Chapter 7: Labor and Employment Law

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CHAPTER 7

Labor and Employment Law

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§ 7.1. Introduction. Significant judicial and legislative developments in Massachusetts labor and employment law occurred during 1981. On the legislative front, several statutes affecting labor relations agencies were enacted. The Board of Conciliation and Arbitration (the "Board") was removed from the jurisdiction of the Department of Labor and Industries and was established as an independent agency. The Board's chairman has authority to promulgate rules and regulations, and to make appointments on a case by case basis to carry out the purposes of the agency. Although it will continue to operate autonomously, the Joint Labor Management Committee (the "Joint Committee") was made a part of the Board. This organizational change enables employees of the two agencies to be interchanged when such is warranted to efficiently and expeditiously deal with particular labor disputes.

There were several significant amendments to chapter 150E of the General Laws, the statute which governs public employee collective bargaining in Massachusetts. The decisions of the Massachusetts Labor Relations Commission (the "Commission") are now reviewable directly by the Massachusetts Appeals Court, removing the superior court from the appellate process. Another amendment permits the Commission to refer "refusal to bargain" cases to either the Board or the Joint Committee for mediation. Finally, an amendment to section 11 of chapter 150E, sets forth the standards for issuing complaints in unfair labor practice cases.

A separate enactment amended the definition of "public employer" in section 1 of chapter 150E.

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2 Id. at Section 235.
3 Id.
4 Id.
5 Id. at Section 240.
6 Id. at Section 243.
7 Id. at Section 244.
Administratively, it is noteworthy that the Commission has instituted an Accelerated Decision Procedure in representation cases to permit issuance of a final and binding decision by a hearing officer within 10 days of the close of a hearing when the parties voluntarily waive all appeal rights. Not surprisingly, this procedure has received little use to date.

The most significant developments in Massachusetts labor and employment law in 1981 were contained in decisions of the Supreme Judicial Court and the Massachusetts Appeals Court. These important decisions involved a variety of issues including standards for evaluating mixed-motive discharges, powers of the Labor Relations Commission and the courts to bring public employee strikes to an end, age discrimination, rights of tenured teachers, nondelegable managerial prerogatives of school committees and application of the state open meeting law.

§ 7.2. Standards in Mixed-Motive Discharge Cases. Section 4(3) of chapter 150A, like its federal counterpart, Section 8(a)(3) of the National Labor Relations Act, prohibits discrimination by an employer against an employee because of the employee's protected activities. During the Survey year, the Supreme Judicial Court in Trustees of Forbes Library v. Labor Relations Commission set forth the standards which the Massachusetts Labor Relations Commission should apply both in evaluating the legality of an employer's decision to discharge an employee who has engaged in protected activities and in allocating the burden of proof in such a case.

In Forbes Library, a media technician was discharged ostensibly for his efforts to unionize the library staff, his infractions of library rules, and his vocal dissatisfaction with the pay and other terms of his employment. The

§ 7.2.1 G.L. c. 150A, § 4 provides in relevant part:
It shall be an unfair labor practice for an employer —

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization


3 G.L. c. 150E, § 2 provides:
Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section twelve.


5 These reasons were given by the plaintiff's supervisors. Id. at 2184-85, 428 N.E.2d at 125. The trustees who terminated his employment "relied heavily" on these reasons and did not
Commission found that the technician regularly engaged in protected activities, that many of his alleged rule infractions were "trivial, false, or long-condoned" and that the tension between him and his supervisors stemmed from his supervisors' retaliatory sentiments. The Commission concluded that the technician was dismissed "solely" on account of his protected activities in violation of G.L. c. 150A, section 4(3). The superior court affirmed that judgment. On further appeal, the Supreme Judicial Court held that the Commission's finding was supported by "substantial evidence", and that the discharge was unlawfully motivated under any of the standards which might be applied in dual motive discharge cases.

In reaching its decision, the Court rejected the "in part" test under which a violation would be found in a dual or mixed motive discharge case if an employer was motivated "even in part" by unlawful sentiments. Instead, the Court adopted the "dominant motive" or "but for" test. Under this standard, a discharge is unlawful if the employee would not have been discharged but for the employee's protected activities, but the discharge is lawful if a lawful basis would have led to the employee's discharge even in the absence of protected activities. The Court deemed the "in part" test of motive overprotective because the test "shields the employee from discharge despite unsatisfactory work or flagrant misbehavior" if unlawful intentions contributed in any way to the employer's decision to discharge the employee. The Court preferred the "but for" test because it rightfully recognizes employer interests in not being forced to accept an unsatisfactory employee and in permitting employers to subject union organizers to discipline the same as any other employee.

Turning to the burden of proof issue, the Court held that the standard should follow the pattern established in the Court's sex discrimination cases, i.e., the employee bears "the ultimate burden of persuasion, but may
rly on a prima facie showing to shift to the employer a limited burden of producing evidence."\textsuperscript{18} The Court acknowledged that the "but for" test calls for special attention to the burden of proof of unlawful motivation and that "[m]otivation is a subjective issue, seldom susceptible to direct proof."\textsuperscript{19} Because the parties must address both lawful and unlawful motives, the Court believed that the "but for" test exacerbates difficulties of proof.\textsuperscript{20} Though some courts have endorsed the concept of placing the entire burden on the charging party, the Supreme Judicial Court rejected such an approach because of the difficulties a charging party would face in addressing the employer's frame of mind and in proving the negative proposition that the discharge was not unlawfully motivated.\textsuperscript{21} The Court also declined the option of placing the burden of persuasion on the employer to prove that it had a lawful reason for discharging the employee, once the employee had established that an improper motive contributed at least partially to his firing.\textsuperscript{22} Placing the burden of persuasion on the employer would require the employer to prove by a preponderance of the evidence that other, lawful considerations would have led to the firing of the employee in any event. Such a burden would invite the trier to examine the wisdom of the employer's reasons.\textsuperscript{23} The Court believed that this may cause a trier of fact to upset legitimate business decisions of the employer with which the trier disagrees but which are not unlawful.\textsuperscript{24}

Instead, the Court chose an intermediate approach, the method of allocating burden of proof employed in sex discrimination cases.\textsuperscript{25} The standard enunciated by the Court requires the charging party to make a prima facie showing of unlawful motivation.\textsuperscript{26} It is the employer's obligation, then, to "come forward" with evidence showing that another lawful reason caused the discharge.\textsuperscript{27} The ultimate burden of persuasion remains with the employee to demonstrate that the reason for the decision advanced by the

\textsuperscript{18} \textit{Id.} at 2186, 428 N.E.2d at 126 (citing School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination, 377 Mass. 424 (1979); Smith College v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221 (1978); Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130 (1976)).

\textsuperscript{19} \textit{Id.} at 2187, 428 N.E.2d at 127.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.} at 2187-88, 428 N.E.2d at 127.

\textsuperscript{22} \textit{Id.} at 2189, 428 N.E.2d at 127.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 2189, 428 N.E.2d at 127.

\textsuperscript{25} \textit{Id.} at 2189-90, 428 N.E.2d at 127-28.

\textsuperscript{26} \textit{Id.} at 2189-90, 428 N.E.2d at 128. The Court noted that a prima facie case might include "proof that the employee had a generally good work record, that he had engaged in protected activity and that this activity was plainly visible to the employer." \textit{Id.} at 2189 n. 4, 428 N.E.2d at 128 n. 4.

