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Chapter 3: State Labor Law

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CHAPTER 3

State Labor Law

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§3.1. Introduction. While the United States Supreme Court decided ten cases in the labor law field during the past year,[1] the Supreme Judicial Court of Massachusetts decided six such cases which, unlike the areas covered by its federal counterpart, dealt primarily with issues dealing with the state's collective bargaining laws for municipal[2] and hospital employees. Notably, the Supreme Judicial Court gave a broad interpretation to the jurisdiction of the state's Labor Commission while also indicating an increased judicial deference to arbitration. In addition, the court decided issues involving agency fees and union certification,

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The author would like to point out intially that the heavy concentration of public employees cases has recently led the Massachusetts General Court to enact a statute which will soon reshape the entire field. See Acts of 1973, c. 1078.

§3.1. 1 In the three cases involving the NLRA, the Court dealt with the right of unions to fine members, the problem of the reasonableness of the fines, and the rights of strikers to reinstatement. NLRB v. Granite State Joint Board Textile Workers, Local 1029, 409 U.S. 213 (1972); NLRB v. Boeing Co., 412 U.S. 67 (1973); NLRB v. International Van Lines, 409 U.S. 48 (1972).

The two cases involving the Fair Labor Standards Act were: Employees of Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare, 411 U.S. 279 (1973); and Brennan v. Arnheim & Neely Inc., 410 U.S. 512 (1973).

The Supreme Court attempted to define the areas of permissible union activity in political affairs in U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); and Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The remaining cases involved the internal affairs of unions, the Hobbs Act, civil rights and state laws requiring employer payments for jury duty. See, respectively, Hall v. Cole, 410 U.S. 904 (1973); U.S. v. Emmons, 410 U.S. 396 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Dean v. Gadden Times Publishing Corp., 412 U.S. 543 (1973).

2 See Chapter 6 of 1971 Annual Survey of Mass. Law, for a full treatment of the issues arising in this relatively new area of labor relations law. Indeed, many of the cases decided during the past Survey year are both legally and factually similar to the issues discussed in the earlier article.

which vitally affect the collective bargaining powers of municipal employees. The new Massachusetts Appeals Court also decided one important case involving the power of cities and towns to enter into multi-year collective bargaining contracts. In addition, the Massachusetts Labor Relations Commmission handed down several important decisions in the municipal labor law field and adopted several NLRB precedents. It is significant to note that many of these Commission decisions appear to place increased reliance upon arbitration procedures as an integral element in the collective bargaining process.

A. Court Decisions

§3.2. Jurisdiction of the Massachusetts Labor Relations Commission. In *American National Red Cross v. Labor Relations Commission,*[1] the Supreme Judicial Court affirmed the Labor Commission's assertion of jurisdiction under chapter 150A over a petition for representation of a unit of registered nurses employed by the Massachusetts Red Cross Blood Program (Red Cross). Relying on a previous United States Supreme Court decision holding that the Red Cross was a "Federal instrumentality" and thus not subject to state taxation,[2] the Red Cross filed a motion before the Commission urging that the Massachusetts Red Cross was immune from regulation under the state's labor laws. When the Commission denied this motion, the Red Cross filed for a writ of prohibition[3] attempting to prevent the Commission from asserting jurisdiction.

Presumably since the Red Cross's writ attacked the jurisdiction of the Commission, the court, without discussing the propriety of reviewing a mere denial of a motion by the Commission, proceeded to consider the merits of the Red Cross's claim directly.[4] The court noted that there was substantial evidence to support the Commission's finding that the Red Cross was both an "employer" and a "health care facility" within the meaning of sections 2(2) and 2(10) of chapter 150A.[5] The court asserted that the Red Cross's admitted immunity from state taxation did not confer a general immunity from state regulation.[6] In support of this, it was noted that the Red Cross's enabling legislation itself states that the organization is authorized to promulgate regulations "*not inconsistent* with the laws of the United States of America or *any state*

§3.2. 1 1973 Mass. Adv. Sh. 699, 296 N.E.2d 214.

2 Department of Employment v. United States, 385 U.S. 555 (1966).

3 Pursuant to G.L. 211, §3, the Supreme Judicial Court may issue a writ of prohibition, which will preclude the exercise of jurisdiction by an inferior tribunal.

4 Cf. City Manager v. Labor Relations Commission, 353 Mass. 519, 233 N.E.2d 310; Harrison v. Labor Relations Commission, 1973, Mass. Adv. Sh. 723, 296 N.E.2d 196 (1973).

5 1973 Mass. Adv. Sh. at 702, 296 N.E.2d at 217.

