stipulate to be "substantially as registered." 

Analysis of the McCarthy opinion suggests not only the availability of a narrower alternative to the Court's resolution of the burden of proof issue, but also the desirability of a narrower resolution of that issue. Specifically, the Court's reasoning in inferring a "legislative preference" for nomination once the required number of petition signatures is submitted appears unpersuasive. The Court based this inference solely on an overly broad interpretation of the legislature's intent in enacting the 1971 amendment to section 7 of chapter 53. That amendment, as previously indicated, liberalized the standard to be employed for signature certification by requiring that, to be certifiable, petition signatures must be signed "as registered or substantially as registered." Thus, the amendment was aimed narrowly at the issue of certification criteria, and did not alter the law regarding the other requirements necessary for an independent candidate nomination.

Given the pointedly narrow scope of the 1971 amendment, the Court's interpretation of the amendment as expressive of a "legislative preference" for nomination once the required number of signatures is submitted appears unjustified. Indeed, since there was no legislative guidance for allocating the burden of proof, the Court should have resolved the

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77 Id. at 23, 359 N.E.2d at 302.
78 Id. at 25, 359 N.E.2d at 303 (emphasis added).
79 The Court's reference to both a narrow and broad basis for the burden of proof holding is inconsistent and confusing. However, because the entire opinion deals with certification and ballot access in a broad manner, the impression given is that the decision was meant to extend beyond the case's particular facts. Thus, the Court's indication of a narrow basis for the burden of proof holding was almost certainly inadvertent.
81 See text at notes 72-73, supra.
83 The statutes are so vague as to burden of proof that the problems encountered by McCarthy were inevitable. Prior to McCarthy, it had been held that registrars' certification decisions were final and unreviewable. Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 238, 69 N.E.2d 115, 122 (1946) (signatures on initiative petitions); Compton v.
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burden of proof issue on the narrowest basis possible. By resolving the burden of proof issue by reference to the parties’ stipulation, the Court could have avoided the potentially unconstitutional result of denying McCarthy a place on the ballot without relying on a questionable interpretation of intent. Thus, instead of announcing an unnecessarily broad holding, the Court could have taken the approach that, having stipulated that the challenged signatures were signed substantially as registered, the Secretary should bear the burden of proving their noncertifiability. At the same time, the Court could have announced that, in the absence of forthcoming legislative guidance, the Court would hold in a future case that the burden will be placed on the Secretary to prove noncertifiability once the required number of signatures is submitted. By announcing its intent to so rule, the Court could in such a future case justifiably interpret legislative silence as implying approval of the Court's approach.

State Ballot Law Comm'n, 311 Mass. 643, 657-58, 42 N.E.2d 288, 296 (1942) (signatures on initiative petitions). Even when certification decisions were brought under judicial scrutiny by applying the general equity jurisdiction of G.L. c. 56, § 59, as McCarthy discovered it was still unclear who should defend the action. Thus, because the system was not cohesive, it was inevitable that anyone needing to use it to challenge certification decisions would run into severe problems.

180 Such a prospective ruling is not to be confused with a prospective holding. Normally, a judicial determination as to the meaning of a statute does not have prospective application. Commonwealth v. Horton, 365 Mass. 164, 172 n.14, 310 N.E.2d 316, 322 n.14 (1974). The suggestion in the text does not run afoul of this proposition however, since it advocates
Although the Court thus can be criticized for not basing its burden of proof holding on the narrow basis that the Secretary's stipulation required such a result, it should be recognized that the lack of legislative guidance on the subject compelled the Court to act. A narrow basis for the opinion, without more, would not have solved the uncertainty stemming from the legislative silence on the burden of proof issue. However, coupled with an announcement that the Secretary will carry the burden in all cases in the future unless the legislature acts to the contrary, basing McCarthy on narrow grounds would have both addressed the root problem of the absence of guidance in the area and imparted to the McCarthy decision itself a sounder legal foundation.

