Chapter 18: State and Municipal Government

Joseph C. Duggan

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CHAPTER 18

State and Municipal Government

JOSEPH C. DUGGAN

A. STATE GOVERNMENT

§18.1. Massachusetts Port Authority. One of the major legislative proposals passed by the General Court during the 1956 session is contained in Chapter 465 of the Acts of 1956, more commonly known as the Massachusetts Port Authority Bill. The objectives encompassed within the scope of this bill are:

1. The creation of a Massachusetts Port Authority, together with a definition of its powers and duties;

2. The transfer of the following existing facilities to the control and jurisdiction of the Authority:
   (a) Logan Airport and Hanscom Field
   (b) The Port of Boston
   (c) The Sumner Tunnel
   (d) The Mystic River Bridge

3. The construction of an additional vehicular crossing between Boston and East Boston;

4. Authorization to issue revenue bonds to provide funds for construction of the additional crossing and to refinance existing facilities.

As a result of the enactment of this bill, much prior legislation is repealed;1 for example, the act creating the State Airport Management Board,2 and all legislation pertinent thereto since the Authority is to supervise the airports.

Comment on the reasons which prompted the creation of the Authority is appropriate and relevant. For the past six years, Logan International Airport and Hanscom Field, both state-owned airports, have steadily lost money despite the earnest efforts of the State Airport Management Board to curtail the losses and put the airports on a sound financial basis.

The same may be said of the state-owned properties in the Port of Boston which also have suffered great loss.

JOSEPH C. DUGGAN is City Solicitor for the City of New Bedford, Massachusetts. He is a member of the Massachusetts and Federal Bars.

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2 G.L., c. 6, §§59A-59C.
In the light of this background, extensive study and investigation preceded the enactment of the bill; and the one salient factor revealed by these investigations and hearings was that the airfield and port agencies had both been tremendously hampered in their operations by their inordinate dependence on the slow-moving processes of legislative appropriation whenever it was desired to plan developments entailing the expenditure of money. Like any other state department, they had to "worry the appropriation through" several bureaus and committees, the House, the Senate, and the Governor's office before they could be assured that funds would be at their disposal.

These two primary considerations, namely, the ever-increasing losses and the slow-moving process of legislative appropriation, led to the suggestion being made in the General Court in 1955 to combine jurisdiction over the airports, the seaport, the Mystic River Bridge, and the Sumner Tunnel (plus a new crossing to be constructed), and to place them in the hands of a single managerial entity. The end result of many hearings, intensive investigations and much study which followed upon this suggestion was the recommendation to create the Authority.3

Seven picked men, experienced in the fields of finance, engineering, and labor relations will control the managerial policy of the Authority. Furthermore, the Authority will be able to act without reference to the legislative budgetary formalities which thus far have hampered the operation of the airports and the Port of Boston, for it will be self-supporting through issuance and sale of its own revenue bonds. This provision, however, has raised the principal adverse criticism which may be leveled at the legislation, i.e., prospective purchasers of bonds should have a right to insist on some security to buttress the promise of the Authority to repay the amounts advanced. The act, however, other than providing for a trust agreement under the terms of which the tolls and other revenues of the Authority may be pledged to secure the bond issues,4 makes no further provision for security to bondholders. In fact, the bill specifically removes the Commonwealth of Massachusetts from any role as guarantor,5 providing, in effect, that the bonds of the Authority are not to be considered as debts of the Commonwealth, or of any political subdivision thereof. It may be wondered why the Commonwealth has not availed itself of the chance to make the bonds that much more attractive either by subjecting the physical properties of the Authority to pledge, or by pledging its own financial resources, especially in view of the fact that the success or failure of the Authority depends in large measure on the success or failure of its sale of revenue bonds.

3 The majority report of a Special Recess Commission set up in the General Court to investigate the feasibility of the suggestion is to be found in House No. 2575 (1956). This majority report was the basic material from which the act was eventually formulated.


5 Id. §11.
While this piece of legislation will undoubtedly give rise to a not inconsiderable spate of litigation, for many questions will necessarily develop concerning the interpretation of various sections of the act, the indications lead to the conclusion that the Massachusetts Port Authority, like many similar governmental units in our sister states, will be accompanied with success and will accomplish its intended purposes to benefit the Commonwealth.

§18.2. The Massachusetts Higher Education Assistance Corporation. Chapter 298 of the Acts of 1956 established a body corporate under the name of Massachusetts Higher Education Assistance Corporation, the aims and purposes of which are to provide financial assistance for higher education to students, their parents or guardians, or to approved educational institutions.