6 1973 Mass. Adv. Sh. at 703, 296 N.E.2d at 218.

thereof."[7] Reasoning that the application of the state labor laws would not impede or burden the Red Cross in the performance of its governmental functions, the court held that there was no reason for immunizing the Red Cross from the jurisdiction of the Massachusetts Labor Relations Commission.[8] While *American National Red Cross* is an important decision which appears to give considerable breadth to the regulatory authority of the Labor Commission, the particularly independent nature of the state Red Cross Blood Program and its receipt of the bulk of its funds from employers admittedly subject to the Commission's jurisdiction may well limit the scope and import of this decision as to other federal "instrumentalities" which would otherwise be subject to state supervision.

§3.3. Municipal labor law: The status of "executive officers" and "supervisors" in certification proceedings. In *Harrison v. Labor Relations Commission,*[1] the Supreme Judicial Court affirmed the Massachusetts Labor Relations Commission's dismissal of a petition for certification filed by the Boston Fire Chiefs' Association. The first petition which was filed with the Commission sought a representation election of a unit including the Boston Fire Department's assistant chiefs, deputy chiefs and district chiefs. The Commission found that the assistant chiefs fell into the narrow category of "executive officers" within the meaning of G.L. c. 149, §178G and that the unit was therefore not appropriate. Thus, by terming these personnel "executive officers" rather than mere "supervisors," the Commission avoided many of the difficulties encountered at the federal level in defining the ambiguous status of "supervisory employees."[2]

When the Association filed a second petition seeking certification for only the deputy and district chiefs, the Commission found that these too were "executive officers," and it accordingly dismissed the petition once again. The Association filed a bill for judicial review under G.L. c. 30A, §14, and the superior court remanded the case to the Commission on the grounds that "the rights of the parties might have been prejudiced by arbitrary and capricious action . . . ."[3] The Commission reaffirmed its earlier decision, and upon appeal the superior court reversed, finding that the deputy chiefs and district chiefs were "supervisory officers" but

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7 Id. at 705, 296 N.E.2d at 219, quoting 36 U.S.C. §2 (1970).

8 Id. at 701, 296 N.E.2d at 216. Since the NLRB had already dismissed the petition seeking an election at the Red Cross's Blood Program, there was no question of actual or potential federal jurisdiction.

§3.3. 1 1973 Mass. Adv. Sh. 723, 296 N.E.2d 196 (1973).

2 See §§2(3), 2(11) and 14(a) of the National Labor Relations Act, 29 U.S.C. §§152(3), (11) and 164(a) (1970).

3 1973 Mass. Adv. Sh. at 724, 296 N.E.2d at 198.

not "executive officers."[4] After further proceedings, the city appealed to the Supreme Judicial Court.

The court first decided the threshold question of whether the Commission's dismissal of the certification petition was ripe for judicial review. It should be noted that under National Labor Relations Board practice such a dismissal would not be ripe for judicial review.[5] Indeed, under the federal system, the aggrieved party must await the commission of an unfair labor practice before review will be granted.[6] Nevertheless, the Supreme Judicial Court, in *City Manager v. Labor Relations Commission*,[7] decided in 1968, qualified this federal principle by creating two exceptions to the general rule that such dismissals are not ripe for judicial review under state law: first, where there are "extraordinary circumstances" making certification questions ones of "vital significance"; and second, where there are questions raised as to the Commission's jurisdiction.[8]

In *Harrison,* the court allowed review on the grounds that the parties had not argued the ripeness issue as well as "in view of our opinion on the merits."[9] Presumably, this latter comment can be interpreted as an indication that the court found the certification questions raised in *Harrison* to be of "vital significance." However, since the court did not refer explicitly to this standard, doubt remains as to the precise circumstances under which a certification petition is reviewable by the courts. On the other hand, it appears that parties—where they by agreement or otherwise do not argue the ripeness issue—will be able to obtain direct judicial review of at least some of the Commission's determinations on the appropriateness of bargaining units.

On the merits, the *Harrison* court reversed the superior court and affirmed the Commission's decision that both the deputy chiefs and the district chiefs of the Boston Fire Department were "executive officers." In the *City of Medford* case, the Supreme Judicial Court had affirmed a Commission finding that the 6 deputy chiefs of the 154 uniformed members of the Medford Fire Department were executive officers. Adopting a sort of numerical ratio rule, the court noted that the Boston Fire Department had over 1900 uniformed members, and it therefore held

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4 The distinction between "executive officers" and "supervisory employees" is not an easy one to draw. It is, however, generally accepted that the former category is not as encompassing as the latter. For a definition of supervisors, see 29 U.S.C. §152(11) (1970).

5 See AFL v. NLRB, 308 U.S. 401 (1940).

6 Id. at 404, 407.

7 353 Mass. 519, 233 N.E.2d 310 (1968).

8 Id. at 524, 233 N.E.2d at 313-14. It appears from this decision that the court will determine what constitutes "extraordinary circumstances" on an ad hoc basis. Id.