\textsuperscript{27} \textit{Id.} at 2190, 428 N.E.2d at 128.
employer was not the true reason for discharge. This burden, according to the Court, requires "solid proof that an asserted lawful reason was not a real motive in the decision." The Court noted that the First Circuit had recently adopted a similar allocation of burden of proof in unlawful discharge cases in Wyman-Gordon Co. v. NLRB and NLRB v. Amber Delivery Serv., Inc.

Few areas of federal labor law have engendered as much controversy as have the standards applied in mixed-motive discharge cases. After years of applying the "in part" test and finding that various circuit courts of appeal, particularly the First Circuit, declined to recognize that test, the National Labor Relations Board in 1980, in Wright Line, purported to reach an accommodation between the "in part" test and the "dominant motive" test by application of the rationale used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle. The Board established a two-part test in Wright Line. First, the general counsel of the Board must make a prima facie showing that protected activity was a "motivating factor" in the discharge. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.
The Wright Line standard has been approved by a number of circuit courts. The First and Third Circuits have approved the Board's "but for" test, but, under the rationale of the Supreme Court's recent decision in Texas Department of Community Affairs v. Burdine, a Title VII employment discrimination case, they have rejected the Board's procedural framework which shifts the burden of proving good cause to the employer. Under Burdine once a prima facie showing of discrimination is made, the burden of production, not persuasion, shifts to the defendant. When the defendant has produced evidence of a legitimate reason for the action, the burden shifts back to the plaintiff to show that the defendant's asserted reason was not the true reason. Plaintiff, thus, retains the ultimate burden of persuasion.

The mixed-motive test adopted by the Supreme Judicial Court in Forbes Library is the same test utilized by the First Circuit. It requires the charging party to carry the ultimate burden of proof. Employers are not required to prove the negative proposition that protected activity was not the real reason for the discharge. Whether the different approaches to burden of proof will have significance in the outcome of cases must await the test of time.

Although Forbes Library arose under chapter 150A, which applies to employees of private employers which are not subject to National Labor Relations Board jurisdiction, the Forbes Library decision likely will be applied to mixed-motive cases arising under chapter 150E, the collective bargaining statute applicable to public employees in Massachusetts. The Court will have the opportunity to address the applicability of its Forbes Library decision to public sector cases in deciding Southern Worcester County Regional Vocational School District v. Labor Relations Commission, which it has accepted for further review.

See, e.g., NLRB v. Charles Batchelder Co., 646 F.2d 33 (2d Cir. 1981); Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3933 (May 24, 1982); Borel Restaurant Corp. v. NLRB, No. 80-1785 (6th Cir. May 3, 1982); Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981); NLRB v. Fixtures Manufacturing Corp., 669 F.2d 547 (8th Cir. 1982); NLRB v. Nevis Industries, Inc., 647 F.2d 905 (9th Cir. 1981).

NLRB v. Wright Line, a Division of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982).

Behring International, Inc. v. NLRB, 675 F.2d 83, 93, Lab. Cas. (CCH) § 13,392 (3rd Cir. April 7, 1982).


41 Id. at 252-53.

42 Id. at 253.

43 Id.

44 See supra notes 25-32 and accompanying text.

45 See G.L. c. 150A.

Southern Worcester is a public sector discriminatory discharge case in which the Appeals Court reversed in part and remanded in part the decision of the Labor Relations Commission. Among the issues to be decided in Southern Worcester are the elements of a prima facie violation of discriminatory discharge and the effect of chapter 71 authority of a school superintendent in the consideration of a school committee's motivation. Resolution of Southern Worcester together with Forbes Library should provide the needed guidance to parties involved in discriminatory discharge cases arising under chapters 150A and 150E.

§ 7.3. Powers of the Labor Relations Commission and the Courts to End Public Employee Strikes. Despite chapter 150E, section 9A(a), which prohibits public employees in Massachusetts from striking,¹ from time to time public employee strikes have occurred. Chapter 150E of the General Laws, section 9A(b) contains procedures to be employed when section 9A(a) is violated.² These procedures empower the Labor Relations Commission to conduct an investigation when an unlawful strike has occurred or is about to occur. At the conclusion of its investigation, if the Commission finds that section 9A(a) has been violated, it sets “requirements” which must be complied with. If the Commission’s order is not obeyed, the Commission may seek its enforcement in the superior court. If the court finds a violation of section 9A(a), it will enter a preliminary injunction ordering the public employees back to work. In the event that the court’s order is not complied with, a finding of contempt may be made. In the past, Massachusetts courts have imposed fines and ordered union officials and/or strikers jailed for contempt of court. During the Survey year, the Supreme Judicial Court issued an opinion in Labor Relations Commission v. Fall River Educators' Association³ which clarified the Commission’s powers under section 9A(b) and the superior court’s powers to deal with contemnors of its orders.

In Fall River Educators’ Association, the Supreme Judicial Court considered for the first time whether a conditional coercive fine could be imposed

§ 7.3. ¹ G.L. c. 150E, § 9A(a) provides as follows:
No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

² G.L. c. 150E, § 9A(b) provides as follows:
Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for the enforcement of such requirements.

in a civil contempt proceeding. The Court held that when contempt of court is found, a coercive, prospective court order may properly be entered mandating the payment of a fine to the Commonwealth for each day of future contempt of that court order.4 The case also clarified certain powers of the Commission to conduct investigatory hearings in cases of public school teacher strikes.

The case arose from a strike by public school teachers in Fall River, who were represented for collective bargaining purposes by the Fall River Educators’ Association (Association).5 Anticipating that a strike was about to occur, the school committee petitioned the Commission to undertake an investigation into the impasse, pursuant to chapter 150E, section 9A(b).6 The Commission scheduled a hearing to air the school committee’s charges.7 By the time the hearing began, the strike had commenced. The Commission ruled that the Association and its members were engaged in a strike in violation of chapter 150E, section 9A(a) and ordered an end to the strike.8 When its order was disobeyed, the Commission sought enforcement of the order in the superior court.9 The superior court judge issued a temporary restraining order against the strike.10 The Association failed to comply with the court’s order and continued the strike.11 The Commission then filed a petition for contempt with the superior court.12 Because the Association failed to comply with its previous order, the court found the Association in civil contempt and issued a preliminary injunction.13 In the preliminary injunction, the court ordered that the Association pay a fine of $20,000 per day, beginning the next day, for each day that the strike continued.14

The strike ended two weeks later when the Association and the school committee entered into an agreement.15 Subsequently, the court ordered payment of $260,000 in fines to the Commonwealth.16 The Association ap-

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4 Id at 308, 416 N.E.2d at 1347.
5 Id. at 298, 416 N.E.2d at 1342.
6 Id.
7 Id. at 298-99, 416 N.E.2d at 1342.
8 Id. at 299, 416 N.E.2d at 1342.
9 Id. The Fall River School Committee was permitted to intervene. Id.
10 Id. The temporary restraining order, in substance, contained a cease and desist order and placed certain affirmative obligations on the Association. Id. at 299-300 n.2, 416 N.E.2d at 1342-43 n.2.
11 Id. at 299-300, 416 N.E.2d at 1342-43.
12 Id. at 300, 416 N.E.2d at 1343.
13 Id.
14 Id.
15 Id. In the agreement, the School Committee agreed to waive any claim of damages arising from the “alleged work stoppage,” not to seek collection of any damages imposed by the court in the Commission’s action and to withdraw from the Commission’s action. Id.
16 Id. at 301, 416 N.E.2d at 1343.
pealed from the judgment of the superior court that ordered the Association to pay the fine to the general fund of the Commonwealth.\textsuperscript{17}