As to the nondispositive holdings in McCarthy, all but one—that registrars are required to record reasons for rejecting signatures as non-certifiable—appear to have a sound basis in legislative intent. Regarding the holding requiring registrars to record their reasons for rejection, nothing in the certification statutes addresses this issue. Because of this silence, the Court should have abstained from making a determination on how the legislature intended registrars to reject signatures as non-certifiable, and indicated that in the absence of legislative action prior to the next case, the Court would hold that the recording of reasons is required. By so doing, the Court could have assured that, even in the absence of further legislative action—indeed, precisely because of legislative inaction—the election laws would not run the risk of imposing, in the next election, too heavy a burden on the Secretary. Moreover, the Court could have avoided resort to the fiction that prior to McCarthy the legislature intended that registrars be required to specify signature rejection reasons.

With regard to the remaining nondispositive issues in McCarthy, the Court was on firmer ground. Thus, the legislative intent, whether express or implied, clearly supports the Court's determinations as to the jurisdiction of the State Ballot Law Commission; that an equity action basing the burden of proof holding on narrow, factual grounds. The prospective ruling which is further advocated is thus viewed as a recognition of the lack of legislative guidance in the area and a strong statement of how the Court will decide future cases. If the legislature then does not act to obviate application of the Court's decision in the future, the Court could then at least argue implicit legislative approval of its broad statutory interpretation.

107 This is precisely the kind of detail more properly suited to legislative determination as part of the overall certification scheme.

108 It is evident from the State Ballot Law Commission's enabling statute that its jurisdiction is limited to those cases involving objections to apparently valid candidate nominations. Section 11 of chapter 53 of the General Laws confers jurisdiction on the Commission to hear objections to particular nominations "[w]hen ... nomination papers have been filed, and are in apparent conformity with law ... ." The Court's holding that the Commission's jurisdiction is limited to such situations, 1977 Mass. Adv. Sh. at 9, 359 N.E.2d at 297, is clearly proper.
in the superior court is the proper method of obtaining review of signature certification;\textsuperscript{109} that the registrars are not necessary parties in the review action;\textsuperscript{110} and that the registrars must certify petition signatures unless they have substantial doubt that the signer is a registered voter eligible to sign.\textsuperscript{111} Thus, in contrast with the Court's resolution of the allocation of the burden of proof and its conclusion that registrars must record reasons for signature noncertification, it is submitted that the Court properly considered and resolved the remaining issues in the case. Moreover, in resolving the latter issues the Court properly gave guidance to all parties concerned with ballot access, and it did so on a sound legal foundation.

II. THE PRACTICAL IMPACT OF McCARTHY

The \textit{McCarthy} decision significantly alters the duties which the Massachusetts ballot access system places on the Secretary of the Commonwealth, local registrars, and independent candidates. Its immediate result is presumptively to entitle independent candidates to a place on the general election ballot once they have filed a number of signatures on nomination petitions equal to the number required, regardless of certifi-

\textsuperscript{109} The statutory authority for superior court jurisdiction of certification review is unexceptionable. Section 59 of chapter 56 of the General Laws gives the superior court equity jurisdiction to enforce chapters 50-56, which include the certification procedures in section 7 of chapter 53. Neither party in \textit{McCarthy} disputed the superior court's jurisdiction, and the dissent explicitly agreed that the superior court was the proper forum for certification review. 1977 Mass. Adv. Sh. at 30, 359 N.E.2d at 305 (Quirico, J. dissenting). Further, the direct review mechanism in the superior court is a simple one and should prove to be least burdensome to all parties.

\textsuperscript{110} While no provision expressly requires this result, the Court soundly reasoned that since, during certification review, the registrars are statutorily prohibited from providing relief to a candidate under G.L. c. 53, § 7, 1977 Mass. Adv. Sh. at 15, 359 N.E.2d at 299, and since the Secretary is capable of providing a candidate relief by being ordered by the superior court to place the candidate's name on the ballot, \textit{id.}, then only the Secretary is a necessary defendant. \textit{Id.} at 14, 359 N.E.2d at 299. Further, this holding tends to simplify the review procedure, and thus is consistent with the \textit{McCarthy} theme of reducing the overall certification review burden.