9 1973 Mass. Adv. Sh. at 726, 296 N.E.2d at 199.

that "on this basis alone" it was reasonable to conclude that the twelve deputy chiefs were executive officers.[10]

With regard to the 55 district chiefs, the court admitted that the issue of their inclusion in the bargaining unit presented a more doubtful question. Quoting from the Commission's opinion, the court asserted that the district chiefs "are not working with the rank and file officers," but are rather an "extension of the chief."[11] The court also adopted the following reasoning of the Commission:

> "For this reason they are entitled to the more elaborate emoluments of their rank; the respect and attention of command; the independent discretion and exercise of their individual judgment on a daily basis." Their "mobility . . . , the chauffeur-driven vehicles, the participation in the development of departmental policy, their duty to implement and carry out these policies, separate them from the rest of the group."[12]

The combination of all these factors was deemed to constitute evidence substantial enough to justify the Commission's finding that the district chiefs were indeed "executive officers."

Under federal labor law, supervisors must be excluded from the bargaining unit.[13] While supervisors are not explicitly excluded from municipal bargaining units under section 178G of chapter 149, the *Harrison* decision may accomplish this result sub silentio. Since, on the average, each Boston district chief supervises about thirty-five uniformed men, he is in fact closer to a supervisor than he is to the head of a department or to another executive officer. All supervisors possess at least some of the attributes which the court found made the district chiefs an "extension of the Chief." If the Commission continues to exclude officials on the level of district chiefs, the courts may be forced as a result of the *Harrison* decision to allow the de facto exclusion of

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10 The court's determination here was based not on any abstract legal definitions, but simply on the numerical ratios involved. See id. at 727, 296 N.E.2d at 199.

11 Id.

12 Id. Section 3 of chapter 1078 of the Acts of 1973 appears to cast some doubt on the continuing validity of this decision. Section 3 provides that only the Fire Commissioner and the Chief of the Department are to be classified as professional employees. The clear implication of this provision is that deputy and district chiefs are non-professional employees, who, unlike "executive officers," can avail themselves of the benefits of union membership.

13 29 U.S.C. §§152(11), 164(a) (1970). This policy avoids many difficult situations which would otherwise arise if a supervisor were subject to conflicting obligations to both the union and management. See, e.g., IBEW v. NLRB, F.2d (D.C. Cir. 1972) (union discipline of supervisors for strikebreaking). When, however, chapter 1078 of the Acts of 1973 goes into effect, some difficult problems will likely arise as the result of the very narrow definition of professional firefighting employees provided for in §3 of that Act.

some supervisors from municipal bargaining units. Municipal bargaining units will consequently be placed in a position similar to that of unions subject to the jurisdiction of the National Labor Relations Board. Whether this result is desirable in light of the limited arsenal of bargaining capability possessed by municipal employees is, of course, open to debate.

§3.4. Municipal labor law: Agency service fees and municipal contracts. In *Karchmar v. City of Worcester*,[1] the court upheld the validity of a municipal contract providing for the payment of agency service fees by all employees within the bargaining unit. While G.L. c. 149, §178L explicitly recognizes that a city may agree to require the deduction of such a fee as a condition of employment, the City of Worcester contended that this provision should not apply to those employees covered by Civil Service. The city argued that the agency shop provision would "diminish the authority and power of the Civil Service Commission"[2] as prescribed by G.L. c. 149, §178N.

The court rejected the city's arguments and held that legislative history clearly demonstrated that the provisions of §178L permitting the deduction of agency service fees applied to all employees in the bargaining unit, including those covered by Civil Service. The Legislature retained the power to amend the conditions of public employment, "either by amending G.L. c. 31 (the Civil Service statutes), or by inserting appropriate provisions in other chapters of the General Laws."[3] By authorizing cities to enter into contracts providing for mandatory agency service fees, the Legislature was deemed merely to have exercised its power to alter the conditions of public employment and not to have "diminish[ed] the authority and power of the civil service commission" within the meaning of G.L. c. 149, §178N.[4]

§3.5. Scope of judicial review in labor cases. In *Albert Greene v.*

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§3.4. [1] 1973 Mass. Adv. Sh. 1223, 301 N.E.2d 570.

[2] Id. at 1230, 301 N.E.2d at 575.

[3] Id. at 1231, 301 N.E.2d at 576.

[4] Id. In the *Karchmar* case, the court also rejected the city's argument that requiring the payment of agency fees would violate the due process and equal protection clauses of the Fourteenth Amendment. Since the city's pleadings in the lower court had not raised the constitutional challenge, and since the attorney general had not been notified of the declaratory judgment's challenge to the constitutionality of the statute (as required by G.L. c. 231A, §8), the city was not permitted to raise its constitutional challenges before the Supreme Judicial Court. Id. at 1234, 301 N.E.2d at 578. Although the court felt that it was therefore "not required" to "examine the somewhat obscure constitutional argument" of the city, the court nonetheless did examine this argument and "conclude[d] that it is without merit." Id. Again, it is suggested that the reader refer to chapter 1078 of the Acts of 1973, which deals at length with the problem of agency fees discussed in this case. Unlike some sections, however, §12 of chapter 1078 appears to reaffirm the right of the employer to collect agency fees if the collective bargaining agreement so provides. See Acts of 1973, c. 1078, §§12, 17G.

