Chapter 9: Labor and Employment Law

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Labor and Employment Law

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§ 9.1. Introduction. Numerous judicial and legislative developments in Massachusetts labor and employment law occurred during 1985. Although no single case decided in 1985 can fairly be described as having landmark significance, in their totality the cases helped to further define labor and management rights in the areas of (1) public sector grievance arbitration under chapter 150E; (2) grievance arbitration under Massachusetts Bay Transportation Authority labor contracts pursuant to chapter 161A, section 19; (3) the duty to bargain in the public sector under chapter 150E as it relates to the unilateral change doctrine; (4) the statutory rights of dismissed teachers; and (5) legal recourse for individual employees outside the sphere of collective bargaining. In addition, chapter 150E was twice amended. The following sections report and analyze each of these developments.

§ 9.2. The Enforcement of Public Sector Arbitration Awards Under Chapter 150E. The Survey year was a frustrating one in large respects for public sector unions and the public sector arbitration process. In 1985 the Supreme Judicial Court and the Appeals Court each decided two cases involving the enforcement of public sector arbitration awards. In all four cases a public sector union had prevailed both before an arbitrator in grievances filed under the terms of a collective bargaining agreement negotiated pursuant to chapter 150E, and in subsequent petitions for enforcement in the superior court pursuant to chapter 150C, section 10. In all cases the Supreme Judicial Court and/or the Appeals Court reversed the superior court, and vacated the awards in whole or in substantial part.

In the first of the two cases before the Supreme Judicial Court, School Committee of Boston v. Boston Teachers Union, Local 66,1 (BTU II) the Boston Teachers' Union had successfully arbitrated a claim for damages on behalf of laid-off teachers under a job security clause contained in its multi-year collective bargaining agreement with the Boston School Com-

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mittee. That same clause had been the subject of a 1982 decision by the Court\(^2\) (BTU I) in which the Court had held the job security clause unenforceable for any period exceeding one fiscal year,\(^3\) on grounds that decisions about the abolition of teaching positions because of declining pupil enrollment were entrusted by law to the exclusive managerial prerogative of a school committee.\(^4\) Thus stymied in its efforts to obtain specific performance of the school committee’s promise to maintain teaching positions at a certain level, the union returned to the arbitration arena to redress the contract violation in money damages. The arbitrator agreed with the union that the school committee had breached the job security clause, and awarded damages to each teacher for salary lost as a result of the layoffs. The superior court confirmed the damage award, and the Supreme Judicial Court granted the school committee’s petition for direct appellate review.

On review, the BTU argued that the holding in BTU I limited an arbitrator’s right to award specific performance of a multi-year job security clause, but did not preclude an award of damages for breach of contract.\(^5\) In support of its argument, the BTU relied upon two earlier opinions of the Court in which arbitral awards for damages were enforced notwithstanding that other portions of those same awards, which had ordered specific performance of the underlying clauses, were vacated. Specifically, BTU cited School Committee of Braintree v. Raymond\(^6\) in which the Court vacated that portion of an arbitrator’s award which directed the employer to reinstate a teacher to an abolished music director position, on the grounds that the employer’s decision to abolish such position was, by state law, an exclusive managerial prerogative, and as such could not be delegated to an arbitrator.\(^7\) Simultaneously, however, the Braintree Court enforced the arbitrator’s award of damages for compensation lost by the music director, noting that the damage award was “separable from [the arbitrator’s] unauthorized determination that the employee should be reinstated.”\(^8\) Similarly, in School Committee of Lynn-

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\(^3\) It is important to note, nonetheless, that the Court has explicitly recognized the enforceability in the public sector of multi-year collective bargaining agreements containing provisions for salary increases in fiscal years subsequent to the fiscal year in which such agreements are negotiated. See BTU I, 386 Mass. at 209 & n.17, 434 N.E.2d at 1265–66 & n.17.

\(^4\) See G.L. c. 71, §§ 37, 42.

\(^5\) BTU II, 395 Mass. at 235, 479 N.E.2d at 647.


\(^7\) Id. at 690, 343 N.E.2d at 148.

\(^8\) Id. at 691, 343 N.E.2d at 149.
field v. Trachtman,\(^9\) the Court vacated an arbitrator's order for reinstatement of a teaching position, but simultaneously enforced the arbitrator's order for payment of damages to a teacher who had been displaced with the elimination of the position. The Trachtman Court resolved the tension between its facially competing conclusions on the grounds that for purposes of the nondelegability doctrine the question of damages is separable from the issue of specific performance.

In reversing the decision of the superior court, and concluding that the arbitrator's award of damages should be vacated, the BTU II Court implicitly acknowledged the continuing vitality of the principle of separability established in Braintree and Trachtman, but refused to apply that principle to the facts at hand.\(^10\) Noting that there was no evidence before the Court that there were "uncommitted, appropriate funds available to the school committee"\(^11\) to pay the damages awarded, the Court qualified the principle of separability by holding that "an arbitrator acts in excess of his authority if damages are awarded for the breach of a provision in a collective bargaining agreement when, at the time of the breach, no funds had been appropriated to implement that provision."\(^12\)

In the second case reviewed by the Court, School Committee of Holbrook v. Holbrook Education Association,\(^13\) an arbitrator had found that the employer had breached the recall provision of its collective bargaining agreement with the teachers' union, and had ordered the employer to recall a laid-off physical education teacher to a vacancy in a school adjustment counselor position, with damages for lost compensation. The teacher in question had been certified by the State Board of Education as a guidance counselor, but had never been certified for, nor worked in, the vacant position.\(^14\) In overturning the employer's decision to recall another laid-off teacher with less seniority than the grievant to fill the vacancy, the arbitrator found that the employer had historically recalled teachers within their order of seniority to fill positions for which they held state certification. Because none of the applicants for the vacancy held adjustment counsellor certifications, the arbitrator awarded the position to the grievant on the basis of seniority within a related certification.\(^15\)

\(^10\) BTU II, 395 Mass. at 235, 479 N.E.2d at 647. Specifically, the Court stated that "[t]he principle set forth in those two cases, that an award of damages 'is separable' from an arbitrator's mistaken conclusion that a particular decision by a school committee is arbitrable, is wholly inapplicable here." Id.
\(^11\) Id. at 235, 479 N.E.2d at 647.
\(^12\) Id. at 236, 479 N.E.2d at 648.
\(^14\) Id. at 652, 481 N.E.2d at 485–86.
\(^15\) Id. at 653, 481 N.E.2d at 486.
Noting that its role in reviewing an arbitrator’s award was narrowly confined to “determining whether the arbitrator’s award ‘improperly intrudes into an area reserved for the judgment of the school committee regarding educational policy,’” the Court, nonetheless, concluded that it was “well settled” that appointment determinations were within the exclusive prerogative of school management, and thus beyond the authority of an arbitrator to overturn. Although acknowledging, at least implicitly, that the recall of a laid-off teacher differed by degree from the appointment of a new teacher, the Court, citing decisions by the Appeals Court in *School Committee of Peabody v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO*, Local 294, and *School Committee of New Bedford v. New Bedford Teachers Association*, nonetheless found the recall of a teacher to a position in which she had never served, and for which she was not technically authorized under the state’s teacher certification schema, sufficiently analogous to an initial appointment decision so as to fall within the exclusive prerogative of management and outside the authority of an arbitrator. Accordingly, the Court vacated the arbitrator’s reinstatement order. On the strength of its separability doctrine, however, the Court upheld the arbitrator’s award of damages for one year as a remedy for the employer’s breach of the recall agreement. Describing the arbitrator’s conclusion that the recall provision had been breached as a final determination not subject to judicial review, the Court, in reliance upon its decision in *Trachtman*, enforced the damage award.

The BTU II and Holbrook decisions are important for two reasons. First, although affirming its long held view that an arbitrator’s decision on the merits of a grievance is non-reviewable as long as the arbitrator acts within the scope of his authority, the Court also reemphasized its more recently adopted view that an arbitrator exceeds his authority when

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16 *Id.* at 654, 481 N.E.2d at 487 (quoting *School Committee of Boston v. Boston Teachers Union, Local 66*, 378 Mass. 65, 389 N.E.2d 970 (1979)). In that case, the Court held that an arbitrator did not enter forbidden ground when he enforced an employer’s contractual promise to consult with the teachers’ union before changing the nature of certain elementary school exams. It follows that merely because an issue subject to arbitration involves educational policies it is not automatically rendered nonarbitrable. Rather, a further analysis is required to determine whether arbitration of the issue presented compels unwarranted interference with powers statutorily reserved to a school committee.