This chapter also authorizes any financial institution and any domestic corporation carrying on business within this Commonwealth to make contributions or loans to the Corporation, notwithstanding any rule at common law, or any provision of any general law, or any provision in their charters to the contrary.

Furthermore, students may receive aid and assistance from the Corporation even though they are under twenty-one; and for this purpose, such minors are to have full legal capacity to act in their own behalf in the matter of contracts and other transactions, and with respect to such acts done by them they are to have all of the rights, powers, and privileges and will be subject to the obligations of persons of full age.

§18.3. Fiscal operation of the Commonwealth: Necessity of appropriation. On May 28, 1956, the Justices of the Supreme Judicial Court rendered an advisory opinion consisting of answers to various questions propounded to them by the Senate concerning the constitutionality of a proposed bill providing that a certain fund be administered and expended by the Fish and Game Board for certain enumerated purposes but "without appropriation."

The Court, after stating that the proposed bill was contrary to the budget and appropriation requirements contained in Article LXIII of the Amendments to the Constitution, supported its view by a discussion of the constitutional limitations surrounding the subject of expenditures and appropriations.

The latter article includes the following provisions: "All money received on account of the commonwealth from any source whatsoever

6 Section 4 and Section 5 both contain matter relative to the taking or use of private property, a type of legislative matter which invariably leads to litigation.


2 The background is this: G.L., c. 131, §3A provides that moneys received by the Commonwealth from fishing and hunting license and permit fees, fines, etc., shall be credited on the books of the Commonwealth to a fund to be known as the inland fisheries and game fund. "... said fund ... shall be appropriated only for the purposes of developing, maintaining ... and administering the division of fisheries and game. Said fund, subject to appropriation, shall be used only [for enumerated purposes] ..." (Emphasis added.)
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shall be paid into the treasury thereof”;3 “Within three weeks after the convening of the general court the governor shall recommend to the general court a budget which shall contain a statement of all proposed expenditures of the commonwealth . . . ”;4 “All appropriations based upon the budget . . . shall be incorporated in a single bill which shall be called the general appropriation bill . . . ”.5

In view of the provisions of G.L., c. 131, §§A and Article LXIII, §§1-3, it was obvious that the fund involved here was money received on account of the Commonwealth6 and was to be paid into its treasury according to Article LXIII, §1; and it was required to be included in the budget according to Section 2; and to be disbursed under the general appropriation bill, or under a supplementary or special appropriation bill according to Sections 3 and 4. Article LXIII, said the Court, was designed to place the fiscal operations of the Commonwealth as far as possible on a strict budgetary plan by which all money received on account of the Commonwealth from any source should be paid into its treasury, and all proposed expenditures of the Commonwealth should be included in some appropriation bill. In other words, it is quite manifest that the general intent and purpose underlying Article LXIII was to centralize the financial affairs of the Commonwealth in its own treasury, and place responsibility for their control in the General Court.

The whole broad purpose of Article LXIII, which required all expenditures to be included in some appropriation bill, could be largely defeated if various sources of income could be expended by administrative officers without appropriation. The bill in question, therefore, did not comply with the budgetary and appropriation requirements, for it would be an attempt to delegate to the Fish and Game Board powers of appropriation vested in the General Court, and, accordingly, it would violate Article XXX of the Declaration of Rights relating to the separation of powers.

§18.4. Special commissions of the General Court: Amenability to process. An interesting decision was found in the case of Luscomb v. Bowker,1 in which the seven defendants involved were members of a special commission2 established for the purpose of conducting an investigation and study of the extent, character, and objects of Communism, subversive activities, and related matters within the Commonwealth. The commission consisted of two members of the Senate, three members of the House of Representatives, and two appointees of the Governor.

4 Id. §2.
5 Id. §3.

§18.4. 1 1956 Mass. Adv. Sh. 1009, 136 N.E.2d 192. See also §§5.2, supra, for further discussion.
2 The commission was established by Resolves of 1953, c. 89.

http://lawdigitalcommons.bc.edu/asml/vol1956/iss1/22
The commission having filed an interim report, and being about to file a final report which apparently would have included the name of any individual, concerning whom the commission has received creditable evidence that such individual is a member of the communist party, the plaintiff brought a bill for injunctive relief against further publication of the statements hereinbefore described, alleging that reference to the plaintiff in the report of the commission, its publication and imminent further publication violated her constitutional rights.

