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Chapter 6: Labor Law

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CHAPTER 6

Labor Law

DAVID F. GRUNEBAUM*

§6.1. Introduction. The material contained in this chapter represents a brief outline and analysis of the significant decisions of the Massachusetts appellate courts and the Massachusetts Labor Relations Commission during the *Survey* year. The chapter deals only with cases in the area of labor management relations and does not touch on decisions relating to such matters as workmen's compensation, pension reform, and environmental and industrial safety. Moreover, the chapter does not represent the courts' entire output during the *Survey* year, nor that of the Commission in the area of labor management relations. The decisions surveyed do represent, however, the most noteworthy contributions made by the courts and the Commission in areas where the law is just beginning to emerge. In this context, it should be noted that federal labor law as administered under the National Labor Relations Act by the National Labor Relations Board has, with only minor substantive changes, operated under the same statutory provisions since 1947,¹ whereas Massachusetts labor law, the most significant aspect of which involves the public sector, has operated under the present law only since July 1974.² Accordingly, the significance of many of the decisions discussed in the chapter lies in their role in defining the terms of the new public employee collective bargaining law and clarifying the relationship of this law to existing laws in the Commonwealth.

§6.2. Appropriate Bargaining Representative. During the *Survey* year in *Labor Relations Commission v. Natick*,¹ the Supreme Judicial Court dealt with the issue of who was the appropriate bargaining representative for the municipal employer in negotiations with

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This article was written by the author in his private capacity. No official support or endorsement by the Massachusetts Labor Relations Commission is intended or should be inferred.

§6.1. ¹ 29 U.S.C. § 151 *et seq.* (1970).

² G.L. c. 150E, as enacted by Acts of 1973, c. 1078, § 2.

§6.2. ¹ 1976 Mass. Adv. Sh. 31, 339 N.E.2d 900.

policemen—the selectmen of the municipality or the police chief.² The Massachusetts Labor Relations Commission had adopted a procedure that bifurcated the obligations and gave the selectmen and the chief each a portion of the responsibility.³ The Commission's position appeared reasonable in light of the Supreme Judicial Court's decisions in *Chief of Police of Dracut v. Dracut*⁴ and *Chief of Police of Westford v. Westford*.⁵ The *Dracut* and *Westford* decisions established the distinction between so-called strong and weak police chiefs as that distinction related to the statutory distribution of administrative power and collective bargaining authority between police chiefs and municipal selectmen.

The suit in *Dracut* was instituted by the police chief of Dracut who sought a declaration that certain provisions of the collective bargaining agreement negotiated between the board of selectmen of Dracut and the police officer's association infringed upon the chief's exclusive authority to make administrative regulations under section 97A of chapter 41 of the General Laws—the “strong chief” law—and were therefore null and void.⁶ Section 97A, in general, grants to the police chief of any town adopting the section the right to “make suitable regulations governing the police department” and the authority to assert “immediate control . . . of the police officers, whom he shall assign to their respective duties and who shall obey his orders.”⁷ The board of selectmen, however, pursuant to then applicable municipal

² *Natick* was a consolidation of four separate cases. See *id.* at 31, 31 n.1, 339 N.E.2d at 901, 901 n.1.

³ See *id.* at 41, 339 N.E.2d at 905.

⁴ 357 Mass. 492, 258 N.E.2d 531 (1970). For a further discussion of *Town of Dracut*, see Sikora, *State and Local Government*, 1970 ANN. SURV. MASS. LAW § 24.6, at 584.

⁵ 1974 Mass. Adv. Sh. 1039, 313 N.E.2d 443. For a further discussion of *Town of Westford*, see Armstrong, *State and Local Government*, 1974 ANN. SURV. MASS. LAW § 17.3, at 413.

⁶ See 357 Mass. at 493-94, 504, 258 N.E.2d at 532, 539. G.L. c. 41, § 97A, provides: In any town which accepts this section there shall be a police department established by the selectmen, and such department shall be under the supervision of an officer to be known as the chief of police. The selectmen of any such town shall appoint a chief of police and such other officers as they deem necessary, and fix their compensation, not exceeding, in the aggregate, the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually and the selectmen may remove such chief or other officers for cause at any time after a hearing. The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of the selectmen to take action thereon within thirty days after they have been submitted to them by the chief of police. The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders. Section ninety-seven shall not apply in any town which accepts the provisions of this section. Acceptance of the provisions of this section shall be by a vote at an annual town meeting.

⁷ *Id.*

collective bargaining laws,⁸ had sole power as “chief executive officer[s]” to conduct collective bargaining negotiations with municipal employees with regard to “wages, hours and other conditions of employment.”⁹ Thus, at issue in *Dracut*, was the question of whether section 97A should be harmonized with or preempted by the municipal collective bargaining law in regards to the proper subjects for collective bargaining.

The Supreme Judicial Court chose to accommodate section 97A with the collective bargaining statute. In this context, the Court determined that the selectmen’s bargaining authority must be exercised in light of and in deference to the police chief’s section 97A powers. Accordingly, the Court stated:

All the statutes must be construed, where capable, so as to constitute a harmonious whole consistent with the legislative purpose disclosed in the new act [G.L. c. 149, §§ 178G-178N]. . . .

The several statutes involved in this case do not compel a conclusion that the total authority over the town’s police department is vested in either the chief or in the board of selectmen. They give a measure of authority to each.¹⁰

Therefore, the Court held that the selectmen had exceeded their authority in negotiating a contract with the police officers, which contract included provisions dealing with shifts, duties, vacations, and leaves of absences.¹¹

The suit in *Westford* was similarly instituted by the town’s police chief, who challenged the selectmen’s authority to negotiate an

⁸ G.L. c. 149, §§ 178G-178N, *repealed* by Acts of 1973, c. 1078, § 1, and *replaced* by Acts of 1973, c. 1078, § 2 (*codified* at G.L. c. 150E).

⁹ G.L. c. 149, § 178I, *as amended* by Acts of 1969, c. 341, and *later repealed* by Acts of 1973, c. 1078, § 1. In pertinent part, § 178I provided:

For the purposes of collective bargaining, the representative of the municipal employer and the representative of the employees shall meet at reasonable times, including meetings appropriately related to the budget making process, and shall confer in good faith with respect to wages, hours and other conditions of employment In the event that any part or provision of any such agreement is in conflict with any law, ordinance or by-law, such law, ordinance or by-law shall prevail so long as such conflict remains.

After the trial in *Dracut*, but prior to the case reaching the Court, § 178I was amended by Acts of 1969, c. 341, to include the following addition: “provided, however, that the provisions of any such agreement shall prevail over any regulation made by a chief of police pursuant to section ninety-seven A of chapter forty-one.” The Court in *Dracut* asserted, however, that the amendment did not affect the disposition of that case. In this context, the Court stated:

This amendment does not affect this case because the record does not show that there are any regulations made by the chief of police pursuant to § 97A now in effect. It does not appear whether the chief has even made any such regulations, nor does it appear whether regulations, if any, made by him have been disapproved by the selectmen.

357 Mass. at 499 n.3, 258 N.E.2d at 535 n.3.

¹⁰ 357 Mass. at 499, 258 N.E.2d at 535-36.

¹¹ *Id.* at 500-02, 258 N.E.2d at 536-37.

agreement dealing with matters of scheduling and assignment.¹² In *Westford*, however, the chief's statutory authority was grounded in section 97 of chapter 41 of the General Laws—the “weak chief” law—rather than section 97A. In contrast to section 97A, section 97 provides that the police department is to be established “under the direction of the selectmen” and that only the selectmen have the power to make “suitable regulations.” Focusing on this distinction,¹³ the Court in *Westford* concluded that the selectmen had not improperly included in their negotiations with the police association matters relating to scheduling and assignments.¹⁴

In *Natick*, the Commission, relying on the strong chief/weak chief distinction developed in *Dracut* and *Westford*, asserted that the collective bargaining responsibilities of the employer-municipality should be divided between the chief of police and the selectmen since the town had adopted section 97A of chapter 41.¹⁵ Accordingly, in its decision and order the Commission ruled that Natick, by adopting section 97A, had designated the chief of police as one of the municipal employers for the purposes of collective bargaining. In addition, the Commission ruled that either the police chief's refusal to bargain or the selectmen's failure to appoint the chief as a co-bargaining representative would constitute a failure to bargain in good faith.¹⁶

On review, the Supreme Judicial Court, prior to reaching the representative question, laid to rest the strong chief/weak chief distinction as developed in *Dracut* and *Westford* and as applied to the question of distinguishing what matters were proper subjects for collective bargaining.¹⁷ The Court first cited the language of section 7 of chapter 150E of the General Laws:¹⁸

If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six

¹² 1974 Mass. Adv. Sh. at 1041, 313 N.E.2d at 445.

¹³ *Id.* at 1043-45, 313 N.E.2d at 446-47.

¹⁴ *Id.* at 1045, 313 N.E.2d at 447.

¹⁵ See 1976 Mass. Adv. Sh. at 35, 40-44, 339 N.E.2d at 903, 905-06. In addition to the question of the proper bargaining representatives for the negotiations with the police association, the Court in *Natick* was asked to make a similar determination with regard to the proper representatives for the negotiations with the firefighters association. *Id.* at 32, 339 N.E.2d at 902. The Court, noting that the town had adopted the strong fire chief statute, G.L. c. 48, § 42, and further noting that § 42 was comparable to § 97A, approached the two issues as involving the same questions for the purposes of their decision. See 1976 Mass. Adv. Sh. at 37-41, 339 N.E.2d at 904-05. Accordingly, the discussion of *Natick* contained in this section will focus only on the police chief issue.

¹⁶ 1976 Mass. Adv. Sh. at 35, 339 N.E.2d at 903.

¹⁷ *Id.* at 39-40, 339 N.E.2d at 904.

¹⁸ Although the *Natick* case arose initially under the old collective bargaining law, G.L. c. 149 §§ 178G-178N, see 1976 Mass. Adv. Sh. at 35, 339 N.E.2d at 903, the Court applied the Commonwealth's new collective bargaining law, G.L. c. 150E, since the Commission's order was applicable to future conduct.

of this chapter and . . . the regulations of a police chief . . . pursuant to . . . [G.L. c. 41, § 97A . . .] . . ., the terms of the collective bargaining agreement shall prevail.¹⁹

The Court then concluded that “[i]f rules and regulations of the respective chiefs may be overridden in the bargaining process, plainly there is a right to bargain on topics covered by those regulations which involve ‘terms and conditions of employment’ (G.L. c. 150E, § 6).”²⁰

After addressing the issue of the proper subjects for collective bargaining, the Court turned to the question of who was the proper municipal bargaining representative. The Court rejected the Commission’s finding of dual municipal bargaining representatives on the ground that chapter 150E contained “no explicit recognition that there may be more than one locus of a municipality’s bargaining authority.”²¹ In rejecting the Commission’s position, the Court first noted that section 6 of chapter 150E requires that the “employer” meet with its employees’ exclusive representative for the purpose of collective bargaining.²² The Court then noted that section 1 of chapter 150E defines a municipal employer for the purpose of collective bargaining as a city or town “acting through its chief executive officer, and any individual who is designated to represent [the town] and act in its interest in dealing with public employees.”²³ Noting that chapter 150E speaks only of a single chief executive officer, the Court rejected the Commission’s suggestion that “Natick has multiple ‘chief executive officers’”²⁴ The Court also focused on the impact of section 7 of chapter 150E, concluding:

We believe that, by enacting G.L. c. 150E, § 7, the Legislature intended to change the result in circumstances similar to those existing in the *Dracut* case, not just providing that “strong” chief regulations may be overridden in the bargaining process but also providing that the selectmen may negotiate conclusively on subjects otherwise assigned to the respective chiefs.²⁵

In addition to its analysis of the applicable statutory provisions, the

¹⁹ 1976 Mass. Adv. Sh. at 39, 339 N.E.2d at 904.

²⁰ *Id.* at 39-40, 339 N.E.2d at 904. Although not denoted as such, this holding by the Court apparently overrules its holding in *Dracut*. Prior to the Court’s *Dracut* decision, the General Court amended G.L. c. 149, § 178I, to specifically provide that the terms of a collective bargaining agreement would prevail over conflicting regulations adopted by a police chief pursuant to § 97A, Acts of 1969, c.341. Thus, the Court in *Dracut* had before it substantially the same statutory language relating to the regulations of police chiefs as it had in *Natick*, yet in *Dracut* the Court did not find a right to bargain over subjects covered by the regulations of the police chief. See 357 Mass. at 499, 258 N.E.2d at 535-36.

²¹ 1976 Mass. Adv. Sh. at 41, 339 N.E.2d at 905.

²² *Id.* at 40, 339 N.E.2d at 905.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 45, 339 N.E.2d at 906-07.

Court also focused on the implications of dual representation on the fundamental labor policy of promoting industrial peace. The Court concluded that a bifurcated system of representation and negotiation would more likely result in labor conflict than would a system of unilateral authority.²⁶ Accordingly, in light of this policy consideration and the statutory analysis undertaken by the Court, the *Natick* Court refused to enforce the Commission's order requiring the selectmen of Natick to appoint, as co-representative for the purposes of collective bargaining, the chief of police.²⁷

The *Natick* decision serves to establish a clear dividing line between the administrative power of police chiefs and the collective bargaining authority of municipal selectmen. Thus, while the strong chief/weak chief distinction will continue to be viable as it relates to the administrative responsibilities of chiefs of police, the Supreme Judicial Court in *Natick* has emphatically stated that the administrative power of a so-called strong chief will not affect the autonomy of the selectmen in their capacity as municipal collective bargaining representatives. In addition, the *Natick* decision indicates a willingness on the part of the Court to substitute its judgment for that of the Commission, not simply with respect to issues of law, but also with respect to more fundamental labor policy issues.²⁸

§ 6.3. Commission Dispute Settlement Authority Under Section 9A of Chapter 150E. In *Director of the Division of Employee Relations v. Labor Relations Commission*,¹ the Supreme Judicial Court held that the Labor Relations Commission had exceeded its authority when it ordered the Department of Public Welfare and the social workers union to enter into binding arbitration as a condition to the grant by the Commission of a cease and desist order to the employer.²

In *Director OER*, the state social workers union had sought to protest a hiring freeze, which freeze had the effect of increasing their workload beyond the level agreed upon under the collective bargaining contract. The union, however, did not seek grievance arbitration

²⁶ *Id.* at 41, 339 N.E.2d at 905. On this point the Court noted that:

The bifurcated negotiations contemplated by the commission do not present an obvious, desirable format for collective bargaining. Even assuming that the areas of respective responsibility can be assigned easily between the selectmen and the particular chief, there remains the fact that bargaining often involves "give and take" on various matters in negotiation. The selectmen and a chief may disagree on which of them should make concessions in order to come to an agreement, and, if they do disagree, the negotiation process is complicated. Moreover, chiefs as negotiators might have a conflict of interest because their own salaries may be affected by the salaries negotiated in the bargaining process.

Id.

²⁷ *Id.* at 46, 339 N.E.2d at 907.

²⁸ See G.L. c. 30A, § 14. State Administrative Procedure; Judicial Review.

§6.3. ¹ 1976 Mass. Adv. Sh. 1045, 346 N.E.2d 852.