17 *School Comm. of Holbrook*, 395 Mass. at 655, 481 N.E.2d at 487.


20 395 Mass. at 656, 481 N.E.2d at 488.


22 *Trachtman*, 384 Mass. at 813, 429 N.E.2d at 704. See supra note 9 and accompanying text.
he intrudes into an area of decision making delegated by law to a public school committee. In furtherance of the latter notion, the Court approved the application of the nondelegability doctrine to decisions involving the lay-off of teachers because of declining enrollments and to the recall of teachers into positions they had never before held and for which they were never certified. In short, the Court’s two decisions in these respects were predictable based upon prior case law, and represented but a quantitative expansion of the nondelegability doctrine.

Second, although not revolutionary in their conclusion that an arbitrator’s award for damages may be enforceable where there is no showing that uncommitted, appropriated funds do not exist to pay the damages, even though the contract clause under which the breach occurred is not specifically enforceable, the two cases do appear to resolve a nagging inconsistency in one aspect of the Court’s earlier nondelegability decisions. Specifically, prior to BTU II and School Committee of Holbrook, it was unclear whether a public sector contract clause, which impermissibly intruded into an area of decision making reserved exclusively to a public employer, was arbitrable for any purpose. This uncertainty stemmed from a 1978 decision, Berkshire Hills Regional School District Committee v. Berkshire Hills Educational Association, in which, at palpable odds with the separability doctrine enunciated in its earlier School Committee of Braintree case and its later Trachtman case, the Court held that a grievance subject to a school committee’s non-delegable power could not be submitted to arbitration.

In Berkshire Hills the school committee and teacher’s union were party to a collective bargaining agreement which required that the committee give preference to applicants “already in the employ of the District” when filling the position of school principal. When the committee refused to observe that provision, an overlooked internal applicant grieved and the matter was eventually referred to arbitration by the union. In upholding a stay of arbitration granted by the superior court and affirmed by the Appeals Court, the Supreme Judicial Court concluded that the contract clause at issue was not a proper subject for arbitration. Moreover, the Court expressly disagreed with the union’s argument, advanced in reliance upon Braintree, that the stay should have been denied because even if the grievant’s appointment was beyond the authority of the arbitrator, it was not certain that an alternative award would have intruded into the school committee’s exclusive domain. Observing that “the very
subject of the proposed arbitration — [the grievant’s] entitlement to the vacant principal’s position — is a matter which, because of the school committee’s exclusive and non-delegable power, cannot be submitted to the ultimate decision of an arbitrator,” the Court concluded that “an agreement to arbitrate a dispute which lawfully cannot be the subject of arbitration [such as the present one] was equivalent to the absence of a controversy covered by the provision for arbitration.”

Because the Court’s holding in Berkshire Hills was so firmly and comprehensively stated, it was at best unclear whether the separability doctrine first announced in Braintree had survived. Since the grievant in Berkshire Hills arguably would have been entitled to at least a year’s damages for lost compensation under the separability doctrine, the Court’s foreclosure of arbitration altogether, coupled with its express rejection of the union’s alternative award argument, left doubts about the vitality of that doctrine. When the Court decided Trachtman in 1981, without a single reference to Berkshire Hills, it was clear that the separability doctrine had indeed survived Berkshire Hills, and that Berkshire Hills was not to be read as broadly as its sweeping language might have suggested.

The question lingered, however, as to whether the Court, for purposes of the separability doctrine, was implicitly drawing a line between contract clauses which provided relief for incumbent teachers whose positions were cut in whole or in part, as in Braintree and Trachtman, and clauses which interfered with the appointment to educational positions never before held by the rejected applicant, such as in Berkshire Hills. School Committee of Holbrook suggests that the Court never intended such line drawing and that Berkshire Hills was simply a benign judicial twitch not to be accorded precedential deference. Because Holbrook involved the recall of a teacher to a position never held, which the Court characterized as “most analogous to an appointment decision,” it seems to follow, contrary to Berkshire Hills, that available relief, at least in the form of limited damages, would render arbitrable those contract clauses which may not be performed specifically through arbitration, even where the power implicated by the clause in question is the core power to appoint.

In summary, the two cases decided by the Supreme Judicial Court in 1985 have remained faithful to the Court’s prior decisions in which the nondelegability doctrine has been invoked to render nonarbitral claims for specific performance of contract clauses which intrude impermissibly

27 Id. at 529, 377 N.E.2d at 944.
29 School Comm. of Holbrook, 395 Mass. at 656, 481 N.E.2d at 488.
into the powers of a school committee, and extended that doctrine to situations where a school committee has acted to reduce the size of its teaching force in light of declining enrollments and to appoint teachers. At the same time, however, the Court has clarified earlier doubts about the overall arbitrability of such clauses by upholding the right of unions to seek relief in arbitration for breach thereof as long as the relief awarded falls short of compelling their specific enforcement.

_School Committee of Peabody v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO, Local 294_, 30 an Appeals Court case pre-dating both _BTU II_ and _School Committee of Holbrook_, also involved the vacation of an arbitrator’s award on nondelegability grounds. Specifically, the arbitrator had ruled that two teachers were improperly denied appointment to positions as assistant principals under the terms of a contractual reduction-in-force agreement between the teachers’ union and the school committee. That agreement purported to give such teachers an advantage over other applicants for the positions in question on the basis of seniority. In deciding for the union, the arbitrator ordered the school committee to appoint the teachers to the positions, and to pay them damages for compensation lost during the prior school year.

Correctly anticipating the Supreme Judicial Court’s subsequent decision in _School Committee of Holbrook_, the Appeals Court ruled that the appointment of an incumbent teacher, who is subject to a reduction-in-force, to a position never before held by him or her, impermissibly intruded into the realm of decision-making reserved exclusively to the school committee by chapter 71.31 The court incorrectly anticipated the _Holbrook_ decision, however, on the question of damages. Thus, the court in _School Committee of Peabody_ also vacated the arbitrator’s award of damages for one year to the grievants, expressly relying upon the rationale of _Berkshire Hills_ as grounds for refusing to apply the separability doctrine.32 Accordingly, that portion of the court’s decision in _Peabody_ holding that a contractual reduction-in-force clause contravened the non-delegability doctrine, at least to the extent that it purported to compel appointment of teachers to positions for which they had never before been deemed qualified by the school committee, survives as good law. That portion of the decision holding that damages may not be recovered for breach of the clause does not appear to have survived in light of the Supreme Judicial Court’s reinforcement in _School Committee of Holbrook_ of the separability doctrine in teacher appointment cases.

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31 _Id._ at 453–54, 475 N.E.2d at 413.
32 _Id._ at 455, 475 N.E.2d at 414.
The Appeals Court decision in *City of Somerville v. Somerville Municipal Employees Association*\(^{33}\) explored a means other than the nondelegability doctrine by which a contract can offend the pre-existing statutory schema and require vacation of an arbitrator's award for breach of such clause. The nondelegability doctrine has been invoked to invalidate contract clauses which are found impermissibly intrusive of a public employer's *general* grant of statutory authority to manage certain of its public responsibilities.\(^{34}\) A second area of concern, however, involves the question of direct conflict between contractual language and detailed provisions of a pre-existing statute which is not listed in chapter 150E, section 7(d) as subordinate to a collective bargaining agreement,\(^{35}\) and represents a *specific* grant of authority to manage a particular aspect of public responsibility.

*City of Somerville* involved a commonplace provision in a collective bargaining agreement covering various city employees including, *inter alia*, clerical workers, who worked in higher job classifications on a temporary basis. That provision, known in the labor vernacular as an "out of grade pay" clause, required the City to pay the salary rate of a higher classification to any lower-classified employee who had temporarily worked in the higher classification for at least three days.\(^{36}\) Typically, the provision was triggered when an incumbent in a higher classification went on vacation, sick leave, or another short-term leave. The City benefitted from the arrangement by obviating tedious and time consuming paperwork that would have been required at civil service for securing a temporary appointment in the absence of the out of grade pay clause, and by insuring the continuity of its operations through employment of a seasoned hand during the absence of the incumbent. The employee working out of grade obviously benefitted from the increased salary rate, payable after three days in the position.