Gari & Sons,[1] the Supreme Judicial Court reaffirmed prior decisions limiting the scope of judicial review of labor arbitration decisions:

> In the absence of fraud, arbitrary conduct, or procedural irregularity in the hearings, the court's determination is confined largely to whether the arbitrator's award conforms to the terms of reference submitted to him by the parties.[2]

The courts are not to substitute their own interpretation of the contract in place of the arbitrator's interpretation, and even if the arbitrator's award is not supported by the evidence, the courts should still avoid upsetting his award.[3]

Also, in a rescript opinion handed down in the case of *Tammany Hall v. Garrity,*[4] new strength was given to the principle[5] that while a party can appeal the granting or denial of a temporary restraining order in a labor dispute to a single justice of the Supreme Judicial Court, the decision of that single justice is not itself a "final decree"[6] and is thus not subject to appeal to the full Supreme Judicial Court.

§3.6. Municipal labor law: The validity of multi-year collective bargaining contracts. In *Mendes v. City of Taunton,*[1] the new Appeals Court held that the City of Taunton could not pay to firemen and policemen the wage increases due them in the second year of their collective bargaining contracts with the city. In August, 1971, the former mayor of the city and the two unions involved executed contracts providing for wage increases in 1971 and 1972. In that same month, the City Council passed an ordinance implementing this agreement and, in September, provided the necessary funds.

The present mayor claimed that under G.L. c. 44, §33A no ordinance providing for an increase in the wages of city employees could be effective "unless it is to be operative for more than three months during the financial year in which it is passed . . . ."[2] The mayor refused to pay the

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§3.5. 1 1972 Mass. Adv. Sh. 1699, 289 N.E.2d 860 (1972).

2 Id. at 1701, 289 N.E.2d at 862.

3 Section 8 of chapter 1078 of the Acts of 1973 also places a strict limitation on the scope of judicial review. It provides that at the request of either party to the dispute, the Commission may order binding arbitration which will be the exclusive method of resolving grievances. In addition, police and fire fighters are required to submit irreconcilable disputes to binding arbitration. Under both circumstances, courts will be obliged to respect the decision of the arbitrator absent extraordinary impropriety or lack of substantial evidence.

4 1972 Mass. Adv. Sh. 1803, 289 N.E.2d 845.

5 See Mengel v. Superior Court, 313 Mass. 238, 47 N.E.2d 3 (1943); Thayer Co. v. Binnal, 326 Mass. 467, 95 N.E.2d 193 (1950).

6 See G.L. c. 214, §9A(6).

§3.6. 1 1973 Mass. App. Ct. Adv. Sh. 579, 301 N.E.2d 580.

2 Id. at 581, 301 N.E.2d at 583.

increases due in 1972, and the two unions each filed a bill for declaratory relief seeking payment of the wages under the collective agreement and the enabling ordinance. In addition, the police union filed unfair labor practice charges with the Massachusetts Labor Relations Commission.

While the Commission found for the unions,[3] the superior court reversed this decision and denied relief to the police and firemen in their actions for declaratory relief. All three cases were consolidated for decision by the Appeals Court.[4]

The Appeals Court construed G.L. c. 44, §33A as requiring "that both the ordinance and all salary increases provided therein must be in effect for more than three months during the financial year in which the ordinance is passed."[5] Noting that if, under the municipal collective bargaining law, an agreement conflicts with any law or ordinance, the law or ordinance shall prevail,[6] the court held that section 33A was controlling and therefore denied the bargained-for pay increases to the two unions. Even though the collective bargaining statute authorizes agreement for up to three years,[7] section 33A was regarded as prohibiting the payment of such a second-year wage increase.

In a well-argued dissent, Judge Goodman maintained that section 33A should be interpreted to require the *ordinance,* not the pay increase itself, to be in effect for at least three months during the year in which it was passed. Furthermore, since cities could enter into other forms of multi-year contracts without obtaining full funding in the first year, and since they could provide "for the attainment of . . . maximum salaries by periodical step-rate increases based on length of service," they should also be able to bind themselves to pay increases in future years under a collective bargaining contract.[8] It was also observed that if city officials should abuse this power in an election year, this abuse could be corrected by the court under section 33A.[9]

The majority in *Mendes,* however, rejected these arguments and has thus brought it about that municipal unions will not be able to secure ordinances guaranteeing the increases provided for in the second and

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3 In re City of Taunton, Massachusetts Labor Relations Commission, Case No. MUP-346, December 6, 1972.

4 1973 Mass. App. Ct. Adv. Sh. 579, 301 N.E.2d 580.