² *Id.* at 1061, 346 N.E.2d at 860.

pursuant to its collective bargaining agreement, but instead filed a prohibited practice charge with the Commission under section 10(a)(5) of chapter 150E³ while at the same time refusing to handle in excess of 120 cases per worker.⁴ The state alleged that such a refusal by the union constituted an illegal work stoppage or slowdown. The state immediately petitioned the Commission for an injunction and cease and desist order. The Commission issued the cease and desist order along with an accompanying order to commence binding arbitration.⁵ Both sides objected to the Commission's order. In an appeal brought by the employer, the Supreme Judicial Court affirmed the cease and desist order, but held that section 9A(b) of chapter 150E of the General Laws, which section empowers the Commission to enforce the section 9A(a) ban on strikes and slowdowns,⁶ and includes language permitting the Commission to "set requirements," is not so broad as to permit the ordering of binding arbitration.⁷ Subsection (b) of section 9A provides:

Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.⁸

The Commission had argued before the Supreme Judicial Court that the "setting of requirements" language of section 9A(b) authorized the Commission not only to compel compliance with the section 9A(a) prohibitions, but also to compel the employer and union to undertake activities, such as arbitration, designed to resolve the

³ G.L. c. 150E, § 10(a)(5), provides in part: "(a) It shall be a prohibited practice for a public employer or its designated representative to: . . . (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six . . ."

⁴ 1976 Mass. Adv. Sh. at 1046-47, 346 N.E.2d at 854.

⁵ *Id.* at 1048-49, 346 N.E.2d at 854-55. The Commission's order provided in part:

1. That Local 509, Service Employees International Union, AFL-CIO cease and desist from encouraging or sanctioning the withholding of services by social workers employed at the Department of Public Welfare; 2. That the Employer and the Union promptly submit to binding arbitration, pursuant to Article XII of the parties' agreement, the disputed assignment of surplus cases and imposition of an alleged hiring freeze; 3. That the Employer and the Union participate in good faith in the arbitration procedures, as required by Chapter 150E, Section 10(a)(6)

. . . .

⁶ *Id.* at 1048 n.4, 346 N.E.2d at 855 n.4. G.L. c. 150E, § 9A(a), provides: "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees."

⁷ 1976 Mass. Adv. Sh. at 1050, 346 N.E.2d at 855.

⁸ G.L. c. 150E, § 9A(b).

underlying dispute.⁹ The Court, however, interpreted the “set requirements” language of the statute to mean that while such language did empower the Commission to place quantifiable standards of productivity upon employees, so that possible violations of the order could be more easily established, the language did not authorize the imposition by the Commission of extrinsic conditions, such as arbitration orders.¹⁰

In arriving at its conclusion with respect to the extent of the Commission’s authority under the “set requirements” language, the Court examined the legislative history of section 9A(b). The Court noted that the broader scope of the language originated in early versions of the statute governing labor relations in the public sector that would have permitted a limited right to strike.¹¹ Under those circumstances, the Court reasoned, the language would have permitted the Commission to impose restrictions necessary for public health and safety.¹² As the bill was finally enacted, however, it contained an absolute prohibition on employee work stoppages.¹³ Therefore, the Court determined that in light of such a prohibition, the need for the additional language designed to maintain vital services had been obviated.¹⁴ The Court, however, asserted that the “set requirements” language retained its evident meaning, noting that the provision could be used in a case such as the one at issue to set minimum levels of performance for determining whether the slowdown was continuing.¹⁵ Thus, the Court read the “set requirements” language as providing assistance in the enforcement of a cease and desist order in a work slowdown situation, rather than as offering an additional, independent tool for promoting the entire collective bargaining process.

The *Director OER* Court also rejected the Commission’s argument that the right to set conditions would assist it in resolving disputes. The Court noted that the Commission’s immediate deferral to an arbitrator had removed the dispute from the Commission’s settlement process almost as quickly as the dispute had entered the process.¹⁶ From the Court’s point of view, such a deferral to an arbitrator negated the Commission’s argument, since the Commission had taken no steps other than the appointment of an entirely separate party to resolve the dispute.¹⁷ In addition, the Court strongly emphasized the power of a section 9A(b) injunction and the importance of the Commission’s neutrality, implying that in some manner, a conditioned

⁹ 1976 Mass. Adv. Sh. at 1051-52, 346 N.E.2d at 856.

¹⁰ *Id.*

¹¹ H. Doc. No. 6194, app. B. (1973).

¹² 1976 Mass. Adv. Sh. at 1052-54, 346 N.E.2d at 856-57.

¹³ See G.L. c. 150E, § 9A(a).

¹⁴ 1976 Mass. Adv. Sh. at 1055-56, 346 N.E.2d at 857.

¹⁵ *Id.* at 1056, 346 N.E.2d at 858.

¹⁶ *Id.* at 1057, 346 N.E.2d at 858.

¹⁷ *Id.*

order might detract from the Commission's neutrality. In this context, the Court stated:

[T]here is an underestimation of the value of § 9A(b) which looks to the intervention in a strike situation of an impartial agency with specialized experience. It can be hoped that a byproduct effect of this intervention will often be a reconciliation of the parties and an end to the difficulty. Even where resort by the Commission to a court becomes necessary, the fact that it is an independent body that seeks the order, instead of the employer as before the enactment of c. 150E . . . is likely to make the result more acceptable to the employees.¹⁸

The Commission further argued that the public employee collective bargaining statute encourages arbitration. The Court, however, asserted that chapter 150E "expresses no unrestrained preference for arbitration in the public employment situations,"¹⁹ and emphasized that under section 8 of chapter 150E the Commission can only order grievance arbitration at the request of one of the parties, and under section 9 of chapter 150E, impasse arbitration must be voluntarily instituted.²⁰

In addition to the Commission's arguments, the union sought to make a *Boys Market*²¹ argument to the effect that an anti-strike injunction carried with it a correlative duty to arbitrate.²² The Court rejected this position, noting correctly that no right to strike had preceded the obligation to arbitrate and that unlike the private sector, no absolute right to strike existed in the public sector.²³ Rather, in the public sector, there is and has been an historic prohibition on strikes that in fact preceded any right on the part of public employees to engage in collective bargaining. It should be added that the dispute was not actually over the issue of arbitration per se, but more accurately over what issues should be presented to the arbitrator.²⁴

The overall effect of the *Director OER* decision was substantially to limit the role of the Commission in attempting to resolve disputes under the authority of section 9A. The decision tends to reduce the Commission's role to a relatively ministerial one. Nevertheless, the

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.* at 1058, 346 N.E.2d at 858.

²⁰ *Id.*

²¹ *Boys Markets, Inc. v. Local 770, Retail Clerks*, 398 U.S. 235 (1970). In *Boys Markets*, the Supreme Court had held that despite the Norris-LaGuardia Act, a federal court could enjoin a strike if that strike was over an arbitrable dispute, *id.* at 254, but only if the employer agreed to arbitrate that dispute. *Id.* See generally Axelrod, *The Application of the Boys Markets Decision in the Federal Courts*, 16 B.C. IND. & COM. L. REV. 893 (1975).

²² 1976 Mass. Adv. Sh. at 1059-60, 346 N.E.2d at 859.

²³ *Id.* at 1059-61, 346 N.E.2d at 859-60.

²⁴ *Id.* at 1049-50, 346 N.E.2d at 855. The employer was willing to arbitrate the issue of whether an assignment of over 120 cases was permissible. The employer objected, however, to arbitration over the legality of the hiring freeze, arguing that this was a management prerogative and necessitated by fiscal exigency. *Id.*

Court left open the issue of whether the Commission might impose conditions upon the parties other than binding arbitration. On this point, it should be noted that one of the Court's criticisms of the Commission's argument that the right to set conditions would assist it in resolving disputes was that the Commission's condition in the instant case only transferred the responsibility of settling the dispute to a different party. This criticism might not be apposite if in a different case the conditions imposed did not include compulsory arbitration. Also unanswered was the issue of the timing and the actual duty of the Commission to find the existence or pending likelihood of a strike. Presumably, the Commission's investigative period might still be used to extract productive movement on the part of the parties in resolving the underlying dispute.

§6.4. Authority of an Arbitrator: Managerial Prerogatives Under Chapter 150E. The Supreme Judicial Court issued two decisions during the *Survey* year involving a school committee's right to unilaterally abolish existing administrative positions. At issue in these decisions was the interrelationship of the school committee's managerial rights as defined generally by section 37 of chapter 71 of the General Laws and the rights of public employees under the applicable municipal employees collective bargaining statute.¹

In *School Committee of Hanover v. Curry*,² the school committee and the teachers' association were parties to a collective bargaining agreement which was effective through August 31, 1973, and which provided for grievance and arbitration procedures for disputes arising during the term of the agreement.³ Prior to the expiration of this agreement, the school committee voted to abolish the position of supervisor of music, effective after the expiration of the agreement.⁴ After the committee made its decision, the union submitted the issue to grievance arbitration. The arbitrator, eight months after the supervisor's position was eliminated, ordered the committee to reinstate the employee to his supervisory position with back pay. The arbitrator's order, however, was vacated by the superior court.⁵

In an appeal by the union to the Appeals Court, the school committee contended that the arbitrator's award was properly vacated since that award compelled the committee to violate section 37 of chapter

§ 6.4. ¹ In *School Comm. of Hanover v. Curry*, 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144, the applicable public employee collective bargaining statute was G.L. c. 149, §§ 178G-178N. See *School Comm. of Hanover v. Curry*, 1975 Mass. App. Ct. Adv. Sh. 467, 471-72, 325 N.E.2d 282, 284-85. In *School Comm. of Braintree v. Raymond*, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145, the dispute at issue arose after the effective date of G.L. c. 150E. 1976 Mass. Adv. Sh. at 400, 343 N.E.2d at 146-47.

² 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144. The facts of the *Hanover* case are set forth in the Appeals Court decision. 1975 Mass. App. Ct. Adv. Sh. 467, 325 N.E.2d 282.

³ 1975 Mass. App. Ct. Adv. Sh. at 468, 325 N.E.2d at 283.

⁴ *Id.* at 468-69, 325 N.E.2d at 284.

⁵ *Id.* at 469-70, 325 N.E.2d at 284.

71 of the General Laws insofar as the award forced the committee to delegate to the arbitrator nondelegable matters relating to educational policy.⁶ In approaching the issue, the Appeals Court sought to harmonize the general managerial mandate of section 37 with the later enacted provisions of sections 178H(1)⁷ and 178J⁸ of chapter 149, which sections conferred on public employees the right to bargain collectively as well as provided for the arbitration of disputes over the resulting contract terms.⁹ The Appeals Court, emphasizing the public responsibility of the school committee, concluded that the abolition of the supervisory position was a matter “predominantly within the realm of educational policy,”¹⁰ and accordingly was an exclusive managerial prerogative that the committee “[could not] bargain away, as it could if it were a private party not subject to public control.”¹¹

Emphasizing that its decision in *Hanover* must be read in conjunction with its holding in another case decided the same day as *Hanover*, *School Committee of Braintree v. Raymond*,¹² the Supreme Judicial Court adopted the Appeals Court’s reasoning in *Hanover* and affirmed the lower court’s decision.¹³ The facts of *Braintree* and *Hanover* were substantially the same, except that the grievance in *Braintree* arose after the effective date of chapter 150E and one year prior to the expiration of the collective bargaining agreement.¹⁴ As in *Hanover*, the arbi-

⁶ *Id.* at 470, 325 N.E.2d at 284. G.L. c. 71, § 37, provides in part that the school committee “shall have general charge of all the public schools” The school committee also asserted that the arbitrator’s award required them to violate G.L. c. 71, § 43. The Appeals Court, however, did not reach that issue. 1975 Mass. App. Ct. Adv. Sh. at 471 n.6, 325 N.E.2d at 284 n.6. In addition, the committee argued that the arbitrator exceeded his powers “in reinstating the employee with back pay as of September 1, 1973, since the collective bargaining agreement under which the grievance arose had expired on August 31, 1973” and that “certain findings of the arbitrator were plainly erroneous.” *Id.* at 470-71, 325 N.E.2d at 284. The court, however, did not reach these contentions. *Id.* at 471, 325 N.E.2d at 284.

⁷ G.L. c. 149, § 178H(1), provides in part that “[e]mployees shall have . . . the right . . . to bargain collectively . . . on questions of wages, hours and other conditions of employment”

⁸ The Appeals Court apparently mistakenly referred to § 178J instead of § 178K. Section 178K provides in part: “The services of the state board of conciliation and arbitration shall also be available to municipal employers and employee organizations for purposes of . . . arbitration of disputes over the interpretation or application of the terms of the written agreement.” G.L. c. 149, § 178K. Section 178J on the other hand sets out the factfinding process which is to be used by municipal employers and employee organizations. *Id.* § 178J.

⁹ See 1975 Mass. App. Ct. Adv. Sh. at 471-78, 325 N.E.2d at 284-87.

¹⁰ *Id.* at 477, 325 N.E.2d at 286.

¹¹ *Id.* at 480, 325 N.E.2d at 287.

¹² 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145.

¹³ 1976 Mass. Adv. Sh. at 397-98, 343 N.E.2d at 145.

¹⁴ 1976 Mass. Adv. Sh. at 401, 343 N.E.2d at 147.

trator in *Braintree* had ordered the complaining party reinstated with back pay.¹⁵

Analyzing the significance of the enactment of chapter 150E on the dispute in *Braintree*, the Court interpreted section 5 of chapter 1078 of the Acts of 1973 as indicating that chapter 150E was not to govern agreements enacted prior to the effective date of chapter 150E.¹⁶ Significantly, the Court in *Braintree* also concluded that, even if chapter 150E was applicable, the difference between that statute and chapter 149 would not be material to the controversy at hand.¹⁷ The Court, however, viewed as material the fact that the grievance occurred one year prior to the expiration of the collective bargaining agreement.¹⁸

With respect to the reinstatement issue, the Court concluded that the school committee could not bind itself not to abolish a supervisory position for a period extending beyond the end of the school year regardless of the terms of the agreement.¹⁹ The Court's conclusion followed from its position that employment contracts for supervisors are invalid if encompassing more than one school year at a time.²⁰ However, with respect to the loss of compensation question, the Court, in affirming the arbitrator's back pay award, concluded that the school committee could provide in the collective bargaining agreement for the payment of lost compensation to an employee whose position was eliminated pursuant to the committee's managerial prerogative.²¹ Finally, and significantly, the Court cautioned that it was not deciding any question relating to the issue of mandatory versus permissive subjects of bargaining. In this context, the Court noted that "[a] marked distinction exists between a duty to engage in collective bargaining, and a freedom to agree to submit controversies, whether or not subject to mandatory bargaining, to arbitration."²²

Hanover and *Braintree* represent an effort by the Court to begin to define the parameters of exclusive management prerogatives in the public sector. The Court has established that the authority to abolish a supervisory position effective either after the end of the school year or after the expiration of the collective bargaining agreement is an exclusive management prerogative. However, since chapter 150E does

¹⁵ See *id.* at 399-401, 343 N.E.2d at 146-47. The case was before the Court on direct review of the superior court's decision vacating the arbitrator's award. *Id.* at 401, 343 N.E.2d at 147.

¹⁶ *Id.* at 401, 343 N.E.2d at 147. Acts of 1973, c. 1078, § 5, provides: "The terms of any collective bargaining agreement in effect prior to the effective date of this act shall remain in full force and effect until the expiration date of said agreement."

¹⁷ 1976 Mass. Adv. Sh. at 401-02, 343 N.E.2d at 147.

¹⁸ *Id.* at 401, 343 N.E.2d at 147.

¹⁹ *Id.* at 404, 343 N.E.2d at 148.

²⁰ *Id.* at 403-04, 343 N.E.2d at 148.

²¹ *Id.* at 404-05, 343 N.E.2d at 148-49.

²² *Id.* at 406, 343 N.E.2d at 149, quoting *Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n*, 37 N.Y.2d 614, 617, 339 N.E.2d 132, 134, 376 N.Y.S. 2d 427, 429 (1975).

not contain a management rights clause, the Court and the Labor Relations Commission will have to continue to define and refine the parameters of exclusive management prerogatives on a case-by-case basis.