Although the City and the Somerville Municipal Employees Association had lived in substantial harmony under the out of grade clause for a number of years, a problem developed over application of the clause in the City's assessing department. Specifically, upon the retirement of an executive secretary in that department, the chairman of the board of


34 To date, the nondelegability cases have been confined primarily to the area of public education. It is unclear to what extent the doctrine will be applied, if at all, to other public functions.

35 G.L. c. 150E, § 7(d) lists various pre-existing statutes, and provides that as to each statute listed any conflicts with a collective bargaining agreement are to be resolved in favor of such agreement.

assessors authorized a lower-classified employee, a head clerk, to assume the duties of the vacant executive secretary position on an acting basis, and also authorized a yet lower classified employee, a principal clerk, to assume the duties of the head clerk on an acting basis.\footnote{Id. at 595–96, 481 N.E.2d at 1179.} The mayor, however, who was the appointing authority under civil service law,\footnote{See G.L. c. 31, § 1 et seq.} would not approve out of grade pay for either of the two lower classified employees. The mayor defended his refusal on grounds that he was reviewing whether there was a continuing need for the executive secretary position, and until that review was completed, did not want employees assigned out of grade work.\footnote{Under the controlling Somerville ordinances, the mayor had control of the assessor’s budget, but could not remove, and thus could not control, either the Chairman or other members of the board of assessors as they were elected officials. See Somerville City Charter, §§ 20–21.}

The chairman of the board of assessors persisted in the assignment of out of grade duties notwithstanding the mayor’s refusal to authorize extra pay. The employees continued to perform the out of grade work, and the mayor continued to deny out of grade pay. Accordingly, the Association filed a grievance over the nonpayment, and the matter was processed to arbitration.\footnote{City of Somerville, 20 Mass. App. Ct. at 597, 481 N.E.2d at 1179.} After hearing and argument, the arbitrator found that under the contractual out of grade pay clause, the City owed compensation for the out of grade work performed by both lower-classified employees. He ordered payment thereof retroactively as well as prospectively until such time as the chairman of the board discontinued the extra duties.\footnote{Id. at 597, 481 N.E.2d at 1179–80.} The City moved to vacate in the superior court, and when the superior court enforced the award, the City filed an appeal with the Appeals Court.

After reviewing the various means by which employees may be lawfully appointed to serve in positions covered by civil service law,\footnote{Id. at 598, 481 N.E.2d at 1180.} the Appeals Court concluded that the out of grade system in the parties’ contract, at least as applied in the case before it, was not one of those means. As the mayor was the appointing authority under civil service law, the court reasoned that only he could fill the higher classified position, permanently or temporarily.\footnote{Id. at 600, 481 N.E.2d at 1182.} The court rejected the Association’s argument that no “appointment” was ever made to the two lower-classified employees who, in the Association’s view, had remained in their normal positions and merely had been assigned temporarily additional duties of the higher classifications. The court concluded that the out of grade clause, as interpreted by the arbitrator, transferred the authority to appoint from
the mayor to the chairman of the board of assessors, and in so doing created an irreconcilable conflict between the collective bargaining agreement and civil service law. Because civil service law is not specifically listed in section 7(d) of chapter 150E, that law prevails in the case of such conflict, warranting, in the court’s view, a reversal of the superior court.

Read broadly, the City of Somerville case could be interpreted to invalidate the out of grade clause contained in the City of Somerville’s collective bargaining agreement with the Association, as well as to invalidate similar out of grade clauses in myriad other collective bargaining agreements throughout the state. Certainly, the court’s zealous concern about the integrity of the civil service process, and its uncomplimentary references to the concept of out of grade work might lead one to believe that the decision should be so construed.

A narrower reading of the court’s holding is available, however, and would seem to be the most sensible way to read the decision. Under the narrower reading, the decision can be limited to the peculiar facts of the case. Thus, an unusual confluence of state and local law led to a situation where (1) the appointing authority had no ability to control the actions of an independently elected department head; (2) a collective bargaining agreement negotiated by the appointing authority on behalf of the City required the City to pay for out of grade work authorized by the department head; and (3) the assignment to work on an out of grade basis was not limited to a short period of time. Under these circumstances apparently, the City of Somerville holding would preclude enforcement of a higher pay requirement in the underlying contract clause. Where, however, the appointing authority has control over the assignment of out of grade work, and such work is assigned only for a limited time period, it is possible that a City of Somerville-like out of grade pay clause would be enforceable. Moreover, even where the assignment of an employee to out of grade work by an appointing authority extended beyond a limited time period, a contract clause unquestionably would be enforceable for higher pay provided the appointing authority took certain procedural steps required under civil service law to make a provisional, temporary, or emergency appointment of the employee doing the out of grade work.

Finally, to the extent that the Appeals Court decision vacated the arbitrator’s award on damages, it also appears to be inconsistent with

44 Id. at 602–03, 481 N.E.2d at 1183.
45 Id.
46 The Appeals Court acknowledged that an acute need for a prompt appointment to fill a vacancy could be satisfied by such types of appointment. Id. at 603 n.14, 481 N.E.2d at 1183 n.14. There appears to be no bar to the enforcement of higher pay for individuals so appointed pursuant to a contractual out of grade pay clause.
§ 9.2 LABOR AND EMPLOYMENT LAW

School Committee of Holbrook.47 An application of the separability doctrine to City of Somerville would have permitted the City to have paid the grievants for out of grade work performed by them through the 1984 fiscal year. That result would not have had the effect of compelling an appointment contrary to civil service law,48 but would have provided limited relief to the grievants whose only fault was that they followed their immediate superior’s instructions. As the question of damages was not raised in the request for further review filed by the association, the Supreme Judicial Court’s denial of such request may not be read as an acceptance of the Appeals Court’s conclusion on the issue of damages.49

A third decision by the Appeals Court in 1985, City of Worcester v. Borghesi,50 also involved an arbitrator’s award, which, in turn, directly implicated specific provisions of a pre-existing state statute. Unlike the civil service law at issue in City of Somerville, however, the statute at issue in City of Worcester, chapter 41, section 111F, is listed in section 7(d) of chapter 150E. Accordingly, the collective bargaining agreement was not subject to attack on grounds of conflict with state law.

In City of Worcester, a police officer was injured in the line of duty, and was granted leave with full pay pursuant to chapter 41, section 111F.51 A disagreement subsequently ensued between the officer and a physician designated by the City, pursuant to that chapter, over the officer’s fitness to return to work. When the City, in reliance on the physician’s opinion, removed him from leave status and ordered him back to work, the officer filed a grievance under a provision of his collective bargaining agreement which apparently52 incorporated chapter 41, section 111F by reference. An arbitrator determined that the officer was still incapacitated when recalled to duty, and ordered the City to compensate the officer for lost wages from the date of the improper recall to November 24, 1981, the date on which the officer was suspended and rendered ineligible for leave status for reasons unrelated to the arbitration matter. The City appealed the grant of compensation, arguing, inter alia, that the arbitrator exceeded his authority because under chapter 41, section 111F, the desig-

47 See supra note 10.
49 In its application for further appellate review, the Association made a tactical decision, which in retrospect seems stubborn and narrow minded, to eschew a request for limited damages in order to confront head on the Appeals Courts’ failure to harmonize the out of grade clause and Civil Service Law. The tactician in the case is also the author of this article.
51 Id. at 661, 477 N.E.2d at 156.
52 The actual contract clause at issue was not specifically identified or quoted in the Appeals Court opinion.
nated physician, and not the arbitrator, was entrusted with determining incapacity.\textsuperscript{53}

The court noted that although the City's argument was couched in terms of excessive authority, it was essentially an attack on the arbitrator's conclusions of fact and law. Reasserting its long held belief that such attacks were outside the scope of the court's review, the court concluded that the award was valid and enforceable.\textsuperscript{54} The court's narrow focus in \textit{City of Worcester} and \textit{City of Somerville} and is explained by the fact that the latter two cases involved statutes not listed in chapter 150E, section 7(d).

\textsection{9.3. The Enforcement of Public Sector Grievance Arbitration Awards Involving the Massachusetts Bay Transportation Authority (MBTA)}. Collective bargaining by employees of the MBTA is regulated by chapter 161A, section 19 \textit{et seq.},\textsuperscript{1} rather than by chapter 150E. In particular, chapter 161A, section 19 authorizes collective bargaining over various employment issues between the MBTA and certain of its employees, and expressly permits the MBTA to include in such agreements a grievance and arbitration procedure culminating in final and binding arbitration. During the Survey year, the Appeals Court in \textit{MBTA v. Local 589, Amalgamated Transit Union},\textsuperscript{2} explored the enforceability of grievance arbitration awards issued pursuant to chapter 161A, section 19.