In the Superior Court the case took a peculiar turn after service had been made on the members of the commission. They filed pleadings entitled "Motion to Dismiss," wherein each, "without submitting to the jurisdiction" of the court but "protesting against such jurisdiction," asserted that he was answerable only to the General Court, and moved that the bill be dismissed. The Superior Court allowed these motions and decreed that no further process issue in the premises.

The Supreme Judicial Court felt there was error in that part of the final decree prohibiting issuance of process on the ground that no member or officer of the legislature was immune from the service of civil process where no arrest had been made. The Massachusetts Constitution provides that a member of the House is exempt from arrest "during his going into, returning from, or his attending the general assembly." But in this case, no arrest had been made or was contemplated. In Long v. Ansell, it was held that a Senator of the United States was not immune from the service of summons in an action for libel, although he could not be placed under arrest.

The great weight of authority appears to hold that a member of the legislature is not exempt from the service of any civil process not involving arrest. Therefore, a member of the legislature is not exempt from suit by an individual which is designed to test the constitutionality of the action of the legislator. By the same token, the members of the commission who were not members of the legislature could not stand in any better position. To epitomize, this opinion decided only that the plaintiff had a right to present her case, and for that purpose, to have process against all of the defendants, so that all might be heard before the case was decided as to any of them. The decrees allowing the motions to dismiss, directed solely to the want of jurisdiction, were reversed.

B. MUNICIPAL GOVERNMENT

§18.5. Construction and interpretation of certain zoning by-laws. A zoning ordinance permitting the construction and use in a general

3 Part II, c. 1, §5, Art. X.
4 293 U.S. 76, 55 Sup. Ct. 21, 79 L. Ed. 208 (1934).
6 Phillips v. Browne, 270 Ill. 450, 110 N.E. 601 (1915); Johnson v. Offutt, 4 Metc. 19 (Ky. 1862); Rhodes v. Walsh, 55 Minn. 542, 57 N.W. 212 (1892); Berlet v. Weary, 67 Neb. 75, 93 N.W. 238 (1903); Gentry v. Griffith, Hyatt & Co., 27 Tex. 461 (1864).
residence district of a building for a "Public or semi-public institution of a philanthropic, charitable, or religious character, but not a correctional institution," was involved in *Gangi v. Board of Appeals of Salem.*

Here the question presented was: Would the construction and use of a building by the Animal Rescue League of Boston in a zoned general residential district, which building would serve as an office and shelter for animals, be in violation of the zoning ordinance? Previously, in *Minns v. Billings,* it was held that both the Massachusetts Society for Prevention of Cruelty to Animals and the Animal Rescue League were public charities and their organizations were also referred to as "institutions." In the *Gangi* case, the Court further stated that the term "institution" may be applied both to the organization, i.e. the League, and to the place where its operations are conducted, i.e. the shelter. Therefore, both the League itself and its proposed shelter were treated as falling within the scope of the phraseology of the ordinance.

Very often, other pertinent statutes must be interpreted and correlated in conjunction with zoning statutes so as to permit proper application of the latter.

A writ of mandamus was brought in *Meadows v. Town Clerk of Saugus* to require the town clerk, under applicable licensing laws, to issue a kennel license for operation on premises in an area zoned for residences. The Court held that the subject matter of the kennel license was not simply a pack of dogs and that the license itself was one covering the location or premises where the dogs were to be kept; and this being so, the petitioners could not compel the respondent to issue a license covering a location in a residence district where the maintenance of the kennel, otherwise permissible, would be in violation of the zoning by-law.

§18.6. School committee powers. Historically, broad powers have been vested in school committees relative to promulgation of rules and regulations for the government and management of the schools under their charge. In *Dowd v. Town of Dover* the question was raised as to whether these broad powers of general supervision over public schools extend to closing of schools, or whether such closing lies solely within the province of the town itself. A petition was brought by ten taxpayers of Dover under G.L., c. 40, §53 seeking to enjoin the school committee from abolishing teachers' positions by closing Dover High School, and from contracting with the town of Needham to send its pupils to Needham on a tuition basis. The Superior Court having ruled that the school committee acted within its powers in so doing, and having dismissed the petition, on appeal the Supreme

2 183 Mass. 126, 130, 66 N.E. 593, 595 (1903).

§18.6. 1 Leonard v. School Committee of Springfield, 241 Mass. 325, 330, 135 N.E. 459, 461 (1925). G.L., c. 71, §3 provides that the school committee has "general charge of all public schools."

Judicial Court affirmed the action of the lower court by citing prior cases where it was decided that school committees unquestionably had power to close schools under the broad construction given to G.L., c. 71, §37.