§6.5. Funding of School Personnel: Collective Bargaining Agreements Negotiated Pursuant to Chapter 150E. Pursuant to the laws of the Commonwealth, the school committee of Boston possesses somewhat less budgetary discretion than other school committees within the state. Generally, a local school committee is empowered to determine the amount necessary for the maintenance of the school system, and the appropriate local authority is required to appropriate that amount.¹ Should the local authority fail to appropriate the necessary funds, a so-called “ten taxpayer suit” may be instituted in the superior court pursuant to section 34 of chapter 71 of the General Laws to compel the town to provide the necessary funds.² In contrast, the Boston School Committee is empowered to make appropriations up to a statutorily determined maximum.³ Pursuant to section 2 of chapter 224 of the Acts of 1936, however, any requests for appropriations beyond the set maximum must be directed, through the mayor, to the city council. Moreover, such requests are subject to the mayor’s approval,⁴ and the Supreme Judicial Court has held that a section 34 remedy is unavailable should the mayor deny approval or the city council reject the appropriation request.⁵

In a significant *Survey* year decision, *Boston Teachers Union, Local 66 (BTU) v. School Committee of Boston*,⁶ the Supreme Judicial Court examined and clarified the relationship of the special Boston school funding laws and the more recently enacted and more general public

§ 6.5.¹ G.L. c. 71, § 34. For the text of this section, see note 2 *infra*.

² G.L. c. 71, § 34, provides in part:

Every city and town shall annually provide an amount of money sufficient for the support of the public schools as required by this chapter. Upon petition to the superior court, sitting in equity, against a city or town, brought by ten or more taxable inhabitants thereof, or by the mayor of a city, or by the attorney general, alleging that the amount necessary in such city or town for the support of public schools as aforesaid has not been included in the annual budget appropriations for said year, said court may determine the amount of the deficiency, if any, and may order such city and all of its officers whose action is necessary to carry out such order, or such town and its treasurer, selectmen and assessors to provide a sum of money equal to such deficiency, together with a sum equal to twenty-five per cent thereof.

For a discussion of this section, see *Pirrone v. City of Boston*, 364 Mass. 403, 406-07, 305 N.E.2d 96, 99-100 (1973).

³ Acts of 1936, c. 224, § 2.

⁴ See *Pirrone v. City of Boston*, 364 Mass. 403, 405-06, 305 N.E.2d 96, 99 (1973). The relevant language of the Acts of 1936, c. 224, § 2, provides that “[n]othing in this section shall prevent the mayor, on request of the school committee, from recommending and the city council from passing additional appropriations for school purposes.”

⁵ 364 Mass. at 413, 305 N.E.2d at 103.

⁶ 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707.

employee collective bargaining statute.⁷ In addition, in that decision the Court again addressed itself to the question of arbitration's role in teacher-school committee labor disputes.

In *Boston Teachers Union*, the city, declaring that the school department was spending at a rate which if continued would result in a 1.4 million dollar deficit, ordered the school committee to cease hiring substitutes. The committee, while objecting to the mayor's directive, nevertheless did cease hiring substitutes, and the union immediately filed a grievance.⁸ The school committee answered by admitting all of the allegations, including violation of the collective bargaining contract, and agreed to arbitration.⁹ The arbitrator found for the union and directed that the school committee could not "hereafter unilaterally discontinue the hiring of daily substitutes during the term of the existing Agreement."¹⁰ In addition, the arbitrator ordered the school committee "and/or" the city to pay over fifty thousand dollars into the Boston Teachers Union Scholarship as damages for the breach of the collective bargaining agreement.¹¹ The superior court confirmed the arbitrator's award and also entered a judgment setting forth the duties of the mayor and the school committee relative to the hiring of substitute teachers.¹²

⁷ G.L. c. 150E.

⁸ 1976 Mass. Adv. Sh. at 1517-18, 350 N.E.2d at 711.

⁹ *Id.* at 1518-19, 350 N.E.2d at 711.

¹⁰ *Id.* at 1520, 350 N.E.2d at 712.

¹¹ *Id.*

¹² *Id.* at 1521, 350 N.E.2d at 712. The judgment stated:

[A] The School Committee of the City of Boston is obligated in accordance with the terms of the collective bargaining agreement between that Committee and the Boston Teachers' Union, Local 66, American Federation of Teachers, A.F.L.-C.I.O. to hire substitute teachers to cover classes of regularly assigned teachers when they are absent.

[B] The School Committee of the City of Boston can enter binding contracts with the Boston Teachers' Union, Local 66, American Federation of Teachers, A.F.L.-C.I.O. in excess of the appropriations available to it; and, in that event, the Mayor of the City of Boston is required to submit a sufficient appropriation to the Boston City Council, for that Council's approval or rejection, so that, if approved, that appropriation will provide the funds necessary to implement the cost items in the provisions in the contracts entered into between the School Committee of the City of Boston and the Boston Teachers' Union.

[C] When the Mayor of the City of Boston fails to submit a sufficient appropriation to the Boston City Council to implement the cost items in the provisions in the contracts entered into between the School Committee of the City of Boston and the Boston Teachers' Union, the funds necessary to implement the provisions in said contracts may be expended by that School Committee in excess of the appropriations available to said Committee.

[D] The School Committee of the City of Boston and its members, the City of Boston and its Mayor and Auditor, and the officers, employees and agents of any of them are permanently enjoined from in any way interfering with, preventing and/or impairing the hiring and payment of substitute teachers to cover classes of regularly assigned teachers when they are absent, unless the provisions of G.L. c. 149, § 178I, are complied within periods prior to July 1, 1974, and the provisions

On direct appeal to the Supreme Judicial Court, the city challenged both the arbitrator's award and the superior court's declaratory judgment. The city first contended that the hiring of substitute teachers was not a proper subject for collective bargaining and that accordingly any arbitration decision involving substitutes based on the agreement was invalid.¹³ The Court rejected this claim by concluding, without supporting rationale, that class size and teaching load were proper bargaining subjects, and that the "manner in which a school committee's agreement concerning class size and teaching load will be carried out may be the subject of collective bargaining . . ." ¹⁴ Accordingly, the Court found that the hiring of substitutes was a proper bargaining subject.¹⁵

The Court then addressed the issue of whether the school committee's agreement on the hiring of substitutes, regardless of its subject matter propriety, was nevertheless unenforceable by the arbitrator insofar as it infringed on the school committee's managerial prerogative. The Court, while not reaching the question of whether the school committee had the managerial right during the term of the agreement to change its stance on class size and teaching load,¹⁶ found that the committee's hiring freeze was not based on educational policies, but on financial strictures imposed on the committee by the mayor.¹⁷ As such, the Court ruled that, unlike in *School Committee of Braintree v. Raymond*,¹⁸ the arbitrator's decision did not infringe on the committee's managerial prerogatives.¹⁹

The city next contended that the arbitrator's award was invalid since at the same time the school committee refused to hire substitutes, there were no appropriated, uncommitted funds available to pay the substitutes.²⁰ While the Court agreed with the city that "the award was valid only if appropriated, uncommitted funds in the school budget established according to law were available for the hiring of substitute teachers at the times the school committee refused to

of G.L. c. 150E, § 7 are complied with beginning July 1, 1974.

1976 Mass. Adv. Sh. at 1538 n.10, 350 N.E.2d at 718 n.10.

¹³ 1976 Mass. Adv. Sh. at 1521-22, 350 N.E.2d at 712.

¹⁴ *Id.* at 1526, 350 N.E.2d at 714.

¹⁵ *Id.* at 1525, 350 N.E.2d at 713.

¹⁶ On this question the Court noted:

Even assuming, but not deciding, that the school committee had the right during the term of the agreement to change its view of proper class size and teaching load and of the use of substitute teachers as matters of educational policy, and thus to ignore its agreement on these subjects, the facts here show that no change of educational policy was involved.

Id. at 1526-27, 350 N.E.2d at 714.

¹⁷ *Id.* at 1527, 350 N.E.2d at 714.

¹⁸ 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145. For a discussion of *Braintree*, see § 6.4 *supra*.

¹⁹ 1976 Mass. Adv. Sh. at 1527-28, 350 N.E.2d at 714.

²⁰ *Id.* at 1529, 350 N.E.2d at 715.

hire substitute teachers,"²¹ it ruled that the union had carried its burden of showing sufficient funds in the appropriate budget classification, and that the city had subsequently not met its burden of establishing that the apparently available funds had been in fact expended or committed at the time of the hiring freeze.²² The city then argued that the arbitrator had exceeded his authority in ordering the city to pay damages into the teachers' scholarship fund.²³ The Supreme Judicial Court agreed, noting that the arbitrator's damage award was not properly directed at providing relief for those teachers harmed by the hiring freeze.²⁴

The city's last argument was a challenge to the superior court's grant of declaratory relief. In particular, the city challenged that part of the court's order which required the school committee to expend funds in excess of available appropriations if the mayor failed to submit a sufficient appropriation to the city council.²⁵ In response to this final challenge by the city, and at the urging of the teachers' union, the Court discussed the roles of the mayor and the school committee in the funding of collective bargaining obligations within the city of Boston. Initially, the Court, in agreeing with the city that the part of the superior court's judgment ordering the school committee to expend unappropriated funds should the mayor fail to submit the requested appropriation was invalid, stated that the proper solution was a suit to compel the mayor to make such a submission.²⁶ The city strenuously opposed this solution, however, arguing that the special school funding laws of Boston give to the mayor an absolute veto over any school committee request for additional appropriations.²⁷

In answering the city's opposition to the Court's solution with respect to the order requiring the school to expend unappropriated funds, the Court looked to the language of chapter 150E, a statute the Court believed should be harmonized with the provisions of the special Boston funding laws. The Court noted that section 7 of chapter 150E requires an employer to "submit to the appropriate legislature body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to

²¹ *Id.*

²² *Id.* at 1530-32, 350 N.E.2d at 715-16.

²³ *Id.* at 1533, 350 N.E.2d at 716.

²⁴ *Id.* at 1535, 350 N.E.2d at 717.

²⁵ *See id.* at 1536-41, 350 N.E.2d at 717-18. For the relevant part of the superior court's judgment, see note 12 *supra*, paragraph C. The city also challenged paragraph D of the court's order, see note 12 *supra*, which paragraph enjoined the city and the committee from interfering with the hiring of substitutes, unless the provisions of G.L. c. 150E, § 7, or G.L. c. 149, § 178I, were met. The Supreme Judicial Court found for the city, ruling that the injunction was too broad and indefinite since these sections were not "uncontrovertibly clear." 1976 Mass. Adv. Sh. at 1540, 350 N.E.2d at 718.

²⁶ 1976 Mass. Adv. Sh. at 1539, 350 N.E.2d at 718.

²⁷ *Id.* at 1541, 350 N.E.2d at 719. See text and notes at notes 1-5 *supra*.

fund the cost items contained therein”²⁸ The Court also noted that under chapter 150E an “employer” in a city is the city itself, and that in the case of school employees, the school committee is the city’s representative for the purpose of collective bargaining.²⁹ Moreover, under section 1 of chapter 150E, the words “legislative body” are defined as the city council when the “employer” is a city.³⁰ Accordingly, the Court found that section 7 of chapter 150E requires the mayor to submit additional requests for appropriations aimed at funding school employee collective bargaining agreements despite the provisions of the special Boston statutes. The Court justified this result on the ground that it preserved the mayor’s veto power as much as possible “without thwarting the legislative intent of G.L. c. 150E that a school committee’s request for appropriations be submitted to the appropriate legislative body.”³¹

Boston Teachers Union demonstrates the willingness of the Court to pass on critical issues involving an arbitrator’s awards. By ruling that class size and teaching load are proper subjects for collective bargaining, the Court adopted an ad hoc method of dealing with the subject of the proper scope of public employee collective bargaining. This procedure has deprived the Court of the Labor Relations Commission’s expertise in this area and will burden the Commission in its efforts to formulate a coherent policy on the subject. In addition, *Boston Teachers Union* read in the light of *School Committee of Hanover v. Curry*³² and *School Committee of Braintree v. Raymond*³³ indicates that while a particular matter may be an appropriate subject for bargaining, any agreement reached on that matter is subject to unilateral modification by the employer if that matter is deemed to be a management prerogative. Accordingly, if labor relations stability is to be achieved in the public sector, it would appear that the Commission and the courts must not only define the parameters of the scope of collective bargaining, but also the parameters of managerial prerogatives. While the Court in *Boston Teachers Union* called for legislative action in defining these parameters,³⁴ it would appear that a viable alternative would be for the Commission to formulate policies defining and verifying these necessary boundaries.

§6.6. Public Employees: Definition. During the *Survey* year, the Supreme Judicial Court for the first time examined the scope of the

²⁸ 1976 Mass. Adv. Sh. at 1543, 350 N.E.2d at 710, quoting G.L. c. 150E, § 7.

²⁹ 1976 Mass. Adv. Sh. at 1543, 350 N.E.2d at 719, citing G.L. c. 150E, § 1.

³⁰ 1976 Mass. Adv. Sh. at 1543-44, 350 N.E.2d at 719-20.

³¹ *Id.* at 1546, 350 N.E.2d at 720.

³² 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144. For a discussion of *Hanover*, see § 6.4 *supra*.

³³ 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145. For a discussion of *Braintree*, see § 6.4 *supra*.

³⁴ 1976 Mass. Adv. Sh. at 1528 n.5, 350 N.E.2d at 714 n.5.

definitional section of the public employer collective bargaining law.¹ In *Massachusetts Probation Association (MPA) v. Commission of Administration*,² the Court concluded that the public employee statute does not extend to nonexecutive state employees.³ Specifically at issue in *MPA* was whether probation officers were public employees.

In *MPA*, the probation officers association in its original petition sought a declaration of whether probation officers were entitled to collective bargaining rights under the then existing state employee collective bargaining law.⁴ The petition was instituted after the Committee on Probation⁵ informed the association that the Committee did not consider itself the employer of the probation officers and therefore would not continue to bargain.⁶ With the passage of chapter 150E, which chapter repealed and superseded the state employee collective bargaining law,⁷ the association filed an amended petition, seeking a declaration of whether "probation officers are 'public employees' within the meaning of the . . . public employee collective bargaining statute [chapter 150E]. . . ."⁸

The Supreme Judicial Court, in addressing the definitional question, first acknowledged the parties' apparent stipulation that the probation officers were employees of the judicial branch of the government.⁹ The Court next turned to section 1 of chapter 150E of the General Laws, which defines a public employee as "any person employed by a public employer . . ."¹⁰ Since the parties had conceded that the probation officers were employees of the judiciary, the issue before the Court was whether the judiciary was a public employer. With respect to this question, the Court noted initially that section 1 "defines 'public employer' as 'the commonwealth acting through the commissioner of administration [or his designee] . . .,'"¹¹ and further

§6.6.¹ G.L. c. 150E, § 1.

² 1976 Mass. Adv. Sh. 1814, 352 N.E.2d 684.

³ *Id.* at 1834, 352 N.E.2d at 691. Executive employees are those employees of entities within the executive branch of government. *See id.* at 1829-30, 352 N.E.2d at 690.

⁴ *Id.* at 1814 n.2, 1818, 352 N.E.2d at 684 n.2, 686. G.L. c. 149, § 178F, was the then existing state employee collective bargaining law. Prior to the enactment of chapter 150E, the general municipal employee collective bargaining law, G.L. c. 149, §§ 178G-178N, did not extend to state employees.

⁵ "The Committee on Probation is composed of the Chief Justice of the Superior Court, the Chief Justice of the Probate Court, the Chief Justice of the Municipal Court of the City of Boston, the Chief Justice of the District Courts, and two persons appointed by the Chief Justice of the Supreme Judicial Court." 1976 Mass. Adv. Sh. at 1818 n.6, 352 N.E.2d at 686 n.6 (citation omitted).

⁶ *Id.* at 1818, 352 N.E.2d at 686. In 1971, the Labor Relations Commission certified, after election, the association as the exclusive bargaining agent for the probation officers and had designated the Committee on Probation as the probation officers' employer. *Id.* at 1817-18, 352 N.E.2d at 685-86.

⁷ G.L. c. 150E, as enacted by Acts of 1973, c. 1078, § 2.