The grievant in the case was hired by the MBTA into a bargaining unit position in 1970. Three years later he was promoted to a management position outside of the bargaining unit, and remained there until that position was eliminated in March of 1981. He then sought to exercise so-called "dropback" rights to return to the bargaining unit.\textsuperscript{3} Although his union voted to allow the dropback, the MBTA refused his request to do so on the basis of inherent management rights. The union filed a grievance on the grievant's behalf under the terms of a collective bargaining agreement which had terminated on December 31, 1980, but which had contained a rollover provision continuing its terms "from year to year thereafter unless changed by the parties."\textsuperscript{4} Following a full hearing, the arbitrator, rejecting various employer defenses, ruled that the grievant

\textsuperscript{54} Id. at 665, 477 N.E.2d at 157-58.
\textsuperscript{1} G.L. c. 161A, § 19 as amended by Acts of 1980, c. 581, § 8, provides for collective bargaining over wages, hours and certain other subjects, prohibits collective bargaining over certain enumerated "matters of inherent management right," and provides for final and binding arbitration of contractual disputes between the parties.
\textsuperscript{3} Id. at 419 n.1, 480 N.E.2d at 1046 n.1.
\textsuperscript{4} Id. at 420, 480 N.E.2d at 1046.
was entitled to dropback pursuant to a past practice which was expressly grounded in a contractual past practice clause. The MBTA was ordered to reinstate the grievant to his former bargaining unit position with full back pay and benefits.\(^5\)

A superior court judge subsequently vacated the award on the grounds that it conflicted with the MBTA’s management rights under chapter 161A, section 19. The union appealed to the Appeals Court, raising several issues and offering the Appeals Court an opportunity to clarify several areas of the law regarding the enforceability of grievance arbitration awards under chapter 161A, section 19.

First, the union argued that the MBTA’s petition to vacate was untimely pursuant to the Massachusetts Uniform Arbitration Act, chapter 251, sections 12 and 13, and that the superior court erred by concluding otherwise. On this point, however, the Appeals Court determined that chapter 251 applied only to commercial arbitration, and did not encompass actions to enforce collective bargaining agreements.\(^6\) Alternatively, the union argued that the MBTA’s petition to vacate was barred by the thirty-day limitations period contained in chapter 150C, section 11(b). Rejecting MBTA’s contention that chapter 150C did not apply to it as it was a political subdivision of the Commonwealth, the court held that the reference to “employers” in chapter 150C, section 17 was to be read expansively, and, absent express exclusionary language in either chapter 161A, section 19 or chapter 150C, could not be deemed to exclude the MBTA.\(^8\)

Notwithstanding that the time limits in chapter 150, section 11(b) were held applicable, the court declined to find that the MBTA’s petition to vacate was untimely. As the applicability of chapter 150C had not been argued in the superior court, the Appeals Court viewed that issue inappropriate for consideration on appeal. More importantly, the court concluded that the issue of timeliness under chapter 150C was analogous to

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\(^5\) Id.
\(^6\) Id. at 422, 480 N.E.2d at 1047.
\(^7\) G.L. c. 105C, § 1 states:

A written agreement or a provision in a written agreement between a labor organization or organizations, . . . and an employer or employers to submit to arbitration any existing controversy or any controversy thereafter arising between parties to the agreement, including but not restricted to any controversy dealing with rates of pay, wages, hours or other terms and conditions of employment of any employee or employees, shall be valid, enforceable and irrevocable, except as otherwise provided by law or in equity for the revocation of any contract.

\(^8\) MBTA v. Local 589, 20 Mass. App. Ct. at 422, 480 N.E.2d at 1047–48. The court was also careful to distinguish grievance arbitration from interest arbitration, the latter of which is subject to G.L. c. 161A, §§ 19(c)–19(g).
a statute of limitations defense, and, as such, had to be proven by the party raising it. 9 Because the union had raised timeliness as a defense in its answer, but had offered no proof as to when the underlying arbitrator’s award had been received by the MBTA for purposes of triggering the limitations period, the timeliness defense failed. 10

On the merits, the Appeals Court addressed three additional issues. Initially, the MBTA argued that the union was without standing to arbitrate the grievant’s dropback rights since the grievant was out of the bargaining union in an executive position at the time the alleged grievance arose. The court disagreed with that argument, holding that the applicability of the dropback right for a former bargaining unit member on leave to take a managerial position was strictly a matter of contract interpretation, which was to be left to the arbitrator. 11 Next, the MBTA contended that the contractual obligation to arbitrate had not survived the expiration of the parties’ collective bargaining agreement. Quoting from an earlier decision by the Supreme Judicial Court, in *Boston Lodge 264, International Brotherhood of Machinists v. MBTA*, 12 for the proposition that the expiration of a collective bargaining agreement did not necessarily mean that the obligation to arbitrate grievances arising under that agreement expired, the Appeals Court also rejected this contention. 13 Further, as the collective bargaining agreement at issue contained a rollover provision, extending the pre-existing terms until a change therein had been negotiated, the Appeals Court had little difficulty in finding the matter, which arose only three months into the rollover period, arbitrable. 14

Finally, the MBTA argued that chapter 581, section 8 of the Acts of 1980, the management rights amendment to chapter 161A, section 19, prohibited collective bargaining over appointments to employment positions and, thus, prohibited it from complying with the arbitrator’s award. 15 The court also rejected this contention, reasoning that the management rights amendment, by its own terms, did not apply to grievance arbitration arising under collective bargaining agreements which had been negotiated prior to the enactment of such amendment. Accordingly, the

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9 Id. at 425, 480 N.E.2d at 1049.
10 Id. at 425 & n.8, 480 N.E.2d at 1049 & n.8.
11 Id. at 426, 480 N.E.2d at 1049.
12 389 Mass. 819, 821, 452 N.E.2d 1155, 1156 (1983). The Court held that where an agreement includes obligations extending beyond its term, and where the promise to arbitrate grievances arising thereunder is broadly expressed, the duty to arbitrate will survive the agreement's expiration.
14 Id.
15 Id. at 427, 480 N.E.2d at 1050.
court reversed the judgment of the superior court and ordered entry of a new judgment enforcing the arbitration award.\textsuperscript{16}

The primary importance of the foregoing case is the application of chapter 150C to MBTA collective bargaining agreements and the extensive body of law, largely sympathetic to the arbitration process, that has developed thereunder. Secondarily, the case serves as a clear warning to a party raising timeliness defenses under chapter 150C that explicit proof as to the date the arbitration award at issue was received by the party seeking its vacation is required as a condition to dismissal on timeliness grounds.

\textbf{§ 9.4. The Duty to Bargain Under G.L. c. 150E and the Unilateral Change Doctrine.} During the Survey year, three cases were reported, outside of the arbitration context, involving the duty to bargain under chapter 150E. Each involved actions by public employers which were opposed by unions on unilateral change theories.\textsuperscript{1} That is to say, in each instance the union argued that a unilateral change in a mandatory subject of bargaining was unlawfully implemented by the employer.

The first case, \textit{Newton Branch of the Massachusetts Police Association v. City of Newton},\textsuperscript{2} tempted the Supreme Judicial Court with the intriguing question whether an employer's right under chapter 150E to implement its last offer following good faith collective bargaining to impasse,\textsuperscript{3} included the right, upon impasse, to unilaterally change a term of employment, which is both a mandatory subject of bargaining under chapter 150E, section 6, and subject to regulation by a pre-existing statute listed in chapter 150E, section 7(d), so that the term of employment, as changed, was inconsistent with the pre-existing statute.\textsuperscript{4} Stated differently, the issue is whether a public employer has a right to implement a proposed change in a condition of employment, which is inconsistent with such statutory requirement, after bargaining to impasse, even though chapter 150E provides that an agreement reached through collective bargaining will supercede any inconsistent requirement of all statutes listed in chapter 150E, section 7(d).