The Supreme Judicial Court began its analysis of the case by addressing the issues raised by the Association relating to the Commission's issuance of its initial order.\textsuperscript{18} The Court stated that it assumed, but did not decide that a valid Commission order was an "indispensable underpinning" of the order of the superior court.\textsuperscript{19}

The Association first argued that, in issuing the order, the Commission had failed to comply with the requirements of the state Administrative Procedure Act.\textsuperscript{20} The Court ruled that the Commission's investigation was not an adjudicatory proceeding as defined by chapter 30A, section 1(1), and, therefore, that the requirements of the Act were inapplicable to the Commission's investigatory hearing.\textsuperscript{21} Next, the Association argued that the Commission had acted improperly in having one of its members act as hearing officer during the investigatory hearing.\textsuperscript{22} The Court found nothing improper about this activity, stating that "[i]t would be anomalous for the Commission to be authorized to conduct an adjudicatory hearing through a hearing officer and not be able to conduct an investigation through such an officer."\textsuperscript{23} The Association then challenged the sufficiency of the evidence before the hearing officer solely on the issue of the Association's involvement in the strike.\textsuperscript{24} The Court reviewed the evidence and concluded that it amply warranted the conclusion that the Association encouraged and was engaged in the strike.\textsuperscript{25} The Court pointed out that, in any event, section 9A(b) merely calls for an investigatory, and not an evidentiary, hearing.\textsuperscript{26} Therefore, the establishment of a formal record at the time of the section 9A(b) hearing was not a necessity.\textsuperscript{27} As to the Commission's actions, the Association argued that the Commission was limited to issuing a cease-and-desist order and that it had no power to impose affirmative obligations on

\begin{footnotes}
\item\textsuperscript{17} \textit{Id.} at 298, 416 N.E.2d at 1342.
\item\textsuperscript{18} \textit{Id.} at 301, 416 N.E.2d at 1343.
\item\textsuperscript{19} \textit{Id.} at 301 n.5, 416 N.E.2d at 1343 n.5.
\item\textsuperscript{20} \textit{Id.} at 301-02, 416 N.E.2d at 1344.
\item\textsuperscript{21} \textit{Id.}
\item\textsuperscript{22} \textit{Id.} at 302, 416 N.E.2d at 1344. Because this argument was raised by the Association for the first time on appeal, the Court would have found it untimely in any event. \textit{Id.}
\item\textsuperscript{23} \textit{Id.} G.L. c. 150E, §§ 4 and 11 expressly provide that a member or agent of the Commission may conduct adjudicatory hearings. \textit{Id.}
\item\textsuperscript{24} \textit{Id.} at 303, 416 N.E.2d at 1344.
\item\textsuperscript{25} \textit{Id.} In an ancillary holding, the Court found that it was reasonable for the Commission to draw an inference adverse to the Association when its officers refused to testify because of the possibility of later criminal or civil proceeding against them. \textit{Id.}
\item\textsuperscript{26} \textit{Id.} at 305, 416 N.E.2d at 1345.
\item\textsuperscript{27} \textit{Id.}
\end{footnotes}
the Association. 24 The Court rejected this contention. 25 Finding that the Commission’s authority to “set requirements that must be complied with” is important in the Commission’s efforts to resolve strikes by public employees, 26 the Court held that the Commission’s authority included the authority to place certain affirmative obligations on the Association. 27

Turning to the judge’s finding that the Association was in contempt of the temporary restraining order, the Court brushed aside the Association’s argument that it could not be held accountable for the actions of certain of its members. 28 The Court stated that “[i]t was incumbent on the executive committee to disavow the conduct of the officers and negotiating team if the Association was to avoid responsibility for their conduct.” 29

The Court next addressed a question of first impression: whether a conditional, coercive fine may be imposed in a civil contempt proceeding. 30 The Court concluded that a fine may properly be imposed for civil contempt where, after an adjudication of contempt, the judge has announced that a fine will be imposed for each day of continued contempt of the court’s order and that such a fine may properly be made payable to the general fund of the Commonwealth. 31 The Court found considerable support for its conclusion in federal court decisions. 32 In differentiating between civil and criminal contempt, the Court stated that “the test is what the judge primarily sought to accomplish.” 33 Here, the Court noted that the imposition of a prospective daily fine was designed to coerce the defiant party to adhere to an injunction by specifying the penalties for further disregard of the superior court’s order. 34 The Court found that this objective was consistent with the intention of civil contempt orders generally, which is to be remedial and for the benefit of the aggrieved party. 35

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24 Id.
25 Id.
26 Id. The power of the Commission to “set requirements that must be complied with” is expressly stated in G.L. c. 150E, § 9A(b).
28 Id. at 306, 416 N.E.2d at 1346.
29 Id.
30 Id. at 306-07, 416 N.E.2d at 1346. The Court refused to address whether a conditional, coercive fine is valid as part of an original order of the court, as opposed to being imposed after a finding of contempt. Id. at 307 n. 9, 416 N.E.2d at 1347 n. 9.
31 Id. at 308, 416 N.E.2d at 1347.
32 Id. at 310, 416 N.E.2d at 1348. These federal cases included the leading case of United States v. United Mine Workers, 330 U.S. 258 (1947). Id. Moreover, the Court found no authority to the contrary. Id.
33 Id. at 308, 416 N.E.2d at 1347.
34 Id.
35 Id.
The Court, however, found that the judge should reconsider the amount of the fine, since he failed to make findings as to how the amount of the fine related to the standards enunciated in United States v. United Mine Workers, although the judge had cited that case in his decision. After reviewing the judge's reasons for imposing a fine of $20,000 per day, the Court set forth a method for determining a reasonable fine, albeit in admittedly general terms. First, the Court stated that, before imposing a coercive fine, judges should take into account the financial resources of the defendant so as to measure an amount that will be effective but not unreasonable. The Court then instructed that "a judge should consider the character and magnitude of the threatened harm, the probable effectiveness of any suggested sanction, the defendant’s financial resources, and the seriousness of the burden of the defendant." Finally, in fixing the amount payable at the conclusion of the contempt, the Court advised that a judge should not feel bound in any way by the specific amount originally imposed. Because the judge in this case did not make the appropriate findings, the Court remanded the case for reconsideration of the amount of the fine payable to the Commonwealth.

The Supreme Judicial Court's decision in Labor Relations Commission v. Fall River Educators’ Association is significant in two respects. First, the decision clarifies the authority of the Labor Relations Commission in asserting its authority in unlawful strike situations. Commission investigations are not subject to the procedural requirements of the state Administrative Procedure Act and the Commission may reach conclusions in investigations of public employee strikes without establishing a formal record. Additionally, the Court makes it clear that in strike investigations, the Commission may draw reasonable inferences adverse to a party from that party's refusal to testify on grounds of self-incrimination.

Second, by permitting the imposition of a conditional, coercive fine against a striking public employee union, the Court has established fines as a potent weapon for curtailing strikes by public employees. At the same time, however, the Court made the dire consequences of such fines less of a reality by requiring judges to recalculate the amounts payable at the conclusion of the strike. If judges utilize this mechanism and significantly reduce fines imposed, then public employee unions may take their chances, feeling

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41 Id. at 313, 416 N.E.2d at 1350.
42 Id. at 314-15, 416 N.E.2d at 1350.
43 Id. at 316, 416 N.E.2d at 1351.
44 Id. at 314, 416 N.E.2d at 1350.
45 Id.
46 Id.
47 Id. at 316, 416 N.E.2d at 1351.
less coercion, knowing that the amount which will actually be payable in the end will not be too painful.