5 Id. at 582, 301 N.E.2d at 583.

6 Id. at 583, 301 N.E.2d at 584, citing G.L. c. 149, §178I. Section 7(f) of c. 1078 of the Acts of 1973 would appear to call for a different result. The new law states that when there is a conflict between the terms of the collective bargaining agreement and any municipal personnel ordinance, by-law, rule or regulation, the former shall prevail.

7 G.L. c. 149, §178I.

8 1973 Mass. App. Ct. Adv. Sh. at 586, 301 N.E.2d at 585 (dissenting opinion), quoting G.L. c. 41, §108A.

9 1973 Mass. App. Ct. Adv. Sh. at 589, 301 N.E.2d at 587 (dissenting opinion). Pursuant to G.L. c. 44, §33A, once city officials submit the annual budget, salary increases are forbidden unless provided for in a supplemental budget.

third years of multi-year contracts. Nonetheless, it should be noted that the court did not decide whether a city administration would be foreclosed from binding itself to seek the necessary enabling ordinances during the second and third years of multi-year contracts. The result, in any event, serves to illustrate the formidable obstacles facing municipal employees in securing collective bargaining agreements that are effective as well as equitable.

B. Massachusetts Labor Relations Commission Decisions*

§3.7. Adoption of NLRB precedents: Deference to arbitration and the *Collyer* principle. In perhaps its most important decision of the year, the *Cohasset School Committee*[1] case, the Massachusetts Labor Relations Commission held that, subject to some ill-defined limitations and qualifications, it would defer action on unfair labor practice charges where the disputed issues were susceptible of resolution under arbitration provisions in the collective bargaining agreement between the parties and where there was no reason to believe that resolution by arbitration would be inconsistent with Massachusetts labor policies. Thus, the Commission adopted, in large part, the deferral policy announced by the NLRB in *Collyer Insulated Wire.*[2]

In the *Cohasset School Committee* case, the Cohasset Teachers' Association charged that the school committee had unilaterally instituted changes in working conditions in violation of sections 178H and 178L of chapter 149.[3] In reply, the school committee urged that its Teacher Evaluation Program was not a mandatory subject of bargaining, i.e., one involving "wages, hours or working conditions,"[4] and that, in any case, since the Association had grieved the evaluation program under the collective bargaining agreement, the Commission should defer action pending the resolution of this grievance.[5]

Accepting the committee's argument, the Commission deferred to the grievance arbitration provisions of the contract. The Commission, like the NLRB in *Collyer,* found deferral justified in view of what has increasingly become a state policy in favor of resolving grievances through

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* The authors gratefully acknowledge the assistance rendered by Alexander MacMillan, Esq., Chairman of the Massachusetts Labor Relations Commission in assembling the important MLRC decisions of the past year.

§3.7. 1 Cohasset School Committee, Case No. MUP-419, June 19, 1973.
2 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).
3 *Cohasset,* Case No. MUP-419, June 19, 1973, at 1-2.
4 See G.L. c. 149, §20C.
5 *Cohasset,* Case No. MUP-419, June 19, 1973, at 3.

the arbitration process.[6] Like the NLRB, the Commission retained limited jurisdiction so that it could act if:

> (1) The dispute is not, with reasonable promptness, resolved by the grievance arbitration process; (2) The grievance and arbitration procedures have not been fair or regular; (3) The result is repugnant to the state labor relations collective bargaining laws found in the policies of Massachusetts General Laws Annotated, Chapter 149.[7]

The Commission surveyed the NLRB precedents subsequent to *Collyer* and indicated that, like the Board, the Commission would interpret the deferral policy broadly. The policy will be applied whether the unfair labor practice charge is brought by the union or the company[8] and regardless of whether an arbitration decision will have been issued.[9] The Commission will also defer to arbitration even if no substantive contract provisions are involved:

> [T]he Commission, similarly to the NLRB, will defer a dispute which is subject to the contract grievance and arbitration procedures even though it does not involve any substantive contract provisions and even though no reasonable construction of the substantive provisions of the contract would preclude a finding that the disputed conduct violated the Act.[10]

Following this policy, the Commission, like the NLRB, will, at least in some circumstances, defer to arbitration even in cases where a discharge is allegedly based on discrimination against union membership and where the only contractual provision involved is the prohibition of discharges without just cause.[11] Apparently, subject to the limitations de-

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6 Judicial deference to arbitration is becoming more pronounced in the field of labor relations. For a discussion of the effects of *Collyer*, see Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1376-81 (1972). The new Massachusetts law dealing with the collective bargaining rights of public employers also places heavy emphasis upon arbitration procedures. Indeed, such an emphasis is particularly appropriate, given proper safeguards, in this area since municipal employees are afforded very few weapons to counter the superior bargaining power of their governmental employers. See Acts of 1973, c. 1078, §§8, 9.