The statute in question, chapter 41, section 111F provides leave with pay for police officers incapacitated by an injury, sustained in the line of

\textsuperscript{16} Id. at 427–28, 480 N.E.2d at 1050.
\textsuperscript{3} See Massachusetts Organization of State Engineers and Scientists v. Labor Relations, 389 Mass. 920, 927, 452 N.E.2d 1117, 1121 (1983) [hereinafter \textit{MOSES}].
\textsuperscript{4} \textit{City of Newton}, 396 Mass. at 190–91, 484 N.E.2d at 1329.
duty, for the period of such incapacity. The union, in negotiations for a successor to a contract expiring on June 30, 1982, sought to change a pre-existing contract clause which had incorporated the protections of chapter 41, section 111F, by permitting a third physician to resolve conflicts between an officer's physician and a physician designated by the City under section 111F over an officer's physical status. The City eventually counterproposed by accepting the union's third physician proposal, but, in addition, insisted upon a limited duty clause which would require an officer to forfeit leave status if found by the third physician to be capable of performing limited police duties on either full or part-time duty basis. After impasse was reached, the City implemented its offer. The union filed a petition for declaratory and injunctive relief in superior court, arguing that the City's unilaterally-imposed policy was inconsistent with section 111F, and was therefore unlawful.

Unfortunately for those interested in the answer to the unilateral change question, the Court eschewed the flirtation posed by the union's appeal by finding that the change implemented by the City of Newton was consistent with chapter 41, section 111F. Specifically, the Court held that chapter 41, section 111F did not prohibit the involuntary return to work of a police officer who was partially incapacitated, yet fully able to perform an assignment within the scope of the officer's job description. Since no conflict with chapter 41, section 111F resulted, there was no need for the Court to determine what the legal effect would be of a unilateral change in a term of employment which, as changed, conflicted with a section 7(d) statute.

Interestingly, although the Court expressly declined to answer the unilateral change question, it did uphold that portion of the City's unilaterally change which (1) provided for referral of disagreements (between an officer's physician and a physician designated by the City) over an officer's physical status to a third physician for resolution and (2) permitted the officer to remain on leave during the interim. Both the referral to a physician beyond the designated physician, and the continuation of paid leave following a determination by the designated physician that the officer was no longer incapacitated are facially inconsistent with section 111F. Although the union itself had proposed the same conditions, no agreement on them was ever reduced to a collective bargaining agreement

5 G.L. c. 41, § 111F.
6 City of Newton, 396 Mass. at 188, 484 N.E.2d at 1327.
7 Id. at 188, 484 N.E.2d at 1327–28.
8 Id. at 192, 484 N.E.2d at 1330.
9 Id. at 191, 484 N.E.2d at 1329.
10 Id. at 192–93, 484 N.E.2d at 1330.
for purposes of chapter 150C, section 7(d), since other portions of the City’s proposal on the subject remained unacceptable to the union.

In *City of Newton*, the Court seems to have authorized a municipal employer to deviate from the requirements of a section 7(d) statute. The Court stated, however, that the third physician provision was a greater benefit than officers enjoyed under section 111F, and that since the City did not eliminate any rights guaranteed by section 111F, its deviation from that section was permissible. Although not expressly stated, the Court may also have upheld the City’s change in leave policy because to the extent that change was inconsistent with section 111F, it was consistent with the union’s stated position at the bargaining table. Whether the City’s deviation from section 111F resulted in greater benefits, it was, nevertheless, a deviation not reduced to a written collective bargaining agreement. For what it is worth, the Court’s rationale on this point seems inconsistent with the plain terms of chapter 150E, section 7(d). All the more inconsistent, at least in the view of this author, would be a decision by the Court in a later case which purported to authorize a public employer to unilaterally change a term of employment following impasse in a manner inconsistent with both section 7(d) and the stated position of a union.

A subsequent case involving the rights of an employer to unilaterally change a condition of employment was substantially more mundane. In *Town of Lee v. Labor Relations Commissions*, the public employer refused to permit a police officer, whose position was within a lawfully designated collective bargaining unit, to move his residence from Lee, Massachusetts to a neighboring town. More pointedly, in reliance upon a residency by-law promulgated by the Town in 1954, the employer advised the officer that if he moved he would be fired.

The union contended that the threat to terminate the officer represented a new or changed policy on the part of the Town over a mandatory subject of bargaining, and demanded negotiations. When the Town refused to bargain over its residency requirements, the union filed a charge of prohibited practice with the Labor Relations Commission. After hearing, the Commission sustained the charge, and the town appealed to the Appeals Court.

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11 Id.
14 G.L. c. 150E, § 11, states in pertinent part: “Any party aggrieved by a final order of the commission may institute proceedings for judicial review in the Appeals Court within thirty days after receipt of said order.”
In agreement with the Commission's long-stated position, the Appeals Court first concluded that a residency requirement as a condition of continued employment, as compared with a condition of hire, is a term or condition of employment within the meaning of chapter 150E, section 6, and is, therefore, a mandatory subject for bargaining. Moreover, in accordance with the supremacy afforded a collective bargaining agreement over conflicting town by-laws by chapter 150E, section 7(d), the court determined "as a matter of logic" that if a collective bargaining agreement was silent on a particular section 6 subject, a public employer must bargain about any new or changed policy or requirement with respect thereto, notwithstanding the language of any town by-law. The court concluded its inquiry by reviewing the Commission's factual finding that the town's position reflected a change and/or new policy, under the substantial evidence rule. After doing so, the court held that the Commission finding was justified.

In summary, Town of Lee reflects an affirmation of the Commission's view that residency requirements as conditions of continued employment are subject to the mandatory bargaining obligation under chapter 150E, section 6. Thus, a public employer wishing to impose a residency requirement must first offer a union representing its employees an opportunity to bargain over such a requirement, and if the union so wishes, must bargain to agreement or impasse prior to implementation thereof.

The final unilateral change case decided during the Survey year involved a prohibited practice charge before the Labor Relations Commission alleging that a school committee had unlawfully required a doctor's certificate from absent teachers who had been suspected of participating in a "sick out." In School Committee of Leominster v. Labor Relations Commission, negotiations for a new collective bargaining agreement had reached impasse. During the negotiations period the old agreement continued in effect beyond its expiration date pursuant to a carry-over clause. The school committee, having heard that the teachers were planning a sick-out for two days, wrote the teachers union advising, inter alia, that it would require a physician's statement from any teacher absent from school during the sick-out period, and would not pay sick leave compensation unless such statements were provided. Arguably, this approach was inconsistent with a provision of the parties' contract, which

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16 *Id.*
17 *Id.*
19 *Id.* at 246, 486 N.E.2d at 757.
permitted the school committee to require a doctor’s certificate after five (5) days of absence.\textsuperscript{20}

Subsequently, an unusually large number of teachers called in sick on one of two consecutive days as rumor had predicted. The school committee filed a strike investigation petition with the Labor Relations Commission under chapter 150E, section 9A(b), and simultaneously notified the absent teachers that a medical certificate would be required as a condition to sick pay for the days each teacher had missed. The Commission declined to rule that the absences constituted an unlawful strike by the union, but found preliminarily that “a number of individuals may have” induced or encouraged a strike.\textsuperscript{22} No further relief was sought at the Commission by the committee, and no further proceedings were held on the strike petition.

The teachers’ union promptly filed a prohibited practice charge alleging that the medical certification requirement was an unlawful unilateral change in violation of the school committee’s duty to bargain in good faith pursuant to chapter 150E, section 10(a)(5).\textsuperscript{23} After a full review, the Commission concluded that notwithstanding the existence of a unilateral change, the committee’s requirement of medical certification was warranted in view of the strong statutory policy against public employee strikes under chapter 150E, section 9A(a).\textsuperscript{24}

After a convoluted tour of the judicial system, detailed in the court’s opinion,\textsuperscript{25} the case finally reached the Appeals Court. Rejecting the union’s argument that the Commission should not have excused the committee’s unilateral change without having first explicitly found that a strike had occurred, the court vigorously upheld the Commission’s conclusion that the committee’s reaction to a suspected strike was “reasonable”\textsuperscript{26} in light of the public policy considerations involved.

Although \textit{School Committee of Leominster} does not give a public employer carte blanche to ignore the Commission’s unilateral change

\begin{itemize}
\item \textsuperscript{20} Id. at 248, 486 N.E.2d at 758.
\item \textsuperscript{21} G.L. c. 150E, § 9A(b) provides in pertinent part:
\begin{quote}
[Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including but not limited to, instituting appropriate proceedings in the superior court . . . for enforcement of such requirements.]
\end{quote}
\item \textsuperscript{22} School Committee of Leominster, 21 Mass. App. Ct. at 247, 486 N.E.2d at 757.
\item \textsuperscript{23} Id. at 248, 486 N.E.2d at 758.
\item \textsuperscript{24} Id. at 249 n.8, 486 N.E.2d at 759 n.8.
\item \textsuperscript{25} Id. at 250, 486 N.E.2d at 759.
\item \textsuperscript{26} Id. at 251, 486 N.E.2d at 759.
\end{itemize}
doctrine during an apparent public employee strike, the case stands firmly for the proposition that a public employer may take reasonable steps to investigate the circumstances of an apparent strike and to withhold compensation from apparent strikers, even though one or more of such steps would not be condoned under chapter 150E, section 10(a)(5) absent a strike setting.