§ 7.4. Age Discrimination in Employment. During the Survey year, the Supreme Judicial Court reviewed one ruling of the Massachusetts Commission Against Discrimination ("MCAD") involving an issue of age discrimination in employment. In *Rock v. Massachusetts Commission Against Discrimination*, the Supreme Judicial Court affirmed the conclusion of the MCAD that by offering early retirement benefits to former employees who were over age fifty-five at the time of a plant closing, but not to former employees who were ages forty through fifty-five at that time, an employer had not engaged in an unlawful practice under chapter 151B, section 4(1).

The facts which gave rise to this case were not in dispute. Westinghouse Electric Corporation ("Westinghouse") laid off a large number of employees during 1970 and 1971, prior to closing its East Springfield, Massachusetts plant. At the time of the layoffs, the plaintiffs had between fifteen and thirty-six years of service and possessed rights in Westinghouse's non-contributory pension plan. Each plaintiff was forty years of age at a minimum, but in no case older than fifty-five. Early retirement benefits under Westinghouse's pension plan were available to those employees who were age fifty-nine or older, and workers under age fifty-nine could not receive pension benefits until they reached age sixty-five. Plaintiffs were members of a union and covered by a collective bargaining agreement. After the East Springfield plant had closed, the union which represented such employees and Westinghouse entered into a new collective bargaining agreement which included a provision to make employees who had attained age fifty-five and were laid-off as a result of a plant closing eligible for immediate early retirement benefits. Although this new agreement did not apply to those workers laid off in East Springfield, the union received a commitment from West-
Ininghouse that it would "do something" for the workers affected by the East Springfield lay-offs. To fulfill this commitment, Westinghouse chose to extend certain early retirement benefits to former East Springfield workers who were at least age fifty-five at the time of the plant's closing, but not to those workers who were younger.

The plaintiffs filed a complaint with the MCAD which alleged that by denying them early retirement benefits Westinghouse had engaged in an unlawful practice under chapter 151B, section 4(1). After an MCAD commissioner found for the plaintiffs, Westinghouse appealed to the full Commission which reversed. The plaintiffs then sought review in the superior court. The Supreme Judicial Court granted the parties' joint application for direct appellate review, after a superior court judge had reserved and reported the case without decision.

A unanimous Supreme Judicial Court affirmed the MCAD decision that Westinghouse had not engaged in an unlawful practice within the meaning of chapter 151B, section 4(1). The Court agreed with the Commission's reading of the legislative history of the Commonwealth's age discrimination law and with the Commission's interpretation of the statute. The Court deferred to the Commission's determination that "the legislature intended that the plaintiffs prove some harm to them due to age and that in the absence of proof of such injury there is no unlawful practice." According to the Court, the Commission found that employees ages forty through fifty-five lost neither a benefit to which they were entitled nor a benefit for which they had some reasonable expectation. The Court further noted that the Commission determined that there was no unlawful discrimination against the workers ages forty through fifty-five since the early retirement program created no added hardship (other than the hardship of the plant closing) and was consistent with the collective bargaining agreement reached with the union subsequent to the plant closing.

The Court believed that there were three additional factors supporting the Commission's ruling. First, the Commission's determination that the Westinghouse early retirement plan was not an unlawful term or condition of

10 Id. at 1754-55, 424 N.E.2d at 245-46.
11 Id. at 1755, 424 N.E.2d at 246.
12 Id. at 1753, 424 N.E.2d at 245.
13 Id.
14 Id.
15 Id.
16 Id. at 1754, 424 N.E.2d at 245.
17 Id. at 1757-58, 424 N.E.2d at 247.
18 Id. at 1758, 424 N.E.2d at 247.
19 Id. at 1755, 424 N.E.2d at 246.
20 Id.
employment reflected a "common sense and practical reading of the statute," consonant with "the history, language, and spirit of G.L. c. 151B, § 4(1), to protect older workers." Second, the Commission's determination was consistent with the way federal courts had interpreted the federal Age Discrimination in Employment Act (ADEA). Specifically, the Court noted that federal courts had applied the concept of "protected class" more narrowly in age discrimination cases, than in race or sex discrimination cases. Thus, all persons protected by the age discrimination laws need not be grouped together for the purposes of defining the limits of their protection. Third, the Commission's finding that Westinghouse had "legitimate, nondiscriminatory reasons for its actions" demonstrated that there was no error in the Commission's determination that the plaintiffs failed to prove that the denial of early retirement benefits to workers who were ages forty through fifty-five was an unlawful practice under chapter 151B, section 4(1).

Although beyond the holding of the case, the Court also discussed the validity of the Commission's rule on continuing violations. The Court found that the rule was not beyond the Commission's power to promulgate. The Court noted that, at the time of the hearing, Commission Rule 3.02 read, in pertinent part:

The complaint may be filed . . . at any time within six months of the alleged unlawful conduct; provided, however, that the six month requirement shall not be a bar to filing in those instances where facts are alleged which indicate that the unlawful conduct complained of is of a continuing nature or allegedly has a continuing effect.

Westinghouse claimed that this rule was beyond the Commission's power to promulgate because it stood in conflict with the limitation expressed in chapter 151B, section 5, which reads in pertinent part: "Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination." In analyzing whether the rule was valid, the Court noted that it is "as deferential" as it would be if it were considering the validity of "a legislative enactment," and, thus, would employ a reasonable relationship test.

21 Id. at 1758, 424 N.E.2d at 247.
24 Id. at 1758-59, 424 N.E.2d at 248.
25 Id. at 1759, 424 N.E.2d at 248.
26 Id. at 1762, 424 N.E.2d at 249-50.
27 Id. at 1760 n.12, 424 N.E.2d at 248 n.12. In 1976, an amendment to the rule deleted the last six words. Id. See 804 C.M.R. 1.03(2) (1978).
29 Id. at 1760, 424 N.E.2d at 249.
30 Id. at 1761, 424 N.E.2d at 249.
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The Court dismissed Westinghouse’s argument that under § 5 the six-month period is triggered from the employer’s earliest violation. The Court observed that the rule was designed to combat ongoing discriminatory practices, and that it was consistent with federal and state rules interpreting similar laws. In addition, the Commission had supported its interpretation by showing that commentators have stressed the need for such a rule in applying employment discrimination laws. Accordingly, the Court concluded that the rule on continuing violations was consistent with the statute and “merely carries out the scheme or design of the chapter.”

§ 7.5. Nondelegable Managerial Prerogatives of School Committees. In School Committee of Braintree v. Raymond and School Committee of Hanover v. Curry, the Supreme Judicial Court held that a school committee’s actions which come within the realm of “educational policy” constitute the exercise of the committee’s nondelegable managerial powers and are not subject to limitation by collective bargaining agreement or to the authority of an arbitrator under such an agreement. In those cases, the Supreme Judicial Court specifically held that the school committees lacked the power to delegate their authority under chapter 71, section 37 to determine qualifications for teaching and that that nondelegable authority encompassed the power to abolish supervisory positions. Arbitrators had ordered the school committees to reinstate supervisory employees after their positions had been eliminated by the school committees for reasons of educational policy. The lower court vacated the arbitrators’ awards and the Supreme Judicial Court affirmed in both cases.

During the Survey year, two important decisions were issued at the appellate level concerning the tension which exists between a school committee’s power under chapter 71, section 37 and the authority of an arbitrator under a collective bargaining agreement to which the school committee is a party.

31 Id.
32 Id.
33 Id. at 1762, 424 N.E.2d at 249.
34 Id. at 1762, 424 N.E.2d at 249-50. The Court admitted that application of the continuing violation rule to particular facts may prove difficult. Id. at 1762, 424 N.E.2d at 250.