7 *Cohasset*, Case No. MUP-419, June 19, 1973, at 7.

8 *Cohasset*, Case No. MUP-419, June 19, 1973, at 10-11, citing National Biscuit Company, 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (1972), aff'd, 479 F.2d 770, 83 L.R.R.M. 2612 (2nd Cir. 1973)

9 *Cohasset*, Case No MUP-419, June 19, 1973, at 11, citing National Radio Co., 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972), motion for further consideration denied, 205 N.L.R.B. No. 112, 84 L.R.R.M. 1105 (1973).

10 *Cohasset*, Case No. MUP-419, June 19, 1973, at 13.

11 Id. at 11-12, citing National Radio Co., 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (1972), motion for further consideration denied, 205 N.L.R.B. No. 112, 84 L.R.R.M. 1105 (1973).

scribed below, the Commission will defer to arbitration whenever two basic conditions have been met:

> (1) the disputed issues are, in fact, issues susceptible to resolution under the operation of the grievance machinery agreed to by the parties, and (2) there is no reason to believe that use of that machinery by the parties could not or would not resolve such issues in a manner compatible with the purposes of the Act.[12]

The Commission did indicate that it will not apply its deferral policy in certain circumstances even where the above criteria have been met: (1) where the contract provisions for resolving the dispute provide criteria clearly inconsistent with the purposes of the state law;[13] (2) where there is no provision for final and binding arbitration between the parties;[14] (3) where, in response to a Commission inquiry, the respondent refuses to submit the dispute to arbitration; or (4) where the Commission finds that the employer is advocating deferral for the purpose of "attempting to undermine the representational status of an employee organization." In addition, deferral will not be regarded as appropriate where disputes over certain basic issues are involved, particularly including disputes over accretions of new employees to the bargaining unit,[15] disputes over one of the party's requests for information,[16] disputes over the employer's basic duty to recognize the union,[17] disputes over the existence of a contract,[18] and disputes involving unlawful contract provisions.[19] Deferral will also not be appropriate where the Commission finds that both parties to the collective bargaining may have interests inimical to the charging parties.[20] Finally, recognizing that arbitration proceedings and the enforcement of arbitration awards can be expensive for a small union, the Commission noted that the parties' ability to pay will be a factor considered in deciding whether to order arbitration.[21]

As on the federal level,[22] this new deferral policy will produce major

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12 *Cohasset,* Case No. MUP-419, June 19, 1973, at 13, citing Eastman Broadcasting Co., 199 N.L.R.B. No. 58, 81 L.R.R.M. 1257 (1972).

13 *Cohasset,* Case No. MUP-419, June 19, 1973, at 14.

14 Id. at 17, 21 citing Whisenhunt Funeral Homes, Inc., 195 N.L.R.B. 106, 79 L.R.R.M. 1467 (1972).

15 *Cohasset,* Case No. MUP-419, June 19, 1973, at 18, citing Combustion Engineering, Inc., 195 N.L.R.B. No. 161, 79 L.R.R.M. 1577 (1972).

16 *Cohasset,* Case No. MUP-419, June 19, 1973, at 18.

17 Id.

18 Id. at 19.

19 Id.

20 Id., citing Kansas Meat Packers, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972).

21 *Cohasset,* Case No. MUP-419, June 19, 1973, at 15, 17.

22 Again, see Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971); Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1376-81 (1972).

changes in the procedures for resolving industrial disputes. Cities and towns will be encouraged to agree to compulsory arbitration clauses, but increased arbitration may drain local unions' small treasuries. Even though the opinion of the Commission recognizes this possibility, in practice the Commission may well be more sensitive to the pressures of its caseload than to the pressures on union treasuries. If so, the protections afforded by the Act will be undermined.

§3.8. The Commission's duty to insure fair representation elections. Among other cases following NLRB precedents, the Commission in the *Jordan Hospital* case[1] announced its adherence to the "laboratory conditions" standard for policing the fairness of representation elections. Citing *General Shoe*[2] and *Dal-Tex Optical Co.*,[3] the Commission noted that elections could be set aside even if the offending party was not at fault and even if his actions did not constitute unfair labor practices. The Commission noted that in holding elections it was its "function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."[4] While most of the Jordan Hospital's actions did "fall short of committing an unfair labor practice,"[5] the Commission found that the hospital's misrepresentations, its failure to provide an opportunity to rebut these misrepresentations, and the general climate of fear engendered by some of the hospital's actions justified the setting aside of the election.