§ 9.5. The Teacher Dismissal Cases. During the Survey year, in Solomon v. School Committee of Boston,¹ the Supreme Judicial Court examined the impact of a maternity leave taken by a provisional teacher on her eligibility for tenure under chapter 71, section 41.² The maternity leave issue arose in the context of a de novo hearing before the superior court, pursuant to chapter 71, section 42A, over Solomon's dismissal by the school committee. In that hearing, as a threshold matter, the school committee contended that an earlier maternity leave taken by Solomon under chapter 140, section 105D,³ constituted a significant disruption of her service during a year needed by her to acquire tenure, and thereby disqualified her from tenure under chapter 71, section 41.⁴ The superior court agreed with the school committee and dismissed the complaint. The Supreme Judicial Court granted a petition for direct appellate review.

On appeal, the school committee first argued that chapter 149, section 105D, which requires completion of an initial probationary period for teachers as a condition precedent to the receipt of maternity leave,⁵ did not apply to non-tenured teachers since they were probationary employees within the meaning of that law. The Court rejected that argument, interpreting the language in section 105D, requiring completion of an initial probationary period to mean the first several months of employment not to exceed six months,⁶ rather than the entire period of their

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² G.L. c. 71, § 41, known as the teacher tenure law, provides for tenured status upon appointment to a fourth consecutive year of employment as a teacher.
³ G.L. c. 140, § 105D, provides that a female employee who has completed her probationary period, and is then absent for no longer than eight weeks for the purpose of giving birth, shall be entitled to her same or similar job upon timely notice and return to work. However, the statute also prohibits the inclusion of maternity leave in the computation of any benefits, rights and advantages not provided all employees while on leaves of absence.
⁴ Solomon, 395 Mass. at 13-14, 478 N.E.2d at 139.
⁵ See G.L. c. 149, § 105D.
⁶ Solomon, 395 Mass. at 15, 478 N.E.2d at 139. The Court relied upon regulations promulgated by the Massachusetts Commission Against Discrimination pursuant to G.L. c. 151B, §§ 3(5), 3(6), and 3(11)(A) as controlling the length of the probationary period required for maternity leave under § 105D. The Court concluded that the relatively short probationary period promulgated by the MCAD was within that agency's regulatory power, and was more consistent with the purposes underlying § 105D than was the three year pre-tenure period established under G.L. c. 71, § 41. Id. at 16, 478 N.E.2d at 139.
employment before obtaining tenure. For teachers, such as Solomon, in a school system without a set probationary period, the Court relied upon section 105D to define the initial probationary period as the first three months of employment, and thus found that Solomon had been eligible for leave under that section.

The Court then turned to the more troublesome argument of the school committee. Relying upon the statutory exclusion in section 105D, of time spent on maternity leave in the computation of an employee’s benefits, rights and advantages, the school committee argued that time on leave which could not be counted for various employment rights, including tenure, necessarily interrupted the consecutive nature of prior service toward tenure, and required recommencement of such service in order to achieve tenure.⁷

In resolving the apparent conflict between the exclusionary language in section 105D and the constitutionally protected choice of a female teacher to have a child,⁸ the Court construed the legislative intent underlying section 105D to permit a teacher on maternity leave to retain her pre-leave years of service for purposes of determining her eligibility for tenure, but to preclude use of time spent on such maternity leave in computing length of service for tenure purposes. Accordingly, the Court concluded that Solomon’s leave did not interrupt her continuity of service towards tenure, and remanded the case to the superior court for a de novo hearing on the dismissal.⁹ The Court expressly declined to answer the further question whether a teacher who has taken a maternity leave must serve an entire additional school year to compensate for the partial school year lost to maternity leave.¹⁰

The Solomon case is important in two respects. Certainly the increased job protection afforded female teachers seeking to advance their careers without forfeiting their right to bear children is a valuable gain. Equally important, however, is the Court’s endorsement of the need to harmonize more recently enacted employment-related statutes with the pre-existing statutory scheme which has granted comprehensive power to municipal managers, in order to achieve the legislative intent behind the more recent legislation.¹¹

The second teacher dismissal case decided by the Supreme Judicial

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⁷ Id. at 17–18, 478 N.E.2d at 140.
⁸ Id. at 18, 478 N.E.2d at 140 (citing Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639–40 (1974)).
⁹ Solomon, 395 Mass. at 18–19, 478 N.E.2d at 140–41.
¹⁰ Id. at 19, 478 N.E.2d at 141.
¹¹ Id. at 18, 478 N.E.2d at 140 (citing, inter alia, Dedham v. Labor Relations Commission, 365 Mass. 392, 402, 312 N.E.2d 548, 556 (1974)).
Court, *Martin v. School Committee of Natick*, 12 and an Appeals Court decision, *Breslin v. School Committee of Quincy*, 13 reviewed the statutory, constitutional, and contractual rights of teachers and principals to a hearing prior to dismissal or demotion. Both cases reaffirmed earlier holdings 14 by the Court that teachers have no rights to a predispositional hearing where the decision to demote or dismiss has been made in good faith on the basis of policy decisions related to a decline in the number of students, or to budgetary considerations. Thus, in *Breslin*, the Appeals Court had little difficulty in concluding that former administrators in the Quincy school system were not entitled under statute or constitution to demotion hearings when their positions were abolished during a bona fide district reorganization. As the Appeals Court noted, “once it is established that the abolition of the . . . positions was rooted in policy and that there were reasons related to educational objectives in opting for an open selection process for the new jobs (i.e., the jobs created by the reorganization), the case for the plaintiffs collapses." 15

While standing for the same proposition, the Supreme Judicial Court’s decision in *Martin* deserves more attention for two reasons. First, *Martin* highlights a plaintiff's heavy burden of proof when seeking a predismissal hearing on statutory or constitutional grounds in the face of declining enrollment or budgetary claims. Martin, a teacher dismissed during a reduction in force due to declining enrollments, argued that his dismissal was not motivated by a declining enrollment, but rather, was based on allegations offered of poor performance. In support of this contention, Martin produced evidence that at the time he was dismissed purportedly due to declining enrollments, he was already awaiting a dismissal hearing before the school committee based upon performance related allegations by the superintendent. 16 Martin argued that the sudden substitution of the dismissal on declining enrollment grounds was a ruse designed to deprive him of his right to a disciplinary dismissal hearing. 17

Characterizing Martin’s argument as having “intuitive appeal,” 18 the Court, nevertheless, affirmed the lower court’s dismissal of the action. In essence, the Court reasoned that the coincidence of the dismissal due to declining enrollments with the scheduling of the disciplinary dismissal

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17 *Id. at 461, 480 N.E.2d at 628.*
hearing was insufficient, without more, to compel a conclusion that the former was a sham designed to avoid the latter. The Court concluded that "as long as there is an actual need for a RIF, the School Committee is free to dismiss teachers without complying with the notice and hearing requirements of G.L. c. 71, § 42." Because there was evidence that enrollments were declining, and that fewer teachers were needed, the Court permitted Martin's dismissal without a hearing.

