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CHAPTER 9

Labor and Employment Law

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§ 9.1. Introduction. During the Survey year, the Massachusetts Supreme Judicial Court and the Appeals Court dealt with a variety of issues relating to labor and employment law. The topics covered by these decisions include the following: a public employer's obligation to bargain over mid-contract changes; the ability of a public employer to implement its last offer after an impasse in bargaining is reached; the arbitrability of issues which arise out of an expired collective bargaining agreement; the right of striking employees to be reinstated after engaging in an unlawful strike; the scope of exclusive managerial prerogatives; the authority of the Labor Relations Commission to order back pay in unlawful discharge cases; interpretations of the teacher tenure statute; reductions in teacher salaries; the power of a school committee to suspend a teacher; the right of housing authorities to condition signing of collective bargaining agreements; the power of the Labor Relations Commission to award attorney's fees and expenses; judicial review of dismissals of tenured teachers; and interpretations of the employment security statute.

§ 9.2. Public Employer — Obligations Concerning Mid-Contract Changes — Mandatory Subject of Bargaining. During the Survey year, the Supreme Judicial Court addressed a number of important issues in School Committee of Newton v. Labor Relations Commission.¹ These issues included mandatory subjects of bargaining, the obligation of a public employer to bargain about mid-contract changes and the manner in which that obligation must be discharged, the standards for determining whether there has been a waiver of the right to bargain, and the principles that govern eligibility for and determination of back pay.

In February, 1976, a representative of the Newton School Committee (the “School Committee”) told representatives of the Newton School Custodians Association (the “Association”) that a reduction in force was

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possible. In response, the president of the Association wrote to the School Committee's assistant director of personnel stating that he hoped any reduction in force would be handled through attrition. A collective bargaining agreement was in effect at the time. During negotiations for the agreement, neither the School Committee nor the Association had offered proposals concerning layoffs or reductions in force; nor had the School Committee given the Association notice that a reduction in force was planned. After "some inconclusive general discussion at regular meetings" between Association representatives and the director of support services, layoff notices were issued to seven custodians in April, 1976, to be effective on June 30 of that year. The seven custodians, though provisional, were senior in length of service to at least seven other provisional custodians to be retained. Although there was discussion between the Association and the School Committee about the reduction in force, the layoffs took effect on June 30 as planned.

Following hearings on prohibited practice charges filed by the Association, the Labor Relations Commission (the "Commission") found that a violation of chapter 150E, section 10(a)(1) and (5) had been committed and ordered the School Committee to reinstate the custodians with back pay and interest from the date of layoff to the date of the respective offers of reinstatement. Subsequently, back pay hearings were held and the Commission ordered the payment of specific amounts to six of the seven custodians. The School Committee appealed both the Commission's ruling that it had engaged in a prohibited practice and the back pay award. The Association also appealed certain aspects of the back pay award. Agreeing with the Commission's conclusions, the Supreme Judicial Court affirmed the judgment and decision.

The first issue addressed by the Court was the School Committee's obligations to bargain over its decision to reduce forces by layoff and over the impact of that decision. All parties agreed that the decision to reduce forces was a matter within the School Committee's exclusive managerial

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2 Id. at 560, 447 N.E.2d at 1205.
3 Id.
4 Id. The collective bargaining agreement was entered into on December 15, 1975, and covered the period from July 1, 1975 through June 30, 1977. Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at 560, 447 N.E.2d at 1204.
10 Id. at 560 n.3, 447 N.E.2d at 1205 n.3.
11 Id. at 561 n.3, 447 N.E.2d at 1205 n.3.
12 Id. at 559, 447 N.E.2d at 1204.
13 Id.
14 Id. at 559, 447 N.E.2d at 1204-1205.
The points upon which they disagreed were whether there was an obligation to bargain over how the reduction would be accomplished (i.e., by layoff) and, if so, whether there was an obligation to bargain over the impact of the layoff.¹⁶

The Court stated that, although lower courts had rendered decisions on proper subjects of bargaining, this was the first case in which the Court had been called upon to decide whether a subject was a mandatory subject of collective bargaining.¹⁷ The Court concluded that termination of employment by layoff is a "term or condition," within the meaning of chapter 150E, section 6,¹⁸ which goes to the "very essence" of the employment relationship, and therefore, falls literally within the scope of mandatory subjects of bargaining.¹⁹

The fundamental issue for the Court was "whether general grants of discretion to a school committee to layoff employees take precedence over the duty [to bargain] stated in [section] 6."²⁰ The School Committee relied upon statutory grants and provisions of the Newton city charter as the basis for its position that the matter of layoffs cannot be subject to any contrary provision in a contract.²¹ The only mandatory subjects of bargaining, the School Committee contended, are those dealt with in the regulations and statutes listed in chapter 150E, section 7(d), which may be superseded by a collective bargaining provision.²² To support its position concerning statutory grants, the School Committee cited the general grants of authority to school committees to operate and manage public schools found in chapter 71, sections 37 and 68.²³ The Court, however, saw no aspect of educational policy implicated in a requirement to bargain over a decision to reduce forces by layoff or over the impact of such a layoff.²⁴

The School Committee also argued that the city charter grants of authority to discharge employees "at its pleasure" controlled because these grants are not listed in chapter 150E, section 7(d), as capable of

¹⁵ Id. at 562, 447 N.E.2d at 1206.
¹⁶ Id.
¹⁷ Id.
¹⁸ 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 of 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.
¹⁹ 388 Mass. at 563, 447 N.E.2d at 1206.
²⁰ Id. at 564, 447 N.E.2d at 1207.
²¹ Id. at 564-65, 447 N.E.2d at 1207.
²² Id. at 565, 447 N.E.2d at 1207.
²³ Id. at 565, 447 N.E.2d at 1208.
²⁴ Id.
being superseded by a collective bargaining agreement. The Court dismissed this contention, noting that few of the statutes and regulations listed in section 7 apply to school committees. In the Court's view, accepting the School Committee's argument would mean that it "had virtually no obligation to bargain about anything." The Court further stated:

We do not attribute to the Legislature an intention to pass a largely ineffective collective bargaining statute as to public school employees. The general discretion to act which school committees have is limited by their obligation to bargain stated in [chapter] 150E, [section] 6. A school committee need not bargain concerning specific statutory requirements or limitations not listed in [section] 7(d). The fact that [section] 7(d) does not list the general authority of school committees to discharge employees at their pleasure is irrelevant in the face of the legislative purpose to subject that general authority to the collective bargaining process, absent some overriding policy against interfering with the school committee's right to determine significant aspects of educational policy.

It follows, the Court said, that decisions regarding the timing of any layoff, the number of employees to be laid off, and which employees are to be laid off are also required subjects of bargaining.

Turning to the second issue, the Court considered the obligation to bargain over a layoff which occurs mid-contract and changes no existing practice. The School Committee argued that, under the circumstances of this case, it was under no obligation to bargain because the collective bargaining agreement was in midterm and the issue of layoffs had not been discussed in bargaining.

Rejecting this argument, the Court concluded that a school committee is obligated to bargain over mandatory subjects that are not covered in a collective bargaining agreement and that are not discussed in bargaining, provided there has not been a waiver by the union of the right to bargain. The Court found unpersuasive the School Committee's contentions that "the commission ignored its own precedent in imposing a mid-term duty to bargain where there was no existing practice" and that it was "unfair to place a new requirement on the school committee because it relied on that precedent in good faith." The Commission's decision, the Court stated, was anticipated both by the Commission's own decisions and decisions

25 Id. at 566, 447 N.E.2d at 1208.
26 Id.
27 Id.
28 Id.
29 Id. at 566-67, 447 N.E.2d at 1208.
30 Id. at 567, 447 N.E.2d at 1209.
31 Id.
32 Id. at 567-68, 447 N.E.2d at 1209 (citing Cohasset School Comm., No. MUP-419 (1974)).
under the National Labor Relations Act.\textsuperscript{33}

The Court also rejected the School Committee’s contention that the Association had waived its right to bargain. The Court concurred with the Commission’s conclusions that the broad but general management rights clause,\textsuperscript{34} which made no reference to layoffs, did not constitute a waiver and that a waiver to be effective must be clear, unmistakable and unequivocal.\textsuperscript{35} Agreeing with the Commission, the Court noted that the Association had not waived its right to bargain by inaction.\textsuperscript{36} In the Court’s view, the Association did not have sufficient specific information upon which it should have been expected to act.\textsuperscript{37}

The Court next considered whether the School Committee had fulfilled its obligation to bargain. The Commission had found that the Association immediately sought to have input into the layoff decision when, on February 15, 1976, it was informed that layoffs were likely. From that time until layoff notices were issued, according to the Commission, the School Committee failed to make itself available for bargaining, thus violating chapter 150E, section 10(a)(5), regardless of its good or bad faith.\textsuperscript{38} The

\textsuperscript{33} School Comm. of Newton, 388 Mass. at 568, 447 N.E.2d at 1209 (citing NL Indus. v. NLRB, 536 F.2d 786, 789-90 (8th Cir. 1976); Robert Shaw Controls Co., Acro Div. v. NLRB, 386 F.2d 377, 388-89 (4th Cir. 1967); NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 683-84 (2d Cir. 1952)).

\textsuperscript{34} 388 Mass. at 568 n.7, 447 N.E.2d at 1210 n.7. The management rights clause stated: Except as specifically abridged, delegated, granted or modified by this Agreement, or any supplementary agreements that may hereafter be made, all of the rights, powers and authority the EMPLOYER had prior to the signing of this Agreement are retained by the EMPLOYER, and remain exclusively and without limitation within the rights of management.

\textsuperscript{35} Id. at 568, 447 N.E.2d at 1210 (citing NLRB v. Everbrite Elec. Signs Inc., 562 F.2d 405, 407-08 (7th Cir. 1977); Leeds & Northrop Co. v. NLRB, 391 F.2d 874, 877-78 (3d Cir. 1968); City of Boston, 9 M.L.C. 1173, 1175 (H. O. 1982); Town of Andover, 3 M.L.C. 1710, 1717 (H. O. 1977); City of Everett, 2 M.L.C. 1471, 1475-76 (1976), aff’d, Labor Relations Comm’n v. Everett, 7 Mass. App. Ct. 826 (1979)). The Court also noted that a “zipper” clause (“a provision making the contract the exclusive statement of the parties’ rights”), may support a finding of waiver, but that no zipper clause was found in School Comm. of Newton, 388 Mass. at 569 n.8, 447 N.E.2d at 1210 n.8 (citing Cohasset School Comm., No. MUP-419 (1974)).

\textsuperscript{36} Id. at 568, 447 N.E.2d at 1210 (citing NLRB v. everbrite Elec. Signs Inc., 562 F.2d 405, 407-08 (7th Cir. 1977); Leeds & Northrop Co. v. NLRB, 391 F.2d 874, 877-78 (3d Cir. 1968); City of Boston, 9 M.L.C. 1173, 1175 (H. O. 1982); Town of Andover, 3 M.L.C. 1710, 1717 (H. O. 1977); City of Everett, 2 M.L.C. 1471, 1475-76 (1976), aff’d, Labor Relations Comm’n v. Everett, 7 Mass. App. Ct. 826 (1979)). The Court noted that decisions under the National Labor Relations Act have dealt similarly with the issue of waiver. NLRB v. Spun-Jee Corp., 385 F.2d 379, 383-84 (2d Cir. 1967) (waiver); Metromedia, Inc., KMBC-TV v. NLRB, 586 F.2d 1182, 1189 (8th Cir. 1978) (no waiver).

\textsuperscript{37} 388 Mass. at 570, 447 N.E.2d at 1211.

\textsuperscript{38} Id. at 571, 447 N.E.2d at 1211.
Commission had further found that the School Committee did not intend "to solve its differences" with the Association at the bargaining table and thus had refused to bargain in good faith in violation of section 10(a)(5). ³⁹

The Court affirmed both findings. As to the first, the Court concluded that "a failure to meet and negotiate when there is a duty to do so and unilateral action without prior discussion can constitute an unlawful refusal to bargain, without regard to the party's good or bad faith." ⁴⁰

According to the Court, substantial evidence supported the Commission's finding on this issue. ⁴¹ The Commission, the Court found, correctly determined that the School Committee's participation in the meetings held on June 29 and 30, just before the effective date of the layoffs, at which the parties discussed the reduction-in-force issue, did not serve to fulfill its bargaining obligation. ⁴² The fact that the parties reached an impasse, the Court concluded, did not permit the School Committee's unilateral action. ⁴³ The Court concurred with the Commission's view that the bargaining process was "artificially shortened," stating specifically that "the School Committee could not refuse to bargain for a period of over four months, negotiate for two days prior to implementation of a change, and then contend that it had fulfilled its bargaining obligation." ⁴⁴ The Commission had assumed, without deciding, that the School Committee participated in these two days of negotiations in good faith. Nevertheless, according to the Court, the Commission had refused to find that the stalemate reached on June 30 was "a final 'impasse' permitting the employer to take unilateral action with respect to mandatory topics." ⁴⁵ The School Committee's course of action, the Commission had concluded, violated chapter 150E, section 10(a)(1) and (5). ⁴⁶

Finally, the Court turned to the question of eligibility for and determination of back pay. First, the Court held that it was within the authority of the Commission to order the payment of lost wages. ⁴⁷ According to the Court, chapter 150E, section 11 states that, if the Commission "determines that a prohibited practice has been committed, it shall order the

³⁹ Id.
⁴¹ 388 Mass. at 575, 447 N.E.2d at 1212.
⁴² Id. at 574, 447 N.E.2d at 1212.
⁴³ Id.
⁴⁴ Id. at 574-75, 447 N.E.2d at 1213.
⁴⁵ Id.
⁴⁶ Id. The Court noted that "[a]lthough this interpretation of the facts was not required, it was supported by substantial evidence and was otherwise lawful." Id.
⁴⁷ Id. at 575, 447 N.E.2d at 1213.
violator to cease the practice ‘and shall take such further affirmative action as will comply with the provisions of [section 11].’ 

Section 11, the Court noted, further provides that the Commission ‘shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section.’ 

The Court rejected the School Committee’s argument that reference to back pay in relation to employees who have been discharged or discriminated against is a limitation on what “affirmative action” may be ordered under section 11. In response to the School Committee’s argument that a back pay order dictates an agreement between the parties, the Court found that the purpose of such an order is to restore the status quo.

Having established the Commission’s authority to order retroactive compensation, the Court next considered whether the Commission should have ordered full back pay from the date of layoff to the date of offers to reinstate. The School Committee’s failure to bargain over the layoff decision, the Court found, justified a back pay order. The Court also sustained the Commission’s conclusion that none of the four conditions recognized by the National Labor Relations Board (“the NLRB”) existed here to justify early termination of back pay as a matter of law. Moreover, the Court concluded that the Commission had the authority under section 11 to award interest and that such an award was consistent with federal practice. The Legislature, the Court noted, had granted the Commission considerable discretion under section 11 in fashioning an appropriate remedy.