After the union won the subsequent representation election, the Commission rejected the hospital's charges against the union. While noting that a minority of the present members of the National Labor Relations Board would ease the "laboratory conditions" standard,[6] the Commission noted without elaboration that it is "not yet ready to adopt this theory . . . ."[7] Since the union won the Jordan Hospital election by a margin in excess of two-to-one, the Commission, again following federal precedents, held that any union excesses could not have affected sufficient votes to frustrate the desires of the majority of the unit.[8]

§3.9. Remedies for unfair labor practices and the definition of a labor organization. In another case decided in line with NLRB deci-

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§3.8. 1 In re Jordan Hospital, Case No. 4-3358, UP-2214, ratified July 25, 1973.
2 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).
3 137 N.L.R.B. 1782, 50 L.R.R.M. 1489 (1962).
4 In re Jordan Hospital, Case No. 4-3358, UP-2214, ratified July 25, 1973, at 7.
5 Id.
6 Id. at 8, citing Allis Chalmers Mfg. Co., 194 N.L.R.B. 1014, 79 L.R.R.M. 1148 (1972).
7 In re Jordan Hospital, Case No. 4-3358, UP-2214 ratified July 25, 1973, at 8.
8 Id. at 9, citing Overnite Transportation Co. v. NLRB, 327 F.2d 36, 55 L.R.R.M. 2126 (4th Cir. 1963); NLRB v. National Plastic Products Co., 175 F.2d 755, 24 L.R.R.M. 2155 (4th Cir. 1949); NLRB v. Wilkening Manufacturing Co., 207 F.2d 98, 32 L.R.R.M. 2664 (3d Cir. 1953).

sions, a case involving Cronin's Restaurant in Cambridge,[1] the Commission observed that "[i]f the employee's discharge was motivated wholly or even in part by his union activity, the Courts have held that discharge is still illegal despite the existence of adequate cause for discharge."[2] Finding that the restaurant's discharge of eight waitresses was motivated by their participation in union activities, the Commission ordered back pay from the time when they asked to return to their jobs.[3] Since there had been such a substantial drop in the employer's business, the Commission ordered reinstatement of the employees on the basis of seniority, but only as new positions became available.[4]

In another case, the Commission followed the NLRB's lead in holding that an informal organization without written rules or constitution can be a labor organization within the meaning of the Act.[5] And, in yet another case, the Commission held that an employer could not exclude a representative of the international from its bargaining sessions.[6]

§3.10. Municipal labor law: The duty to bargain in good faith. In the most important cases not involving NLRB precedents, the Commission outlined the duty to bargain under G.L. c. 149, §§178L(1) and (4). In *Town of Swampscott and Local 1459, International Association of Firefighters,*[1] a number of the city's practices were held to constitute a refusal to bargain in good faith. The Commission regarded a refusal to discuss wages until seventeen days prior to the town meeting as "clearly" violative of the duty to bargain in good faith. The Board of Selectmen's refusal to bargain about working hours was also a violation, despite the Board's contention that this was within the sole discretion of the Fire Chief. Similarly, a violation was found in the fact that the Board of Selectmen stood silent when an agent of the town sponsored a by-law

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§3.9. 1 Crimson Cafe, Inc., D/B/A Cronin's Restaurant and Harvard Square Waitresses Organizing Comm., Case No. UP-2201, Jan. 16, 1973, appeal pending sub nom. Harvard Square Waitresses Organizing Committee v. Labor Relations Commission, Case No. Eq. 34713, Middlesex Superior Court.

2 Id. at 7, citing NLRB v. Princeton Inn. Co., 424 F.2d 264, 73 L.R.R.M. 3002 (3d Cir. 1970); NLRB v. Barberton Plastic Products, Inc., 354 F.2d 166, 61 L.R.R.M. 2049 (6th Cir. 1965); NLRB v. Whitin Machine Works, 204 F.2d 883, 32 L.R.R.M. 2201 (1st Cir. 1953).

3 The principal federal case supporting such an order is Stackpole Carbon Co. v. NLRB, 105 F.2d 167 (3d Cir. 1959).

4 *Crimson Cafe, Inc.,* Case No. UP-2201, Jan. 16, 1973, at 11-12, citing New York Ship Buildng Corp., 89 N.L.R.B. 1446, 26 L.R.R.M. 1124 (1950); Sifers Candy Co., 92 N.L.R.B. 1220, 27 L.R.R.M. 1232 (1951); Hoffman Beverage Co., 163 N.L.R.B. 981, 65 L.R.R.M. 1011 (1967).

5 In re City of Lynn, Case No. MCR-1113, Feb. 7, 1973, at 4, citing Jat Transportation Co., 128 N.L.R.B. 780, 46 L.R.R.M. 1405 (1960).

6 In re Brimfield School Committee, Case No. MUP-462, Feb. 16, 1973, citing Oliver Corporation, 74 N.L.R.B. 483, 20 L.R.R.M. 1183 (1947).

§3.10. 1 In re Town of Swampscott, Case No. MUP-350, Dec. 15, 1972.

inconsistent with the terms of the agreement reached between the Board of Selectmen and the union.