Second, Martin, reveals an expansion in the scope of judicial inquiry beyond the traditional statutory criteria in a section 43A case. There is nothing new about permitting a teacher in a statutory action under chapter 71, section 43A to contest a disciplinary dismissal. The judicial inquiry in such cases, however, historically has been limited to those factors specifically identified in chapter 71, section 41 and has not extended to the terms of a collective bargaining agreement. This historical approach by the Court is entirely consistent with well established law in the private sector. Although there is neither any federal statute providing judicial review to dismissed private sector employees which parallels the protections of chapter 71, section 43A, nor an election of remedies statute which parallels chapter 105E, section 8, which expressly permits a teacher to elect either arbitration or a statutory action to contest dismissal, the federal courts have from time to time been asked to review the propriety of an employee dismissal in consideration of certain contractual protections claimed by the employee in his/her collective bargaining agreement. Because of the national policy favoring resolution of private sector labor disputes through voluntary arbitration, the United States Supreme Court has refused to allow federal or state courts to consider a dismissed private sector employee's claims arising out of a collective bargaining agreement, and has limited such employee's recourse to the arbitration process, except in the limited case where the employee first proves that his collective bargaining agent has breached its duty to represent the employee fairly in the grievance/arbitration procedure. Quite simply stated, absent a breach of a union's duty of fair representation, federal law precludes judicial consideration of a dis-

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19 Id. at 467 n.9, 480 N.E.2d at 628 n.9.
20 Id. at 467, 480 N.E.2d at 628 (emphasis supplied).
21 See G.L. c. 71, § 43A.
22 Specifically, G.L. c. 71, § 42 requires in part that no tenured teacher may be discharged "[e]xcept for inefficiency, incapacity, conduct unbecoming a teacher . . . , insubordination or other good cause . . . ."
missed employee's claims for relief which arise out of a collective bargaining agreement. The Supreme Judicial Court has freely applied this law in private sector cases over which it has held concurrent jurisdiction, and has extended the law into the public sector, at least in the context of suits by an individual employee against the Massachusetts Bay Transportation Authority.

Notwithstanding the Court's historical approach in section 43A cases, the existence of a binding arbitration clause, and the absence of a claim that Martin's union breached its duty of fair representation, the plaintiff in Martin was allowed to argue that certain clauses of the collective bargaining agreement between his union and the school committee precluded his dismissal. Specifically, Martin argued that (1) procedures required by the agreement for a critical evaluation of his performance had not been followed; (2) a notice requirement of the agreement was not followed; (3) his seniority rights under the agreement were violated; and (4) an earlier evaluation was not reviewed from his personnel file in apparent breach of the agreement.

Although the Court concluded that none of Martin's contractual claims were sufficiently compelling to have avoided entry of summary judgment against him, the decision is remarkable in that the Court actively considered the contractual arguments. Because the Court's focus under section 43A in non-disciplinary dismissal cases has been confined narrowly to determining whether the policy decision leading to a reduction in force has been made in good faith, and whereas the Court has been generous in reviewing explanations advanced by a school committee in support of such decisions, a former teacher's chances of overturning his/her dismissal have been slim. However, to the extent that the Court is willing to consider limitations which have been negotiated into a collective bargaining agreement on a school committee's right to select a particular teacher for a non-disciplinary dismissal in a section 43A proceeding, the chances for successful challenge of such dismissal are greatly expanded. Thus, in Martin, for example, notwithstanding the proven need for a reduction in force, the Court appeared willing to consider the possibility of Martin's reinstatement, had Martin offered persuasive evidence that he was as qualified as less senior teachers who had been retained in the school committee's employ, pursuant to the terms of the applicable collective bargaining agreement which afforded job security to equally qual-

27 Martin, 395 Mass. at 468, 480 N.E.2d at 629.
28 Id. at 468-70, 480 N.E.2d at 629–30.
ified teachers on the basis of seniority. Although the Court rejected Martin's claims for lack of proof, the applicability, validity and strength of the underlying contract clauses appear to have passed judicial scrutiny, and to have thus expanded both the scope of judicial inquiry beyond the traditional statutory criteria, and the chances of success in court for a section 43A plaintiff. In light of Martin, organized groups of teachers and other employees should negotiate specific protection for individual teachers or groups of teachers in anticipation of layoffs due to declining enrollments or budgetary factors, and feel comfortable that such protections will be applied regardless of whether a teacher chooses arbitration or a section 43A complaint to challenge dismissal.

The Court's willingness to consider contractual protections has great tactical significance for individual teachers. If a teacher elects arbitration under chapter 150E, section 8, for example, normally his/her union must also agree to have the case arbitrated before arbitration can occur. Subsequent to Martin, however, if the union acting in complete good faith refuses to move the case to arbitration, the teacher may still have an opportunity to have his contractual rights reviewed and enforced under section 43A. Moreover, even if a union agrees to take a teacher's case to arbitration, it may still be to the teacher's advantage to elect a statutory rather than arbitral forum. Generally, if a union takes a case to arbitration, the teacher must accept the union's attorney as his attorney in the case. Furthermore, the union's view of the case may not always be entirely consistent with the teacher's, and the union may be unwilling to make certain arguments, harmful to its institutional interests, that would be helpful to the teacher's case. In these circumstances the teacher is certainly better off electing a section 43A suit, as he can choose his own attorney and make his own arguments regardless of his union's point of view. In conclusion, Martin, an ostensibly innocuous case in which a

30 Martin, 395 Mass. at 470, 480 N.E.2d at 630.
31 It is likely that a review of the collective bargaining agreement, absent a claim that the plaintiff was unfairly represented by his union, was undertaken because of the election of remedies provision in G.L. c. 150E, § 8. That analysis, which is not relevant in the private sector, would also suggest that other public sector plaintiffs, who do not have a similar election option, will not be able to avoid their collective bargaining agreement arbitration obligation absent a breach of the duty of fair representation.
32 Martin also has important implications as to when a teacher's election of remedy must be made. Although G.L. c. 150E, § 8 expressly states that where "arbitration is elected by the employees as the method of grievance resolution, (it shall) be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination . . ." (emphasis supplied), the Court refused to consider one of Martin's contractual claims on grounds that Martin had earlier grieved such claim, but could not proceed to arbitration because of his union's refusal to do so. It is unclear whether the Court concluded that Martin had not "elected" his statutory remedy, because he had apparently been forced into it for lack of options, or because he had "elected" to pursue his contractual grievance
displaced teacher once again failed to regain employment, and in which traditional notions of deference were again expressed with respect to a school committee's right to reduce its teaching staff, actually has great significance to individual teachers, teacher unions and school committees alike.

In the final decision involving a teacher dismissal, *Martell v. Teachers Retirement Board*, the Appeals Court reaffirmed the principle that a public employee could have his legal right to retirement benefits under chapter 32 determined in a court action for declaratory relief, rather than through an action before the Contributory Retirement Appeal Board (CRAB). This decision is in accord with the court's earlier decision in the case of *Brown v. Taunton*. Noting that there were no disputed facts requiring resolution by CRAB, the court concluded that the issues of law could be resolved as easily by a court as by CRAB. Because such an employee must know in advance what his/her resources will be, the court viewed an action for declaratory relief as an ideal forum for promptly determining the employee's legal claim.

§ 9.6. Individual Employee Actions Outside the Sphere of Collective Bargaining. In Massachusetts, as in various other jurisdictions across the country, individual employees have sought legal recourse in ever increasing numbers outside the sphere of collective bargaining against their employers for dismissals or other adverse action which those employees have viewed as unfair. Although such employees have made some inroads into the once impenetrable employment-at-will doctrine, two suits decided by the Appeals Court during the *Survey* year failed to advance those inroads. In *Azzi v. Western Electric Co.*, the plaintiff Azzi had

procedure before filing suit under § 43A. In either event, the Court's conclusion is suspect. If the Court's conclusion regarding election was based upon the former analysis, it reflects an unnaturally rigid view and can be fairly characterized as unfortunate judicial hairsplitting. If based on the latter analysis, the Court's conclusion is plainly inconsistent with clear statutory language which binds a teacher to his/her forum at the time arbitration is selected rather than when a grievance is filed. Perhaps later cases will either clarify or revise the Court's approach on this point.


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§ 9.6. Individual Employee Actions Outside the Sphere of Collective Bargaining. In Massachusetts, as in various other jurisdictions across the country, individual employees have sought legal recourse in ever increasing numbers outside the sphere of collective bargaining against their employers for dismissals or other adverse action which those employees have viewed as unfair. Although such employees have made some inroads into the once impenetrable employment-at-will doctrine, two suits decided by the Appeals Court during the *Survey* year failed to advance those inroads. In *Azzi v. Western Electric Co.*, the plaintiff Azzi had
been employed by the defendant as a machine operator, and was, as such, covered by a collective bargaining agreement between the defendant and Local 1365 of the Communications Workers of America. That agreement contained a grievance and arbitration procedure for resolution of disputes over the dismissal of employees in the bargaining unit. Azzi was terminated by the defendant when, following a satisfactory physical examination conducted by an employer physician, he failed to return to work from a disability leave which he had been on since suffering a work related injury months earlier. Without contesting the dismissal through the grievance and arbitration procedure, Azzi sued Western Electric in superior court, claiming that the dismissal violated the collective bargaining agreement and independently constituted a breach of the common law doctrine of good faith and fair dealing articulated by the Supreme Judicial Court in *Fortune v. National Cash Register Co.* The superior court dismissed the action upon the defendant's motion for summary judgment and Azzi appealed.