The School Committee, questioning whether the Commission had properly computed damages, argued that the burden of proof should have been on the employees with respect to mitigation of damages. The

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48 Id. (quoting G.L. c. 150E § 11).
49 Id.
50 Id. at 576, 447 N.E.2d at 1213.
51 Id.
52 Id. at 577, 447 N.E.2d at 1214.
53 The four conditions are (1) an agreement is reached, (2) the parties bargain to a bona fide impasse, (3) the union fails seasonably to request bargaining or to respond to a bargaining request, or (4) the union fails to bargain in good faith. See Transmarine Navigation Corp., 170 N.L.R.B. 389, 390 (1968); Winn-Dixie Stores, Inc., 147 N.L.R.B. 788, 792 (1964).
54 388 Mass. at 578, 447 N.E.2d at 1215.
55 Id. at 579, 447 N.E.2d at 1215 (citing Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962), enforcement denied on other grounds, NLRB v. Isis Plumbing & Heating Co., 322 F.2d 913 (9th Cir. 1963)).
56 Id. at 580, 447 N.E.2d at 1215. The Court distinguished its decision in Broadhurst v. Director of Div. of Employment Security, 373 Mass. 720, 369 N.E.2d 1018 (1977), which held that interest cannot be awarded on improperly denied unemployment benefits.
57 388 Mass. at 580, 447 N.E.2d at 1215-16.
Court, however, sustained the Commission's holding that the burden of proof should be on the employer, noting that such a placement was consistent with Massachusetts law and NLRB cases. The Court also agreed with other Commission conclusions with respect to computation of back pay, including the reduction of back pay by the amount of unemployment compensation received by the custodians.

The importance of *School Committee of Newton* is evident in a number of areas. It is apparent from *School Committee of Newton* that, on matters of legal interpretation of the statutes which the Labor Relations Commission is responsible for applying, the Supreme Judicial Court will accord considerable deference to Commission decisions, particularly if the Commission applies time-honored interpretations of the National Labor Relations Act.

*School Committee of Newton* also instructs that, unless a decision of a school committee affecting terms and conditions of employment directly implicates educational policy, the school committee will be obligated to bargain about aspects of the matter. As a result, the question of whether or not a decision implicates educational policy is likely to be heavily debated in future cases. It is not clear from the Court’s opinion why the Newton School Committee decided to reduce forces. An unanswered question, therefore, is whether educational policy would be implicated, for example, if a reduction in force were necessary because of financial exigencies and the continuation of educational programs was at stake.

The important consideration for both public employers and collective bargaining representatives is that the rules governing their conduct be clear. In most instances, the obligation to bargain is not onerous. Rarely is there insufficient time to bargain over a decision. It would certainly be advisable, therefore, for a public employer, unless it is crystal clear that a decision is not bargainable, to offer the bargaining representative the opportunity to negotiate. If an employer believes that a decision may not require bargaining, the employer could nevertheless engage in the bargaining process, while reserving its rights on that question.

Finally, *School Committee of Newton* suggests one noteworthy distinction between Labor Relations Commission and NLRB decisions relating to the reliance upon a “zipper” clause as the basis for a finding of waiver. Under current NLRB case law, the Board has been reluctant to base a finding of waiver on a zipper clause alone. The Commission and the Court, however, appear willing to do so. Consequently, school commit-

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58 Id. at 580, 447 N.E.2d at 1216. See M. Restaurants, Inc. v. NLRB, 621 F.2d 336, 337 (9th Cir. 1980); Marine Welding & Repair Works, Inc. v. NLRB, 492 F.2d 526, 528 (5th Cir. 1974).

59 388 Mass. at 581, 447 N.E.2d at 1216.

60 See supra note 35.
tees and other public employers should consider seeking an appropriate zipper clause if they wish to obviate their obligation to bargain over mid-term decisions which alter non-contract terms and conditions of employment.

§ 9.3. Public Employer — Right to Implement Last Offer After Impasse but Before Fact-Finding. The impasse resolution procedures set forth in sections 8 and 9 of chapter 150E, the Public Employee Collective Bargaining Law, distinguish this statute from both the Massachusetts private sector labor law and the National Labor Relations Act. Under federal law, an employer may implement unilaterally all or part of its offer to a union if an impasse has been reached in negotiations. Chapter 150E, however, contains a provision not found in either the federal law or the Massachusetts private sector labor law. Section 10(a)(6) of chapter 150E makes it an unfair labor practice for a public employer to refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections 8 and 9. For public employees, other than those employed as police and fire personnel, fact-finding is the final stage in the impasse resolution process and takes place only after an impasse has been certified by a state mediator. Until the Supreme Judicial Court’s decision in Massachusetts Organization of State Engineers & Scientists v. Labor Relations Commission, (“MOSES”), it was unclear whether a public employer could unilaterally implement its offer after an impasse in bargaining had been reached, but prior to completion of fact-finding, without violating section 10(a)(6).

In MOSES, the Massachusetts Organization of State Engineers and Scientists (“MOSES”) and the Commonwealth of Massachusetts Office of Employee Relations (the “Commonwealth”) were parties to a collective bargaining agreement which ran through June 30, 1980. Article 29 of the agreement provided, “[s]hould a successor agreement not be executed by July 1, 1980, this Agreement shall remain in full force and effect until a successor agreement is executed or an impasse in negotiations is reached.” No agreement was concluded by July 1, 1980, and on August 6, 1980, MOSES petitioned the Massachusetts Board of Conciliation and Arbitration for mediation pursuant to section 9 of chapter 150E. On

§ 9.3. ¹ G.L. c. 150A.
⁴ G.L. c. 105E, § 9.
⁶ Id. at 921, 452 N.E.2d at 1118.
⁷ Id. (quoting Article 29 of the collective bargaining agreement).
⁸ Id.
September 16, a mediator declared an impasse and certified the matter for fact-finding. A fact-finder was appointed. Prior to the commencement of fact-finding, a meeting between the parties was held under the auspices of the mediator. At that meeting, the Commonwealth presented to MOSES, through the mediator, a number of work rules changes, some of which were to go into effect that day. The changes in work rules conformed to the Commonwealth’s previous bargaining position.

Fact-finding began in December, 1980, and in January, 1981, MOSES filed charges with the Labor Relations Commission (the “Commission”) alleging that the Commonwealth had failed to bargain and participate in good faith in fact-finding as required by chapter 150E, section 10(a)(5) and (6). Following hearings, the Commission ruled that the unilateral changes made by the Commonwealth were lawful because an impasse in bargaining had been reached. MOSES appealed the Commission’s ruling.

In February, 1981, the Commonwealth announced a decision to layoff employees in the bargaining unit represented by MOSES. MOSES filed a grievance, alleging that the Commonwealth had used incorrect seniority credits in determining which employees were to be laid off. MOSES unsuccessfully sought arbitration in the grievance procedure. The Commonwealth refused to arbitrate on the ground that no arbitration agreement was in effect. In June, 1981, MOSES requested bargaining concerning the impact of the transfer of employees from one department to another on the seniority rights of its members. Meetings were held but no bargaining took place, and the transfers became final in July, 1981.

MOSES brought charges against the Commonwealth in June, 1981, because of its refusal to arbitrate the layoffs and to bargain over the transfers. The Commission ruled that the Commonwealth’s duty to arbitrate and to bargain had expired when it bargained to impasse. MOSES appealed and the two cases were transferred to the Supreme Judicial Court on its own motion.

MOSES contended that “the statutorily-sanctioned fact-finding procedures are an integral part of the public sector negotiating process and that,

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9 Id.
10 Id. at 922, 452 N.E.2d at 1118.
11 Id. at 922, 452 N.E. 2d at 1119.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id. at 922-23, 452 N.E.2d at 1119.
17 Id. at 923, 452 N.E.2d at 1118-19.
18 Id.
19 Id.
therefore, an impasse which would permit a public employer to initiate unilateral changes cannot legally occur prior to completion of fact-finding.\textsuperscript{20} In addition, MOSES argued, unilateral changes prior to completion of fact-finding should be per se unlawful as a matter of policy because otherwise a public employer would "hold an unfair economic advantage over public employees who unlike their private sector counterparts, are forbidden by law to strike."\textsuperscript{21}

Stating that the issue was one of statutory interpretation, the Court noted it gives deference to an administrative interpretation of a statute, especially "where, as here, an agency must interpret a legislative policy which is only broadly set out in the governing statute."\textsuperscript{22} Nothing in either the statute itself or its legislative history, the Court observed, suggested that implementation of unilateral changes prior to completion of fact-finding was either allowed or prohibited.\textsuperscript{23} The Court then turned to the Commission's interpretation and application of the statute.\textsuperscript{24}

According to the Court, as early as 1974, the Commission had relied upon the Supreme Court's decision in \textit{NLRB v. Katz}\textsuperscript{25} and ruled that a public employer could not make unilateral changes in mandatory subjects of bargaining without negotiating with the union representing its employees.\textsuperscript{26} In 1979, the Court noted, the Commission held in \textit{Hanson School Committee},\textsuperscript{27} that a public employer could implement a change unilaterally where an impasse in bargaining had been reached, even though the mediator had made no formal declaration of impasse.\textsuperscript{28} In \textit{Hanson}, according to the Court, the Commission "stated that although the existence of a legitimate impasse merely suspended, but did not terminate, a party's obligation to bargain in good faith, '[a]fter good faith negotiations have exhausted the prospects of concluding an agreement, an employer may implement unilateral changes which are reasonably comprehended within its pre-impasse proposals.'"\textsuperscript{29} The Court reasoned that it was evident from the Commission's decisions\textsuperscript{30} that the Commission "has consistently applied principles derived from private sector bargaining cases to cases . . .

\textsuperscript{20} Id. at 923, 452 N.E.2d at 1119.
\textsuperscript{21} Id. at 923-24, 452 N.E.2d at 1119.
\textsuperscript{22} Id. at 924, 452 N.E.2d at 1120 (quoting School Comm. of Springfield v. Board of Education, 362 Mass. 417, 442, 287 N.E.2d 438, 455 (1972)).
\textsuperscript{23} 389 Mass. at 924-25, 452 N.E.2d at 1120.
\textsuperscript{24} Id.
\textsuperscript{25} 369 U.S. 736 (1962).
\textsuperscript{26} 389 Mass. at 926, 452 N.E.2d at 1121.
\textsuperscript{27} 5 M.L.C. 1671 (1979).
\textsuperscript{28} 389 Mass. at 926, 452 N.E.2d at 1121.
\textsuperscript{29} Id. at 926-27, 452 N.E.2d at 1121 (quoting \textit{Hanson}, 5 M.L.C. at 1675-76).
\textsuperscript{30} See id. at 927, 452 N.E.2d at 1121 (citing Commonwealth of Massachusetts, 8 M.L.C. 1499, 1502 (1981); New Bedford School Comm., 8 M.L.C. 1472, 1477 (1981)).
involving public employers where issue was the legitimacy of unilateral changes after impasse.’’

Reviewing the Commission’s reasoning, the Court determined that it would not disagree, either as a matter of law or public policy, with the Commission’s interpretation. First, the Commission had concluded that, because a dispute is returned to the parties for further bargaining if the impasse continues after publication of the fact-finder’s report, the logical extension of MOSES’s argument would be that a public employer could not implement changes even after completion of fact-finding, a result the Commission found untenable. Second, the Commission had noted that in drafting chapter 150E, the Legislature had drawn heavily on the National Labor Relations Act and that, “if the Legislature had intended to reject Federal precedent in this area it would have done so explicitly.’’ Finally, the Commission had reviewed federal decisions which held, “that a party’s use of economic weapons to resolve a labor impasse was not inconsistent with a good faith willingness to bargain and reach settlement.’’

The Court stated that its decision in MOSES was foreshadowed by its recent statement in School Committee of Newton v. Labor Relations Commission that “[i]n the absence of impasse, unilateral action by an employer concerning mandatory subjects of bargaining violates the duty to bargain in good faith.’’

Concerning the refusal to arbitrate and bargain, the Court concluded that MOSES’s argument hinged on the legal validity of the Commission’s finding of impasse. Since the Commission’s finding was not improper, the Commission’s holding on this point was affirmed.

The Court’s decision in MOSES is well-reasoned and logical. The principle that an employer may implement changes unilaterally after an impasse in bargaining has been reached is based upon a necessary accommodation between a union’s interest in having issues resolved through bargaining and an employer’s interest in not being foreclosed from making changes without a union’s agreement. This policy of accommodation is as applicable under chapter 150E as it is under the National Labor Relations Act.

The MOSES decision will be greeted more with relief than joy by public employers. Unilateral implementation is a measure that employers will use only under extreme circumstances because of the damage such an

31 389 Mass. at 927, 452 N.E.2d at 1121.
32 Id. at 927-28, 452 N.E.2d at 1122.
33 Id. at 928, 452 N.E.2d at 1122.
34 Id.
36 389 Mass. at 928, 452 N.E.2d at 1122.
37 Id. at 929, 452 N.E.2d at 1122.
action inevitably does to the relationship between the parties. Nevertheless, had MOSES been decided the opposite way, it would have meant, from a practical standpoint, that a public employer who needed to make changes would have been stymied for months if not years. Such a result would have imposed untenable limitations on the ability of public employers to take necessary actions.

§ 9.4. Obligation to Arbitrate Issues Arising Out of Expired Collective Bargaining Agreement. During the Survey year, the Supreme Judicial Court considered whether under Massachusetts law there is a duty to arbitrate issues arising out of a collective bargaining agreement that has expired. In Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO v. Massachusetts Bay Transportation Authority, the plaintiff Union sought to compel the defendant Massachusetts Bay Transportation Authority ("Authority") to arbitrate the Authority's failure to make certain cost of living adjustments allegedly required by a collective bargaining agreement. The Agreement, which expired on December 31, 1977, provided for "cost-of-living adjustments to be made quarterly 'during the term of the Agreement and during any period of negotiations thereafter, unless and until the Parties, by agreement, provide otherwise.' " The Agreement also included a clause requiring binding arbitration to resolve grievances arising out of the "terms and provisions of this Agreement."

The Authority continued to make quarterly cost-of-living adjustments after the agreement expired, through September, 1980. The employees continued to work without a contract, being compensated as if the expired agreement were in effect. In December, 1980, however, the Authority refused to make the quarterly cost-of-living adjustments. The Union filed a grievance, which the Authority denied. When the Authority also refused to arbitrate the dispute, the Union sought an order to compel arbitration.