3 For a discussion of the decisions see Grunebaum, Labor Law, 1976 ANN. SURV. MASS. LAW
4 G.L. c. 71, § 37 provides in pertinent part:
[The school committee] may determine, subject to this chapter, the number of weeks and the hours during which such schools shall be in session, and may make regulations as to attendance therein.
A. Arbitrability of Reduction of Teaching Load and Salary

In School Committee of Lynnfield v. Trachtman, the Massachusetts Appeals Court applied the nondelegability doctrine to a school committee's decision to reduce a teacher's teaching responsibilities and his salary.

The Lynnfield School Committee voted to eliminate 5.6 teaching positions from its budget for the 1977-78 school year. As part of this reduction, the school committee reduced by 30% the teaching load and salary of Arnold Trachtman, a tenured teacher, because enrollment in his classes had declined during his seven years in the school system. Trachtman filed a grievance pursuant to the collective bargaining agreement between the school committee and the Lynnfield Teachers Association, Trachtman's collective bargaining representative.

The arbitrator held that the issues of whether the school committee violated the teachers' collective bargaining agreement by reducing Trachtman's responsibilities and his salary presented arbitrable claims under the agreement. Addressing the merits, the arbitrator held that the school committee had violated the agreement because the agreement only authorized full-time teaching responsibilities and full-time salaries. The arbitrator awarded Trachtman $5,757, representing the difference between the amount he received for the school year and the amount he would have received as a full-time teacher.

A judge of the superior court confirmed the arbitrator's award pursuant to chapter 150C, section 11(a)(3), finding in relevant part that the reduction was not an exercise of managerial discretion on the part of the school committee, but rather was a subject of collective bargaining contract and therefore properly arbitrable.

The Appeals Court modified the superior court's judgment confirming the arbitration award. The court sustained that part of the arbitrator's award making Trachtman whole for the reduction in his salary, but held that the arbitrator had exceeded his authority in ruling that the school committee violated the collective bargaining agreement by partially eliminating Trachtman's teaching position. The court reasoned that the reduction in...
Trachtman’s teaching load constituted the exercise of the school committee’s nondelegable managerial powers under chapter 71, section 37, which reserves “general managerial powers in school committees over matters ‘predominantly within the realm of educational policy.’”13 Like the power to eliminate a teaching position, the court found that the power to reduce a teacher’s responsibilities is a managerial prerogative over educational policy which cannot be delegated to an arbitrator.14

The Appeals Court held, however, that the reduction in Trachtman’s salary involved a mandatory subject of bargaining under chapter 150E, section 217 and thus warranted separate consideration from the arbitrator’s improper finding that the collective bargaining agreement could restrict the school committee’s right to reduce Trachtman’s teaching responsibilities.18 In view of the arbitrator’s finding that the bargain struck by the school committee and the teachers association was predicated on full-time annual wages and that prorated salary had not been contemplated by the parties, the court declined to disturb the arbitrator’s monetary award on the basis of the agreement.19

In reducing Trachtman’s teaching load, the likely objective of the Lynnfield School Committee was to realize a budget savings. Instead, it found itself paying Trachtman a full-time teacher’s salary in return for part-time services. If school committees are to realize savings from reducing teachers’ responsibilities from full-time to part-time, the *Trachtman* decision instructs that it is imperative that their collective bargaining agreements expressly provide for part-time salaries for part-time teaching.

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13 *Id.* at 545, 417 N.E.2d at 461 (citation omitted). These powers include the power to change duties of a tenured teacher and to assign new duties (McDevitt v. School Comm. of Malden, 298 Mass. 213 [1937]; the power “to change duties or rank of a teacher entrusted with special duties of management or discretion” (School Committee of W. Springfield v. Korb, 337 Mass. 788, 795 [1977]); the power to abolish a position for reasons of “economy, system reorganization or educational policy” (Nutter v. School Comm. of Lowell, 5 Mass. App. Ct. 77, 79-80 [1977]); and the power to reduce responsibilities of a position (Setterlund v. Groton-Dunstable Regional School Comm., 1981 Mass. Adv. Sh. 156, 159, 415 N.E.2d 214, 216).


15 G.L. c. 150E, § 2 provides:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion.


B. Arbitrability of Claims Based on Discrimination

In *Blue Hills Regional District School Committee v. Flight*, the Supreme Judicial Court established that there are limits to a school committee's freedom to act on matters of educational policy under the auspices of the nondelegability doctrine. The Court created an exception to that doctrine where a school committee has engaged in gender-based discrimination.21

In *Flight*, an arbitrator initially found that the Blue Hills Regional School Committee had violated express provisions of its collective bargaining agreement by failing to promote a teacher to an administrative position because of her sex.22 The arbitrator ordered the school committee to promote the teacher and to pay her a salary differential with interest.23 The superior court confirmed the award.24 The Appeals Court then ruled that, although the grievance brought by the teacher was properly arbitrable, the enforcement of the arbitrator's award "would contravene the non-delegability doctrine" and was therefore unlawful.25 On appeal, the Supreme Judicial Court reversed the Appeals Court and reinstated the judgment of the superior court.26

The Supreme Judicial Court confirmed the lower court's finding that, where the collective bargaining agreement provides expressly that all appointments would be made irrespective of the sex of the applicant, the teacher's grievance was a proper subject for arbitration.27 The Court then observed that, however dutifully the Appeals Court had followed the nondelegability doctrine precedent, the instant case warranted an exception to that doctrine.28 Where, as here, a teacher is denied a promotion because of her sex, the Court stated that an order granting the promotion with back pay was appropriate because "[d]enial of a promotion to a public employee because of her sex is constitutionally impermissible and violates statutory proscriptions."29 The Court further explained that a decision of an arbitrator in such a case is just as valued as the decision of an independent commission and thus is not an unreasonable impingement upon managerial

157, 168.

21 *Id.* at 1242, 421 N.E.2d at 756.
22 *Id.* at 1240, 421 N.E.2d at 756.
23 *Id.*
24 *Id.*. The award was confirmed with minor modification to the payment of interest. *Id.*
26 *Id.*
27 *Id.* at 1242, 421 N.E.2d at 756.
28 *Id.*
29 *Id.*
prerogative. The Court declined to question the decision of the arbitrator on a matter properly within his jurisdiction and, thus, upheld the award of the arbitrator.

The Flight decision makes clear that the managerial discretion enjoyed by school committees is not unlimited and that the nondelegability doctrine will not be permitted to shield unlawful discrimination. Moreover, the arbitration process may, in appropriate cases, be utilized as a forum to determine claims of such unlawful conduct. To an employee, arbitration has two distinct advantages over administrative and judicial recourse. First, an arbitrator's decision can be overturned only on very limited grounds. Second, arbitration provides an employee with a relatively speedy and economical means of adjudicating such claims.

§ 7.6. The Role of the Courts in Teacher Dismissal Cases. In Springgate v. School Comm. of Mattapoisett, the Appeals Court considered a number of significant issues with regard to chapter 71, sections 42 and 43, provisions which govern the dismissal of tenured teachers.