⁸ 1976 Mass. Adv. Sh. at 1814-15, 352 N.E.2d at 684-85.

⁹ *Id.* at 1823, 352 N.E.2d at 687.

¹⁰ G.L. c. 150E, § 1.

¹¹ 1976 Mass. Adv. Sh. at 1826, 352 N.E.2d at 688, citing G.L. c. 150E, § 1.

noted that the Commissioner of Administration is an officer within the executive branch of the government.¹²

The Court then examined the responsibilities of the Commissioner as defined by sections 3 and 4 of chapter 7 of the General Laws.¹³

¹² 1976 Mass. Adv. Sh. at 1827, 352 N.E.2d at 689.

¹³ G.L. c. 7, § 3, provides:

The executive office for administration and finance shall serve as the principal agency of the executive department of the government of the commonwealth for the following purposes:

(1) Developing, co-ordinating, administering and controlling the financial policies and programs of the commonwealth;

(2) Supervising the organization and conduct of the business affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth;

(3) Developing new policies and programs which will improve the organization, structure, functions, economy, efficiency, procedures, services and administrative practices of all such departments, commissions, offices, boards, divisions, institutions and other agencies.

Id., § 4, provides:

The governor shall appoint a commissioner of administration, who shall be a person of ability and experience. He shall serve at the pleasure of the governor, shall receive such salary not exceeding twenty thousand dollars per year as the governor may determine, and shall devote his full time during business hours to the duties of his office. Except in the cases of the comptroller's division and the purchasing agent's division, each as established under section four A, the commissioner shall be responsible for the exercise of all powers and the performance of all duties assigned by law to the executive office for administration and finance or to any division, bureau or other administrative unit or agency under the said office. He shall be the executive and administrative head of the said office; and every division, bureau, section and other administrative unit and agency within the said office, other than the comptroller's division and the purchasing agent's division, shall be under his direction, control and supervision. He shall have access to all books, papers, documents, records and equipment in the custody of the comptroller's division and the purchasing agent's division; and the comptroller and purchasing agent shall furnish him with all information requested by him for the purpose of discharging the duties of the office of commissioner of administration. He shall act as the executive officer of the governor in all matters pertaining to the financial, administrative, planning and policy co-ordinating functions and affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth. He shall inquire into the business affairs of the commonwealth and the laws governing them; shall supervise program planning and the co-ordination of the activities and programs of the commonwealth in its dealings with the federal government; shall review and report to the governor and the general court on all proposed legislation affecting the organization, structure, efficiency and administrative functions, services, procedures and practices of the departments, commissions, offices, boards, divisions, institutions and other agencies, or any of them, under the executive department of the government of the commonwealth; shall conduct studies of the operations of the said agencies with a view to effecting improvements in administrative organization, procedures, and practices and to promoting economy, efficiency, and avoiding of useless labor and expenses in the said agencies; shall from time to time recommend to the governor and the general court such changes as he shall deem desirable in the laws relating to the organization, structure, efficiency or administrative functions, services, procedures and practices of any such agency or agencies; and shall have such other powers and

The Court asserted that the functions set forth in sections 3 and 4 extended “primarily, if not exclusively, to the executive branch of the government . . .”¹⁴ Accordingly, the Court concluded that “it would be anomalous to interpret c. 150E, § 1, as covering State employees not employed in the executive branch of government.”¹⁵ In addition, the Court examined the prior state employee collective bargaining law, and based on a comparison of the language of that statute with the language of sections 3 and 4 of chapter 7, concluded that the prior law applied only to executive employees.¹⁶ The Court then examined the legislative history of chapter 150E and determined that the General Court did not intend to broaden the coverage of the act to include nonexecutive employees.¹⁷

Finally, the Court pointed out that section 7 of chapter 150E enumerates those statutes which, in the case of conflict, are to be overridden by collective bargaining agreements arrived at pursuant to chapter 150E. After noting that section 7 does not list those statutes governing the wages and terms of employment of probation officers,¹⁸ the Court went on to state that “the statutes relating to State employees which are specified in § 7 apply only to employees clearly within the executive branch.”¹⁹ Accordingly, the Court ruled that probation officers are not public employees and that “public employee” as used in chapter 150E does not include nonexecutive employees.²⁰

While the *MPA* decision involved only judicial employees, the Court’s analysis and conclusion leave little doubt that the scope of chapter 150E has been defined to exclude all nonexecutive state employees. This result will make future determinations of what employee groups fall into the nonexecutive category critical.

§ 6.7. Binding Arbitration: *Town of Arlington v. Board of Conciliation and Arbitration.*¹ In a major *Survey* year decision discussed in detail in a later section,² the Supreme Judicial Court upheld as constitutional the state’s binding arbitration statute.³ This statute provides for

duties as shall be assigned to him by statute and may from time to time be assigned to him by the governor in accordance with law. In making any examination or investigation authorized under this chapter, the commission may require the production of books, papers, contracts and documents relating to any matter within the scope of such examination or investigation.

¹⁴ 1976 Mass. Adv. Sh. at 1829, 352 N.E.2d at 690.

¹⁵ *Id.*

¹⁶ *Id.* at 1830, 352 N.E.2d at 690.

¹⁷ *Id.* at 1831-32, 352 N.E.2d at 690-91.

¹⁸ G.L. c. 276, §§ 83-99C.

¹⁹ 1976 Mass. Adv. Sh. at 1833, 352 N.E.2d at 691.

²⁰ *Id.* at 1833-34, 352 N.E.2d at 691.

§ 6.7. ¹ 1976 Mass. Adv. Sh. 2035, 352 N.E.2d 914. For a more extensive discussion of *Town Of Arlington*, see § 6.10 *infra*.

² See § 6.10 *infra*.

³ Acts of 1973, c. 1078, § 4.

so-called “last and best offer” arbitration for the police and fire fighters of any city, town, or district where a collective bargaining impasse has continued for thirty days after the publication of a factfinder’s report made pursuant to section 9 of chapter 150E of the General Laws.⁴ In general, the procedure requires that the parties submit to a panel of three arbitrators the bargaining issues in dispute. The arbitration panel conducts a hearing at the end of which the disputing parties submit to the panel a statement of their “last and best offer” on each issue in dispute. A majority of the arbitration panel then selects one of the two statements. The selection is final and binding upon “the parties and upon the appropriate legislative body.”⁵

⁴ The § 9 procedures that must be followed prior to the institution of binding arbitration are as follows:

After a reasonable period of negotiation over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse. Upon receipt of such petition, the board shall commence an investigation forthwith to determine if the parties have negotiated for a reasonable period of time and if an impasse exists, within ten days of the receipt of such petition, the board shall notify the parties of the results of its investigation. Failure to notify the parties within ten days shall be taken to mean that an impasse exists.

Within five days after such determination, the board shall appoint a mediator to assist the parties in the resolution of the impasse. In the alternative, the parties may agree upon a person to serve as a mediator and shall notify the board of such agreement and choice of mediator.

After a reasonable period of mediation, not to exceed twenty days from the date of appointment, said mediator shall issue to the board a report indicating the results of his services in resolving the impasse.

If the impasse continues after the conclusion of mediation, either party or the parties acting jointly may petition the board to initiate fact-finding proceedings. Upon receipt of such petition, the board shall appoint a fact-finder, representative of the public, from a list of qualified persons maintained by the board. In the alternative, the parties may agree upon a person to serve as fact-finder and shall notify the board of such agreement and choice of fact-finder. No person shall be named as a fact-finder who has represented an employer or employee organization within the preceding twelve months. The fact-finder shall be subject to the rules of the board and shall, in addition to powers delegated to him by the board, have the power to mediate and to make recommendations for the resolution of the impasse. The fact-finder shall transmit his findings and any recommendations for the resolution of the impasse to the board and to both parties within thirty days after the date of his appointment. If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the board shall make them public. . . .

⁵ Acts of 1973, c. 1078, § 4, provides in part:

If an employee organization duly recognized as representing the firefighters or police officers of a city, town or district is engaged in an impasse which has continued for thirty days after the publication of the fact-finder’s report pursuant to section nine of chapter one hundred and fifty E, said employee organization shall petition the board to make an investigation. If, after investigation, the board determined that: (1) the requirements of section nine of chapter one hundred and fifty E have been complied with in good faith by the employee organization; (2) thirty days have passed since the date of publication of the fact-finders report pursuant to said section nine; (3) the proceedings for the prevention of any prohibited

In *Town of Arlington v. Board of Conciliation and Arbitration*,⁶ this procedure was challenged by the town as violative of the Home Rule Amendment,⁷ as improperly delegating legislative power to private individuals, as contravening the "one-man, one-vote" principle expressed in the fourteenth amendment to the United States Constitution, and as conflicting with other General Laws regulating municipal finance.⁸

With respect to the home rule challenge, the Court simply noted that while the grant of authority to municipalities was broad, section 8 of the Home Rule Amendment reserved to the General Court "the power to act in relation to cities and towns . . . by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two . . ."⁹ Since there was no doubt that the binding arbitration statute was a general law, the Court found the statute to be consistent with the Home Rule Amendment. In addition,

practices have been exhausted, provided that any such complaints have been filed with the commission, prior to the date of the fact-finder's report; and (4) an impasse exists, the board shall immediately notify the employer and the employee organization that the issues in dispute shall be resolved by a three-member arbitration panel.

Said panel shall be comprised of three arbitrators, one selected by the employer, one selected by the employee organization, and a third an impartial arbitrator, who shall act as chairman of the panel, who shall be selected by the two previously selected arbitrators. In the event that either party fails to select an arbitrator . . . the board shall appoint the arbitrator or arbitrators necessary to complete the panel, which shall act with the same force and effect as if the panel had been selected without intervention by the board.

The arbitration panel shall, acting through its chairman, hold a hearing within ten days after the date of appointment of the chairman The chairman shall give at least seven days notice in writing to each of the other arbitrators, and to the representatives of the municipal employer and employee organization of the time and place of such hearing. The chairman shall preside over the hearing and shall take testimony. . . .

A record of the proceedings shall be kept, and the chairman shall arrange for the necessary recording service. . . . At the conclusion of the hearing, each party shall submit a written statement containing its last and best offer for each of the issues in dispute to the panel, which shall take said statements under advisement. Within ten days after the conclusion of the hearing, a majority of the panel shall select one of the two written statements and shall immediately give written notice of selection to the parties. The selection shall be final and binding upon the parties and upon the appropriate legislative body. . . .

Any determination or decision of the arbitration panel if supported by material and substantive evidence on the whole record shall be binding upon the parties and may be enforced at the instance of either party or of the arbitration panel in the superior court in equity; provided, that the scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign and transfer employees.

⁶ 1976 Mass. Adv. Sh. 2035, 352 N.E.2d 914.

⁷ MASS. CONST. amend. art. 89.

⁸ 1976 Mass. Adv. Sh. at 2036-37, 352 N.E.2d at 916.

⁹ *Id.* at 2040, 352 N.E.2d at 918, quoting MASS. CONST. amend. art. 89, § 8.

the Court asserted that it could no longer be doubted that the Legislature has the power to legislate in the area of municipal wages and benefits.¹⁰

In responding to the town's challenge that binding arbitration constituted an improper delegation of legislative power, the Court held that the Legislature could delegate the implementation or administration of policies to private individuals, so long as proper safeguards were provided.¹¹ The Court accordingly focused on the issue of whether the statute's safeguards were sufficient to avoid the possibility of arbitrary or capricious action by the delegee. Finding adequate statutory standards,¹² the Court concluded that the delegation involved in the binding arbitration statute was valid.¹³

The town's "one-man, one-vote" challenge was summarily dismissed by the Court. The Court asserted that the "one-man, one-vote" concept could not apply unless the arbitration panel was exercising general legislative power.¹⁴ The Court concluded, however, that the resolution of a "collective bargaining impasse by selecting between the two final offers of the parties" did not involve general legislative power.¹⁵

The town's final constitutional challenge based on an alleged con-

¹⁰ 1976 Mass. Adv. Sh. at 2041, 352 N.E.2d at 918.

¹¹ *Id.* at 2045, 352 N.E.2d at 920.

¹² Acts of 1973, c. 1078, § 4, provides the following standards for arbitrators:

The factors among others, to be given weight by the arbitration panel in arriving at a decision shall include:

- (1) The financial ability of the municipality to meet costs.
- (2) The interests and welfare of the public.
- (3) The hazards of employment, physical, education, and mental qualifications, job training and skills involved.
- (4) A comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities.
- (5) The decisions and recommendations of the fact finder.
- (6) The average consumer prices for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wages and fringe benefits.
- (8) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (9) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment.
- (10) The stipulation of the parties.

¹³ 1976 Mass. Adv. Sh. at 2046, 352 N.E.2d at 920.

¹⁴ *Id.* at 2047, 352 N.E.2d at 920, *citing* *Avery v. Midland County*, 390 U.S. 474 (1968); *Sailors v. Board of Educ. of the County of Kent*, 387 U.S. 105 (1967).

¹⁵ 1976 Mass. Adv. Sh. at 2047, 352 N.E.2d at 920-21.

flict between the binding arbitration statute and other General Laws regulating the conduct of municipal finance was also summarily dismissed by the Court. In dismissing the challenge, the Court noted that while section 31 of chapter 44 of the General Laws sets controls on "irresponsible spending by departments of local governments," that section goes on to provide that the function of the section "is not to bar local spending . . . required by a valid State program."¹⁶ Accordingly, the Court concluded that it saw "no problem in requiring special action by the town through its finance committee and town meeting to meet by appropriation the award of the arbitrators."¹⁷

In closing, the Court noted that much of the town's brief was devoted to challenging what were in effect legislative policy decisions. The Court asserted that these challenges should therefore be directed to the General Court.¹⁸ The binding arbitration statute by its terms expires on June 30, 1977.¹⁹ While the Court's decision in *Town of Arlington* apparently lays to rest the question of the statute's constitutionality, the town will no doubt find a forum for its policy issues when the Legislature addresses the question of the renewal of the binding arbitration statute.

§ 6.8. Prohibited Labor Practices Under Chapter 150E. The question of whether a violation of section 178L(1) of chapter 149 of the General Laws¹ depends upon the existence of a recognized or certified union was decided during the *Survey* year by the Appeals Court in *Stoughton School Committee v. Labor Relations Commission*.² Although the *Stoughton* case arose under section 178L(1) of the now repealed bargaining statute,³ section 178L(1) is substantially the same as section 10(a)(1) of the new collective bargaining statute.⁴ Accordingly, the case can be viewed as suggesting the present status of the law.

In *Stoughton*, the teacher, clerical, and library aides had sought to form a union. The school committee, apparently in response to the

¹⁶ *Id.* at 2048-49, 352 N.E.2d at 921, citing G.L. c. 44, § 31.

¹⁷ 1976 Mass. Adv. Sh. at 2049, 352 N.E.2d at 921.

¹⁸ *Id.* at 2049-50, 352 N.E.2d at 921-22.

¹⁹ Acts of 1973, c. 1078, § 8.

§6.8. ¹ Section 178L was repealed by Acts of 1973, c. 1078, § 1. The subject matter is now covered in G.L. c. 150E, § 10, which was enacted by Acts of 1973, c. 1078, § 2. Prior to its repeal, § 178L(1) provided in part: "Municipal employers or their representatives or agents are prohibited from:—(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section one hundred and seventy-eight . . ." Section 178(H) provided in part: "(1) Employees shall have, and be protected in the exercise of, the right to self-organization, to form, join or assist any employee organization . . ."

² 1976 Mass. App. Ct. Adv. Sh. 509, 346 N.E.2d 129.

³ G.L. c. 149, §§ 178D, 178F-178N, repealed by Acts of 1973, c. 1078, § 1, replaced by G.L. c. 150E, as enacted by Acts of 1973, c. 1078, § 2.