In the *Town of South Hadley* case, the Commission indicated that when a selectman signs a collective bargaining agreement, even if he makes known his opposition to certain clauses, he cannot then in good faith oppose before the legislative body the necessary appropriations and implementing legislation.[2]

In a case involving the Board of Selectmen of Natick and a local representing its firemen,[3] the Commission found that the Board of Selectmen had failed to bargain in good faith because it refused to appoint the Chief of the Fire Department as a member of the city's collective bargaining committee. It was noted that some of the local's demands could only be agreed upon by the Chief since he had sole authority to establish the system of shifts, the tours of duty, and the general assignment of men in the Fire Department.[4] Given this authority, the Chief was under a duty to bargain, and the selectmen could not exclude him from the bargaining committee.

In passing, the Commission also referred to the 1970 amendment to c. 149, §178I,[5] which seemingly overruled the Supreme Judicial Court's decision in *Chief of Police of Dracut v. Town of Dracut*.[6] In that case, the court found that any terms of a collective agreement which impinged upon the Police Chief's statutory sole authority to decide duty, vacation and leave assignments were void. Since the new amendment had provided "that the provisions of any such [collective bargaining] agreement shall prevail over any regulation made by a chief of police pursuant to Section 97a of Chapter 41, or by the chief or any other head of a fire department under the provisions of Chapter 48,"[7] the Commission noted that it "doubt[ed] that the *Dracut* case . . . is any longer the law."[8]

§3.11. Definition of "employees" for purposes of collective bargaining. Finally, in a case presenting a question of first impression under the collective bargaining law for state employees, the Commission dismissed a representation petition filed by the Walpole Chapter of the National Prisoners' Reform Association.[1] The Chapter sought recognition in a unit described as "all persons who are incarcerated in the Massachusetts Correctional Institution, Walpole, and who are employed by the

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2 In re Town of South Hadley, Case No. MUP-230, March 22, 1972.

3 In re Board of Selectmen of the Town of Natick, Case No. MUP-441, Aug. 7, 1973.

4 G.L. c. 48, §42.

5 Acts of 1970, c. 340.

6 Chief of Police of Dracut v. Town of Dracut, 357 Mass. 492, 258 N.E.2d 531 (1970).

7 Acts of 1970, c. 340.

8 In the matter of the Board of Selectmen of the Town of Natick and Local 1707, Int'l Association of Firefighters, Case No. MUP-441, Aug. 7, 1973, at 10.

§3.11. 1 In re Commonwealth of Massachusetts Department of Corrections, Case No. SCRX-2, Sept. 24, 1973.

Massachusetts Department of Corrections in the production of goods and services."[2] The Commission admitted that these prisoners did fall within the literal definition of employees contained in §178F(1) of chapter 149. However, in view of the statutory powers given to the Commissioner of Corrections over the education, employment and training of the prisoners,[3] the Commission argued that it could not guarantee to prisoners the same rights which are guaranteed to regular employees of the Commonwealth and that therefore to declare that such prisoners are employees of the Commonwealth would be an "empty gesture."[4] Noting that prisoners in the past had not been considered covered under the personnel rules and regulations governing state employees,[5] the Commission concluded that the Legislature had not intended to include the prisoners within the protections afforded by G.L. c. 149, §178F.[6]

CONCLUSION

Thus, the developments in the labor law field in Massachusetts during the Survey year centered primarily upon the area of public, rather than private, labor relations. The Supreme Judicial Court issued several important decisions encompassing both jurisdictional and substantive areas of the law. Although these cases vested increased authority in the hands of the Labor Commission, defined more sharply the appropriate bargaining units in the public sector, and exemplified the growing judicial deference to arbitration, their impact was cumulative rather than dramatic. Significantly, the Massachusetts Labor Relations Commission also began to adopt more federal precedent, which course of action seems to indicate an increased reliance upon arbitration procedures. Indeed, the adoption of the *Collyer* principle was probably the year's most noteworthy development. Still, 1973 was not a year of major departures in the labor field, and future developments, especially in the municipal area, will be henceforth shaped not so much by previous precedent as by chapter 1078 of the Acts of 1973, which restructures the law centering on public employees and their rights to enjoy the fruits of collective bargaining.[7]

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2 Id. at 1.

3 Id. at 12-15, citing G.L. c. 124, §1; c. 127, §§48, 48A, 49.

4 In re Commonwealth of Massachusetts Department of Corrections, Case No. SCRX-2, Sept. 24, 1973, at 16. While the Commission did not define this phrase, it is obvious that the political sensitivity of the issue precluded a traditional approach to the problem.

5 Id. at 16-18.

6 Following past precedent, the Commission offered to conduct an election upon the request of both parties, even though it lacked jurisdiction to compel a representation election. Id. at 20-21.

7 For a discussion of this new state labor relations law, see the author's forthcoming article, "A Preliminary Analysis of the New Public Employees' Law in Massachusetts," 18 Boston Bar J. 5 (Jan. 1974).