The question of the scope of contractual powers of school committees was presented in another guise in School Committee of Salem v. Gavin. General Laws, c. 43, §29 provides in substance that all contracts made by any department or board (the school committee being such a "department" or "board" within the meaning of c. 43, §29) where the amount involved is $1000 or more shall not be deemed to have been made or executed until approved by the mayor. On the other hand Sections 37 and 38 of the same chapter provide that school committees shall have general charge of the public schools, and shall elect, and contract with, teachers. In the Gavin case, the majority of the school committee voted to give the defendant coach of football a three-year contract at a salary of $2500 a season. The mayor of Salem did not concur in the committee's action. The school committee the following year brought a bill for declaratory relief under G.L., c. 231A seeking to have the contract declared invalid because it did not bear the approval of the mayor. The contract having been declared invalid, the defendant coach thereupon appealed; and it was held that the subject matter of the contract was one over which the authority of the school committee was supreme; and, accordingly, it was not subject to the provisions of G.L., c. 43, §29, and was valid though not approved by the mayor. The Court carefully distinguished this case of a contract for professional services, analogous to that of a contract with a teacher, which traditionally has been under the exclusive and untrammeled control of school committees, from contract cases of a commercial nature, e.g. a contract for the transportation of pupils which would not be valid without the approval of the mayor as in Eastern Massachusetts Street Railway v. Mayor of Fall River.

A third case, however, illustrates the point that school committees are not completely autonomous. In Young v. City of Worcester it was held that a vote to increase the salary of the superintendent of schools, passed by the school committee forty-three days after the city manager had submitted the annual budget to the city council, was not timely. The day following the vote the council adopted the budget for the city, including the item for the superintendent's salary as originally submitted by the school department.

Although no time is expressly fixed by statute for determining the municipality's obligation to provide whatever funds the school com-

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mittee within its powers requests, the Court was of the opinion that the critical date was the date of the submission of the annual budget to the city council. This was felt to be the necessary implication of G.L., c. 44, §§32 and 33. These sections provide that the city manager is to submit to the city council an annual budget within forty-five days after the annual organization of the city government. Thereafter the council has forty-five days in which to consider the controllable items of appropriation. To do so intelligently, it needs to know the total of the proposed budget, including the total of fixed items over which it has no control, such as school department estimates. The Court also thought that Section 33A, which provides that the annual budget shall contain sums sufficient to pay the salaries of officers and employees fixed by law or by ordinance, implied the same provision for the other class of fixed items. Accordingly, the estimates of the school committee entailing a required appropriation had to be in the city manager’s hands by the time he brought the recommended annual budget into existence, which occurred when he submitted it to the city council.

While this rule does not affect the school committee’s admitted power and right to establish the superintendent’s salary, it does show that the exercise of that power, particularly as it relates to a supplementary appropriation, is not without restriction.

§18.7. Validity of takings by eminent domain and easement. The off-street parking lot has now become such a necessary public utility that many communities have been constrained to take private land by eminent domain for the purposes of constructing public parking places. In Tate v. City of Malden, it was held that the statute under which the city acted authorized the taking of the land for such public purpose even though the land was at the time of taking utilized by the private owners for public parking, the exact same use to which the city intended to put the land. The Court said that the taking was necessary, although the private owners were themselves using the land for a public parking lot, because at any moment the private owners might decide to sell the land or use it for purposes other than public parking.

§18.8. Pensions: Basis for computation, and presumptions relative to annuities. Under the provisions of G.L., c. 32, §58, a veteran who has been in the service of the Commonwealth, or any county, city, and so forth, for a total period of thirty years in the aggregate shall “. . . be retired from active service at sixty-five per cent of the highest annual rate of compensation, including any bonuses paid in lieu of additional salary or as a temporary wage increase in addition to his regular compensation. . . .” In Smith v. City of Lowell, the plaintiff, chief engineer in the water department, brought a bill in equity for a declaratory judgment as to the amount of retirement allowance to


which he was entitled. As chief engineer, he was responsible for the employees in the engine room and, there being no one qualified and available to relieve him, was required to work seven days each week. His total wages in the last year of his employment were $5991.06.