Applying established law, the Appeals Court summarily affirmed the superior court's dismissal of the plaintiff's argument grounded in the collective bargaining agreement. Noting that Azzi had neither exhausted his rights under the applicable grievance/arbitration procedure nor charged that his collective bargaining agent had represented him unfairly in the grievance process, the court ruled that he had not fulfilled the conditions precedent to qualify for judicial relief. This analysis is entirely consistent with the relevant federal and state precedent.

With respect to the common law claim, however, the court was without explicit guidance from Massachusetts' case law. Azzi argued that the covenant of good faith and fair dealing applied by the Supreme Judicial Court in the at-will employment situation presented in *Fortune*, should also be available to an employee who is employed under the terms of a collective bargaining agreement which creates substantive rights to job security, and contains a grievance procedure for enforcing those rights. Rejecting this argument, the court observed that the ability of Azzi to have secured relief through the grievance procedure distinguished this case from *Fortune*, and compelled dismissal. Any other result, noted the court, would subvert the orderly process for dispute resolution established by Western Electric and the union. In this regard, the court's opinion is sound. Not only did Azzi have an available remedy under the collective bargaining agreement, but that remedy potentially was far more

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3 *Id.* at 408, 474 N.E.2d at 1168.
5 *See supra* § 4.5 notes 13–16 and accompanying text.
7 *Id.* at 410, 474 N.E.2d at 1169.
expansive than the circumscribed *Fortune* holding would have provided. Accordingly, the prejudice to a plaintiff in Azzi's situation arising from a refusal to apply the covenant of good faith and fair dealing is slight. In addition, the discharge of employees for performance-related reasons, even if unfair, does not provoke or deserve the same level of indignation by our society as does a discharge for discrimination based upon invidious motives such as race, sex or similar classifications, and therefore would not appear to warrant the dual access to a contractual grievance/arbitration procedure and the court system accorded to discrimination-based claims.

In the second case filed by an individual employee seeking to overturn an allegedly wrongful discharge outside of the collective bargaining process, *Rafferty v. Commissioner of Public Welfare*, the plaintiff, employed provisionally pursuant to chapter 31, section 41 by the Massachusetts Department of Public Welfare as assistant director of field operations for the department's child support enforcement unit, had been spoken to on several occasions by his immediate supervisor about the quality of his work. In light of the supervisor's continuing dissatisfaction with his work, the plaintiff subsequently was transferred to another job assignment. Following a further employment-related problem between the plaintiff and his supervisor, the plaintiff was asked to resign. Although he initially agreed "to leave quietly" if allowed to stay on for an additional three weeks, the plaintiff later refused to resign, and was terminated.

Without requesting a hearing under chapter 31, section 41, the plaintiff filed suit in superior court alleging that his dismissal deprived him of property without due process of law in violation of 42 U.S.C. § 1983, constituted an intentional infliction of emotional distress, and was a breach of contract. After a jury-waived trial, the superior court entered judgment for the plaintiff on all but the emotional distress count. The superior court found that the plaintiff had substantive rights to the protection of an employer-personnel policy dealing with progressive disci-

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8 In *Fortune*, the plaintiff's only recovery was monetary. He was not awarded reinstatement, nor does the case holding suggest that reinstatement is a remedy available in a good faith and fair dealing case.

9 See G.L. c. 151B, § 4.


12 Id. at 719–20, 482 N.E.2d at 843.

13 Id. at 720–21, 482 N.E.2d at 843.

14 G.L. c. 31, § 41 provides discharged provisional employees with an opportunity for an informal hearing before the appointing authority, and makes the decision of the appointing authority on the merits of the discharge final and binding. See *Rafferty*, 20 Mass. App. Ct. at 723 n.8, 482 N.E.2d at 845 n.8.

pline, and that under such policy he had a constitutionally protected property interest in continued employment; that the plaintiff had not been required to exhaust his chapter 31, section 41 administrative remedy; and that his discharge breached the terms of the aforesaid personnel policies, apparently on the basis of an implied contract theory.\textsuperscript{16}

The Appeals Court reversed the judgment on all counts. Ruling that the personnel policy upon which the superior court had grounded the plaintiff's constitutional claim to continued employment was applicable only to tenured employees, the court found further that there was no state or federal statutory requirement that precluded the removal of a provisional employee without just cause.\textsuperscript{17} Moreover, the court declared that under Massachusetts law, a provisional employee must exhaust the administrative remedy provided by chapter 31, section 41 before pursuing other contract claims, if any, over which the superior court had jurisdiction.\textsuperscript{18} Since the plaintiff had not exhausted the administrative remedy, he had no basis to pursue a superior court action. Finally, the court, with minimal discussion, found no basis for the plaintiff's contract claim under an implied obligation of good faith or fair dealing.\textsuperscript{19}

The court noted, but left unanswered, the question whether a non-tenured employee, who has exhausted available administrative remedies under chapter 31, section 41, can sue in superior court under a contract or other claim based upon a personnel policy which purports to expand that employee's right beyond the protection of an appointing authority hearing under chapter 31, section 41.\textsuperscript{20} Although it can be argued that the legislature did not intend that provisional employees have rights greater than the section 41 hearing, there is no express statement to that effect anywhere in chapter 31. In addition, to the extent that a public employer is willing to expand the right of non-tenured employees to job protection, perhaps in an effort to enhance its ability to recruit more qualified personnel, or perhaps merely to ensure fair treatment of its employees as a management philosophy, there seems to be little basis in logic to preclude it from doing so. Accordingly, until such time as the legislature expressly limits the ability of a public employer to supplement

\textsuperscript{16} The Appeals Court opinion does not detail the legal theory relied upon by the trial judge on the contract counts. However, later in its opinion, the court suggests that the trial court may have relied on a good faith and fair dealing theory. See Rafferty, 20 Mass. App. Ct. at 725, 482 N.E.2d at 846.

\textsuperscript{17} Rafferty, 20 Mass. App. Ct. at 723, 482 N.E.2d at 845.

\textsuperscript{18} Id. at 723–24, 482 N.E.2d at 845.

\textsuperscript{19} Id. at 725, 482 N.E.2d at 846.

\textsuperscript{20} Id. In this regard, see Allen v. City of Marietta, 601 F. Supp. 482, 492 (N.D. Ga. 1985), where the court concluded that personnel policies promulgated by the City, including, \textit{inter alia}, a rule that discipline could be imposed only for cause, created a protected property interest which could not be interfered with absent due process.
the protection offered by section 41, it would appear appropriate for the
courts to permit employee lawsuits based upon expanded protections
that may exist, upon exhaustion of the section 41 procedures.

§ 9.7. The Statutory Amendments. Chapter 150E, the public employee
collective bargaining law, was twice amended in 1985. The first amend-
ment,1 which provided for the confidentiality of the work product of
public sector mediators by prohibiting disclosure of such work product
in non-criminal legal proceedings, extended the confidentiality privilege
to private sector mediators, including those operating under chapter 150,
section 10A.2 This enactment helps insure the actual and perceived neu-
trality of mediators, and thus invite open communication between me-
diators and the parties to labor dispute, a factor critical to the fair and
prompt resolution of such disputes. Although the prohibition against
disclosure by mediators may create problems of proof in subsequent
arbitration or civil cases involving the intent of contract language nego-
tiated with the assistance of a mediator, the greater degree of openness
afforded the bargaining process would seem to outweigh the proof prob-
lems created by the legislation.

The second amendment granted interest arbitration rights to state and
metropolitan district commission police officers as a means of resolving
impasse in contract negotiations. This enactment is significant in light of
the repeal of a parallel right to interest arbitration for municipal police
officers and firefighters as result of the so-called Proposition 2-1/2 refer-
endum in November of 1980.3

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2 Id. at § 1. G.L. c. 150, § 10A provides:
Any person acting as a mediator in a labor dispute, including any person acting as
such pursuant to the provisions of this chapter, who receives information as a
mediator relating to the labor dispute shall not be required to reveal such information
received by him in the course of mediation in any administrative, civil or arbitration
proceeding. Nothing herein contained shall apply to any criminal proceedings.