The Mattapoisett School Committee dismissed Marjorie Springgate as a result of a number of misdeeds over a twelve-month period. A superior court judge, after trial, found that Springgate's discharge was unjustified and directed the school committee to reinstate her. On appeal, the school committee argued that the de novo judicial review by the superior court provided for in chapter 71, section 43A was an unconstitutional trespass on executive prerogatives. The Appeals Court rejected this argument. Analogizing a school committee's obligations under section 42 to "those incident to a judicial investigation", the court concluded that a school committee's dismissal process should be subject to judicial review. That it is subject to de novo review, concluded the court, makes the court's task "not unlike that which it performs in hearing appeals from the grant or denial of zoning variances or special permits." The Appeals Court then defined the scope of appellate review as "confined to examination of determinations of law by the trial judge and whether the judge's findings of fact pass the clearly er-
Finally, the Appeals Court held that as a matter of law the judge in the instant case erred in concluding that six of the eleven charges brought by the school committee were vague. With one exception, the Appeals Court concluded, the school committee had set forth the specific incidents relied upon and the dates on which these incidents allegedly occurred.

The Appeals Court then discussed the role of the superior court in determining the sufficiency of the charges. The Appeals Court noted that the trial judge had ruled that all of the school committee's charges "amounted to no more than a collection of petty complaints, 'picayune, miniscule matters' which did not 'constitute adequate grounds for dismissal of a teacher under the statute'." The Appeals Court, however, stated:

"It is not a judicial function ... under G.L. c. 71, § 43A, to assess the gravity of a school committee's charges or the appropriateness or wisdom of its action. The permissible grounds for dismissal under G.L. c. 71, § 42 — inefficiency, incapacity, conduct unbecoming a teacher, insubordination, and other good cause — include any ground which is not arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of running a sound school system." The Court concluded that:

A pattern of persistent disruptive behavior and clashes with colleagues, however minor each incident, which tends in the judgment of the school committee to interfere with the efficient operation of a school is reasonable grounds for dismissal, it may be characterized as conduct unbecoming a teacher.

The Court then found that the evidence substantiated a sufficient number of the relatively minor incidents to justify the dismissal of Springgate for incapacity or conduct unbecoming a teacher.

The original de novo law enacted in 1958 accorded a dismissed teacher a full opportunity for a new hearing before a judge of the superior court who would make his own determination as to whether the teacher should be dismissed. The trial court's role was not merely to determine whether a

9 Id. at 260, 415 N.E.2d at 890.
10 Id.
11 Id. at 260-61, 415 N.E.2d at 890.
12 Id. at 261, 415 N.E.2d at 891.
13 Id.
14 Id. at 262, 415 N.E.2d at 891.
15 Id. at 269, 415 N.E.2d at 895.
16 The original de novo law provided:

Any teacher or superintendent of schools employed at discretion who has been dismissed by vote of a school committee under the provisions of section forty-two or section sixty-three may within thirty days after the vote of dismissal appeal therefrom to the superior court in the county in which he was employed. The court shall advance the
school committee was "justified" in its dismissal action.\textsuperscript{17}

In 1977, the General Court changed the role of the superior court pursuant to section 43A, providing for a \textit{de novo} hearing in which the court would "review such action, and determine whether or not upon all the evidence such action was justifiable".\textsuperscript{18} The amended section 43A also provides: "If the court finds such action was justifiable, the action of the school committee shall be affirmed."\textsuperscript{19}

The Appeals Court's decision in \textit{Springgate} demonstrates the significance of the changes in the role of the superior court in reviewing dismissals of tenured teachers. Under the original \textit{de novo} law, the superior court would have acted properly in assessing the gravity of the charges against Springgate and the appropriateness and wisdom of the school committee's action. That the superior court may no longer exercise such prerogatives under section 43A significantly enhances the powers of school committees in teacher dismissal cases. School committees now enjoy great latitude in determining proper cause for dismissal and a superior court judge may not substitute his or her judgment for that of the school committee unless the school committee's action is "arbitrary, irrational, unreasonable, in bad faith, or irrelevant to the committee's task of running a sound school system."\textsuperscript{20}

\textsection{7.7. \textbf{Strict Construction of Tenure Statute.}} During the \textit{Survey} year one high court decision was announced concerning teacher tenure. In \textit{Farrington v. School Comm. of Cambridge},\textsuperscript{1} a divided Supreme Judicial Court held that the Cambridge School Committee's failure to act seasonably to deny tenure and to give notice of that decision had the effect of "electing" a teacher to tenure.\textsuperscript{2} The plaintiff teacher was employed for three consecutive years by the City of Cambridge.\textsuperscript{3} On April 15 of her third year, the teacher received notice from the superintendent of schools informing her that she would not be rehired for the following year.\textsuperscript{4} However, the school commit-
The plaintiff did not take its vote until July 10 when it decided not to rehire the plaintiff. The plaintiff received notice of that vote on July 18.

The Appeals Court affirmed the judgment of the superior court in concluding that the April notice was defective because it was from the superintendent and not from the school committee, and that the July vote was ineffective because it was later than the April 15 deadline specified for such votes by chapter 71, section 41. The Supreme Judicial Court observed that an amendment to chapter 71, section 38 by statute 1914, chapter 342 now grants every superintendent of schools the power to prevent the granting of tenure by making a decision not to nominate a teacher for election, contract, or promotion, but that that amendment was not in effect at the time this case arose. Thus, the sole issue on appeal to the Supreme Judicial Court was whether the decision of the lower court that the plaintiff obtained tenure under chapter 71, section 41 due to the defective notice and tardy vote was erroneous.

The majority held that the effect of the defective notice and late school committee vote was to grant the plaintiff tenure under chapter 71, section 41. The majority first restated the principle of *Bonar v. Borton* that "a teacher obtains tenure after three consecutive years of employment unless the appropriate school department officials give her timely, authorized, and proper notice in her third year of probationary employment that she will not be employed in the following year." The majority rejected the school committee's contention that an authorized notice, given before the April 15 deadline, adequately preserves the school committee's option to make an adverse tenure decision at some later date. The majority saw the instant situation no different than the failure to give a teacher in her first or second year "an adequate notice" that she will not be employed in the following year.

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1. *Id.* at 153, 415 N.E.2d at 212.
2. *Id.*

   Every school committee, in electing a teacher or superintendent who has served in its public schools for the three previous consecutive school years ... shall employ him to serve at its discretion. ... A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year.

5. *Id.* at 153, 415 N.E.2d at 213.
6. *Id.*
9. *Id.* at 154, 415 N.E.2d at 213.

http://lawdigitalcommons.bc.edu/asml/vol1981/iss1/10
year timely notice of her dismissal which would entitle the teacher to an additional year of service.\textsuperscript{14}

In a brief but vehement dissent, Justices Braucher and Abrams stated that they did not feel compelled to endorse the incorrect \textit{Bonar} decision since they were not members of the Court at the time it was decided.\textsuperscript{15} They argued that the effect of the instant decision and \textit{Bonar} is to grant "an unqualified teacher life tenure because of a highly technical procedural defect, to the detriment of the children who should be the beneficiaries of the system."\textsuperscript{16} They were especially critical of the majority's opinion in light of the amendment to chapter 71, section 38 which now allows superintendents to exercise the power to deny tenure.\textsuperscript{17}

\textbf{Farrington} demonstrates the extent of the majority's firm commitment to a strict construction of chapter 71, section 41, the teacher tenure statute, and that the impact of such a reading upon the education of Massachusetts children, in their view, is not a relevant consideration.

\textbf{§ 7.8. Reduction of Teaching Load and Salary of Tenured Teacher. \textit{Setterlund v. Groton-Dunstable Regional School Comm.}}\textsuperscript{1} involved issues which are significant to every school committee in the Commonwealth facing reductions in teaching staff.