The superior court dismissed the complaint because no collective bargaining agreement was in effect. In addition, the court concluded that the Authority was barred by statute from making the cost-of-living ad-

2 Id. at 819-20, 452 N.E.2d at 1155.
3 Id. at 820, 452 N.E.2d at 1155 (quoting the agreement) (emphasis supplied by the Court).
4 Id.
5 Id.
6 Id. at 820, 452 N.E.2d at 1155-56.
7 Id. at 820, 452 N.E.2d at 1156.
8 Id.
9 Id.
10 Id. at 820, 452 N.E.2d at 1155.
justments.\textsuperscript{11} The case was transferred to the Supreme Judicial Court on its own motion.\textsuperscript{12} The Court reversed the judgment, finding an agreement to arbitrate the issue of the Authority's obligation to pay the disputed cost-of-living increases, and no statutory bar to payment of such increases if the arbitrator determined that the collective bargaining agreement required them.\textsuperscript{13}

According to the Court, a provision in a collective bargaining agreement for continued compensation during negotiations after the agreement expires is reasonable. Therefore, the Court stated, the issue whether negotiations were continuing in December, 1980, so as to require payment of the cost-of-living adjustments, arose out of the terms and provisions of the expired agreement and should be submitted to arbitration.\textsuperscript{14} In support of this conclusion, the Court reasoned that although the collective bargaining agreement had expired, both the contractual obligation to make cost-of-living adjustments under certain conditions and the duty to arbitrate any unresolved grievance arising out of the agreement survived.\textsuperscript{15}

The Court next dismissed the Authority's contention that it was barred by statute from paying the adjustments. The Authority relied upon two acts\textsuperscript{16} passed after the effective date of the agreement between the Authority and the Union.\textsuperscript{17} The Court concluded that both statutes were concerned with interest arbitration and future contracts, and did not govern cost-of-living provisions in agreements in force at the time the act was passed, or bar enforcement of agreements to pay cost-of-living adjustments after the expiration of a contract period.\textsuperscript{18}

Finally, the Court distinguished the decision of the United States Court of Appeals for the First Circuit in \textit{Local Div. 589, Amalgamated Transit Union v. Massachusetts,}\textsuperscript{19} which upheld the constitutionality of the two acts "as applied to an existing contract that purported to provide for a perpetual extension of its terms."\textsuperscript{20} The Supreme Judicial Court stated

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id. at} 821, 452 N.E.2d at 1156.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} G.L. c. 161A was amended in 1978 "to prescribe certain interest arbitration procedures between the MBTA and its unions." \textit{Boston Lodge 264, 389 Mass. at} 822, 452 N.E.2d at 1156. G.L. c. 161A, § 19, was amended in 1980 to "prohibit the MBTA from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law." \textit{Boston Lodge 264, 389 Mass. at} 822, 452 N.E.2d at 1156-57.
  \item \textsuperscript{17} \textit{Id. at} 821, 452 N.E.2d at 1157.
  \item \textsuperscript{18} \textit{Id. at} 822, 452 N.E.2d at 1157.
  \item \textsuperscript{19} 666 F.2d 618, 640 (1st Cir. 1981), \textit{cert. denied}, 457 U.S. 1117 (1982).
  \item \textsuperscript{20} \textit{Boston Lodge 264, 389 Mass. at} 823, 452 N.E.2d at 1157.
\end{itemize}
that Local Div. 589 did not involve "the rights of the Commonwealth to abrogate the obligation to make cost-of-living adjustments expressed in an agreement already in effect."\(^{21}\)

The decision of the Court in Boston Lodge 264 is consistent with the reasoning of the United States Supreme Court in Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Union,\(^{22}\) in which the Court held, as a matter of federal labor policy, that, unless the parties have expressly indicated otherwise, disputes which arise after the contract has expired, but which "arise under" the contract, are subject to the arbitration provisions of the expired contract. By its decision, the Supreme Judicial Court has adopted this policy of favoring arbitration as the mechanism for resolving all disputes arising under a collective bargaining contract, even those disputes which occur after the contract has expired. An employer who intends not to be bound to arbitrate such disputes must ensure that this intention is expressly set forth in its contract.

§ 9.5. Public Employer — Obligation to Reinstate Strikers Who Engaged in an Unlawful Strike. The Supreme Judicial Court, in Utility Workers of America, Local 466 v. Labor Relations Commission,\(^1\) decided that a town that had not petitioned the Labor Relations Commission for an order directing unlawful strikers to return to work was not thereafter prohibited by chapter 150E, section 9A from refusing to permit such strikers to return to work immediately at the conclusion of the strike.\(^2\) The case arose when night shift water department and waste disposal employees in the town of Braintree (the "Town"), who were represented by the Utility Workers of America, Local 466 (the "Union"), called in sick on April 28, 1981 to protest the lack of progress in collective bargaining negotiations with the Town.\(^3\) Off-duty employees refused to replace them.\(^4\) The morning shifts on April 29, 1981 also failed to report to work and picket lines were formed at both departments.\(^5\) Management personnel operated both the water department facilities and the Town’s incinerator during the first day of the strike.\(^6\) Several incidents of vandalism occurred at the water department during the work stoppage.\(^7\) On the morning of April 29, 1981, arrangements were made by the Town’s incinerator consultant with other waste processor plants to dispose of refuse normally burned at the Town’s

\(^{21}\) Id.


\(^2\) Id. at 506-07, 451 N.E.2d at 128.

\(^3\) Id. at 501-02, 451 N.E.2d at 125.

\(^4\) Id. at 502, 451 N.E.2d at 125.

\(^5\) Id.

\(^6\) Id. at 501-02, 451 N.E.2d at 125.

\(^7\) Id. at 502, 451 N.E.2d at 125.

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incinerator, but in order to make such arrangements, the Town had to commit itself to using such alternative plants for at least one week.\(^8\) The water department was the Town's sole provider and source of water for industrial and domestic use, and for fire protection.\(^9\)

Also on the morning of April 29, a national representative of the Union arrived in Braintree.\(^10\) After learning that the Town's selectmen had decided on April 28 to make a new offer to the Union, he met with the employees, and they decided to return to work for night shifts that evening.\(^11\) Town officials, however, were not so advised.\(^12\) Early that evening, the national representative informed the superintendent of the water department that the strike was over and that the midnight shift would report for work.\(^13\) The Town officials did not know that the return to work decision had been made at a Union meeting.\(^14\) Town officials decided that the water department employees would not be permitted to return to work that evening because of "uncertainty as to whether the men would actually return to work and concern about the vandalism that had occurred at the water department."\(^15\) Later that evening, the Union also informed Town officials that incinerator employees would be returning to work on the night shift, but the Town decided not to permit the employees to return to work until further notice.\(^16\) On May 1, all striking employees were suspended for one week for having engaged in an unlawful strike.\(^17\)

The Union filed charges with the Labor Relations Commission (the "Commission"), alleging that the Town had engaged in prohibited practices in violation of chapter 150E, section 10(a)(1), (3), (4) and (5), by locking out the employees.\(^18\) Following the issuance of, and hearings on a complaint alleging violations of section 10(a)(1) and (5), the Commission decided that the Town's action was "a response to the unlawful work stoppage, and was intended to preserve and protect public services."\(^19\) Accordingly, the Commission concluded, the Town did not violate section 9A(a) or bargain in bad faith in violation of section 10(a)(1) and (5).\(^20\)

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\(^8\) *Id.* at 502, 451 N.E.2d at 126.
\(^9\) *Id.*
\(^10\) *Id.*
\(^11\) *Id.*
\(^12\) *Id.*
\(^13\) *Id.*
\(^14\) *Id.*
\(^15\) *Id.* at 502-03, 451 N.E.2d at 126.
\(^16\) *Id.* at 503, 451 N.E.2d at 126.
\(^17\) *Id.*
\(^18\) *Id.* at 501, 451 N.E.2d at 125.
\(^19\) *Id.*
\(^20\) *Id.*
The Supreme Judicial Court took the case on its own motion and affirmed the Commission’s decision.\(^{21}\)

The Court, referring to the language in chapter 150E, section 9A(b),\(^{22}\) noted that the Town did not file a petition with the Commission for an order directing the employees to stop striking under section 9A(b).\(^{23}\) The Union contended that the presence of the word “shall” in the first sentence of section 9A(b) required the Town “to petition the commission and that the filing of this petition is the only action which a public employer is authorized to take when confronted with an illegal work stoppage by its employees.”\(^{24}\) The Commission’s position was that filing a petition was not the exclusive means by which a public employer may deal with an unlawful strike; rather, the petition was necessary only as a “prerequisite to obtaining administrative or judicial relief from violations by employees of [section] 9A(a).”\(^{25}\)

The Court concluded that the Commission’s decision was correct. According to the Court, nothing in the language of section 9A(b) indicates that “by creating the petitioning process the Legislature intended to limit the means by which a public employer may respond to an illegal work stoppage.”\(^{26}\) The Court refused to read section 9A(b) as precluding a public employer from acting to protect threatened essential public services until it has petitioned the Commission and received an answer.\(^{27}\) According to the Court, a public employer acting in good faith must be permitted to take emergency actions to prevent public services from being disrupted. The Court noted that “[a] contrary interpretation of the statutory language would severely limit the ability of the employer to protect and maintain important public services while waiting for the commission to complete its investigation.”\(^{28}\) In addition, the Court found that the Commission was justified in deciding that the Town did not violate section 9A(b) by preventing the employees from returning to work until the Town

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\(^{21}\) Id.

\(^{22}\) Id. at 503, 451 N.E.2d at 126.


\(^{24}\) Id.

\(^{25}\) Id. at 503-04, 451 N.E.2d at 126.

\(^{26}\) Id. at 504, 451 N.E.2d at 127.

\(^{27}\) Id.

\(^{28}\) Id. at 505, 451 N.E.2d at 127.
could determine that water and incinerator services would not be disrupted by further illegal work stoppages or vandalism. Rejecting the Union's argument that lockouts are per se unlawful, the Court noted that lockouts are not mentioned, much less prohibited, in chapter 150E.

Finally, the Court sustained the Commission's finding that the Town did not violate section 10(a)(1) and (5). The Union contended that the lockout was undertaken to gain a prohibited bargaining advantage. The Court, however, noted that the Union presented no evidence that the Town was improperly motivated in its actions. On the other hand, the Court concluded, substantial evidence supported the Commission's finding that the Town's actions were justifiable responses to an unexpected job action and the possibility of further vandalism and strikes.

The significance of this decision lies in the Court's conclusion that the strike petition process is not a limitation on a public employer's legitimate "self-help" efforts to deal with an illegal work stoppage. The Commission's interpretation of section 9A(a) was reasonable. Given the delays inherent in the strike petition process, a contrary interpretation would have severely impaired the ability of a public employer to operate in the face of a strike.

Although the Court's handling of the Union's argument that a lockout is per se unlawful is also noteworthy, it would be dangerous to read into the Court's conclusion more than is warranted. The Court was careful to note that "[b]oth parties use the term 'lockout' in referring to the employer's refusal to allow the employees to work immediately at the end of the strike. We take no position on whether that term properly applies to the employer's acts in this case." The essence of the decision in Utility Workers is that the town of Braintree took reasonable defensive measures designed to protect itself. The Commission and the Court are likely to evaluate other "defensive" measures taken by public employers on a case-by-case basis. A public employer would probably have difficulty sustaining the legitimacy of an "offensive" lockout, i.e., a lockout that is designed to exert pressure on a bargaining unit to accept a public employer's bargaining position, notwithstanding the absence of any reference to the term "lockout" in the statute. Although an offensive lockout is lawful under the National Labor Relations Act, because no right to strike is

29 Id.
30 Id.
31 Id. at 506, 451 N.E.2d at 127.
32 Id.
33 Id. at 506, 451 N.E.2d at 128.
34 Id.
35 Id. at 501 n.1, 451 N.E.2d at 125 n.1.
§ 9.6. Public Employer — Exclusive Managerial Prerogatives. In recent years, the Supreme Judicial Court has developed the doctrine that, as a matter of public policy, certain matters are beyond the scope of collective bargaining in the public sector because they fall within the public employer's exclusive managerial prerogative. Under this doctrine, a public employer may not be compelled to bargain about a matter that is within its exclusive managerial prerogative. Moreover, a public employer may not be required to comply with a contractual restriction on its prerogatives to which it may have agreed. Finally, a public employer may refuse to comply with an arbitration award finding a contractual violation for failure on the part of the public employer to adhere to a restriction on its prerogatives.¹

A. Transfer of Prosecutorial Duties Out of Bargaining Unit

The principle of exclusive managerial prerogative was applied by the Supreme Judicial Court in *Town of Burlington v. Labor Relations Commission.*² The issue in *Town of Burlington* was whether the town of Burlington (the "Town") had the right to unilaterally reassign prosecutorial duties from officers of the Town's police department, whose members were unionized, to town counsel.

Burlington police officers had prosecuted criminal cases in the district court for many years.³ In February, 1979, the court's presiding judge notified the Town's police chief that the Town's case load was too great for the one prosecuting officer assigned to handle the Town's criminal cases.⁴ The judge suggested the addition of a second police prosecutor and improved preparation of cases. A second prosecuting officer was therefore designated.⁵ At the same time, the Town's selectmen decided to cease using police prosecutors and to assign the prosecution of criminal cases to town counsel.⁶ Although collective bargaining negotiations with the International Brotherhood of Police Officers (the "IBPO") were in progress for a new contract, the selectmen did not raise the issue in

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³ Id. at 158, 454 N.E.2d at 466.
⁴ Id.
⁵ Id.
⁶ Id.
negotiation. The IBPO heard rumors of the impending change before the contract was signed in May. On June 6, 1979, the Town voted at a town meeting to amend its by-law, enabling the selectmen to implement their plan. The two police prosecutors were then reassigned to other duties at a reduction in pay.

The IBPO filed an unfair labor practice charge with the Labor Relations Commission (the "Commission") and sought to require the selectmen to bargain over the issue of reassigning prosecutorial duties previously performed by police prosecutors. The selectmen did not respond to the charge and the Commission issued a complaint alleging that the Town had engaged in a prohibited practice within the meaning of chapter 150E, section 10(a)(1) and (5).

A commission hearing officer ordered the Town to cease and desist from reassigning prosecutorial duties without first bargaining with the IBPO. In addition, the Town was ordered to reinstitute the past practice of assigning prosecutorial duties to the bargaining unit and to reimburse the two officers for lost wages. The Commission affirmed the decision of the hearing officer. The Town appealed to the superior court and the IBPO intervened. Both the IBPO and the Commission filed a counterclaim alleging noncompliance with the Commission's decision. The Town and Commission both moved for summary judgment. The superior court dismissed the complaint and affirmed the Commission's decision in its entirety. The Town appealed and the case was transferred to the Supreme Judicial Court on its own motion.

The Commission had based its ruling on prior commission decisions that contracting out bargaining unit work is a mandatory subject of bargaining. Both the Commission and the superior court had rejected the

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7 Id.
8 Id.
9 Id. at 158-59, 454 N.E.2d at 466.
10 Id.
11 Id. at 158-59, 454 N.E.2d at 466-67.
12 Id. at 159, 454 N.E.2d at 467. G.L. c. 150E, § 10(a)(1) and (5) provides:
   (a) It shall be a prohibited practice for a public employer or its designated representa-
   tive to: (1) Interfere, restrain, or coerce any employee in the exercise of any right
   guaranteed under this chapter; . . . (5) Refuse to bargain collectively in good faith with
   the exclusive representative as required in section six.
13 390 Mass. at 159, 454 N.E.2d at 467.
14 Id. at 159-60, 454 N.E.2d at 467.
15 Id. at 160, 454 N.E.2d at 467.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id. at 161, 454 N.E.2d at 467 (citing City of Boston, 6 M.L.C. 1117 (1979); City of
Town’s argument that a decision to reassign the prosecutorial function is a managerial prerogative. The Supreme Judicial Court reversed, holding that the Commission’s decision was erroneous as a matter of law. The Court noted that pursuant to chapter 278, section 15, city solicitors, town counsel or other persons may be appointed to represent a city or town in prosecutions in district courts under the municipality’s by-laws, orders, rules or regulations, and to do anything concerning such prosecution that may be done by the district attorney. The Court also observed that the statutes do not address the matter of prosecution of criminal cases in the district court where neither the district attorney nor the city solicitor or town counsel appears. These cases, according to the Court, are frequently prosecuted by a member of the municipality’s police department. The decision as to who shall be assigned the prosecution of cases in the district court, the Court found, is a decision which falls within the exclusive managerial prerogatives of the Town, subject only to the authority of the attorney general or district attorney. The Court therefore concluded that the Town may designate who will prosecute criminal cases in a district court. The public policy inherent in that designation, the Court reasoned, “is so comparatively heavy that collective bargaining, and even voluntary arbitration on the subject is, as a matter of law, to be denied effect.” Consequently, the Court held that the decision to assign prosecutorial duties is not a proper subject for collective bargaining. The Court also found that, although the Town reserved the decision to reassign the prosecutorial function, the circumstances favoring bargaining on the impact of the Town’s decision were strong. The Court was careful to note, however, that its holding only determined that, in this case, bargaining over the impact of the Town’s decision would not have been an interference with the Town’s “‘right to determine . . . policy.’”