The question for decision was whether the retirement allowance should be 65 percent of that amount, or of a much smaller amount based on what his compensation would have been for a normal five-day, forty-hour week even though he worked seven days a week. On appeal by the city from a final decree declaring that the highest annual rate of compensation was $5991.06 (his total wages in his last year of employment), the Supreme Judicial Court undertook to decide "what was the employee's highest annual rate of compensation." In answering the question, the Court analyzed the objective of the statute, which was to provide for a retired employee an annual allowance amounting to a certain percentage of the regular compensation received by him before retirement. Since none of plaintiff's regular compensation could properly be considered payment for "overtime" because it was payment for his customary work ("overtime pay" not being computable in determining the highest annual rate of compensation), it followed that his regular compensation was in the amount found by the master, i.e. his total wages, and not the amount based on what his compensation would be for a five-day, forty-hour week.

§18.9. The Massachusetts "heart law." The Massachusetts "heart law," so-called, was construed in Selectmen of West Springfield v. Hoar, wherein an annuity was claimed by the widow of a police officer who died of heart disease, the claim being made under G.L., c. 32, §89A, which provides: "If an employee . . . dies as a natural and proximate result of undergoing a hazard peculiar to his employment, while in the performance of his duty . . . there shall . . . be paid . . . to the following dependents of such deceased person the following annuities: . . ." The question raised was whether the presumption defined in G.L., c. 32, §94, the "heart law," applied in instances where a widow's annuity was claimed under the foregoing Section 89A. The presumption of Section 94 reads as follows: "any condition of impairment of health caused by . . . heart disease resulting in total or partial disability to a . . . permanent member of a police department . . . who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of such condition, shall be presumed to be suffered in the line of duty."

The plaintiff selectmen contended that the presumption in Section 94 related only to "any condition of impairment of health" and to "total or partial disability," and contained no reference whatever to "death"; and consequently the presumption was intended only for the benefit of "living" potential pensioners and not for the benefit of "dependent potential annuitants" under Section 89A.

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The Court found, however, that other considerations tended in the opposite direction from the contention of the plaintiffs. The Court felt that since the retirement laws do provide for allowances to dependents in the event of service-connected death, as well as for allowances to the living for service-connected disabilities, and since Section 94 relates only to a presumption that heart disease is service-connected, it would seem natural to conclude that the presumption should apply in cases of death from that cause, as well as in cases of disability.

It might also be noted that Chapter 374 of the Acts of 1956 amends that portion of Chapter 32 of the General Laws dealing with pensions for policemen and firemen by inserting after Section 851 a new Section 85J, which provides that any policeman or fire fighter eligible for superannuation retirement shall have the right at the time of his retirement to elect one of two options for payments of his pension. Under Option A, the full yearly amount of pension is payable under Sections 80-85. Under Option B, a lesser amount of yearly pension is payable to the policeman or fire fighter during his lifetime, with a provision that one half of the yearly amount of such lesser pension shall be continued during the lifetime of and paid to his widow. 2

§18.10. Civil service: Discharge while suspension in effect. In the case of Mayor of Newton v. Civil Service Commission, 1 the question arose as to whether an appointing authority could discharge a person in the classified service who was at the time of the discharge under a previous unexpired definite suspension. 2 To the contention that the appointing authority had no right to take dismissal action against the civil service employee because at the time of discharge he was separated from the police service by reason of previous suspension, the Court replied by distinguishing between "suspension" and "dismissal," pointing out that it was a distinction of substance and not merely one of form. "Suspension," said the Court, "imports the possibility or likelihood of return to the work when the reason for suspension ceases to be operative. Dismissal imports an ending of the employment." 3

However tenuous the grasp that the employee might have had on the office while suspended, up to the time he was ordered discharged by the appointing authority the door had not been entirely closed; therefore, the Court felt that the appointing authority was not required to wait until the expiration of his suspension before proceeding against him for his other later conduct leading to discharge while under the definite, unexpired suspension.

As to the suspension of civil servants, it should also be noted that G.L., c. 43, §45 has been amended by Section 1 of Chapter 629, Acts

2 Acts of 1956, c. 374, now G.L., c. 32, §85J gives the manner in which the lesser amount in Option B is computed.

2 G.L., c. 31, §43(b) specifies the manner in which hearing is afforded.
of 1956, by striking out paragraph (e), and inserting in its place a new subsection. Prior to amendment, a suspension for a period not exceeding five days could only be made pending a hearing which was required to be held by the appointing authority within five days; under the amendatory act, however, the suspension may be ordered for just cause, and hearing on the question of whether there was just cause will be afforded only when requested by the suspended employee.

Section 2 of Chapter 629 further amends Chapter 31, Section 43 by adding a new subsection (g) which contains the same provisions as amended paragraph (e) and applies to imposition of punishment duty on police officers for disciplinary purposes.