⁴ G.L. c. 150E, § 10(a)(1) provides: "(a) It shall be a prohibited practice for a public employer or its designated representative to: . . . (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter . . ."

unionization of the aides,⁵ voted to change all such aide positions from full-time to part-time.⁶ The committee action resulted in the resignation of those aides who needed full-time positions.⁷ The aides filed a petition for certification and a complaint alleging violation of section 178L.⁸ The Labor Relations Commission, finding that the union had been recognized, granted the requested certification and ordered the school committee to cease and desist from refusing to bargain in good faith. In addition, the Commission ordered the committee to restore the aides' hours and pay to their original status, to offer employment to those aides who had resigned because of the new program, and to provide back pay to the aides to compensate them for any wages lost under the new program.⁹ In reviewing the Commission's findings and orders, the superior court ruled that the Commission's finding as to union recognition by the school committee was unsupported by substantial evidence, and that "[a]bsent such recognition, the findings with respect to unfair labor practices cannot stand."¹⁰

The Appeals Court reviewed the conflicting testimony on the issue of whether the union had been recognized, but despite the Commission's argument to the contrary, the court held that no recognition had been granted.¹¹ Nevertheless, responding to the underlying unfair labor practice charges, the court held that election, certification, or recognition of the union was unnecessary in order for there to be a violation of section 178L(1).¹² The court reasoned that such a result was mandated since "[o]therwise an employer could fire at will any employee who attempted to form or participate in an employee organization . . . [thus] render[ing] the right of self-organization meaningless."¹³ The Appeals Court, rather than recommitting the case to the superior court, took the record before it and on the substantial evidence on the record found that the Commission could

⁵ The school committee's vote to change the aides' positions to part-time occurred at the same meeting in which the union had presented its claim for recognition. In addition, there was evidence that the committee believed that the aides, if part-time employees, would be ineligible for collective bargaining. 1976 Mass. App. Ct. Adv. Sh. at 511. 346 N.E.2d at 132.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 512, 346 N.E.2d at 132.

⁹ *Id.* at 512-13, 346 N.E.2d at 133.

¹⁰ *Id.* at 513-14, 346 N.E.2d at 133.

¹¹ *Id.* at 514-16, 346 N.E.2d at 133-34. The Commission's position was based on the statement of one committee member to the union representative. The alleged statement was that "[r]ecognition is yours, if that's what you wish; but we do not wish to enter into professional negotiations." *Id.* at 515, 346 N.E.2d at 133. The Appeals Court, while noting that recognition can be conferred orally, found that it had not been shown that the committee member had the authority to bind the committee. *Id.* at 515-16, 346 N.E.2d at 133-34.

¹² *Id.* at 517, 346 N.E.2d at 134.

¹³ *Id.* at 518-19, 346 N.E.2d at 135.

properly find a section 178L(1) violation.¹⁴

In addition to the challenge to the recognition finding, the school committee also argued that the Commission lacked authority to impose a back pay remedy in the instant case since there had been no discharge.¹⁵ The Appeals Court responded to this argument by indicating that those aides who left the school committee's employ because they required full-time employment had been constructively discharged.¹⁶ The court further held that the law did not require actual discharge where the actions had a coercive impact. Accordingly, as to those who remained, the court permitted a back pay award, holding that to do otherwise would have discriminated against those who had not left the school committee's employ.¹⁷

Clearly in *Stoughton* the court was not going to permit the school committee to use its own improper actions as a defense to back pay awards, nor was it going to permit the narrow reading of the Commission's remedial authority proffered by the school committee. Thus, the *Stoughton* decision should be viewed as reaffirming the Commission's role in preserving public employees' collective bargaining rights, as well as defining in part the scope of the prohibited practices set out in section 178L(1) of chapter 149 and subsections (1) and (3) of section 10(a)¹⁸ of chapter 150E, the new public employee collective bargaining law.

§6.9. Miscellaneous Labor Relations Commission Decisions. In two important cases coming before the Labor Relations Commission during the *Survey* year, the Commission, in somewhat controversial opinions, distinguished its views from those expressed by the National Labor Relations Board. In the first matter, the Commission denied an employer-law firm's motion to dismiss a certification petition filed by the employees of the firm. In a second case, the Commission granted recognition to interns, residents, and fellows at a municipal hospital.

I. JURISDICTION

In a 1973 decision, *Bodle, Fogel, Julber, Reinhardt, and Rothschild*,¹ the National Labor Relations Board (the "Board") refused to assert juris-

¹⁴ *Id.* at 519, 346 N.E.2d at 135.

¹⁵ *Id.* at 520, 346 N.E.2d at 135. G.L. c. 149, § 178L, provided in part: "[The Commission] shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section."

¹⁶ 1976 Mass. App. Ct. Adv. Sh. at 521, 346 N.E.2d at 135.

¹⁷ *Id.* at 521-23, 346 N.E.2d at 135-36.

¹⁸ G.L. c. 150E, § 10(a)(3), provides: "(a) It shall be a prohibited practice for a public employer or its designated representative to: . . . (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization . . ." For the text of § 10(a)(1), see note 4 *supra*.

§6.9. ¹ 206 N.L.R.B. 512, 84 L.R.R.M. 1321 (1973).

diction over law firms.² The particular law firm before the Board in *Bodle, Fogel* was composed of five attorney-partners and seven attorney-associates. The firm annually received revenues in excess of \$500,000, of which over \$50,000 constituted out-of-state receipts. Moreover, a number of the firm's clients were engaged in interstate commerce.³

In addressing the jurisdictional question, the Board initially noted that given the firm's commercial data and the "customarily liberally construed 'affecting commerce' test," the Board had the legal authority to assert jurisdiction.⁴ The Board, however, citing *NLRB v. Denver Building & Construction Trades Council*,⁵ emphasized that the Board could, in its discretion, decline to assert jurisdiction over a complaint if the policies of the National Labor Relations Act would not be furthered by asserting jurisdiction.⁶ Significantly, after acknowledging the existence of its discretionary jurisdictional powers, the Board chose to address the jurisdictional question as it related to law firms generally, rather than as it related to *Bodle, Fogel* specifically.⁷

In defining the parameters of its jurisdictional discretion, the Board indicated that the test was "whether the stoppage of business by reason of labor strife would tend substantially to affect commerce."⁸ Applying this standard to the operation of law firms, the Board concluded that while a lawyer may "assist in the negotiation and ultimate formulation of complex interstate agreements relating to trade and business," the lawyer is "cast not in the role of principal, but as helper to the party—his client—who is the moving force in commerce."⁹ Accordingly, the Board concluded that it was improbable that labor strife between lawyers and their employees would result in a substantial interruption in the flow of commerce, regardless of the "high esteem" that clients had for their attorneys.¹⁰ In addition, the Board, in dicta,¹¹ indicated that it was troubled by the possibility of a conflict of

² *Id.* at 514, 84 L.R.R.M. at 1323.

³ *Id.* at 512, 84 L.R.R.M. at 1323.

⁴ *Id.*

⁵ 341 U.S. 675 (1951). The Supreme Court in *Denver Building & Construction Trades Council* commented on the Board's discretionary jurisdictional powers, noting that:

Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.

Id. at 684, cited at 206 N.L.R.B. at 512, 84 L.R.R.M. at 1321.

⁶ 206 N.L.R.B. at 512, 84 L.R.R.M. at 1321.

⁷ *Id.*, 84 L.R.R.M. at 1322. The Board noted: "We deem it appropriate . . . at this time to consider whether we ought to decline jurisdiction over law firms generally or whether we ought to attempt to establish jurisdictional standards and to assert jurisdiction over at least certain classes of law firms." *Id.*

⁸ *Id.* at 513, 84 L.R.R.M. at 1322.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *id.* at 512 n.2, 84 L.R.R.M. at 1321 n.2.

interest as well as a possible threat to client confidentiality and the sanctity of the lawyer/client privilege if legal employees were recognized.¹²

Against the backdrop of *Bodle, Fogel*, the Massachusetts Labor Relations Commission during the *Survey* year denied a motion to dismiss a certification petition, which petition had been filed by the employees of a law firm. In *Foley, Hoag & Eliot v. United File Room Clerks, Messengers, & Library Personnel of Foley, Hoag & Eliot*,¹³ the employees had petitioned the Regional Director of the NLRB for certification. The Regional Director, however, relying on the Board's decision in *Bodle, Fogle* dismissed the employees' petition.¹⁴ The employees then sought certification from the Commission pursuant to section 5 of chapter 150A of the General Laws.¹⁵ In its motion to dismiss for lack of jurisdiction, respondent *Foley, Hoag* raised the following issues: (1) whether the Commission could assert jurisdiction over the petition despite the preemption doctrine; (2) whether chapter 150A of the General Laws reached employees of a law firm; and (3) whether the Commission, assuming it had jurisdiction, should decline to assert that jurisdiction for the reasons of inappropriateness, confidentiality, or conflict of interest.¹⁶

In support of its preemption argument, *Foley, Hoag* initially contended that the dispute at issue was subject to the traditional doctrine of preemption as developed by the United States Supreme Court in *Guss v. Utah Labor Relations Board*¹⁷ and *San Diego Building Trades Council v. Garmon*,¹⁸ since the dispute was not within the purview of section 14(c) of the National Labor Relations Act.¹⁹ The Supreme Court in *Guss* had held that if the NLRB did not cede jurisdiction to state agencies pursuant to section 10(a) of the NLRA,²⁰ those agencies could not assert jurisdiction over disputes over which the NLRB had declined to assert jurisdiction if the dispute involved a matter entrusted by Congress to the NLRB.²¹ The Supreme Court in *Garmon* defined the parameters of the entrusted matter as being those matters arguably protected or prohibited by section 7²² and 8²³ of the

¹² *Id.* at 513-14, 84 L.R.R.M. at 1323.

¹³ 2 M.L.C 1302 (1976).

¹⁴ *Id.* at 1305.

¹⁵ G.L. c. 150A, § 5(c), provides in part: "Whenever a question affecting industry, trade or health care arises concerning the representation of employees, the commission may investigate such controversy and certify to the parties, in writing, the name or names of the representatives who have been designated or selected."

¹⁶ 2 M.L.C at 1302-03.

¹⁷ 353 U.S. 1 (1957).

¹⁸ 359 U.S. 236 (1959).

¹⁹ 2 M.L.C. at 1305.

²⁰ 29 U.S.C. § 160(a) (1970).

²¹ 353 U.S. at 9.

²² 29 U.S.C. § 157 (1970).

²³ *Id.* § 158.

NLRA.²¹ The result of *Guss* and *Garmon* was to create a “no-man’s land” wherein parties to certain labor disputes were denied an agency forum.²⁵ Section 14(c) of the NLRA was passed to eliminate this “no-man’s land.”²⁶ Section 14(c) establishes state agency jurisdiction over those labor disputes over which the Board, in its discretion, declines to assert jurisdiction. Section 14(c) provides:

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.²⁷

Referring to the language of section 14(c), Foley, Hoag argued that the Board had not declined jurisdiction over law firms as a class; that the Board’s failure to assert jurisdiction over law firms was not based solely on a finding of insubstantial impact on commerce; and that the Board, applying its 1959 standards, would have asserted jurisdiction over law firms.²⁸ Therefore, Foley, Hoag concluded that the traditional doctrine of preemption was applicable.

Addressing Foley, Hoag’s preemption argument, the Commission first noted that the Regional Director of the Board had dismissed the employees’ petition based on the Board’s decision in *Bodle, Fogel*.²⁹ The Commission then examined the *Bodle, Fogel* decision and pointed to language in that decision which “beyond per adventure” indicated that the Board had declined to assert jurisdiction over law firms as a

²⁴ 359 U.S. at 245.

²⁵ COX & BOK, CASES AND MATERIALS ON LABOR LAW 1218 (7th ed. 1969).

²⁶ *Id.* at 1219.

²⁷ 29 U.S.C. § 164(c) (1970).

²⁸ 2 M.L.C. at 1306. Further arguing preemption Foley, Hoag asserted that the supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, required the Commission to follow the Board’s *Bodle, Fogel* precedent and decline jurisdiction. 2 M.L.C. at 1308. The Commission rejected this contention as “unsupported and untenable” asserting that Foley, Hoag’s result would merely “reviv[e] the ‘no-man’s land’ ” sought to be obviated by § 14(c). *Id.*

²⁹ 2 M.L.C. at 1305.

class.³⁰ With respect to Foley, Hoag's second contention that the Board's decision was not based solely on a finding of no substantial impact on commerce, the Commission asserted that the issue of whether or not a decision to decline jurisdiction rests solely on the ground of insubstantial impact of interstate commerce is not determinative since section 14(c) does not require insubstantial impact to be the sole reason for declining jurisdiction.³¹ Moreover, the Commission indicated that the Board's discussion of confidentiality, conflict of interest, and administrative difficulty in *Bodle, Fogel* constituted dicta.³² The Commission, commenting on Foley, Hoag's third contention, simply indicated that the Board's 1959 standards were in the form of categories and that these categories never included law firms.³³

Having dismissed Foley, Hoag's preemption arguments, the Commission turned to the question of the applicability of state labor law. Section 1 of chapter 150A of the General Laws expresses the state's labor policy as the provision of collective bargaining rights for employees in order to avoid industrial strife which would have the "necessary effect of burdening or obstructing industry or trade."³⁴ Foley, Hoag argued that its activities did not affect industry and trade since it was engaged in a "learned profession."³⁵ The Commission concluded, however, that the legal services provided by Foley, Hoag would affect industry and trade enough to warrant asserting jurisdiction. In this respect, the Commission reasoned that since a law firm's activities often facilitate the business interests of its clients, any interruption of the law firm's activities would result in an obstruction of industry and trade.³⁶

Finally, the Commission addressed Foley, Hoag's contention that assuming the Commission had jurisdiction, it should decline to assert it for reasons of inappropriateness, confidentiality, or conflict of interest. The Commission's short answer to Foley, Hoag's contention was that the state labor act³⁷ does not provide a discretionary basis for declining jurisdiction.³⁸ In addition, the Commission examined the

³⁰ *Id.* at 1306-07. The Commission compared the concluding sentence in *Bodle, Fogel*, "[I]t is our present determination that the policies of the Act would not be effectuated by our assertion of jurisdiction over law firms," with the Board's language in *Evans & Kunz, Ltd.*, 194 N.L.R.B. 1216, 1216, 79 L.R.R.M. 1181, 1182 (1972), "Our decision herein is limited solely to the facts of the instant case and not to law firms as a class." 2 M.L.C. at 1307 n.9.

³¹ 2 M.L.C. at 1307.

³² *Id.*

³³ *Id.*

³⁴ G.L. c. 150A, § 1, provides in part: "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing industry and trade"

³⁵ 2 M.L.C. at 1309.

³⁶ *Id.*

³⁷ G.L. c. 150A.

³⁸ 2 M.L.C. at 1313.

question of whether despite issues of confidentiality or conflict of interest there could exist an appropriate bargaining unit. Citing Board precedent, the Commission concluded that membership by employees in a labor organization does not result in a sufficient conflict of interest to warrant denying those employees their fundamental bargaining rights.³⁹ As to issues of confidentiality, the Commission concluded that that problem was best raised at a hearing to determine the appropriate bargaining unit.⁴⁰

Foley, Hoag was a private sector case involving a large group of unorganized, clerical employees who would seem to have been subject to the Board's jurisdiction, but who, for special reasons, had been excluded by the Board. Such a vacuum is not dissimilar to the situation in the health care industry ten years ago when the Board, by statute, was denied jurisdiction over that industry. Because of the federal statutory limitation, there was a tremendous increase of state labor agency involvement in the health care industry, which resulted in the passage of the 1974 amendments to the National Labor Relations Act, granting the Board jurisdiction in the area.⁴¹ If the Board refuses jurisdiction and states begin granting organizational rights to employees of law firms, the reaction of the legal profession, not without its own legislative power, will be interesting to watch.