The decision in Town of Burlington demonstrates an accommodation between a public employer’s obligation to bargain over decisions that affect wages, hours, terms and conditions of employment, and the employer’s need to be insulated from bargaining over decisions that lie at the


22 390 Mass. at 161, 454 N.E.2d at 467-68.
23 Id. at 161, 454 N.E.2d at 468.
24 Id. at 162, 454 N.E.2d at 468.
25 Id.
26 Id.
27 Id. at 164, 454 N.E.2d at 469.
28 Id.
29 Id. at 165, 454 N.E.2d at 470.
30 Id. at 167, 454 N.E.2d at 471 (quoting School Comm. of Newton v. Labor Relations Commission, 388 Mass. 557, 566, 447 N.E.2d 1201, 1208 (1983)).
heart of its mission. The "exclusive managerial prerogative" concept in Massachusetts' public employee labor law is analogous to the concept under the federal labor law that decisions that "lie at the core of entrepreneurial control" are not mandatory subjects of bargaining even though they affect terms and conditions of employment.31 There is, however, a critical distinction. A matter within a public employer's exclusive managerial prerogative is beyond the power of the public employer to limit by contract. Contractual commitments that infringe upon such prerogatives are unenforceable because they are inconsistent with the public employer's statutory responsibilities. Under federal law, on the other hand, if a private employer agrees to limit its power over matters that lie at the core of its entrepreneurial control, such obligations are binding and enforceable contractual commitments.

B. A Defense to Prohibited Practice Charge

A fundamental principle under the National Labor Relations Act is that an employer may not discharge an employee for filing a grievance under a collective bargaining agreement.32 During the Survey year, the Massachusetts Appeals Court, in School Committee of East Brookfield v. Labor Relations Commission,33 considered the application of this principle in a public employment context. In East Brookfield the appeals court also considered what deference should be accorded to decisions of the Massachusetts Labor Relations Commission (the "Commission") and whether the definition of "professional employee" in chapter 150E, section 1 applies to "educators" who are not "teachers" within the meaning of chapter 71, section 38G.34


34 Under G.L. c. 150E, § 1, a "professional employee" is defined as: any employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

35 G.L. c. 71, § 38G provides:
No person shall be eligible for employment by a school committee . . . unless [she]
Carol Nason was hired by the East Brookfield School Committee (the "School Committee") as an "art instructor," even though she was neither certified, nor certifiable, as a teacher. The School Committee hired Nason when it was unsuccessful in recruiting an art teacher. During the five years she was employed in such capacity, Nason was paid a pro-rata share of the noncertified teacher salary. At the start of the 1976-77 school year, Nason asked her principal how she could obtain a raise. He referred her to the East Brookfield Teachers Association (the "Association"), which was the exclusive representative of "all professional employees.

The collective bargaining agreement between the School Committee and the Association contained a salary scale only for persons who were certified or certifiable as teachers. Nevertheless, Nason went to the Association with her salary question and the Association initiated a grievance on her behalf, alleging in part that she was a "professional" employee within the meaning of the agreement's recognition clause and was being denied the benefits of the contract. When her grievance was denied, contractual arbitration proceedings were instituted.

The arbitrator found that Nason was a "professional employee" and thus, a member of the bargaining unit. He also concluded that Nason's salary should not be based on the contractual salary schedule, that her salary had been arrived at on the basis of prior dealings and that, for the year in question, it had been correctly computed.

The arbitrator's award was appealed to the Commission. At the hearing, the Commission found that the superintendent of schools, in response to Nason's grievance, had stated that it would be unfortunate if the Association persisted with the grievance, because such action could place the School Committee in a position where they might terminate Nason's

37 Id. at 47, 449 N.E.2d at 673.
38 Id.
39 Id. at 48, 449 N.E.2d at 673.
40 Id.
41 Id.
42 Id. at 48-49, 449 N.E.2d at 673-74.
43 Id. at 49, 449 N.E.2d at 674.
44 Id.
45 Id. at 49, 449 N.E.2d at 674.
46 Id. at 49-50, 449 N.E.2d at 674.
employment and choose a certified art teacher. According to the Commission, the School Committee had taken the position that Nason was not a professional employee, but if she would withdraw her grievance and discuss her salary problem with them, the problem could be resolved. If, however, she chose to pursue her grievance, the School Committee would fire her. When Nason indicated her intent to pursue her grievance, the School Committee discharged her. A prohibited practice charge alleging a violation of chapter 150E, section 10(a)(1) and (3) was then filed, claiming that Nason was discharged unlawfully.

The Commission concluded that Nason had established a prima facie case under the rationale of Trustees of Forbes Library v. Labor Relations Commission. The School Committee argued that Nason was discharged because of a policy decision to no longer employ noncertified teaching personnel, not because she had filed a grievance. The Commission, however, determined that the School Committee "would have continued to employ Nason in spite of the stated lawful reason for her discharge 'were it not for the fact that she filed a grievance to attempt to adjust her salary.'"

On appeal by the School Committee to the superior court, the trial judge concluded that (1) there was insubstantial evidence that the School Committee would not have discharged Nason but for her decision to pursue her grievance; and that (2) the Commission had exceeded its authority in ordering the School Committee to reinstate Nason, a noncertified teacher, to her former position. Nason appealed, and the appeals

47 Id. at 50, 449 N.E.2d at 674.
48 Id. at 50, 449 N.E.2d at 675.
49 Id.
50 Id.
51 Id.
53 Id. at 51, 449 N.E.2d at 675 (quoting the Commission) (emphasis in original).
54 Id. at 51, 449 N.E.2d at 675 (quot ing the Commission) (emphasis in original).
55 Id. at 51, 449 N.E.2d at 675.
The appeals court agreed with the superior court that the Commission had rejected the School Committee's evidence in toto, but found that it does not follow that the Commission's decision was not supported by substantial evidence. The appeals court thus adopted the federal view of the appropriate deference to be accorded to the decision of an agency charged with enforcing a labor relations statute. The federal standard, set forth in *Universal Camera Corp. v. National Labor Relations Board*, states: 

[T]he requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertise which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

According to the appeals court, the Commission had expressly found, and the School Committee had all but conceded, that Nason was fired "to avoid possibly inconvenient or expensive arbitration awards." The Commission, the appeals court noted, had rejected the School Committee's evidence because the Commission had disagreed with the School Committee's contention that it had been bound to elect one of three choices when Nason insisted on pressing the matter to arbitration, to wit: either (1) accede to the demand that Nason be paid according to the salary applicable to certifiable teachers; (2) proceed to arbitration, running the risk of losing with no right of review and being required to pay Nason in the same unacceptable manner afforded under the first option; or (3) adopt a policy of no longer employing certifiable teaching personnel.

According to the Commission and the appeals court, there was a fourth option. The School Committee could have recognized Nason as a member of the bargaining unit, insisted that the teacher's salary scale did not apply to her and attempted to negotiate an appropriate scale for noncertifiable teach-

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56 *Id.* at 47, 449 N.E.2d at 676.
57 *Id.* at 52, 449 N.E.2d at 676. The superior court had reversed the Commission's decision because the Commission had rejected in toto the School Committee's evidence, much of which was either corroborated by Nason or uncontested, "without an explicit and objectively adequate reason." *Id.*
60 *Id.* at 53, 449 N.E.2d at 676.
ers. The School Committee’s failure to adopt this fourth option, according to the appeals court, justified the Commission’s decision and led the court to conclude that there “was substantial evidence to show that ‘Nason’s discharge was triggered by the filing of a grievance, and could have been avoided by the withdrawal of that grievance.’”

The appeals court also rejected the superior court’s conclusion that the Commission had violated chapter 71, section 38G and exceeded its jurisdiction, committing an error of law, by ordering reinstatement or employment of Nason as a teacher. The Commission, noted the appeals court, had ordered Nason reinstated to her “former position,” which had been described by the School Committee as an “aide” or “instructor” position, and not as a “teaching position.”

Finally, while noting that the Commission’s delay in reaching its decision, approximately two years, might increase the School Committee’s financial liability to Nason, the appeals court was unwilling to conclude that the delay warranted reversal of the Commission’s decision.

In sum, the decision of the East Brookfield School Committee to discontinue the use of noncertified instructional personnel is an educational decision which falls within its exclusive managerial prerogative. The East Brookfield case, however, shows once again that this important school committee power cannot be used to shield otherwise unlawful conduct.

On a practical level, the East Brookfield case is instructive to school committees and practitioners because many “teacher” contracts contain recognition clauses that recite that the bargaining unit is comprised of all “professional” or “professional instructional” personnel, or similar descriptions. It is not uncommon for school committees to employ tutors, aides and others who “instruct” and who may be deemed “professional,” but who have not been considered part of the teachers’ bargaining unit. Recognition clauses typically have not restricted coverage to certified teachers because of the provision in chapter 71, section 38G which permits school committees to employ uncertified “teachers” where it would

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63 Id. at 53, 449 N.E.2d at 676.
64 Id. (quoting the Commission).
65 Id. at 55, 449 N.E.2d at 677.
66 Id. The appeals court did conclude, however, that the matter of computation of “monetary losses suffered by [Nason] from the date of her termination to the date of the offer of reinstatement” should be remanded to the Commission for a “more definite or specific order.” Id.
67 Id. at 56, 449 N.E.2d at 677.
be a hardship to secure certified personnel.\textsuperscript{70} Little consideration had been given to the possibility that such recognition clauses might sweep in ancillary instructional personnel who do not function as teachers. After \textit{East Brookfield}, school committees and teacher associations may want to examine their recognition clauses to assess which, if any, instructional personnel beyond classroom teachers may be deemed included within the bargaining unit.

\section{Labor Relations Commission — Authority to Decline Back Pay Award in Unlawful Discharge Cases.} During the Survey year, the Supreme Judicial Court, in \textit{Therrien v. Labor Relations Commission},\textsuperscript{1} further illuminated the rights and obligations of public employees who oppose paying agency service fees to a labor organization.\textsuperscript{2} In \textit{Therrien}, the Court held that teachers wrongfully discharged when tendering late payment of agency fees need not be awarded back pay after failing to follow prescribed procedures.\textsuperscript{3}

Steven Therrien and Walter Wasiuk were tenured teachers employed by the Leominster School Committee (the "School Committee").\textsuperscript{4} The collective bargaining agreement covering them required nonunion employees to pay agency service fees to the Leominster Education Association (the "Association").\textsuperscript{5} Consistently, Therrien and Wasiuk, neither of whom were Association members, delayed paying their agency service fees, protested the amount of such fees and sought pro rata rebates for political expenditures pursuant to chapter 150E, section 12.\textsuperscript{6}

Therrien and Wasiuk failed to pay fees due on November 1, 1980 and, pursuant to a request by the Association’s president that they be terminated, the Superintendent of Schools notified the teachers that failure to

\textsuperscript{70} See \textit{supra} note 35.
\textsuperscript{3} 390 Mass. at 645, 459 N.E.2d at 89.
\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{6} Id. G.L. c. 150E, § 12 provides in pertinent part:
The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment . . . of a service fee to the employee organization which . . . is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting. Such service fee shall be proportionately commensurate with the cost of collective bargaining and contract administration.
pay the fees by December 1, 1980 would result in their dismissal.\(^7\) When
the teachers did not pay the fees, the School Committee voted to dismiss
them at a meeting on February 23, 1981.\(^8\) The following day, Therrien and
Wasiuk tendered payment of the agency service fees to both the treasurer
and the president of the Association, but these offers were refused.\(^9\) The
dismissal of the teachers became effective at the close of the school day
on February 24.\(^10\) The Association again rejected tenders by the teachers
at an emergency executive board meeting that evening.\(^11\)

Two days after their terminations, Therrien and Wasiuk were rehired as
substitute teachers.\(^12\) Subsequently, they were appointed as probationary
teachers.\(^13\) As such, they were required to pay agency service fees.\(^14\)
About one month later, Therrien and Wasiuk were notified that, because
of Proposition 2 1/2, they were not reappointed for the next school year.\(^15\)
Their employment ended in June, 1981.\(^16\)

Therrien and Wasiuk filed charges with the Labor Relations Commis­
sion (the “Commission”) on June 1, 1981, alleging that the School Com­
mittee and the Association had committed prohibited practices in viola­
tion of chapter 150E, sections 10(a)(1) and (3) and 10(b)(1).\(^17\) These
charges were dismissed.\(^18\) On reconsideration, the Commission decided to
issue complaints against the School Committee and the Association.\(^19\)
After a hearing, the Commission held that the Association had violated
chapter 150E, section 10(b)(1), by refusing to accept the tender of agency
fees prior to the teachers’ effective terminations and that the School
Committee had violated chapter 150E, section 10(a)(1) and (3), by dis-

\(^7\) 390 Mass. at 646, 459 N.E.2d at 90.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id.
\(^15\) Id.
\(^16\) Id.
\(^17\) Id. G.L. c. 150E, § 10(a)(1) and (3) provides in pertinent part:
It shall be a prohibited practice for a public employer or its designated representative
to: (1) [i]nterfere, restrain, or coerce any employee in the exercise of any right
guaranteed under this chapter . . . , (3) [d]iscriminate in regard to hiring, tenure, or any
term or condition of employment to encourage or discourage membership in any
employee organization . . . .

G.L. c. 150E, § 10(b)(1) provides in pertinent part: “It shall be a prohibited practice for an
employee organization or its designated agent to: (1) [i]nterfere, restrain, or coerce any
employer or employee in the exercise of any right guaranteed under this chapter . . . .”

\(^18\) 390 Mass. at 646, 459 N.E.2d at 90.
\(^19\) Id.
charging the teachers despite their tender.\textsuperscript{20} The Commission ordered reinstatement, but refused to award back pay.\textsuperscript{21} The Commission also denied relief under its own regulations.\textsuperscript{22}

On appeal, the Supreme Judicial Court rejected the teachers' argument that denial of back pay infringed upon their constitutional rights and violated chapter 150E. The Court declined to consider the constitutional issue because at no time during the course of the administrative proceedings had the teachers challenged their terminations on constitutional grounds.\textsuperscript{23} Turning to the issue of back pay, the Court noted that the Commission has discretion under chapter 150E, section 11 to award reinstatement, "with or without back pay."\textsuperscript{24} Similar language under the National Labor Relations Act, the Court stated, had been construed by federal courts as "delegating considerable remedial discretion."\textsuperscript{25} The Court concluded that it would not disturb the exercise of such discretion "unless it is 'arbitrary or capricious' . . . or 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies' of the statute . . . ."\textsuperscript{26} Addressing the teachers' argument that the denial of back pay is contrary to the policies underlying chapter 150E, the Court agreed "that a back pay award is an order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of a prohibited practice."\textsuperscript{27} Nevertheless, the Court found that a denial of back pay in a particular case does not necessarily violate that public policy.\textsuperscript{28} The Court noted that in School Committee of Greenfield,\textsuperscript{29} the Court, concerned about the proper functioning of an association through access to fees, had suggested that "a constitutional method of ensuring conformity with the public policy which promotes peaceful and efficient labor relations was to escrow the fees pending adjudication."\textsuperscript{30} In Therrien however, because of the teachers' repeated delays in paying the fees and the time and effort which the Association and the School Committee were required to expend, the Court concluded that the Commission did not violate public policy or abuse its discretion in denying back pay.\textsuperscript{31}

\textsuperscript{20} Id. at 647, 459 N.E.2d at 90.
\textsuperscript{21} Id.
\textsuperscript{22} Id. See infra note 33 for text of 402 CMR § 17.05(2) (1981).
\textsuperscript{23} 390 Mass. at 647-48, 459 N.E.2d at 90-91.
\textsuperscript{24} Id. at 648, 459 N.E.2d at 91.
\textsuperscript{25} Id. (citing Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964)).
\textsuperscript{26} 390 Mass at 648, 459 N.E.2d at 91 (quoting G.L. c. 30A, § 14(7)(g) and Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943)).
\textsuperscript{27} Id. at 649, 459 N.E.2d at 91.
\textsuperscript{28} Id.
\textsuperscript{29} 385 Mass. 70, 431 N.E.2d 180 (1982); see supra note 2.
\textsuperscript{30} Therrien, 390 Mass. at 649, 459 N.E.2d at 91.
\textsuperscript{31} Id.
According to the Court, the Commission properly considered the competing interests of the School Committee and the Association.\(^{32}\)

In addition, the Court sustained the Commission’s interpretation of chapter 402 of the Code of Massachusetts Regulations, section 17.05(2).\(^{33}\)

The Court noted that in City of Chicopee\(^{34}\) the Commission had held that an employee must file a charge of prohibited practice and contemporaneously establish an escrow fund to secure the right to continued employment under section 17.05(2).\(^{35}\) The right to establish an escrow fund, the Court noted, arises at the time of the decision to terminate and expires as of the effective date of termination "so long as this period of time is reasonable for purposes of taking the above action."\(^{36}\) The Court found that Therrien and Wasiuk had failed to comply with the above requirements set forth in the regulation.\(^{37}\) According to the Court, although the regulation did not delineate the procedural requirements for filing charges and establishing escrow funds, the Commission’s interpretation was neither clearly in error nor inconsistent with the terms of the regulation. Moreover, the Court stated, the Commission’s "interpretation protects the interests of the [A]ssociation and the [S]chool [C]ommittee, and simultaneously affords dissenting employees a means by which they can ‘toll’ their effective termination pending adjudication."\(^{38}\)

The Commission’s remedial order in this case is surprising. Back pay almost always accompanies reinstatement of an employee who has been unlawfully discharged. Although Therrien and Wasiuk failed to establish an escrow fund and file a charge at the time of the decision to terminate them, their tender of the agency fees owed "immediately following notice of dismissal" should have been sufficient to excuse such failures. Had their tender been accepted, there would have been no need for either

\(^{32}\) Id.