\textsuperscript{111} The substantial doubt standard derives directly from the language in section 7 of chapter 53 of the General Laws requiring voters to sign nomination petitions "as registered or substantially as registered." Substantially as registered, the Court concluded, means that signatures are certifiable unless a registrar has substantial doubt that the signer is not a registered voter. 1977 Mass. Adv. Sh. at 22, 359 N.E.2d at 302. This formulation calls on the registrars to use their common sense instead of requiring them to apply a rigid rule. \textit{Id.} Such flexibility is desirable because it focuses on the underlying issue directly, by asking whether the signer is a registered voter, instead of indirectly, by questioning whether the signature meets the comparison rules. No longer will signatures be rejected because a voter forgets exactly how he signed his name when registering to vote, or has since modified his signature.
Even if the registrars have certified less than the required number of signatures, the Secretary may nevertheless be ordered by the superior court to place a candidate's name on the ballot. A court would have no choice unless the Secretary could prove that a number of signatures greater than the difference between the number required and the number submitted had been properly denied certification.

The burden imposed on the Secretary and the registrars by the McCarthy decision is likely to be administratively difficult to bear. The Secretary will now have to work the same amount of man-hours under the same time constraints which heretofore have been imposed on the independent candidates. The Court's decision that the registrars must develop a system to indicate reasons for certification refusal will ease the burden somewhat. Developing such a system for certification refusal should prove simple, and it may even make certification easier by providing a uniform list of valid rejection reasons. Still, the effort necessary to recheck the signatures on a name-by-name basis is only slightly diminished. To accomplish the task, both the Secretary and the registrars will probably have to employ a temporary election year work force.

It is possible that because of a lack of time or organization, or because the number of signatures is extremely great or the number of independent candidates filing certification review suits in a given year is overwhelming, the Secretary or the registrars will not be able to fulfill their responsibilities adequately. The result, of course, would be automatic ballot access for candidates. If McCarthy leads to such a result, the system will have developed yet another serious flaw and legislative reform will be even more urgent.

Despite the potential problems which McCarthy poses, the decision may have a stimulating effect upon the political arena by encouraging future independent candidates, who are now relieved of the burdens which have been shifted to the Secretary and local registrars. While they must still collect thousands of signatures, if insufficient signatures are certified independent candidates will only have to file suit against the Secretary to gain a presumptive right to a place on the ballot. They will not be required to engage in a difficult rechecking of the certification process unless the Secretary can demonstrate proper certification refusal. This represents a significant saving to independent candidates in organizational manpower and cost, and will facilitate ballot access.

112 Id. at 18, 23, 359 N.E.2d at 300, 302.
113 Id. at 23, 359 N.E.2d at 302-03.
114 The candidate must be given ballot access since, under McCarthy, he is presumptively entitled thereto once he has submitted petitions containing the number of signatures required by law. Id. at 18, 359 N.E.2d at 300.
CONCLUSION

The *McCarthy* decision has substantially altered the signature certification and certification review procedures to be used for independent candidate nominations. While the decision has a broad impact, the Court could have narrowly decided certain issues in the case on their particular facts. By announcing prospective rulings on these issues, the Court could have left the broader, more specific reform measures to the legislature. This approach would have allowed McCarthy a place on the ballot while still expressing the need for legislative action concerning independent candidate ballot access. By contrast, the *McCarthy* Court may have exceeded its proper judicial role by fashioning a broad set of ballot access procedures in the absence of adequate legislative guidance.

The immediate result of the decision is that independent candidates are now presumptively entitled to a place on the general election ballot once they have filed a number of signatures on nomination petitions equal to the number required, regardless of certification, unless the Secretary can prove that insufficient signatures are in fact certifiable.\(^\text{118}\) While the decision may be administratively difficult to implement, it will eliminate the arguably unconstitutional burden which would otherwise be placed on independent candidates. In so doing, *McCarthy* may have a stimulating effect upon the political arena.

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\(^\text{118}\) *Id.* at 18, 359 N.E.2d at 300.