II. ORGANIZATIONAL RIGHTS

In another significant departure from a recent Board decision, the Massachusetts Labor Relations Commission granted certification to a unit composed of residents, interns, and clinical fellows at a municipal hospital. Both the Board's and the Commission's decisions initially focused on the issue of whether residents, interns, and clinical fellows ("housestaff") were students or employees. If employees, then both conceded that certification would be appropriate, but if students, then neither the state nor the federal labor relations acts granted coverage.

In *Cedars-Sinai Medical Center*,⁴² the Board found the housestaff to be students rather than employees within the meaning of that term in the National Labor Relations Act.⁴³ The Board's decision was based on its determination that the housestaff was "primarily engaged in graduate educational training at *Cedars-Sinai* and that . . . [w]hile the housestaff spends a great percentage of their time in direct patient

³⁹ *Id.* at 1314.

⁴⁰ *Id.* Although the Commission accepted preliminary jurisdiction over *Foley, Hoag*, it continued its hearings while the union requested an appeal and was granted an application for formal argument before the Board. The continuance was permitted since a finding of jurisdiction by the Board would preempt the Commission's jurisdiction.

⁴¹ Act of July 26, 1974, Pub. L. 93-360, 88 Stat. 395.

⁴² 223 N.L.R.B. No. 57, 91 L.R.R.M. 1398 (1976). For a discussion of *Cedars-Sinai*, see *Annual Survey of Labor Law*, 17 B.C. IND. & COM. L. REV. 1105 (1976).

⁴³ 223 N.L.R.B. at , 91 L.R.R.M. at 1400.

care, this is simply the means by which the learning process is carried out."⁴⁴ In addition, the Board found that staffing at Cedars-Sinai was done not so much to meet hospital needs, but rather was done to provide educational benefits to the housestaff, and that interns and residents chose hospitals for their educational advantages, rather than for their respective rates of pay.⁴⁵ In a strong dissenting opinion,⁴⁶ Board Member Fanning found that employee and student status were not mutually exclusive and proceeded to analyze the employment characteristics of the housestaff, including salaries of up to \$20,000.00 per annum, tax withholding, vacations, uniforms, health insurance, and other fringe benefits.⁴⁷

In *City of Cambridge and Cambridge Hospital House Officers Association*,⁴⁸ the Massachusetts Labor Relations Commission closely followed the Fanning dissent in *Cedars-Sinai*. While the Commission recognized the educational benefits accruing to interns and residents, it "reject[ed] the Board's conclusion that the professional development received by house officers precludes an employment relationship between the hospital and these providers of essential health care."⁴⁹ In reaching its decision, the Commission considered many of the same factors as Member Fanning.⁵⁰ Additionally, the Commission found support in the decisions of the New York and Michigan Labor Relations Commission, which ruled that housestaffs of municipal hospitals were covered under the applicable state public employee labor relations act.⁵¹

In *Cambridge City Hospital*, the Commission categorized the factors to be considered in coming to a decision with respect to the status of a housestaff as those imposed by external sources and those imposed by the employer itself. The Commission found that the housestaff at Cambridge City Hospital was subject to income tax and eligible for Workmen's Compensation—external factors—and received fringe benefits, ID cards and a competitive salary—internal factors.⁵² The Commission also looked at the working conditions at the hospital, noting that while requests for rotational assignments were normally made by the housestaff, the final decision in placement was predicated on hospital staffing needs and not on personal career goals as expressed

⁴⁴ *Id.* at , 91 L.R.R.M. at 1400.

⁴⁵ *Id.* at , 91 L.R.R.M. at 1400.

⁴⁶ *Id.* at , 91 L.R.R.M. at 1401-06.

⁴⁷ *Id.* at , 91 L.R.R.M. at 1402-04.

⁴⁸ 2 M.L.C. 1450.

⁴⁹ *Id.* at 1459.

⁵⁰ *Id.* at 1459-60. The factors considered included, *inter alia*, the pay schedule, the coverage of the housestaff by Workmen's Compensation, and Blue Cross and Blue Shield, and the receipt of paid vacation.

⁵¹ *Regents v. Michigan University*, 204 N.W.2d 218, 82 L.R.R.M. 2909 (Mich. 1973); *Bronx Eye Infirmary, Inc.*, 32 N.L.R.B. 65 (N.Y. 1969).

⁵² 2 M.L.C. at 1461-63.

through requests.⁵³ In sum, the Commission, without rejecting the existence and importance of the educational aspects of internships and residencies, found that the fundamental relationship between a hospital and an intern or resident was one of employment, and that “[t]he fact that house officers may be students for some purposes and employees of others . . . should not deprive them of all rights under Massachusetts General Laws Chapter 150E.”⁵⁴

Cambridge City Hospital was a public sector case involving highly skilled and educated professionals. The case manifests the willingness of the Commission to take jurisdiction and grant organizational rights to groups of persons disenfranchised by the Board’s jurisdictional limitations. In *Cambridge City Hospital*, the employees involved would not have been subject to the national act as they were municipal employees. Nonetheless, it is interesting to note the different positions taken in *Cedars Sinai* and *Cambridge City Hospital* by the Board and the Commission respectively on the student/employee issue. The Commission, unlike the Board, seems willing to separate for the purposes of granting bargaining rights the employee aspect of the house-staff’s position from the student aspect. As a result, the Commission seems in a better position to confront a difficult factual situation and arrive at a result that furthers the policy underlying collective bargaining acts.

III. DUTY TO BARGAIN

In *IAFF Local 1009 v. City of Worcester*,⁵⁵ the Labor Relations Commission concerned itself with the duty to bargain where the parties had entered into factfinding pursuant to section 9 of chapter 150E of the General Laws.⁵⁶ The Commission addressed the question of

⁵³ *Id.* at 1463.

⁵⁴ *Id.* The Commission also rejected the employer’s contention that members of the housestaff were part-time employees. *Id.* at 1464-65.

⁵⁵ 2 M.L.C. 1238 (1975).

⁵⁶ Section 9 provides the procedures for mediation, factfinding, and voluntary arbitration in the public sector. The proceedings for factfinding and voluntary arbitration are as follows:

If the impasse continues after the conclusion of mediation, either party or the parties acting jointly may petition the board to initiate fact-finding proceedings. Upon receipt of such petition, the board shall appoint a fact-finder, representative of the public, from a list of qualified persons maintained by the board. In the alternative, the parties may agree upon a person to serve as fact-finder and shall notify the board of such agreement and choice of fact-finder. No person shall be named as a fact-finder who has represented an employer or employee organization within the preceding twelve months. The fact-finder shall be subject to the rules of the board and shall, in addition to powers delegated to him by the board, have the power to mediate and to make recommendations for the resolution of the impasse. The fact-finder shall transmit his findings and any recommendations for the resolution of the impasse to the board and to both parties within thirty days after the

whether submission of issues involving nonmandatory subjects of bargaining to a section 9 factfinder was consistent with good faith bargaining.⁵⁷ In addition, the Commission examined whether the shifting of a party's demands during factfinding constituted bad faith participation in the factfinding process.⁵⁸

In *City of Worcester*, the firefighters union, after submitting evidence to the factfinder, provided him with forty issues for resolution. The City objected to all but eight of these proposals as being nonmandatory and alleged that the union's submission constituted a failure to bargain in good faith.⁵⁹ The Commission rejected the City's contention, concluding that while the City had objected to the submission, it had done so only after the submission and completion of the parties' presentations.⁶⁰ The Commission ruled that this failure to make timely objection was fatal.⁶¹ In its view, a party does not waive objection when it discusses the nonmandatory subject in the initial bargaining phase. In fact, the Commission appears to encourage such discussion.⁶² The Commission reasoned, however, that the amelioratory effect of open discussion was no longer applicable once the parties have invoked impasse procedures. In this context, the Commission stated:

On the contrary, a requirement that an employer timely object to consideration by the fact finder of nonmandatory subjects at least

date of his appointment. If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the board shall make them public.

Any arbitration award in a proceeding voluntarily agreed to by the parties to resolve an impasse shall be binding on the parties and on the appropriate legislative body and made effective and enforceable pursuant to the provisions of chapter one hundred and fifty C, provided that said arbitration proceeding has been authorized by the appropriate legislative body or in the case of school employees, by the appropriate school committee.

If the impasse continues after the publication of the fact-finder's report, the issues in dispute shall be returned to the parties for further bargaining.

Any time limitations prescribed in this section may be extended by mutual agreement of the parties and the board.

⁵⁷ G.L. c. 150E, §§ 10(b)(1)-(2), mandate good faith bargaining. Subsections (1) and (2) provide:

(b) It shall be a prohibited practice for an employee organization or its designated agent to:

(1) Interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section six; . . .

⁵⁸ *Id.* § 10(b)(3), provides that it is a prohibited practice for an employer organization to: "(3) Refuse to participate in good faith in the mediation, fact finding and arbitration procedures set forth in sections eight and nine."

⁵⁹ 2 M.L.C. at 1238.

⁶⁰ *Id.* at 1240.

⁶¹ *See id.* at 1240-41.

⁶² *Cf. N.L.R.B. v. Davidson*, 318 F.2d 550, 558 (4th Cir. 1963).

serves the salutary purpose of alerting the employee organization that submission of the challenged proposals may trigger the filing of a complaint of prohibited practice, thereby enabling the employee organization to consider withdrawal of the questioned issues in order to avert the risk of a prohibited practice, with the consequence—for police and fire—of delaying compulsory interest arbitration.⁶³

In this manner the Commission decided that the tardy objection constituted the waiver although it also found that insistence, over timely objection, to a nonmandatory subject, would be a violation of the good faith requirement if the bargaining involved police officers or firefighters.⁶⁴

Though not deciding the question, the Commission suggested that when the bargaining does not involve police officers or firefighters and therefore does not involve an ultimate, mandatory impasse settlement mechanism, submission to the factfinder, over timely objection, of a nonmandatory subject may not constitute bad faith bargaining. The Commission's distinction was predicated on its belief that the voluntary arbitration mechanism of section 9 was rarely used and thus nonpolice or fire factfinding "typically serves merely as a prelude to further bargaining, has little or no 'precedential' value and therefore [there is] significantly less reason [for such fact finding to be] limited in scope."⁶⁵

Such a distinction is logical since little harm is done in nonfinal situations by encouraging wide-ranging and generally more open negotiations. However, where the effect of allowing submission of nonmandatory subjects may be to permit an outside arbitrator to impose a settlement which includes matters otherwise nonmandatory, one of the parties may be prejudiced by permitting the submission of such a nonmandatory subject to the arbitrator.

In *City of Worcester*, the City also alleged union violations of the duty to bargain in good faith arising from the union's shifting of its demands during the factfinding stage. The Commission, however, rejected this contention.⁶⁶ The Commission noted that factfinding serves a mediatory function as well as the quasi-adjudicative one. Accordingly, it concluded that since the process of factfinding is part of the continuum of collective bargaining, those steps which further the process can hardly be held to be bargaining in bad faith.⁶⁷ Examining the facts before it, the Commission concluded that since there was no evidence of an agreement on the demands which were modified, nor

⁶³ 2 M.L.C. at 1240. Section 4 of chapter 1078 of the Acts of 1973 provides for compulsory interest arbitration for police and firefighters' unions. For a discussion of those procedures, see §6.7 *supra*.

⁶⁴ 2 M.L.C. at 1244.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1245.

⁶⁷ *See id.* at 1246.

were these shifts evidenced by any actual motive to harass the city, the modification of these demands, as submitted to the factfinder, was not an indication of bad faith bargaining.⁶⁸

IV. USE OF AN EXPEDITED HEARING

In an attempt to aid it in meeting an increasing workload, the Commission approved a number of procedural matters in *Town of Sharon v. Joseph B. Puchalski*.⁶⁹ In *Puchalski* the Commission, in affirming an earlier decision in which an improper practice had been found, underscored its position on the propriety of ordering a section 11⁷⁰ expedited hearing over the objection of both parties.⁷¹ It rendered its decision on the basis of the hearing officer's handwritten notes (used solely to verify the accuracy of the tapes and not for the purposes of making an official record), and the tape recordings made at the hearing. The town had objected to the procedure on due process grounds, alleging numerous gaps and inadequacies in the recordings.⁷² The Commission did not deny the existence of certain minor gaps, but found them to be insufficient, when examined and compared with the hearing officer's notes, to prevent the Commission from fairly appraising and deciding the case.⁷³

⁶⁸ *Id.* at 1245. The Commission also rejected the city's contention that the union had violated the ground rules by giving information to a newspaper reporter. *Id.* at 1246-47. Moreover, the Commission rejected the contention of bad faith predicated upon certain minor errors in calculations pertaining to matters presented to the factfinder by the union. *Id.* at 1247-50.

⁶⁹ 3 M.L.C. 1052 (1976).

⁷⁰ G.L. c. 150E, § 11, provides in part:

Upon any complaint made under this section the commission in its discretion may order that the hearing be conducted by a member or agent of the commission. At such hearing the employer, the employee organization or the person so complained of shall have the right to appear in person or otherwise defend against such complaint. At the discretion of the commission, any person may be allowed to intervene in such proceeding. In any hearing the member or agent shall not be bound by the technical rules of evidence prevailing in the courts. At the conclusion of the hearing, the member or agent shall determine whether a practice prohibited under section ten has been committed and if so, he shall issue an order requiring it or him to cease and desist from such prohibited practice. If the member or agent determines that a practice prohibited under section ten has not been committed, he shall issue an order dismissing the complaint. Any order issued pursuant to this paragraph shall become final and binding unless, within ten days after notice thereof, any party requests a review by the full commission. A review may be made upon a written statement of the case by the member or agent agreed to by the parties, or upon written statements furnished by the parties, or, if any party or the commission requests, upon a transcript of the testimony taken at the preliminary hearing, together with such other testimony as the commission may require.

⁷¹ 3 M.L.C. at 1052 n.1.

⁷² *Id.* at 1055, 1057-58.

⁷³ *Id.* at 1059.

V. AGENCY FEE REGULATIONS

Pursuant to section 9R of chapter 23 of the General Laws,⁷⁴ the Commission in June of 1976 adopted new agency service fee rules. These rules implement section 12 of chapter 150E, which section permits the imposition of a service fee on public employees represented by a bargaining agent where the contract so providing has been duly ratified.

In adopting a comprehensive set of rules and regulations, the Commission was able to avoid the necessity of litigation on each aspect, could expedite individual problems, and establish a uniform set of standards. The fee was carefully limited to that amount actually expended by the bargaining agent in the course of collective bargaining contract administration.⁷⁵ The rules also set forth due process protection for the ratification of the contract imposing the service fee⁷⁶ and requirements regarding termination for nonpayment.⁷⁷ This use of rulemaking powers to implement the public employee collective bargaining act was a further extension of the procedures adopted for

⁷⁴ G.L. c. 23 § 9R, as amended by Acts of 1973, c. 1078, § 2A. Section 9R provides in part: "The commission shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of . . . chapter one hundred and fifty E."

⁷⁵ Rules and Regulations Relating to the Administration of an Act providing for Collective Bargaining for Public Employees, Article IX, § 3. In § 3(b) the Commission provided that "[t]he service fee shall be proportionately commensurate with the costs of collective bargaining and contract administration." In addition, the Commission sought to delimit what constituted collective bargaining costs by setting out in its regulations certain activities deemed not to be related to collective bargaining and contract administration. The activities so listed include:

- i. Contributions to political parties or candidates for or holders of public office;
- ii. Contributions to charitable, religious or political organizations or causes;
- iii. Fines, penalties or damages arising from the unlawful activities of a bargaining agent or a bargaining agent's officers or agents or members;
- iv. Costs of social or recreational activities;
- v. Costs of educational activities unrelated to collective bargaining and contract administration;
- vi. Costs of medical insurance, retirement benefits or other benefit programs;
- vii. Costs incurred by the bargaining agent to organize employees who are not included in the bargaining unit;
- viii. Other costs unrelated to collective bargaining and contract administration.