\(^{33}\) Id. at 650, 459 N.E.2d at 92. 402 CMR § 17.05(2) (1981) provides:
An Employee shall have the right to contest the decision to terminate his employment by filing a grievance in accordance with the collective bargaining agreement and/or by filing appropriate charges before the Commission. During the pendency of the employee’s grievance under the collective bargaining agreement or charge before the Commission, the employee shall be permitted to continue his or her employment if the employee pays the contested service fee to an escrow fund administered by the bargaining agent or offers to make other appropriate arrangements for payment of the service fee to the bargaining agent. An employee who refuses to pay the service fee to an escrow fund or to make other appropriate arrangements for payment of the service fee to the bargaining agent and who is terminated will be denied a back pay award by the Commission if the Commission finds the service fee unlawful.

\(^{34}\) 7 M.L.C. 2040 (1981).

\(^{35}\) Therrien, 390 Mass. at 650, 459 N.E.2d at 92.

\(^{36}\) Id. (quoting City of Chicopee, 7 M.L.C. 2040, 2046 (1981)).

\(^{37}\) Id.

\(^{38}\) Id. at 650-51, 459 N.E.2d at 92.
requirement. The Association's unlawful refusal to do so was, in effect, condoned by the Court. In light of the Therrien decision, employees who desire to contest the payment of full agency fees should do so with great care.

§ 9.8. Interpretation of the Teacher Tenure Statute. The Supreme Judicial Court, during the Survey year, issued two decisions interpreting chapter 71, section 41, the teacher tenure statute. Under Massachusetts law public school teachers who serve beyond three consecutive school years become tenured. Teachers who are serving in their third consecutive school year, and who are given timely notification that they will not be reappointed for the following school year, do not receive tenure.¹

In the first case, Ripley v. School Committee of Norwood,² the Supreme Judicial Court considered whether a public school teacher who has been given timely notification of non-reappointment in her third consecutive year of service and who is thereafter terminated, but who is then rehired on a full-time basis prior to the beginning of the subsequent school year, attains tenure.³ The Court held that when the Norwood School Committee (the "School Committee") rehired the teacher, it rehired her with tenured status.⁴

Stephanie Ripley, a teacher with the Norwood Public Schools, was dismissed due to declining enrollment at the end of her third consecutive year of service.⁵ The School Committee carried out her dismissal in accordance with applicable law and the provisions of the collective bargaining agreement then in effect.⁶ Shortly before the next school year began, the School Committee asked Ripley to substitute for a teacher on pregnancy leave, beginning the first day of the school year.⁷ Although she herself was due to deliver a child in mid-September, Ripley accepted.⁸ Ripley's later request for a pregnancy leave was not acted upon.⁹ Nonetheless, when the time came, she left work, delivered a child, and returned to teaching after a brief absence.¹⁰ Upon her return, Ripley was

¹ G.L. c. 71, § 41 provides in pertinent part, "[e]very school committee, in electing a teacher who has served in its public schools for three previous consecutive years, shall employ him to serve at its discretion . . . ." Id. Service at "discretion" has long been interpreted to mean service with tenure. See, e.g., Paguette v. Fall River, 278 Mass. 172, 179 N.E. 588 (1932).
³ Id. at 611-12, 451 N.E.2d at 722-23.
⁴ Id. at 612, 451 N.E.2d at 723.
⁵ Id. at 611, 451 N.E.2d at 722.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.
¹⁰ Id.
reassigned to the same teaching position she had held at the beginning of
the school year and up until her absence due to childbirth.\textsuperscript{11} A short time
later, the School Committee voted to appoint Ripley as a regular full-time
teacher.\textsuperscript{12} The following spring, however, Ripley was notified that she had
not been reappointed to the professional staff for the next school year.\textsuperscript{13}
Ripley commenced an action against the School Committee, claiming that
she was a tenured teacher.\textsuperscript{14}

In superior court, Ripley sought a declaration of her tenured status
under chapter 71, section 41.\textsuperscript{15} The School Committee moved for sum­
mary judgment.\textsuperscript{16} A judgment of dismissal with prejudice was entered
denying Ripley tenured status, and Ripley appealed.\textsuperscript{17} The Supreme Judicial
Court transferred the case on its own motion and reversed.\textsuperscript{18}

The Supreme Judicial Court, in reaching its decision, relied heavily on a
plain reading of chapter 71, section 41, and on simple arithmetic. The
Court stated that, since Ripley had served for three previous consecutive
school years when she was offered a position as a regular full-time teacher
in November, she had satisfied the statutory criteria for a tenured em­
ployee.\textsuperscript{19}

The School Committee had attempted to convince the Court otherwise
with two arguments. Ripley's original termination in the spring, the
School Committee argued, had ended her right to be treated as a tenured
employee.\textsuperscript{20} The Court was not persuaded, however, distinguishing the
cases on which the School Committee relied.\textsuperscript{21} Next, the School Commit­
fee contended that Ripley's absence from employment near the beginning of the school year constituted a break in service sufficient to abrogate any tenure claim. 22 The Court, in response to this argument, pointed out that Ripley's absence had not resulted in a break in service because, at that time, she was not a tenured employee. According to the Court, Ripley acquired tenure status when the School Committee voted to hire her as a full-time teacher after she had returned from having her child. 23 The unambiguous language of chapter 71, section 41 convinced the Court that the restrictive interpretation urged by the School Committee was unwarranted. 24

The Court carefully noted several issues that it did not reach in Ripley. First, the Court did not decide the legality of "recall" rights, under a collective bargaining agreement, which give tenured teachers laid off due to budgetary constraints first consideration for openings in the following two year period under chapter 71, section 38. 25 Section 38 provides that no teacher may be elected by a school committee without the prior nomination of the superintendent of schools. Second, the Court left open for resolution (1) whether the Court's analysis of the tenured status of a teacher whose service was terminated, and who then was reemployed, would be affected by the nature of, or reasons for, the initial termination, that is, whether it was a voluntary resignation, for cause dismissal, or dismissal arising solely from declining enrollment or budgetary constraints; and (2) whether a tenured teacher who voluntarily terminates in one year and who then is rehired, not during the next school year, but rather in a subsequent school year, retains tenured status. 26 Finally, the Court conceded that it had not reached the issue whether chapter 149, section 105D, regarding maternity leave, precludes considering an absence due to childbirth as a break in service that would defeat a claim of tenured status. 27

In Ripley, the Court ignored the traditional notion of termination in favor of a literal reading of the tenure statute, chapter 71, section 41. The Court properly rejected an implicit argument that school committees may defeat a teacher's right to tenure under section 41 by simply terminating the teacher at the end of three years of consecutive service, and then rehiring the teacher for the next school year. In Ripley, the hiatus between the time the teacher was terminated and the time when the teacher was reappointed as a regular, full-time teacher was relatively brief. The Court

22 389 Mass. at 615, 451 N.E.2d at 724.
23 Id.
24 Id. at 616, 451 N.E.2d at 725.
25 Id. at 613 n.3, 451 N.E.2d at 723 n.3.
26 Id. at 615 n.5, 451 N.E.2d at 724 n.5.
27 Id. at 616, 451 N.E.2d at 725.
will probably soon be presented with cases where the layoff is longer. The question will then be how long an interim is required before statutory tenure is cut off.

Section 41 of chapter 71 states that "[e]very school committee, in electing a teacher who has served in its public schools for three previous consecutive school years, shall employ him to serve [with tenure]."28 In Ripley, the Court did not directly address the question whether "three previous consecutive school years" means any three consecutive years in the past or only the three consecutive years directly preceding the employment of the teacher. The interruption in service in Ripley was less than one year. In cases where the hiatus is longer, it is difficult to predict whether the Court will find that the teacher was rehired with tenure. The Court's seeming literal interpretation of section 41 may compel such a conclusion.

The practical effect of Ripley is that school committees may be discouraged from filling regular, full-time vacancies with teachers who either have served three previous consecutive years or were tenured prior to their termination, knowing that such teachers, once reappointed, may be viewed as serving with tenure. Based on the Court's reasoning in Ripley, however, teachers hired to serve other than as "regular, full-time" teachers should not be deemed to be tenured. Consequently, hiring a formerly tenured teacher to fill a vacancy only during another teacher's pregnancy leave should not result in the temporarily appointed teacher acquiring tenured status.

In the second case, School Committee of Grafton v. Grafton Teachers' Association,29 the Supreme Judicial Court applied the reasoning set forth in Ripley. The Court was asked, in consolidated cases, to decide if the following three issues were arbitrable: (1) whether the School Committee violated the collective bargaining agreement when it dismissed, rather than laid off, teachers pursuant to a provision of the agreement; (2) whether "laid off" status under the agreement, as a matter of contract interpretation, and not as a matter of statutory or common law, contemplates that "laid off" teachers who are reemployed during the recall period retain tenure; and (3) whether teachers who are dismissed for economic reasons are entitled upon recall to tenure because the agreement provides that recalled teachers be given "such salary, seniority and fringe benefits" to which they were previously entitled.30

The School Committee of Grafton had dismissed eleven tenured teachers for budgetary reasons in accordance with applicable law and proce-
dures. 31 Three of the eleven teachers were reappointed in the next school year. 32 The other eight teachers were not. 33 Pursuant to the collective bargaining agreement between the Grafton School Committee and the teachers' association, if an opening was available during a specified period of time after their termination, teachers "laid off" in a reduction in force due to economic reasons were entitled to be recalled at "such salary, seniority and fringe benefits as they were entitled to at the effective date of their lay off." 34 When the School Committee of Grafton had voted to dismiss the eleven teachers rather than lay them off, the teachers' association filed a grievance which was stayed by a superior court judge. 35 Later, when three of the teachers were recalled, the teachers' association again filed a grievance seeking arbitration of the status of the recalled teachers, and again a superior court judge stayed the grievance proceedings. 36 The teachers' association appealed and the cases were consolidated for review by the Supreme Judicial Court. 37

The Supreme Judicial Court found that resolution of the issues raised on behalf of the three recalled teachers was likely to be controlled by Ripley. 38 The facts in School Committee of Grafton and those in Ripley, according to the Court, were indistinguishable. 39 The Court concluded that application of Ripley would probably require that the three rehired teachers be considered to have been recalled with tenured status. The case with respect to the other eight teachers, according to the Court, was moot for purposes of the statute or the contract, because none of them had been recalled during the one year following their dismissals. 40 The Court remanded the case for reconsideration of the status of the three recalled teachers' cases in light of Ripley. 41

The Court properly concluded that Ripley controlled the tenure status of the three teachers who were reappointed pursuant to the collective bargaining agreement. A literal reading of section 41 of chapter 71 compels the conclusion that tenured teachers who are dismissed, but subsequently reappointed to regular, full-time teaching positions before the start of the next school year, are reappointed with tenured status.

The School Committee of Grafton decision has one curious aspect,

31 Id. at 790, 452 N.E.2d at 496.
32 Id.
33 Id. at 792, 452 N.E.2d at 496.
34 Id. at 790-91, 452 N.E.2d at 496.
35 Id. at 789, 452 N.E.2d at 496.
36 Id. at 790, 452 N.E.2d at 496.
37 Id. at 791, 452 N.E.2d at 496.
38 Id. at 792, 452 N.E.2d at 497.
39 Id.
40 Id. at 792, 452 N.E.2d at 497.
41 Id.
however. The Court found that the cases of the teachers who were not rehired were moot, whether considered under the contract or the statute, presumably section 41. These teachers, who were not recalled, sought a declaration that arbitration should resolve the question whether the School Committee had violated the collective bargaining agreement when it "dismissed" rather than "laid off" the teachers for budgetary considerations. The Court's conclusion that their cases "appear to be moot" would therefore be correct only if no new teachers were hired to fill openings for which these teachers could have been recalled under the collective bargaining agreement. If new teachers had been hired, those tenured teachers who were not rehired could claim that denial of "laid off" status cost them reappointment. Under such a scenario, these teachers' cases would not be moot if considered under the contract.

Also, by declaring that the cases of the teachers who were not rehired in the next school year were moot, the Court suggested that if these teachers were rehired in a subsequent school year, albeit not as a function of the collective bargaining agreement, they would be reappointed without tenured status. In Ripley, the Court stated that it had left open the question whether "a tenured teacher who terminates his or her service in one year and then who is rehired not during the next school year but rather in a subsequent school year retains tenured status." The Court seems to suggest a negative answer to this question in School Committee of Grafton.

§ 9.9. Reduction of Teacher Salaries. Except when there is "a general salary revision affecting equally all teachers of the same salary grade in the town," chapter 71, section 43 provides that no tenured teacher shall have his salary reduced without the teacher's consent. In 1981, the Supreme Judicial Court, in Setterlund v. Groton-Dunstable Regional School Committee, determined that this statute would not be violated if a tenured teacher's salary were reduced in either of two situations: (1) if the teacher is subject to a collective bargaining agreement, and the reduction is in accordance with the terms of that agreement; and (2) if the teacher, although not subject to a collective bargaining agreement, individually consents to a salary reduction. In Setterlund, the tenured teacher, through his collective bargaining representative, had consented to a salary reduction. Consequently, the Court found that cutting the teacher's salary

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42 Id.
43 Id.
44 Id.
45 Ripley, 389 Mass. at 615 n.5, 451 N.E.2d at 724 n.5.
§ 9.9. 1 G.L. c. 71, § 42.
3 Id. at 330 n.3, 415 N.E.2d at 216 n.3.
in half did not violate chapter 71, section 43. The Setterlund Court, however, determined that the teacher's involuntary reduction from full-time to part-time status constituted a dismissal, triggering his right to de novo review by the superior court.