William Setterlund, a tenured teacher, was notified by the Superintendent of the Groton-Dunstable Regional School District that he would recommend a reduction in Setterlund's teaching position and salary from full-time to half-time for the 1979-80 school year.\textsuperscript{2} The reasons given for the reduction were "staff cuts, tax cut legislation, budgetary problems and program needs".\textsuperscript{3} Following the school committee's vote accepting the Superintendent's recommendation, Setterlund filed a complaint in the superior court seeking reinstatement to a full-time position and a ruling that his salary had been unlawfully reduced.\textsuperscript{4} The judge of the superior court denied his claim relating to the salary reduction and ruled that he was not entitled to a hearing in superior court under chapter 71, section 43A concerning his claim that the reduction from full-time to part-time status was improper.\textsuperscript{5} Setterlund thereupon appealed.\textsuperscript{6}

\begin{itemize}
\item \textsuperscript{1} \textit{Id.}
\item \textsuperscript{2} \textit{Id.} at 154-55, 415 N.E.2d at 213 (Braucher and Abrams, J.J. dissenting).
\item \textsuperscript{3} \textit{Id.} at 155, 415 N.E.2d at 213.
\item \textsuperscript{4} \textit{Id.} at 156, 415 N.E.2d at 214.
\item \textsuperscript{5} \textit{Id.}
\item \textsuperscript{6} \textit{Id.}
\end{itemize}
The first issue addressed by the Court was whether the pro-rata reduction in Setterlund's salary as a result of the reduction in teaching responsibilities violated chapter 71, section 43. The Court found that the reduction in Setterlund's salary did not violate this statute because Setterlund, through his collective representative, had consented to a proportional salary for part-time teachers. The Court noted that the rate of pay for part-time teachers is a bargainable subject under chapter 150E, sections 5 and 6 and that reductions in salary for purposes of chapter 71, section 43 do not require "individual consent" in all cases. The Court distinguished two situations in which a tenured teacher may have his salary reduced: (1) if as here, he is subject to a collective bargaining agreement, it may be reduced in accordance with the agreement; (2) if he is not subject to a collective bargaining agreement, he must individually consent to a reduction.

The second issue addressed by the Court was whether, under chapter 71, sections 42 and 43A, an involuntarily reduction of a tenured teacher

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7 G.L. c. 71, § 43 provides in relevant part:
The salary of no teacher employed in any town except Boston to serve at discretion shall be reduced without his consent except by a general salary revision affecting equally all teachers of the same salary grade in the town.


9 G.L. c. 150E, § 5 provides in relevant part:
The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

10 G.L. c. 150E, § 6 provides:
The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment, but such obligation shall not compel either party to agree to a proposal or make a concession.


12 Id. at 158 n.3, 415 N.E.2d at 215 n.3.

13 G.L. c. 71, § 42 provides in relevant part:
In every such town a teacher or superintendent employed at discretion under section forty-one or a superintendent employed under a contract, for the duration of his contract, shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so request [sic], he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section.

14 G.L. c. 71, § 43A provides:
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from full-time to part-time employment is a "dismissal". If so, Setterlund had been improperly denied de novo review of the school committee's action in the superior court. The Court agreed with the plaintiff that a reduction to part-time was sufficient to trigger the statutory protection granted tenured teachers under chapter 71, section 43A. In so ruling, the Court held that a reduction from full-time to part-time teaching status without the teacher's consent is a "dismissal" and that the term "dismissal" does not require that a teacher be "wholly banished from the school system." The Court referred to the Illinois case of Caviness v. Board of Educ. where it was stated:

[T]o be consistent with the purpose of the School Code the words ['removed' or 'dismissed'] must encompass any reduction in extent of employment. The tenure provisions of the School Code were intended to protect experienced and veteran teachers against capricious, fickle and irregular exploits of school boards. . . . And limiting the application of 'removed' or 'dismissed' to instances of complete termination would — as a practical matter — totally obliterate the protection intended by the statute. If this were the case, a board could merely nibble away and reduce one's employment until economic necessity forced the tenured teacher to resign. Such interpretation cannot be sanctioned. [Emphasis in original.]

The Supreme Judicial Court found this reasoning persuasive. In ruling that the salary reduction was not unlawful, the Supreme Judicial Court stated expressly what seemed obvious from the Trachtman decision,

Any teacher or principal or superintendent of schools employed at discretion or any superintendent employed under a contract, for the duration of his contract, or any principal or supervisor, who had been dismissed, demoted, or removed from a position by vote of a school committee under the provisions of section forty-two, section forty-two A or section sixty-three may, within thirty days after such vote appeal therefrom to the superior court in the county in which the person was or is employed. The court shall advance the appeal for a speedy hearing and, after such notice to the parties as it deems reasonable, it shall hear the case de novo, review such action, and determine whether or not upon all the evidence such action was justifiable. If the court finds such action was justifiable, the action of the school committee shall be affirmed; otherwise, it shall be reversed and the appellant shall be reinstated to the position without loss of compensation. The decision of the court shall be final, except as to matters of law.

16 id. at 159, 415 N.E.2d at 216.
17 id.
18 id.
20 id. at 31.
that, if the collective bargaining agreement contemplates part-time salaries for part-time teachers, a teacher has consented to a reduction from full-time salary to part-time salary and there is thus no violation of chapter 71, section 43. However, this reading of the statute appears to fly in the face of chapter 150E, section 7(d), which sets forth the specific statutory provisions which can be superseded by a collective bargaining agreement where there is a conflict between the statute and the agreement. Chapter 71, section 43 is not among those statutory provisions listed in section 7(d).

§ 7.9. Open Meeting Law. Subject to certain limited exceptions, all meetings of governmental bodies in Massachusetts must be open to the public. This so-called "open meeting" law is designed to eliminate secrecy surrounding deliberations and decisions of governmental bodies. Because governmental bodies might be unduly hindered in the performance of their functions if all meetings must be open to the public, the law permits executive (closed) sessions solely for purposes expressly set forth in chapter 39, section 23B. Further, executive sessions must be convened in accordance with specific statutory procedures. Two cases arising under the open meeting law during the Survey year provided the Appeals Court with the opportunity to examine appropriate subjects for executive session and the procedures required to convene such sessions.

In Puglisi v. School Committee of Whitman, a complaint alleged that an executive session held by the Whitman School Committee violated the open meeting law. The trial judge ruled in the plaintiff's favor and invalidated the action taken by the school committee in executive session. The Appeals Court affirmed the decision of the trial judge, but modified the judgment.

The executive session in question occurred subsequent to a public hearing held to air certain charges against an elementary school principal and to determine whether the principal should be dismissed or otherwise disciplined. After the school committee spent an evening hearing testimony, it voted to reconvene the next evening at which time it would make a decision regarding the principal's continued employment. Upon reconvening, the

§ 7.9. 1 G.L. c. 39, §§ 29A-29C.
3 Id. at 72-73, 378 N.E.2d at 987.
4 Id. at 73, 378 N.E.2d at 987.
5 Id. See G.L. c. 39, § 23B.
7 Id. at 47, 414 N.E.2d at 613.
8 Id.
9 Id.
10 Id.
11 Id. at 47, 414 N.E.2d at 613-14.
school committee adjourned to executive session at the request of the superintendent of schools.\textsuperscript{12} The superintendent requested the executive session for the stated purpose of discussing his, \textit{i.e.}, the superintendent’s, reputation and character, although the superintendent’s reputation or character had not been in question.\textsuperscript{13}