Id. at § 3(d).

⁷⁶ *Id.* at § 4. Section 4 provides for ratification by a majority of *all* the employers on a bargaining unit present and voting regardless of their status with the union. *Id.* at § 4(a)-(c). Section 4 further delineates the notice requirements that must be met prior to the convening of a ratification meeting. *Id.* at 4(d)-(f).

⁷⁷ *Id.* at § 5. Section 5 provides that an employee need only tender payment of the fee to insulate himself from nonpayment termination. *Id.* at § 5(a). Moreover, the payment of the fee cannot be required, "before the thirtieth day following the beginning of the employee's employment or the effective date of the collective bargaining agreement, whichever is later." *Id.* In addition, § 5(b) gives an employee the right to challenge his or her nonpayment termination through the collectively bargained for grievance procedure and/or through a charge with the Commission. The aggrieved employee can also

unit determinations in 1975, when the Commission established the outline for the statewide units of state government employees by adopting a structure of ten basic units.⁷⁸

STUDENT COMMENT

§6.10. Labor Law—Public Employee Impasse Procedures—Final Offer Arbitration: *Town of Arlington v. Board of Conciliation and Arbitration*¹ (and a companion case)². The creation in Massachusetts of public employee collective bargaining rights is a fairly recent development, and the status of the laws providing such rights remains unsettled. Although as early as 1958 the General Court granted to employees of the Commonwealth and its political subdivisions the right to form unions and present proposals with respect to salaries and other conditions of employment,³ prior to 1965 public employees were still dependent upon legislation for increases in wages and benefits.⁴ In 1965, the General Court enacted a comprehensive mandatory collective bargaining law for public employees.⁵ The 1965 statute denied municipal employees the right to engage in, induce, or encourage any strike, work stoppage, slowdown, or withholding of services.⁶ It replaced this traditional private sector bargaining weapon with a procedure for mediation, conciliation, and factfinding⁷ to encourage peaceful resolution of negotiations. However, it contained no effective substitute for the strike to produce an agreement if both parties remained set in their positions after mediation and factfinding. Because the statute lacked the element of finality produced by a strike, it was criticized by public employees as not providing meaningful collective bargaining rights.⁸

continue his or her employment if the contested service fee is paid into an escrow fund administered by the bargaining agent or otherwise made appropriately available to the agent. *Id.* at § 5(b).

⁷⁸ See Amendment to Rules and Regulations of the Labor Relations Commission, 1 M.L.R.R. 3031.

§6.10. ¹ 1976 Mass. Adv. Sh. 2035, 352 N.E.2d 914. Other defendants are representatives of the members of Local 1297, International Association of Firefighters, AFL-CIO. *Id.* 2035 n.1, 352 N.E.2d at 914 n.1.

² A companion case, *Town of Arlington v. Board of Conciliation and Arbitration*, was decided at the same time. The other defendant was Arthur Guarente, individually and as representative of the members of the Arlington Ranking Officers Association. *Id.* at 2035 n.2, 352 N.E.2d at 914 n.2.

³ Acts of 1958, c. 460.

⁴ See Segal, *Labor Law: Municipal Bargaining*, 1971 ANN. SURV. MASS. LAW § 6.2, at 99.

⁵ Acts of 1965, c. 763. This statute applied to all county, city, town or district employees, except elected officers, board and commission members, executive officers, and police. *Id.* at c. 763, § 2, amending G.L. c. 149 by inserting § 178G.

⁶ *Id.* at c. 763, § 2, amending G.L. c. 149 by inserting § 178M.

⁷ *Id.* at c. 763, § 2, amending G.L. c. 149 by inserting § 178J.

⁸ See Sherry, *Labor Law*, 1974 ANN. SURV. MASS. LAW § 2.12, at 25.

Chapter 1078 of the Acts of 1973, inserted as chapter 150E of the General Laws,⁹ moved toward providing these meaningful bargaining rights in the area of protective services. While the new law continues to prohibit strikes in all areas of public employment,¹⁰ it provides for the submission of unresolved bargaining issues to final and binding arbitration for an experimental three-year period in the area of municipal and town firefighters and police officers.¹¹

This comment will describe the general impasse procedures implemented by section nine of chapter 150E for public employees and the specific compulsory arbitration provisions of section four which affect police and fire personnel. It will then discuss the constitutional challenges leveled against these compulsory arbitration provisions by cities and towns of the Commonwealth in the *Town of Arlington* case. Upon determining that the Court properly dismissed the challenges under the Massachusetts Constitution and General Laws, the comment will examine the underlying policy considerations which support the use of compulsory interest arbitration for an additional experimental period within the area of protective services. After an analysis of the alternatives to arbitration that would produce the necessary “finality” in collective bargaining impasse situations, it will be concluded that compulsory arbitration is the only viable alternative which properly balances the need of public employees for meaningful collective bargaining, the need of the community for uninterrupted police and fire service, and the need of municipalities to control the cost and efficiency of such services.

Impasse procedures under section 9 of chapter 150E¹² affect all public employees covered by the new law.¹³ Section 9 provides that after a reasonable period of negotiation over the terms of a collective bargaining agreement, either party, or the parties acting jointly, may petition the Board of Conciliation and Arbitration for a determination that an impasse exists. Upon determining that such impasse exists, the Board is empowered to appoint a mediator to assist the parties in the resolution of the impasse.¹⁴ Within twenty days of his appointment,

⁹ Acts of 1973, c. 1078 (codified at G.L. c. 150E, § 1 *et. seq.*). Police are included for the first time within the definition of employee. *Id.* at § 1.

¹⁰ G.L. c. 150E, § 9A.

¹¹ Acts of 1973, c. 1078, §§ 4, 8.

¹² G.L. c. 150E, § 9.

¹³ Under G.L. c. 150E, § 1, “public employee” is defined as: any person employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees, and members of the militia or national guard and employees of the commission. . . .

¹⁴ G.L. c. 150E, § 9. The parties are also free to agree between themselves upon a person to serve as mediator, provided they notify the Board of their agreement and choice. *Id.*

the mediator must issue to the Board a report indicating the results of his services in resolving the impasse. If the impasse continues, either party, or the parties acting jointly, may petition the Board to appoint a factfinder.¹⁵ The factfinder is subject to the rules of the Board and has the power to mediate and make recommendations for the resolution of the impasse. He is required to transmit his findings and any recommendations for the resolution of the impasse to the Board and to both parties within thirty days of his appointment.¹⁶ If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the Board is required to make public the findings.¹⁷

Although the parties may voluntarily agree to resolve an impasse by arbitration, in which case the arbitration award is binding on the parties and upon the appropriate legislative body,¹⁸ they are in no way forced to do so, and neither party may do so unilaterally. If the impasse continues beyond the publication of the factfinder's report, the issues in dispute are returned to the parties for further bargaining.¹⁹ In all areas of public employment except police and fire personnel, the statutory aids provided to resolve collective bargaining disputes are exhausted at this point. Because public employees are denied the right to strike to test the strength of their bargaining position, and because public employers are unlikely to submit voluntarily to a form of third party arbitration, the procedure fails to define a point at which a final and mutual decision must be made if the parties remain set in their positions after mediation and factfinding. Without the element of finality produced by the strike or a form of third party arbitration, meaningful collective bargaining is frustrated and at times appears illusory. Additional bargaining is futile when there is little incentive to reach an agreement.²⁰

¹⁵ *Id.* The Board is required to appoint a fact-finder representative of the public from a list of qualified persons it maintains. The parties may also agree between themselves upon a person to serve as factfinder and must notify the Board of such agreement and choice of factfinder. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* The purpose of making the factfinder's report public is to bring public pressure to bear on the parties, and to encourage them to settle according to the factfinder's recommendations. "Pickets at City Hall"—*Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment*, GOV'T EMPL. REL. REP. (BNA) RF-1, 51:151 (1970).

¹⁸ Provided that the arbitration proceeding has been authorized by the appropriate legislative body. G.L. c. 150E, §9.

¹⁹ *See id.*

²⁰ It is important to note that the 1973 statute leaves public employees without a statutory resolution of their impasse beyond mediation and factfinding *only* in the area of collective bargaining agreements. G.L. c. 150E, §8, provides that the parties may include within a written agreement a grievance procedure culminating in final and binding arbitration in disputes concerning the interpretation and application of such written agreements. In the absence of such a grievance procedure, binding arbitration may be ordered by the Labor Relations Commission upon the request of either party. *See Grievance Arbitration in the Public Sector: The New Massachusetts Law*, 9 SUFFOLK UNIV. L. REV. 721 (1975), for a discussion of the binding arbitration of grievance procedures.

Section 4 of chapter 150E attempts to remedy this situation with respect to employees engaged in protective municipal services.

When an employee organization representing the fire fighters or police officers of a city, town, or district is engaged in an impasse that has continued for thirty days after publication of the factfinder's report, section 4 of chapter 150E provides that the employee organization shall petition the Board to make an investigation.²¹ If the Board determines that the section 9 requirements²² have been complied with in good faith by the employee organization, that proceedings for the prevention of any prohibited practices have been exhausted,²³ and that an impasse exists, the Board is required to notify the parties immediately that the issues in dispute will be resolved by arbitration.²⁴

The arbitration proceedings will be conducted by a panel selected in accordance with the provisions of section 4 of chapter 150E.²⁵ Pursuant to section 4 the proceedings before the arbitration panel are informal. Consequently, "any oral or documentary evidence and other data deemed relevant by the arbitration panel may be received into evidence."²⁶ Also, any person, labor organization, or governmental unit having substantial interest in the proceedings may be granted leave to intervene.²⁷ At the conclusion of the hearing, each party must

²¹ Acts of 1973, c. 1078, § 4. Section 8 of chapter 1078 provides that "the provisions of section four of this act shall terminate on June thirtieth nineteen hundred and seventy-seven."

²² See text at notes 10-15 *supra*.

²³ Such complaints must have been filed with the Labor Relations Commission prior to the date of the factfinder's report. See G.L. c. 150E, § 10, for list of prohibited practices. Section 11 defines the procedure under which a section 10 prohibited practice complaint is handled by the labor relations commission. The Board of Conciliation and Arbitration discovered in 1975 that some prohibited practice charges which were wholly unrelated to bargaining were delaying final offer arbitration. In a joint memorandum issued by the Board and Labor Relations Commission on March 20, 1975, a policy was adopted under which the Board need not refrain from processing arbitration petitions, even where prohibited practice charges are pending before the Commission, where:

(1) The charge is unrelated to the requirement to bargain in good faith or the requirement to comply in good faith with mediation and factfinding procedures; (2) The charge is filed by an employee organization and alleges lack of good faith bargaining by the public employer, provided that disposition of the charge does not require a determination as to the scope of bargaining under chapter one hundred and fifty E.

See: *Interim Report of the Governor's Task Force on Chapter 150E and Impasse Procedures*, Pub. No. 9102-14-35-8-76-CR.

²⁴ Acts of 1973, c. 1078, § 4.

²⁵ The arbitration panel consists of a member selected by the town, a member selected by the employee organization, and an impartial chairman chosen by the other two members from a list of arbitrators prepared by the Board. The Board, in an effort to enforce the section 4 time constraints on choosing neutral arbitrators, has since January of 1975 required that the parties strike no more than four names each on one list of nine. This procedure assures that one name must be acceptable to both. *Interim Report of the Governor's Task Force on Chapter 150E and Impasse Procedures*, Pub. No. 9102-14-35-8-76-CR., at 5.

²⁶ Acts of 1973, c. 1078, § 4. The arbitrators are given subpoena powers and the power to administer oaths. *Id.*

²⁷ *Id.* The hearings must be concluded within forty days. *Id.*

submit to the panel a written statement containing its “last and best” offer for each of the issues in dispute. Within ten days thereafter, a majority of the panel must select one of the two written statements. The panel’s selection will be final and binding upon the parties and upon the appropriate legislative body.²⁸ If the arbitration panel’s decision is supported by material and substantive evidence on the whole record, that decision may be equitably enforced by either party or the arbitration panel in the superior court.²⁹

The constitutional implications of the chapter 150E proceedings for final and binding arbitration for police officers and firefighters were tested during the Survey year in *Town of Arlington v. Board of Conciliation and Arbitration*.³⁰ In *Town of Arlington*, after separate negotiations between the town and employee organizations representing the firefighters and police officers failed to produce collective bargaining agreements, each employee organization petitioned the Board of Conciliation and Arbitration for mediation and factfinding.³¹ When no contract emerged, the Board determined that the conditions for binding arbitration existed.³² Following the arbitration hearings, a majority of each panel selected the written statement submitted by the employee organizations.³³ Thereafter, the town brought an action to set aside the “last and best offer” arbitration awards issued pursuant to section 4.³⁴ The Supreme Judicial Court granted direct appellate re-

²⁸ *Id.* The arbitration panel, in arriving at a decision, is directed to give weight to ten standards:

(1) The financial ability of the municipality to meet costs.

(2) The interests and welfare of the public.

(3) The hazards of employment, physical, educational, and mental qualifications, job training and skills involved.

(4) A comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities.

(5) The decisions and recommendations of the factfinder.

(6) The average consumer prices for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wages and fringe benefits.

(8) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(9) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

(10) The stipulation of the parties.

²⁹ *Id.*

³⁰ 1976 Mass. Adv. Sh. 2035, 352 N.E.2d 914. See note 1 *supra*.

³¹ 1976 Mass. Adv. Sh. at 2037, 352 N.E.2d at 917.

³² *Id.*

³³ *Id.* at 2038, 352 N.E.2d at 917.

³⁴ 1976 Mass. Adv. Sh. at 2035, 352 N.E.2d at 916. The cities of Boston and Worcester joined in the town’s brief as *amici curiae*. Seventy-five municipalities of the Com-

view on reservation and report by the superior court judge without decision.³⁵ On appeal, the town challenged the constitutionality of final and binding arbitration on four grounds. The town argued that such arbitration (1) violated the Home Rule Amendment to the Massachusetts Constitution by removing decision-making power with regard to police and fire services from the municipality, (2) unconstitutionally delegated legislative power to a panel of private individuals, (3) contravened the “one-man, one-vote” principle in violation of the equal protection clause of the fourteenth amendment to the United States Constitution, and (4) violated provisions of the municipal finance laws that had previously been held to prevail over conflicting statutes.³⁶

The Court dismissed each of these challenges. It found the arbitration provisions contained in section 4³⁷ to be (1) a general law consistent with the General Court’s power under section 8 of the Home Rule Amendment,³⁸ (2) a proper occasion for delegation, given the protections against arbitrary action that section 4 of chapter 150E³⁹ provided,⁴⁰ (3) not a grant of general legislative power to the arbitration panel, and thus not involving the “one-man, one-vote” principle of the equal protection clause,⁴¹ and (4) a statute in which the General Court specifically provided that the funding of arbitration awards would prevail over conflicting municipal finance laws.⁴² The Court therefore held that the binding arbitration provisions of section 4 of chapter 150E suffered from no constitutional infirmity.⁴³

An examination of each ground of decision in *Town of Arlington* serves to highlight the major constitutional issues involved in the area of public employee impasse procedures.

I CONSTITUTIONAL CHALLENGES TO BINDING ARBITRATION

A. HOME RULE AMENDMENT CHALLENGE

The Town of Arlington first challenged the binding arbitration provisions of section 4⁴⁴ as violative of the Home Rule Amendment to the Massachusetts Constitution.⁴⁵ The town acknowledged that prior

monwealth endorsed the brief by authorization of boards of selectmen, mayors, or city councils. See Brief for Appellant at 58-9.

³⁵ *Id.* at 2035, 352 N.E.2d at 916. Direct appellate review was granted pursuant to G.L. c. 213, § 1B.