During the Survey year, the Appeals Court faced a question similar to the one addressed in Setterlund. In Lehmann v. Upper Cape Cod Regional Vocational Technical School District Committee, the Appeals Court held that the dismissal of Frederick Lehmann, a tenured teacher, from his position as a full-time teacher and his subsequent reappointment as a part-time teacher at pro rata pay violated chapter 71, section 43. The Upper Cape Cod Regional Vocational Technical School District Committee (the “School District Committee”) had voted to phase out an industrial arts program. Lehmann, who taught in that program, was dismissed by a vote of the School District Committee from his full-time teaching position which paid a salary of $17,423.00 a year. At the same meeting, the School District Committee appointed Lehmann to a part-time position at a pro rata salary of $11,720.00 for the next school year. At no time did Lehmann consent to this reduction in salary. Lehmann brought a declaratory action pursuant to chapter 71, section 43A, seeking a determination that the School District Committee had violated chapter 71, section 43. A superior court judge held in favor of Lehmann and the School District Committee appealed.

On appeal, the Appeals Court found the Lehmann case almost indistinguishable from Setterlund. Comparing the facts before it to those in Setterlund, the court chastised the School District Committee for putting “form over substance.” The court analogized the cases to those in which courts had seen through formalistic approaches to the resolution of tax questions involving so-called “step transactions.” The Appeals Court concluded that Lehmann’s salary reduction, without his consent, violated chapter 71, section 43.
The Appeals Court misapplied *Setterlund* in *Lehmann*. The *Setterlund* Court held only that a teacher is entitled to all procedural protections afforded a tenured teacher in connection with dismissal if he is reduced from full-time to part-time. The facts recited in *Lehmann* show that the School District Committee followed *Setterlund*, adhering to the mandated procedures in dismissing a tenured teacher.\(^{18}\) The School District Committee provided Lehmann with a dismissal hearing and the other required procedural protections. After Lehmann was "dismissed," the School District Committee rehired him to work on a part-time basis. Once dismissed, Lehmann was no longer tenured, and, thus, no longer protected by chapter 71, section 43. Under such circumstances, a claim that his salary had been reduced without his consent should have failed. Even if chapter 71, section 43 had protected Lehmann, his acceptance of the part-time position could constitute the consent to salary reduction required by the statute. In sum, the Appeals Court erred in holding that *Lehmann* was controlled by *Setterlund*.

\section*{§ 9.10. School Committee's Power to Suspend a Teacher.} School committees may suspend a teacher for misconduct under two different statutes. The first, chapter 71, section 42D, provides, *inter alia*, that a school committee may suspend a teacher for "unbecoming conduct" for a period of up to one month.\(^1\) The second alternative is chapter 268A, section 25, which provides that employees of a county, city, town or district may be suspended by the appointing authority during any period such employee is under indictment for misconduct in office or employment.\(^2\) Chapter 268A, section 25 does not specify any limit on the length of time during which a teacher may be suspended.\(^3\)

During the Survey year, the Massachusetts Appeals Court in *Dupree v. School Committee of Boston*,\(^4\) considered whether a suspended teacher, who had been indicted for drug-related offenses, had been indicted for misconduct "in office or employment" within the meaning of chapter 268A, section 25.\(^5\) The Appeals Court held that, where a public school teacher was indicted for possession with intent to distribute cocaine, the

\(^{18}\) See id. at 283-84, 457 N.E.2d at 667.
\(^{1}\) G.L. c. 71, § 42D.
\(^{2}\) G.L. c. 268A, § 25 provides in pertinent part:

An officer or employee of a . . . city . . . may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any election or appointive public office . . ., be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner. . . .

\(^{3}\) See id.
\(^{5}\) Id. at 536-37, 446 N.E.2d at 1100.
school committee could lawfully suspend him from employment under chapter 268A, section 25.  

The plaintiff was an untenured public school teacher in the Boston public schools. Following a late evening arrest outside a Boston bar and subsequent search of his apartment where cocaine was seized, the plaintiff was indicted for possession with intent to distribute a controlled substance. The Boston School Committee (the "School Committee"), upon learning of the indictment, suspended the plaintiff from employment. The School Committee never alleged that the plaintiff had engaged in misconduct on school grounds, during work hours, or with school personnel or students. The plaintiff sought declaratory relief in superior court and was awarded the amount of his withheld salary. On appeal, however, the Appeals Court reversed.

Although the Appeals Court acknowledged that an indictment for a crime arising from an employee's off-duty conduct is not generally considered misconduct in office, the court found that certain crimes charged are "so inimical to the duties inherent in the employment that an indictment for that crime is for misconduct in office." In support of a broad interpretation of the term "in office," the court observed that a police officer is almost automatically suspended under a similar statute that applies to state employees. The public trust held by a police officer, the court noted, compares favorably to the public trust held by the school teacher. Emphasizing that the teacher is a role model and has particular statutory responsibilities for drug education, the court found the School Committee entitled to use its discretion in deciding that the plaintiff's drug-related indictment was an "indictment for misconduct in office."

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6 Id. at 538, 446 N.E.2d at 1100.
7 Id. at 535, 446 N.E.2d at 1099.
8 Id. at 536, 446 N.E.2d at 1100.
9 Id. at 535, 446 N.E.2d at 1099. The School Committee chose to proceed under G.L. c. 268A, § 25, rather than under G.L. c. 71, § 42D because the latter statute grants school committees the right to suspend teachers for "unbecoming conduct" for a period of only one month. Dupree, 15 Mass. App. Ct. at 537 n.3, 446 N.E.2d at 1100 n.3.
10 Id. at 536, 446 N.E.2d at 1100. The court noted that the plaintiff was convicted and was in the process of appeal. Id. at 536 n.2, 446 N.E.2d at 1100 n.2.
11 Id. at 536, 446 N.E.2d at 1100.
12 Id.
13 Id. at 537, 446 N.E.2d at 1100. The court cited cases and statutes that had interpreted the phrase "in office" fairly broadly. See id.
14 Id. G.L. c. 30, § 59, is nearly identical to G.L. c. 268A, § 25, except that it applies to state employees.
16 Id. (citing G.L. c. 71, § 1, which specifically requires that "instruction as to the effects of . . . narcotics on the human system . . . be given to all pupils in all schools under public control."
17 Id. The court conceded that Tobin v. Sheriff of Suffolk County was helpful to the
A contrary holding, the court stated, would compel authorities to move for dismissal of the teacher, rather than his suspension, since the only other way to suspend him would be for unbecoming conduct under chapter 71, section 42D.\(^\text{18}\) In the court’s view, its interpretation of chapter 268A, section 25 was a "sensible supplement" to the provisions of chapter 71, section 42D.\(^\text{19}\) Accordingly, the court remanded the case for entry of judgment consistent with its holding.\(^\text{20}\)

The reasoning in *Dupree* would seem to apply also to indictments for other types of criminal activity deemed contrary to the status of teachers as role models for students, but not to alleged criminal conduct less serious than that in *Dupree*. Because of the difficulty justifying the *Dupree* decision with the Supreme Judicial Court’s more literal interpretation of chapter 268A, section 25, it is uncertain to what extent *Dupree* will be followed. The Appeals Court recognized that, were suspension not available, the School Committee would have had to choose between dismissing *Dupree*, which might have been difficult to support upon review, or reinstating *Dupree* and risking a loss of public trust. The *Dupree* decision was therefore a practical one based on particular facts. Consequently, should a teacher be under indictment for other than drug-related crimes, *Dupree* may not apply. *Dupree* may be expanded, however, to allow suspensions under chapter 268A upon evidence that the teacher’s presence in the classroom, would undermine the public trust in the school system.

§ 9.11. Right of Housing Authorities to Condition Signing Collective Bargaining Agreements on State Agency Approval. During the Survey year, in *Springfield Housing Authority v. Labor Relations Commission*,\(^\text{1}\) the Massachusetts Appeals Court considered whether a housing authority could condition the signing of a collective bargaining agreement on an agency’s approval after the terms of the agreement had been fully negotiated. The Springfield Housing Authority (the "Authority") negotiated two agreements with the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (the "Union"). The Union ratified both agreements, but the Authority conditioned its

plaintiff. In *Tobin* the Supreme Judicial Court suggested that an indictment of a deputy sheriff, an officer of the court, which arose from the alleged bribery of the mayor of Revere, was not an indictment for misconduct in office under chapter 268A, section 25. Nevertheless, citing the special role of teachers in the education of youths, the court distinguished *Tobin*.


\[\text{19} \] ld.

\[\text{20} \] ld. at 541, 446 N.E.2d at 1102. The *Dupree* decision was appealed, but further appellate review was denied. 389 Mass. 1103, 451 N.E.2d 1166 (1983).


http://lawdigitalcommons.bc.edu/asml/vol1983/iss1/12
ratification on approval by the Massachusetts Department of Community Affairs (the "Department"), a division of the Executive Office of Communities and Development ("EOCD") which has supervisory authority over local housing authorities. This condition, not agreed to by the Union, was imposed because of an EOCD regulation requiring Department approval of collective bargaining agreements entered into by a local housing authority which cover employees working in projects receiving state funding. When submitted for approval, the agreements were rejected by the Department for reasons of undue cost. As a result, the Authority declined to execute the agreements, although it expressed a willingness to bargain further concerning the terms considered unacceptable by the Department.

The Union filed charges against the Authority, alleging a violation of chapter 150E, section 10(a)(5). The Labor Relations Commission (the "Commission") found for the Union, concluding that the condition imposed by the Authority was invalid because the Union had not agreed to it in the course of negotiations. The Commission ordered the Authority to execute the agreements and to cease and desist from failing to bargain in good faith. The Authority appealed.

The Appeals Court found that the long-standing rule announced in H.J. Heinz Co. v. NLRB, which states that it is a breach of the duty to bargain in good faith for a party to refuse to execute a collective bargaining agreement which has been fully bargained, applies equally to the public and private sectors. Noting that the Commission has found the Heinz policy embodied in chapter 150E, section 10(a)(5), the Appeals Court ruled that a public employer may not impose a new condition at the end of the bargaining process which could frustrate the agreement.

The Appeals Court then considered whether the EOCD's "prior approval" regulation, promulgated pursuant to chapter 121B, section 29,
excused the violation. In addition to giving the Department general supervision over local housing authorities, section 29 accords the Department rulemaking authority over the standards and principles “governing the planning, construction, maintenance and operation of clearance and housing projects by housing authorities.” 14 Section 29 also provides, that housing authorities “shall bargain collectively with labor organizations representing its employees and may enter into agreements with such organizations.” 15 In light of the foregoing provisions of section 29, the Appeals Court concluded that the “‘prior approval’ regulation could lawfully apply only to cases where the negotiating parties . . . agreed that their bargain should be thus conditioned.” 16 In this case, where the Union had not so agreed, the Appeals Court opined, the regulation exceeded the rulemaking power conferred in section 29, as limited by section 10(a)(5). 17

The Appeals Court noted that its decision does not require EOCD to abandon its concern with labor negotiations. The Appeals Court stated:

EOCD has the capacity to influence policy and action in the labor field without going to the impermissible extreme of reserving to itself an after-the-fact power of veto of completed agreements. It can keep the authorities informed of funding realities and other inhibitions on sensible negotiation. The regulations, indeed, now require any authority about to engage in labor negotiations to meet with the deputy commissioner of the Division of Community Development “to discuss matters pertinent to the proposed collective bargaining” . . . and also to meet with this official for a conference when the bargaining is “approaching finalization” . . . . In turn, the housing authority can make EOCD’s views known to the labor representative. 18

thereof to the department, to the state auditor and to the mayor of the city or to the selectmen of the town within which such authority is organized, such reports to be in a form prescribed by the department with the written approval of said auditor. The department or said auditor shall investigate the budgets, finances and other affairs of housing authorities and their dealings, transactions and relationships. They shall severally have the power to examine into the properties and records of housing authorities and to prescribe methods of accounting and the rendering of periodical reports in relation to clearance and housing projects undertaken by such authorities. The department shall from time to time make, amend and repeal rules and regulations prescribing standards and stating principles governing the planning, construction, maintenance and operation of clearance and housing projects by housing authorities . . . A housing authority shall bargain collectively with labor organizations representing its employees and may enter into agreements with such organizations. Notwithstanding any provision of law to the contrary the provisions of sections four, ten and eleven of chapter one hundred and fifty E shall apply to said authorities and their employees . . . .

14 G.L. c. 121B, § 29. See supra note 13 for text of statute.
15 G.L. c. 121B, § 29.
17 Id.
18 Id. at 660, 454 N.E.2d at 511-12 (quoting 760 C.M.R. § 28.03-.04 (1978)).
Finally, the Appeals Court observed that, if EOCD requires "ultimate control," the solution is to seek amendment of the basic legislation.\textsuperscript{19}

The decision in Springfield Housing Authority is consistent with traditional notions of good faith bargaining. The express language of section 29 reinforces the legislative intent that housing authorities not be required to secure "prior approval" of collective bargaining agreements by the Department. Although the decision seems to accord housing authorities much greater autonomy in negotiating contracts, the importance of EOCD to the success of housing authorities is likely to result in closer communication between the two entities during the bargaining process than in the past. Rather than waiting until the conclusion of negotiations to seek EOCD approval, housing authorities will make certain, as bargaining progresses, that they stay within the bounds of what EOCD is likely to approve. In terms of the collective bargaining process, this is preferable to having the parties complete the bargaining process and then find that their efforts are to no avail because EOCD has rejected the contract, as occurred in Springfield Housing Authority. Such an outcome inevitably damages labor-management relations.

\textsection{9.12.} Labor Relations Commission — Power to Award Attorney’s Fees and Expenses. In City of Boston v. Labor Relations Commission,\textsuperscript{1} the Massachusetts Appeals Court considered the power of the Labor Relations Commission (the "Commission") to award attorney’s fees and expenses. The Commission had determined that the City of Boston and the County of Suffolk had committed prohibited practices in violation of chapter 150E, section 10(a)(1) and (5).\textsuperscript{2} As a result, the Commission had ordered the city and county, \textit{inter alia}, to pay the attorney’s fees and expenses of the union which were attributable to the investigation, preparation and presentation of the charges before the Commission.\textsuperscript{3} The superior court affirmed the Commission’s decision and also awarded the Commission its attorney’s fees and expenses in connection with the court proceeding.\textsuperscript{4} The city and county appealed.\textsuperscript{5}

The central issue before the Appeals Court involved the power of the Commission to order the payment of attorney’s fees and expenses. The

\textsuperscript{19} \textit{Id.} at 661, 454 N.E.2d at 512.
\textsuperscript{2} \textit{Id.} at 123, 444 N.E.2d at 951. The prohibited practices consisted of unreasonable delays in executing negotiated agreements. \textit{Id.}
\textsuperscript{3} \textit{Id.} There were four separate collective bargaining agreements. \textit{Id.} at 123, 444 N.E.2d at 951.
\textsuperscript{4} \textit{Id.}
\textsuperscript{5} \textit{Id.}
Commission had relied upon its power to fashion remedies under chapter 150E, section 11. It also had pointed to the power of the National Labor Relations Board to order such a remedy and to the reliance of state appellate courts upon federal cases interpreting the National Labor Relations Act in construing various provisions of chapter 150E, including section 11.