Proceeding into executive session, the school committee, as to matters of form, “turned its corners squarely.”\textsuperscript{14} The Appeals Court acknowledged that the school committee followed “the letter of the law” as to form, but nevertheless affirmed the trial judge’s finding that, as to matters of substance, the executive session was “a sham.”\textsuperscript{15} The Appeals Court concluded that the clear purpose of the executive session was not to discuss the superintendent’s reputation or character, but to allow the superintendent to have the last word on the principal’s continued employment.\textsuperscript{16} Moreover, even if the executive session was convened to discuss the superintendent’s reputation and character, the Appeals Court agreed with the trial judge that “the maneuver represented a distortion of the statute.”\textsuperscript{17} The Appeals Court reasoned that the exception which appears in chapter 39, section 23B(1) was designed to allow a public body “to engage in candid discussion about the character and reputation of an individual who is the subject of potential action by that public body.”\textsuperscript{18} The superintendent, acting in a prosecutorial role, was in need of no such rights, according to the Appeals Court.\textsuperscript{19} The Appeals Court supported its reasoning by reference to other jurisdictions which had not permitted such dubious gambits to justify executive sessions.\textsuperscript{20}

The Appeals Court, however, departed from the trial judge’s decision with respect to the matter of appropriate relief.\textsuperscript{21} While noting that the statute authorized courts to order future compliance with the open meeting law by a governmental body, the Appeals Court also noted that a court “may invalidate any action taken at the meeting.”\textsuperscript{22} In this case, the Appeals Court felt that any desire to invalidate the school committee’s action,
and thereby reinstate the principal, must be tempered by recognition that the courts must not infringe upon a school committee's exclusive dominion over the management of its public schools. The Appeals Court found that, while it was appropriate to order back-pay from the date of the principal's discharge until the school committee has acted in conformity with the open meeting law, it would be inappropriate to order his reinstatement. The Appeals Court modified the trial judge's order accordingly.

In District Attorney for Northwestern District v. Board of Selectmen of Sunderland, the Appeals Court ruled that the Board of Selectmen of Sunderland violated the open meeting law in two respects. First, the Board failed to secure the requisite majority vote to go into executive session required under chapter 39, section 23B. Second, its closed meeting with department heads for the purpose of discussing salaries of non-union employees of the town did not fall within either the § 23(B) exception for discussion of "strategy with respect to collective bargaining" or the § 23(b) exemption for conducting "collective bargaining".

At a regularly scheduled meeting of the board of selectmen to discuss the town budget, three selectmen were present along with heads of town departments. During the meeting, one of the selectmen moved to go into executive session to discuss "collective bargaining". The motion was seconded. During discussion of the motion it became evident that the purpose of the proposed executive session was to allow the department heads to talk about the salaries of their non-union employees with the board in preparation of the town budget. At the conclusion of the discussion on the motion, two selectmen abstained and one voted to enter executive session. Based upon that single affirmative vote, the board members met with the department heads in executive session. During the executive session, the selectmen discussed a variety of subjects, but at no time were there present

23 Id. at 50, 414 N.E.2d at 615.
24 Id. at 51, 414 N.E.2d at 615. The court stated that reinstatement may be read as conferring entitlement to a position. Id. at 50, 414 N.E.2d at 615. The adverse practical consequences of reinstatement in cases such as this were acknowledged by the Appeals Court. Id.
25 Id. at 51, 414 N.E.2d at 615-16.
27 Id. at 742, 418 N.E.2d at 644. Under § 23B, no executive session is permitted unless "a majority of the members [of the governmental body] have voted to go into executive session."
29 Id. at 741, 418 N.E.2d at 643.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
any employees whose salaries were being discussed, collective bargaining agents or other town employees.\(^ {35} \)

The District Attorney brought the complaint against the board.\(^ {36} \) The superior court ruled that one vote did not constitute a majority vote as required by section 23B to convene a closed session, and that the Board did not convene in closed session to discuss collective bargaining.\(^ {37} \) The Appeals Court affirmed that decision.\(^ {38} \)

The Appeals Court first addressed the issue of whether a single vote by a member of a three-member board could ever constitute a majority vote.\(^ {39} \) The court examined the language of section 23B which provides that “a majority of [the board] have voted to go into executive session.”\(^ {40} \) Like the superior court, the Appeals Court found the phrase simple and unambiguous and thus, to be construed by “common and approved use of this language.”\(^ {41} \) The standard definition of “majority”, the court observed, is “a number greater than half of a total.”\(^ {42} \) This standard definition, when read with the common law maxim that “in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body,” convinced the Appeals Court that under no circumstances could one vote constitute a majority of a quorum of a three-member board.\(^ {43} \)

The Appeals Court then considered whether the board had a legitimate purpose for moving into executive session.\(^ {44} \) The court noted that under section 23B the burden to show the need for a closed meeting rests on the governmental body.\(^ {45} \) The court then commented that a governmental body cannot rely upon section 23B exceptions to open meetings where the exceptions are shams, citing *Puglisi v. School Comm. of Whitman.*\(^ {46} \) The court next focused on whether the board had conducted “collective bargaining.”\(^ {47} \) The board argued that under *Attorney General v. School Comm. of Taunton,*\(^ {47} \) heads of departments were appropriate bargaining representatives with whom the board could properly discuss wages, hours, and other working conditions.\(^ {48} \) The court readily distinguished *Taunton,* observing that in

\(^ {35} \) Id. at 741, 418 N.E.2d at 644.

\(^ {36} \) Id. at 740, 418 N.E.2d at 643.

\(^ {37} \) Id. at 740-41, 418 N.E.2d at 643.

\(^ {38} \) Id. at 741, 418 N.E.2d at 644.

\(^ {39} \) Id. at 742, 418 N.E.2d at 644.

\(^ {40} \) Id.

\(^ {41} \) Id.

\(^ {42} \) Id.

\(^ {43} \) Id.

\(^ {44} \) Id. at 743, 418 N.E.2d at 644.

\(^ {45} \) Id.

\(^ {46} \) Id.

\(^ {47} \) Id.


the instant case, there was no evidence that the department heads had any role in collective bargaining negotiations or that the employees who were discussed were members of collective bargaining units or about to become such. Nor was there evidence showing how an open meeting would have had a negative impact on the board’s bargaining position with collective bargaining units, as there had been in Taunton.

These two open meeting law cases demonstrate that the courts will enforce the open meeting law strictly. In both cases, the governmental bodies were found to have had no permissible justification for entering executive session. The Appeals Court’s strict reading of section 23B places governmental bodies on notice that executive sessions found not to be firmly within the exceptions of section 23B will not be tolerated.

These two cases also illustrate that public bodies have not generally found the open meeting law easy to adjust to, since there are certain types of matters which simply are not suitable for discussion in open session. In such instances, some public bodies have searched, with varying degrees of success, for ways around the law. Some have simply disregarded the law. Indeed, in some situations the obligation to discuss a matter in public does not appear to serve the public interest. For example, it is difficult for candidates for the position of superintendent of schools to be probed in open session concerning their backgrounds and qualifications. This type of public questioning creates a “fish bowl” environment which plainly discourages some qualified candidates from applying. Moreover, once a school committee has narrowed the field of candidates, it is certainly not in the public interest to require the school committee to discuss in public the range of compensation which it would be willing to offer a candidate. Discussing such matters in public can only serve to impair the bargaining power which a school district should have in entering compensation negotiations with a candidate.

The open meeting law was designed to meet a legitimate objective, i.e., to prevent secret government. But in accomplishing this objective the public interest also pays a price. The courts have appropriately recognized, however, that it is the legislature, and not the courts which must find the proper accommodation of the countervailing interests of the public’s right to know and the effective operation of our governmental bodies.

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49 Id. at 743, 418 N.E.2d at 645.
50 Id. at 744, 418 N.E.2d at 645.