The Appeals Court noted that the Supreme Judicial Court in Bournewood Hospital, Inc. v. Massachusetts Commission Against Discrimination, had recently construed similar language under chapter 151B, section 5 as not authorizing the Massachusetts Commission Against Discrimination ("MCAD") "to assess attorney's fees and expenses incurred by an employee who complains to the MCAD of unlawful discrimination." According to the Appeals Court, the reasoning in Bournewood established that "if the Legislature had intended to depart from the long standing practice of not allowing attorneys fees except in the traditional and narrowly circumscribed instances, . . . it would have said so on the face of [the statute]." Based on the reasoning in Bournewood, the Appeals Court concluded that the Commission was not authorized to order that attorney's fees and expenses be paid to the union which had filed the charges, and that the superior court was not justified in ordering

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6 Id. at 124, 444 N.E.2d at 952. G.L. c. 150E, § 11 provides:

If, upon all the testimony, the commission determines that a prohibited practice has been committed, it shall state its findings of fact and shall issue and cause to be served on the party committing the prohibited practice an order requiring it or him to cease and desist from such prohibited practice, and shall take such further affirmative action as will comply with the provisions of this section, including but not limited to the withdrawal of certification of an employee organization established by or assisted in its establishment by any such prohibited practice. It shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section.


8 See id. at 125, 444 N.E.2d at 952.


10 G.L. c. 151B, § 5 provides:

If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in [G.L. c. 151B, § 4] . . . the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice . . . and to take such affirmative action, including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, . . . as, in the judgment of the commission, will effectuate the purposes of this chapter . . . .


12 Id. at 125, 444 N.E.2d at 952.
the payment of the Commission’s attorney’s fees and expenses in connection with the superior court proceeding. 13

The National Labor Relations Act, like chapter 150E, does not contain any express provision for the awarding of attorney’s fees and expenses. The power of the National Labor Relations Board to order the payment of attorney’s fees and expenses has been drawn from the general remedial powers of the Board. Nevertheless, despite the fact that federal precedents have carried great weight in the interpretation of chapter 150E, the Appeals Court was unwilling to infer from the Commission’s general remedial powers the ability to award attorney’s fees and expenses.

§ 9.13. Dismissal of Tenured Teachers — De Novo Court Review. Under chapter 71, section 43A, any tenured teacher who is dismissed by vote of a school committee may appeal the dismissal to the superior court, which then hears the case de novo to determine whether the evidence supported such action. 1

In the 1981 decision of Springgate v. School Committee of Mattapoisett, 2 the Appeals Court stated that chapter 71, section 43A requires the superior court to determine “whether the school committee acted on the evidence rather than out of bias, political pressure, or other improper matters,” 3 by a process of “de novo review” in which “findings of fact of the school committee carry no evidentiary weight.” 4

During the Survey year, the Appeals Court in Kurlander v. School Committee of Williamstown, 5 outlined more specifically the scope of the superior court’s de novo review. The Appeals Court held that de novo review of a school committee's decision to discharge a tenured teacher permitted a superior court judge to make an independent determination whether any of the charges brought against the teacher had been substantiated.6

Kurlander, the tenured teacher, argued that the School Committee of Williamstown (the “School Committee”) had erred in not announcing its findings with respect to the specific charges brought against him.7

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13 Id. at 126, 444 N.E.2d at 952-53.
§ 9.13. 1 G.L. c. 71, § 43A.
3 Id. at 306, 415 N.E.2d at 889.
4 Id. at 306, 415 N.E.2d at 889.
6 Id. at 357, 451 N.E.2d at 143.
7 Id. at 362-66, 451 N.E.2d at 141-44. A unanimous Appeals Court also held that the provisions of the open meeting law, G.L. c. 39, § 23B, did not preclude a school committee from meeting in closed session for discussion and deliberation of the publicly heard case.
School Committee had merely announced that it was satisfied that there was good cause for Kurlander's dismissal,\(^8\) without specifying which, if any, of the specific charges against Kurlander had been proven.\(^9\)

In response to Kurlander's appeal from the superior court's decision upholding his dismissal, the majority of the Appeals Court found that, after Kurlander had submitted the School Committee's decision for de novo review, the superior court judge was free to make whatever fact findings the record indicated should be made, unconstrained by those made by the School Committee.\(^{10}\) The majority stated that de novo review "(1) supplants any fact finding function the school committee may have; (2) transfers the function of finding facts to the [s]uperior [c]ourt; and (3) requires the [s]uperior [c]ourt, solely on its own view of the evidence before it, to make a fresh determination of 'whether the evidence substantiates the charges made by the school committee.'"\(^{11}\)

In dissent, Judge Warner disagreed with the majority on the issue of how broad the scope of de novo review is at the superior court level.\(^{12}\) According to Judge Warner, a school committee has a duty to announce its decision on the individual charges brought against the teacher and de novo review should be confined to consideration of only those charges which the school committee announces have been proven.\(^{13}\) Consequently, Judge Warner would have remanded the case to the School Committee for a statement of which charges had been substantiated and then to the superior court for de novo review of those charges found proven.\(^{14}\)

The dissent's approach in this case is more persuasive. As Judge Warner noted, de novo review focuses on the charges brought against the tenured teacher and proven by the school committee, rather than on the causes of his dismissal.\(^{15}\) The majority stated that the superior court judge was free to make his own conclusions as to the adequacy of the charges against the tenured teacher, in view of the discretion accorded a school committee to do so by a joint reading of G.L. c. 39, § 24 and G.L. c. 71, § 42. Kurlander, 16 Mass. App. Ct. at 359-61, 451 N.E.2d at 144-45.

\(^8\) Id. at 354-55, 451 N.E.2d at 141.
\(^9\) Id. at 354, 451 N.E.2d at 141. The School Committee sent Kurlander a letter, making fourteen specific charges of causes for his dismissal. Id. at 351, 451 N.E.2d at 140. After the hearing, the School Committee voted unanimously that the "charge" of conduct unbecoming a teacher, insubordination and inefficiency had been substantiated. Id. at 352, 451 N.E.2d at 140.
\(^10\) Id. at 352, 451 N.E.2d at 141-42.
\(^12\) Id. at 362, 451 N.E.2d at 145 (Warner, J., dissenting).
\(^13\) Id. at 362, 451 N.E.2d at 147 (Warner, J. dissenting).
\(^14\) Id. at 364, 451 N.E.2d at 148 (Warner, J. dissenting).
\(^15\) Id. at 366, 451 N.E.2d at 146-47 (Warner, J. dissenting).
for dismissal of Kurlander without regard to which charges had been proven to the School Committee. As Judge Warner pointed out, under the majority's analysis, the superior court judge could have found that Kurlander should have been dismissed for causes which the School Committee had not found existed. By electing to have a de novo review of the School Committee's decision, Kurlander was therefore placing himself in a kind of double jeopardy. While the court may have found the School Committee's unstated conclusion on certain charges unsubstantiated, it could have reached its own independent conclusions in support of dismissal based on charges found unsubstantiated by the School Committee. Clearly the superior court's de novo review is meant to embrace only those charges proven to the satisfaction of the school committee. The superior court judge should independently review the evidence supporting those "proven" charges and decide, without any deference to the School Committee's finding, whether the evidence in the record substantiated them.

§ 9.14. Employment Security - Interpretation of Chapter 151A. Chapter 151A, the Massachusetts employment security statute, sets forth, inter alia, the standards for determining eligibility for unemployment compensation benefits. During the survey year, the Supreme Judicial Court decided four noteworthy cases arising under chapter 151A.

A. Defining a "Stoppage of Work"

Section 25 of chapter 151A lists certain circumstances in which unemployed persons are disqualified from receiving unemployment compensation benefits. Subsection (b) of section 25 disqualifies unemployed persons from receiving benefits for "[a]ny week with respect to which the director finds that his unemployment is due to a stoppage of work which exists because of a labor dispute . . . ." In 1979, the Supreme Judicial Court held, in Westinghouse Broadcasting Co. v. Director of the Division

16 See id. at 356-59, 451 N.E.2d at 142-43.
17 Id. at 365, 451 N.E.2d at 147 (Warner, J. dissenting)
2 G.L. c. 151A, § 25.
3 G.L. c. 151A, § 25(b). This general prohibition is subject to two qualifications, or exceptions. The first qualification is where an otherwise eligible person "becomes involuntarily unemployed during the period of the negotiation of a collective bargaining contract, in which case the individual shall receive benefits for the period of his unemployment but in no event beyond the date of the commencement of a strike or lockout." G.L. c. 151A, § 25. The second qualification is where an otherwise eligible person "is not recalled to work within one week following the termination of the labor dispute." Id.
of Employment Security,\(^4\) that the term "stoppage of work," as used in section 25(b), refers to the effect upon an employer's operations produced by a labor dispute, rather than to the fact that there is a cessation of work by employees.\(^5\) The Court held in Westinghouse that no "stoppage of work" occurs when an employer's main business continues on, unabated, during the absence of striking employees.\(^6\) The Court left the standard for determining whether there has been an abatement of an employer's operations somewhat flexible, noting that most jurisdictions use a "substantial curtailment" test.\(^7\) A stoppage of work ends once an employer's operations have returned to normal, and otherwise eligible persons are then entitled to receive unemployment benefits.\(^8\)

During the Survey year, the Supreme Judicial Court articulated the standard to be used in analyzing whether an employer's operations had returned to normal. In Reed National Corp. v. Director of the Division of Employment Security,\(^9\) the Court held that "the stoppage of work ends when the substantial curtailment [of the employer's operations] no longer exists."\(^10\) According to the Court, whether a substantial curtailment of an employer's operations continues is primarily a factual determination to be made by the Board of Review of the Division of Employment Security (the "Board").\(^11\)

The case arose when the plaintiff, Reed National Corporation ("Reed"), challenged the decision of the Board awarding unemployment benefits to the claimants beginning at a date some five months after the claimants went out on strike following a breakdown in contract negotiations between Reed and the union representing the employees.\(^12\) The Board determined that the strike created a "stoppage of work," finding that Reed's operations were substantially curtailed as a result of the strike, which was called "because of a labor dispute."\(^13\) According to the Board, this stoppage of work continued until a date five months after the strike began.\(^14\) After that date, the Board concluded, the claimants could

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\(^5\) Id. at 54-55, 389 N.E.2d at 413.
\(^6\) Id. at 56, 389 N.E.2d at 413.
\(^7\) Id.
\(^10\) Id. at 338, 446 N.E.2d at 399.
\(^11\) Id. at 399, 446 N.E.2d at 400.
\(^12\) Id. at 337, 446 N.E.2d at 399. Reed had a financial interest in having the Board deny the claimants' benefits because Reed would be required to contribute to the unemployment compensation of the claimants in the event such benefits were awarded. Id.
\(^13\) Id. at 338, 446 N.E.2d at 399.
\(^14\) Id.
not be disqualified from receiving benefits. The decision of the Board was affirmed by the district court, and Reed appealed.

The Supreme Judicial Court began by addressing Reed’s claim that, as a matter of law, the employer’s operations must return to “normal” or full production before striking employees could collect benefits under chapter 151A, section 25(b). Rejecting this contention, the Court pointed out the logical inconsistency that would result from finding that a stoppage of work does not begin until production has decreased by 20 to 30 percent, and having the stoppage of work end only when production returns to 100 percent. Consequently, the Court held that, just as a stoppage of work begins with a substantial curtailment of the employer’s operations, a stoppage of work ceases when that substantial curtailment no longer remains.

Turning to the question of how substantial curtailment of an employer’s operations should be measured, the Court first stated that the inquiry is primarily one of fact for the Board. The Court then pointed out that its definition of “stoppage of work” was intentionally inexact, and was designed to be flexible enough to fit a variety of factual settings. Other jurisdictions, the Court noted, have found substantial curtailment when production drops by 20 to 30 percent. When making a decision, the Court stated, the Board “should view the drop in production and decreased number of employed production workers, as compared with these figures from the previous year, in the context of all the circumstances, including the overall status of the corporation’s operations.” In Reed National, the Court stated that the Board had failed to make the findings of fact necessary to justify its conclusion that operations had returned to normal five months after the strike began, although evidence in the record supported such findings. The Court therefore remanded the case for further fact finding.

The Reed National decision, setting forth the standard to be applied when determining whether a stoppage of work has ceased, was predictable. The Court had previously determined that a stoppage of work com-

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15 Id.
16 Id.
17 Id.
18 Id. at 338-39, 446 N.E.2d at 399.
19 Id. at 338, 446 N.E.2d at 399.
20 Id. at 339, 446 N.E.2d at 400.
21 Id.
22 Id.
23 Id. at 340, 446 N.E.2d at 400.
24 Id.
25 Id. at 341, 446 N.E. 2d at 401. The Court remanded the case to the district court with instructions for the case to be remanded to the Board for fact finding. Id.
menced when a significant percent of an employer's operations have been curtailed. It was therefore logical for the Court to hold that, when the employer's percentage of production reaches a point above the stoppage of work level, the stoppage is over, even though production has not returned to 100 percent. If the labor dispute continues after production has risen above the stoppage of work level, then otherwise eligible persons should be entitled to receive unemployment compensation.

The Reed National decision affords the Board considerable discretion to decide whether a substantial curtailment of an employer's operations has ceased. As a practical matter, if the Board makes findings of fact along the lines suggested by the Court, its conclusions will be sustained on appeal.

The ability of employees to obtain unemployment compensation benefits during a strike is a significant factor in determining how long a strike will last. The Reed National decision is helpful because it sets forth the standard for determining whether a stoppage of work has ceased, and when otherwise eligible employees out of work in the midst of a labor dispute will be able to receive unemployment benefits.

B. Defining "Total or Partial Unemployment"

The Massachusetts employment security law requires, inter alia, that a person be in "total or partial unemployment" in order to be eligible for benefits. A person is "deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable of and available for work, he is unable to obtain any suitable work." For purposes of defining total unemployment, "shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks . . . to which it can reasonably be considered to apply." During the Survey year, in South Hadley v. Director of the Division of Employment Security, the Supreme Judicial Court held that a school teacher who was employed under a collective bargaining agreement which extended through the summer, and who was given a notice of dismissal at the close of the school year, does not receive "remuneration" for the following summer months and, thus, if otherwise eligible, can receive unemployment compensation benefits during those months.

In the spring of 1981, the South Hadley School Committee (the "School Committee") notified Lynn Fitzgerald, a tenured teacher, that

26 See G.L. c. 151A, § 24(c) and G.L. c. 151A, § 1(r).
27 G.L. c. 151A, § 1(r)(2).
28 G.L. c. 151A, § 1(r)(3).
30 Id. at 401-02, 450 N.E.2d at 597.
she would be laid off effective the following fall because of a reduction in the town’s budget. A district court judge affirmed the decision of the Division of Employment Security (the “Division”) that Fitzgerald was entitled to unemployment benefits, if she was otherwise eligible, from the date she had last worked at the end of the school year. The Town of South Hadley appealed, arguing that Fitzgerald was ineligible to receive benefits for the summer months because the term of her employment extended through the summer under the collective bargaining agreement, because she was on vacation during the summer, and because she could have received insurance coverage through the summer and had her salary paid to her over twenty-six biweekly installments. The Supreme Judicial Court rejected the town’s arguments, finding that Fitzgerald was not ineligible to receive unemployment compensation during the summer months following receipt of the School Committee’s notice of her dismissal.

The Court began its analysis by reviewing certain details of the collective bargaining agreement. According to the Court, while the agreement ran through the summer, it called for the school year to end by June 30. Next, the Court found that Fitzgerald’s last day of employment was June 23, and that subsequently she had no obligation to work for the town.

The Division hearing officer, the Court noted, had concluded Fitzgerald was in "total unemployment" as defined by chapter 151A, section 1(r)(2) as of June 23, and was therefore entitled to receive benefits from that date forward, if otherwise eligible.

Reviewing the hearing officer’s decision, the Court first looked to chapter 151A, section 1(r), for a definition of "total unemployment." In determining whether Fitzgerald was in total unemployment as of June 23, the Court focused on the meaning of the word "remuneration" as defined in chapter 151A, section 1(r)(3). The Court found that since Fitzgerald had performed no wage-earning services during the summer period, the question was whether, in the broader sense, she had received any "remuneration" over the summer. In analyzing this issue, the Court first

31 Id. at 399, 450 N.E.2d at 597.
32 Id.
33 Id. at 400, 450 N.E.2d at 597.
34 Id. The Supreme Judicial Court sustained the decision of the district court and the Division of Employment Security. Id.
35 Id. The compensation plan described by the Court also included certain fringe benefit plans. Id.
36 Id.
37 Id.
38 Id. at 401, 450 N.E.2d at 597.
39 Id. at 401, 450 N.E.2d at 598.
40 Id.
pointed out that Fitzgerald had received no ""compensation"" for that period, ""[b]ecause under [chapter] 71, [section] 40, a public day school teacher's compensation is treated as earned during the time when school is in session."" Assuming that the meaning of the term "remuneration" when defined as "any consideration" was broader than the term "compensation," the Court then considered whether Fitzgerald had received any remuneration whatsoever over the summer. The test, according to the Court, "is not in what week the remuneration is received but in what week it is earned or to which it may reasonably be considered to apply." The Court found it impossible to conclude that the remuneration paid school teachers during the summer, in the form of compensation or benefits, applied to any time other than the school year. Concluding that Fitzgerald had received no remuneration during the summer, the Court found that the teacher was not ineligible for benefits during the summer months following receipt of the notice of dismissal.

The Court found support for its decision in chapter 151A, section 28A(a), which provides that a teacher who works in one school year, and has a "reasonable assurance" of working in the following school year, is not entitled to unemployment compensation during the intervening summer months. The Court inferred that the Legislature intended that those teachers who had no reasonable assurance of returning the following school year would, if otherwise eligible, be entitled to unemployment compensation. While, theoretically, Fitzgerald could have been recalled, in the Court's view she had no reasonable assurance of returning. If the Legislature had intended to deprive teachers, such as Fitzgerald, of unemployment compensation during the summer, according to the Court, it could have stated so in chapter 151A, section 28A(g).

In a final footnote, the Court noted that the town believed that this result was unfair because the town frequently must send layoff notices in the spring to protect itself against the possibility of insufficient appropriations. According to the town, many teachers who receive notice in the spring are, in fact, rehired when sufficient appropriations are subse-

41 Id. G.L. c. 71, § 40 states: "[t]he compensation paid to [public day school] teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year." Id.
42 South Hadley, 389 Mass. at 401, 450 N.E.2d at 598.
43 Id. at 402, 450 N.E.2d at 598.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id. at 402-03, 450 N.E.2d at 598.
50 Id. at 403 n.6, 450 N.E.2d at 598-99 n.6.
quently made.\textsuperscript{51} The Court stated that the town should take such an argument to the Legislature because the statutes at issue dictated the result in the instant case.\textsuperscript{52}

The practical effect of \textit{South Hadley} is that, where budgetary considerations force a school committee to send dismissal notices to teachers in the spring to avoid a contractual obligation to have them return in the fall, those teachers will be able to collect benefits during the summer. If these teachers do collect benefits over the summer, the towns and cities will, depending upon the method of contribution, either directly or indirectly, be forced to pay for these benefits. This result will further burden municipal budgets that are already strained.

The \textit{South Hadley} decision will, perhaps, have a more significant practical impact on the strategies employed by school committees negotiating teacher contracts. At present, many teacher contracts contain provisions that require notice of layoff or dismissal be sent before the end of the school year in order for them to be effective as of the beginning of the next school year. Prior to \textit{South Hadley}, school committees had little financial incentive to oppose sending spring notices. As was the case in \textit{South Hadley}, such notices are routinely sent out to many teachers due to budgetary uncertainties. When the budget is finalized, many, if not all, of the teachers who received such notices are, in fact, reappointed to teaching positions for the next school year. \textit{South Hadley} provides for school committees to seek the right to send dismissal or layoff notices only after the budget has been finalized for the next fiscal year. Clearly a school committee would benefit by having to send notices only to those teachers who it was reasonably certain would not be employed. School committees which are required to send spring notices are likely to take the steps necessary to shorten the period of time between the sending of dismissal notices and the reemployment of laid off teachers which follows finalization of the budget.

C. Interpreting the Concept of "Involuntary Resignation"

Chapter 151A, section 25(e)(1) provides that a person is ineligible for unemployment benefits if he has left work "voluntarily without good cause attributable to the employing unit or its agent."\textsuperscript{53} A person shall not be disqualified from receiving benefits under this provision, however, if he can establish "that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary."\textsuperscript{54} During the Survey year, in \textit{Manias v. Director of the Division of

\begin{itemize}
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} G.L. c. 151A, § 25(e)(1).
  \item \textsuperscript{54} Id.
\end{itemize}
Employment Security, the Supreme Judicial Court concluded that a review examiner's failure to make findings on a claimant's contentions that she had good cause to leave her employment was an error in law. The claimant Angeliki Manias had argued that both her employer's reduction in her work hours, which substantially reduced her accustomed wages, and her child care demands constituted urgent and compelling reasons for her to leave her position, thus rendering her resignation "involuntary" for purposes of section 25(e)(1).

A restaurant had employed Manias as a laundry worker. Although for a period of time her work schedule included a great deal of overtime, her schedule was changed so as to eliminate the extra hours. When asked to work evening hours, she objected, claiming that evening hours would interfere with her family and homemaking obligations. She requested a change in her schedule and resigned when it was denied. The review examiner from the Division of Employment Security (the "Division") denied Manias unemployment benefits, finding that her leaving was voluntary and without good cause attributable to her employer. She appealed to the Boston Municipal Court, which affirmed the decision of the review examiner. The case was thereupon appealed to the Supreme Judicial Court pursuant to chapter 151A, section 42.

The Supreme Judicial Court held that, if the review examiner's findings supported the claimant's contentions that her employer's reduction in her work hours and overtime resulted in a substantial reduction in her wages, then such facts would constitute good cause attributable to the employer for purposes of chapter 151A, section 25(e), making her eligible to receive unemployment benefits. In addition, the Court held that a finding could be made that the claimant's child care and family obligations were so compelling as to render her resignation involuntary.

Addressing the claimant's first argument, the Court found that, where the basis of employment includes the guarantee of overtime, an employee can resign for good cause when the employer takes that overtime away.

56 Id. at 206, 445 N.E.2d at 1071.
57 Id. at 202, 445 N.E.2d at 1068.
58 Id.
59 Id.
60 Id. at 202, 445 N.E.2d at 1069.
61 Id.
62 Id.
63 Id.
64 Id. at 202, 445 N.E.2d at 1068.
65 Id. at 203, 445 N.E.2d at 1069.
66 Id. at 205, 445 N.E.2d at 1070.
67 Id. at 202, 445 N.E.2d at 1069. Moreover, the Court reasoned that a sharp reduction in wages may be viewed as good cause for leaving employment. Id. at 203, 445 N.E.2d at 1069.
Moreover, the Court determined that a substantial reduction in wages may render a job unsuitable and be viewed as good cause for leaving employment. The Court pointed out that it would be absurd for an employer to be able to drastically reduce an employee's wages, forcing his resignation, and at the same time prevent him from collecting unemployment benefits. The Court stated that, for Manias to prevail on remand, she would have to establish that the reduction in her hours, including accustomed overtime, resulted in a substantial wage reduction. According to the Court, the fact finder could either make this determination on the already assembled evidence, or reopen the record to receive further evidence.

The claimant's second argument was that her resignation was involuntary because her new hours did not permit her to meet her child care and domestic responsibilities. The Court reasoned that "[s]ince domestic responsibilities can entitle a claimant to reject certain employment situations as unacceptable and restrict her work availability under [section] 24(b), . . . those same responsibilities also may constitute urgent and compelling reasons which make a resignation involuntary under . . . [section] 25(e)(1)." Although substantial evidence was already in the record, the Court remanded the case, stating that the Division should decide such fact issues.

The Manias decision reinforces the obligation of the Division of Employment Security to establish the factual bases for its determinations. In this case, the Division failed to make findings of fact, incorrectly assuming that the claimant's reasons for resignation could not, as a matter of law, constitute either "good cause" or "compelling" reasons. In rejecting the Division's assumption, the Court opened the door to claimants to argue a


86 Id.
89 Id.
70 Id.
71 Id. at 204, 445 N.E.2d at 1070-71.
72 Id. at 204-05, 445 N.E.2d at 1069-70.
73 Id. at 204, 445 N.E.2d at 1070. In Conlan v. Director of the Division of Employment Security, 382 Mass. 19, 413 N.E.2d 727 (1980), the Court held that the board of review of the Division had erred in ruling that, as a matter of law, a claimant failed to meet the availability requirements of G.L. c. 151A, § 24(b) because she was unwilling to work all shifts other than the day shift due to personal domestic responsibilities, and in failing to consider whether the claimant had good cause within the meaning of G.L. c. 151A, § 25(c) to decline suitable employment. Conlan, 382 Mass. at 25, 413 N.E.2d at 731. In Conlan, the Court pointed out, however, that a claimant cannot restrict his availability so drastically as to effectively remove himself from the work force and still obtain unemployment compensation benefits. Id.
74 Manias, 388 Mass. at 205-06, 445 N.E.2d at 1070-71.
right to benefits if they leave work because their salary is reduced or domestic responsibilities require them to stay at home. The Manias decision should not be interpreted, however, as supporting the proposition that employees who leave work because of serious domestic requirements, if otherwise eligible, are entitled to receive unemployment benefits. For benefits to be awarded, there must be a change in the terms of employment. Although the Court was not clear on this point, in Manias the claimant will probably not succeed if the fact finder, on remand, concludes that the terms of her employment had not changed. The claimant should be entitled to receive benefits only if a change in the terms of her employment have made already existing domestic responsibilities impossible to meet.

D. Defining "Suitable Employment"

Under chapter 151A, section 25, no benefits may be paid to a person who fails to accept "suitable employment" without good cause when offered to him. According to the statute, the suitability of a position depends on whether the employment is "detrimental to the health, safety or morals of an employee, is one for which he is reasonably fitted by training and experience . . ., is located within [a] reasonable distance . . . and . . . does not involve travel expenses substantially greater than [did] . . . his former work." The statute expressly makes certain work unsuitable, dictating that "benefits shall not be denied . . . to any otherwise eligible individual for refusing to accept new work under any of the [unsuitable] conditions." During the Survey year, in Gillig v. Director of the Division of Employ-

75 G.L. c. 151A, § 25(c).
76 See id.
77 Id. G.L. c. 151A, § 25(c) reads in pertinent part:
No work shall be deemed suitable, and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: —
(1) If the position offered is vacant due directly to a strike, lockout or other labor dispute;
(2) If the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
(3) If acceptance of such work would require the individual to join a company union or would abridge or limit his right to join or retain membership in any bona fide labor organization or association of workmen.
An individual who is certified as attending an industrial retraining course or other vocational training course as provided under section thirty shall not be denied benefits by reason of the application of the first paragraph of this subsection relating to failure to apply for, or refusal to accept, suitable work.
ment Security,\textsuperscript{78} the Supreme Judicial Court addressed for the first time the significance of the "new work" language in section 25, and denied unemployment compensation to a claimant who had refused, in essence, to continue in old work under conditions declared unsuitable for new work in the statute. The claimant was employed as a restaurant management trainee at $200 per week, based on 50 hours of work, from December 1979 to February 1980.\textsuperscript{79} One of the conditions of her employment was that she be available "at all times for all shifts."\textsuperscript{80} Although the claimant made known her unhappiness about working the early shift, she nevertheless did so from time to time.\textsuperscript{81} Early in 1980, the employer closed one of its restaurants.\textsuperscript{82} At this time, the employer reduced the size of its management staff and wanted to insure that all trainees continuing in employment would be available to work all shifts.\textsuperscript{83} The claimant was terminated because she expressed her reluctance to work the early shift.\textsuperscript{84}

After a hearing, the director of the Division of Employment Security (the "Division") found that the claimant had left work voluntarily, without compelling reasons or "good cause attributable to the employing unit," and was therefore not entitled to benefits.\textsuperscript{85} The Board of Review (the "Board") of the Division found that if the claimant had been willing to work the early shift, she could have continued in employment.\textsuperscript{86} Reversing the decision of the hearing officer, however, the Board found that the early shift was "unsuitable" employment within the meaning of chapter 151A, section 25(c)(4) and that the claimant was entitled to unemployment benefits.\textsuperscript{87} The district court affirmed the decision, and the case was appealed to the Supreme Judicial Court.\textsuperscript{88}

The Court reversed and remanded the case for entry of judgment

\textsuperscript{78} 389 Mass. 483, 450 N.E.2d 622 (1983).
\textsuperscript{79} Id. at 483-84, 450 N.E.2d at 623.
\textsuperscript{80} Id. at 484, 450 N.E.2d at 623.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 484, 450 N.E.2d at 624.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. Subsection (c)(4) provides that:

No work shall be deemed suitable, and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: . . . (4) If in the case of a female the acceptance of such work would require her to work between the hours of twelve midnight and six o'clock ante meridian.

G.L. c. 151A, § 25(c)(4), was repealed by Acts of 1980, c. 131, § 10, but had not been repealed at the time this claim was originally filed.

\textsuperscript{88} Gillig, 389 Mass. at 484, 450 N.E.2d at 624.
\textsuperscript{89} Id. at 484, 450 N.E.2d at 623.
denying benefits. The Court began by pointing out that the claimant had not rejected new work in declining to work the early shift. The claimant, the Court noted, had worked the early shift in the past and she was required, as a condition of employment, to be available to work that shift. Based on these facts, the Court concluded that the Board had erred as a matter of law in determining that section 25(c)(4) applied. The Court reasoned that the Legislature had intended to give meaning to the word "new" and that the word was not surplusage in the statute.

Based on these facts, the Court concluded that the Board had erred as a matter of law in determining that section 25(c)(4) applied. The Court reasoned that the Legislature had intended to give meaning to the word "new" and that the word was not surplusage in the statute. According to the Court, statutes in other states, and case law in the federal courts and other state courts, supported its decision. The Court, however, was careful to acknowledge that the claimant could have had "good cause" to leave work within the meaning of chapter 151A, section 25(e)(1), and thus, not be ineligible for benefits, but that such "good cause" had not been raised in the hearing.

The Gillig decision may reflect the Court's desire to avoid addressing a constitutional question involving gender-based discrimination, especially since the statutory provision at issue had already been repealed. The Court left open the question whether the reasons the positions listed in section 25(c) were unsuitable employment in the first place also established "good cause" for leaving a job. In Gillig, the Court could have ruled as a matter of law that it was "good cause" for the claimant to leave a job that would have been unsuitable if she had been requested to take it as new work. This, however, would have required the Court to reach the constitutional issue which it avoided. The Court did suggest that, if a claimant works in a job that is deemed "unsuitable" new work, the nature of the work may constitute good cause for leaving. In future cases before the Division, claimants are therefore likely to use the "unsuitable" categories listed in section 25(c) as some evidence of "good cause" for resigning.

90 Id. at 487, 450 N.E.2d at 624.
91 Id.
92 Id.
93 Id.
94 Id. at 486, 450 N.E.2d at 625.
95 See id. at 486-87, 450 N.E.2d at 625.
96 Id. at 487, 450 N.E.2d at 625.
97 See supra note 87. The employer claimed that the statute was unconstitutional on the basis of gender-based discrimination, but the Court sidestepped this argument. See Gillig, 389 Mass. at 485, 450 N.E.2d at 624.