³⁶ See 1976 Mass. Adv. Sh. at 2036-37, 352 N.E.2d at 916.

³⁷ G.L. c. 150E, § 4.

³⁸ 1976 Mass. Adv. Sh. at 2040-41, 352 N.E.2d at 918.

³⁹ G.L. c. 150E, § 4.

⁴⁰ 1976 Mass. Adv. Sh. at 2043-44, 352 N.E.2d at 919.

⁴¹ *Id.* at 2046-47, 352 N.E.2d at 920.

⁴² *Id.* at 2048, 352 N.E.2d at 921.

⁴³ *Id.* at 2052, 352 N.E.2d at 922.

⁴⁴ G.L. c. 150E, § 4.

⁴⁵ 1976 Mass. Adv. Sh. at 2039, 352 N.E.2d at 918. See MASS. CONST. amend. art. LXXXIX.

to the adoption of the Home Rule Amendment,⁴⁶ cities and towns were creatures of the state and subject to the absolute will of the legislature.⁴⁷ However, the town argued that adoption of the amendment, with its purpose being:

... to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article⁴⁸

had the effect of granting plenary powers to cities and towns.⁴⁹ As such, the municipalities were subject only to general regulation by the legislature, and prohibited only from exercising a limited number of functions.⁵⁰ The town then proceeded to argue that in light of the fact that the control of police and fire services are not included in the list of prohibited functions, and since such services are "core functions to the existence of local government,"⁵¹ municipalities could now independently control those services. The town contended that the Legislature's provision for binding arbitration at the request *only* of municipal fire and police employees, without the consent of the city or town, was contrary to the purpose of the Home Rule Amendment, insofar as the provision potentially transferred the complete management of police and fire services from municipal officials to arbitration panels.⁵²

The Court admitted that it was the intention of the Home Rule Amendment to grant to cities and towns "independent municipal

⁴⁶ Article 89 was adopted by the General Courts of the political years 1963 and 1965, and was approved by the people on November 8, 1966. MASS. CONST. amend. art. LXXXIX.

⁴⁷ The Home Rule Procedures Act, G.L. c. 43B, passed by the General Court in the extra session of 1966, detailed the procedures under which the municipalities could effect this constitutional grant of home rule. Acts of 1966, Extra Session, c. 734.

⁴⁸ MASS. CONST. amend. art. LXXXIX, § 1.

⁴⁹ Brief for Appellant at 9.

⁵⁰ *Id.* These functions did not specifically include regulation of police and fire service. MASS. CONST. amend. art. LXXXIX, § 7, denies any city or town the power to:

- (1) regulate elections other than those prescribed by sections three and four;
- (2) to levy, assess and collect taxes;
- (3) to borrow money or pledge the credit of the city or town;
- (4) to dispose of park land;
- (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or
- (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the Commonwealth.

⁵¹ Brief for Appellant at 10.

⁵² *Id.* at 10-11.

powers which they did not previously inherently possess.”⁵³ It noted, however, that section 6 of the amendment, while granting to municipalities broad governmental powers, limits the municipal exercise of those powers to acts “not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight [of the amendment].”⁵⁴ Those powers reserved to the Legislature by section 8 include the power “to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two”⁵⁵ Since the binding arbitration provisions of section 4⁵⁶ applied equally to all employee organizations representing the firefighters or police officers in any city, town, or district,⁵⁷ the Court concluded that those provisions clearly fell within the scope of “general laws” as defined by section 8 of the Home Rule Amendment.⁵⁸ In addition, the Court noted that the General Court’s power to legislate in the area of municipal wages and benefits prior to the adoption of the Home Rule Amendment was well settled.⁵⁹ It found nothing in the amendment to withdraw or limit that power, other than the limits imposed by section 8, which limits the Legislature had not exceeded.⁶⁰

In addition to its argument that the Home Rule Amendment guaranteed to municipalities independent control of police and fire services, the town presented another argument in support of its Home Rule Amendment challenge. After pointing out that section 7 of chapter 150E⁶¹ specifies that the terms of a collective bargaining agreement should prevail over conflicting municipal personnel ordinances, the town asserted that this provision conflicted with section 6 of the Home Rule Amendment in that section 6 subjects municipal ordinances only to the Constitution and the General Laws and not to any contract determined by an arbitration panel.⁶² Thus, the town reasoned that a town by-law granting firefighters four weeks of vacation after twelve years of service should supersede the arbitrator’s award of four weeks of vacation after ten years of service, because the town by-law neither conflicted with any General Law nor with any provision of the Constitution.⁶³

The Court dismissed this argument summarily, noting that in cases

⁵³ 1976 Mass. Adv. Sh. at 2039, 352 N.E.2d at 918, *citing* Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 358, 294 N.E.2d 393, 408 (1973).

⁵⁴ 1976 Mass. Adv. Sh. at 2040, 352 N.E.2d at 918, *citing* MASS. CONST. amend. art. LXXXIX, § 6.

⁵⁵ MASS. CONST. amend. art. LXXXIX, § 8.

⁵⁶ G.L. c. 150E, § 4.

⁵⁷ Acts of 1973, c. 1078, § 4.

⁵⁸ 1976 Mass. Adv. Sh. at 2041, 352 N.E.2d at 918.

⁵⁹ *Id.*, *citing* Quinlan v. Cambridge, 320 Mass. 124, 126, 68 N.E.2d 11, 14 (1946).

⁶⁰ 1976 Mass. Adv. Sh. at 2041, 352 N.E.2d at 918.

⁶¹ G.L. c. 150E, § 7.

⁶² Brief for Appellant at 13.

⁶³ *Id.*

of inconsistency or conflict, a local ordinance or by-law must give way to a law enacted by the legislature in accordance with section 8 of the Home Rule Amendment.⁶⁴ The arbitration panel's award, made pursuant to a valid general law, thus superseded the municipal ordinance, both because it was enacted in accordance with section 8 of the Home Rule Amendment, and because such a result was mandated by section 7 of chapter 150E.⁶⁵

B. IMPROPER DELEGATION CHALLENGE

Relying on article 5 of the Massachusetts Declaration of Rights,⁶⁶ the town next challenged section 4 of chapter 150E⁶⁷ as involving an unconstitutional delegation of power to a panel of politically unaccountable private individuals.⁶⁸ Article 5 states that since power derives from and resides in the people, government officers, whether executing legislative, executive, or judicial power, are agents of the people and are at all times accountable to the people.⁶⁹ The town urged that the section 4⁷⁰ arbitration panel exercised two of the most fundamental legislative functions—the allocation of public resources through the mechanism of the municipal budget, and the legislative power of taxation.⁷¹ The town asserted that municipal budgetmaking was a legislative function insofar as it traditionally involved a political bargaining process between competing interest groups,⁷² with the town budget representing an accommodation of those interests.⁷³

⁶⁴ 1976 Mass. Adv. Sh. at 2041-42, 352 N.E.2d at 918, *citing* Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 294 N.E.2d 393 (1973) (order of state Housing Appeals Committee under G.L. c. 40B, §§20, 21 to permit building of low and moderate income housing was enforced in face of inconsistent local zoning by-law); and Bloom v. Worcester, 363 Mass. 136, 293 N.E.2d 268 (1973) (“Although substantial legislative authority devolves upon local governments automatically on the adoption of such a self-executing home rule amendment, the Legislature by positive enactments may restrict local legislative action or deny municipalities power to act at all in certain areas.” *Id.* at 143-44 n.4, 293 N.E.2d at 273 n.4.)

⁶⁵ See 1976 Mass. Adv. Sh. at 2041-42, 352 N.E.2d at 918. G.L. c. 150E, § 7, provides in part:

If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal, personnel ordinance, by-law, rule or regulation, . . . the terms of the collective bargaining agreement shall prevail.

⁶⁶ MASS. CONST. pt. 1, art. 5.

⁶⁷ G.L. c. 150E, § 4.

⁶⁸ Brief for Appellant, 13-37.

⁶⁹ “[All] power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents and are at all times accountable to them.” MASS. CONST. pt. 1, art. 5.

⁷⁰ G.L. c. 150E, § 4.

⁷¹ Brief for Appellant, 13-15.

⁷² *Id.* at 14, *citing* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1162 (1974) [hereinafter, *Summers*].

⁷³ *Id.*, *citing* *Summers*, *supra* note 72, at 1162-63.

Such an accommodation, the town argued, should only be made by an individual politically responsible to those competing interest groups.⁷⁴ However, under the challenged statute, an arbitration panel unilaterally exercising control over wages, hours, and conditions of employment, performs the municipal budgetmaking function insulated from political accountability.⁷⁵ The town further asserted that an arbitration award involved the legislative power of taxation in that such an award not only affects the allocation of resources but also ultimately affects the municipal tax rate.⁷⁶ In this context, the town reasoned that since the budget is primarily comprised of salaries,⁷⁷ and primarily funded by local property taxes,⁷⁸ an arbitration award is inevitably linked to the local tax rate.⁷⁹ Accordingly, the town urged the Court to “look to the reality of how power is exercised by the arbitration panel,”⁸⁰ and the effect of that power on the local legislative body which is unable to “review, reject or amend a panel selection.”⁸¹

With respect to the issue of the “reality of how power is exercised,” the town argued the panel was not politically accountable notwithstanding the inclusion in section 4 of the ten standards designed to guide the arbitration panel’s decision.⁸² The town viewed these standards as too subjective,⁸³ and criticized the statute as lacking any indication of the weight to be accorded the factors when they pointed in opposite directions.⁸⁴ Further buttressing its improper delegation theory, the town asserted that the ad-hoc operational framework of the arbitration panel insulates the arbitrators from public accountability,⁸⁵ that judicial review is not a substitute for political re-

⁷⁴ *Id.* at 15, citing *Summers, supra* note 72, at 1184.

⁷⁵ See Brief for Appellant at 17-18.

⁷⁶ *Id.* at 16-17.

⁷⁷ Ninety-four percent of the monies appropriated for Arlington’s fire services in fiscal 1976 were for salaries. Brief for Appellant at 16.

⁷⁸ Approximately seventy-five percent of all the Town’s budget appropriations are raised by property taxation. Brief for Appellant, appendix at 16.

⁷⁹ Brief for Appellant at 16.

⁸⁰ *Id.* at 22.

⁸¹ *Id.* at 23.

⁸² *Id.* at 23. See note 28 *supra* for the ten standards. The Board of Conciliation and Arbitration contended that the “language, purposes, and statutory framework of Section 4 provide sufficient guidelines and safeguards to protect against arbitrariness.” Brief for Appellee, Board of Conciliation and Arbitration, 30-32. See also Brief for Appellee Local 1297, International Association of Firefighters, AFL-CIO, and Arlington Ranking Officers Association and their Representatives, 21-30.

⁸³ See Brief for Appellant at 23-28. For example, factor (2) in section 4’s standards, “the interest and welfare of the public,” cannot be ascertained by objective data, and invites the arbitrator to make a judgment about what he thinks is good for the public.

⁸⁴ Compare, e.g., factor 1, the financial ability of the municipality to meet costs, with factor five, the cost of living. G.L. c. 150E, § 4. Because there is no “universally accepted objective criteria” for determining public sector wage and benefit levels, arbitrators are left to rely on equitable considerations in place of economic objectivity, which can result in the social and economic philosophy of the arbitrator being imposed on the parties and the public. Brief for Appellant at 24-25.

⁸⁵ *Id.* at 28. Since authority to appoint the arbitration panel is dispersed, the town argued that no focus was provided for political accountability. Since the panel was not a

sponsibility,⁸⁶ and that the operational procedures of the arbitration panel do not protect against the arbitrary exercise of power.⁸⁷

In response to the town's improper delegation challenge, the Court indicated that the doctrine of nondelegation does not stem from article 5 of the Declaration of Rights, as the town had asserted, but from article 30 of the Declaration of Rights⁸⁸ and from article 4 of section 1 of chapter 1 of part 2 of the Massachusetts Constitution.⁸⁹ The Court recognized that the Legislature was unable to delegate general power to make laws.⁹⁰ It carefully distinguished, however, the improper delegation of lawmaking responsibility from the Legislature's proper delegation to a board of the responsibility to implement the details of a previously established legislative policy.⁹¹ The Court acknowledged that central to the delegation question was the issue of whether the General Court had provided protection against arbitrary action by the arbitration panel.⁹² In this context, the Court found that the ten standards contained in section 4,⁹³ plus the regulations governing the hearings procedure and conduct, the requirement that arbitration be preceded by negotiation, mediation, and factfinding, and the provision for judicial review by either party in the superior court, provided adequate protection against arbitrary action.⁹⁴ Moreover, while the Court agreed that the arbitration panel had the power to establish salaries,⁹⁵ it found this power to be entirely distinct from the powers of appropriation and taxation, which are exercised by the legislative body

continuing body, it had no need to be responsive to the will of the people to insure future funding. The panel does not exercise continuing responsibility for administration of the power delegated to it, as would members of an administrative body. Concern for reputation does not render the arbitration responsive to the public. The selection process does not render the panel politically accountable. *Id.* at 28-35.

⁸⁶ *Id.* at 35. The judicial review provision of G.L. c. 150E, § 4, indicates that the arbitration panel's decision is binding on the parties and may be enforced by either party or the arbitration panel in the superior court, provided that the panel's decision is supported by "material and substantive evidence on the whole record." *Id.*

⁸⁷ Brief for Appellant at 36. The arbitration panel's operational procedures are explained in the text at notes 21-25 *supra*. The town argued that there is no formal procedural decision making by the arbitration panel, and no independent analysis of the evidentiary record. The neutral arbitrator decides the matter, with the other panel members presumptively voting for the offer of the party that appointed them. Brief for Appellant at 36-37.

⁸⁸ MASS. CONST. pt. 1, art. 30.

⁸⁹ 1976 Mass. Adv. Sh. at 2042, 352 N.E.2d at 919. See MASS. CONST. pt. 2, c. 1, § 1, art. 4.

⁹⁰ *Id.*, citing *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass. 409, 420-23, 294 N.E.2d 354, 361-62 (1963) and *Broadbine v. Revere*, 182 Mass. 598, 600, 66 N.E. 607, 608 (1903).

⁹¹ *Id.* at 2042-43, 352 N.E.2d at 919, citing *Mass. Bay Transp. Auth. v. Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 544, 205 N.E.2d at 346, 351 (1965); *Commonwealth v. Diaz*, 326 Mass. 525, 527, 95 N.E.2d at 666, 668 (1950); *Commonwealth v. Hudson*, 315 Mass. 335, 341, 52 N.E.2d at 566, 571 (1943).

⁹² 1976 Mass. Adv. Sh. at 2043-44, 352 N.E.2d at 919.

⁹³ G.L. c. 150E, § 4. See note 28 *supra* for the ten standards.

⁹⁴ 1976 Mass. Adv. Sh. at 2044, 352 N.E.2d at 919.

⁹⁵ *Id.*, 352 N.E.2d at 919-20.

entirely apart from the arbitration panel.⁹⁶ The Court pointed out that the panel establishes the obligation when it makes an award; the legislative body then must determine how this obligation is to be funded. Since the Court was satisfied that the enumerated safeguards constituted sufficient protection against arbitrariness,⁹⁷ it found that the statute did not improperly delegate legislative power.⁹⁸

C. EQUAL PROTECTION CHALLENGE

The town's third challenge to final and binding arbitration was that such arbitration violated the one-man one-vote principle of the fourteenth amendment to the United States Constitution.⁹⁹ The town argued that in order to comport with the requirements of the fourteenth amendment, an entity such as the arbitration panel that performs a legislative function must be elected rather than appointed.¹⁰⁰ This argument was based on the rather tenuous legal proposition that since the arbitration panel exercised "classically legislative" functions, an election was constitutionally mandated.¹⁰¹

The town first contended that because the arbitration panel made core governmental decisions,¹⁰² it was classically a legislative body within the meaning given that term by the United States Supreme Court in *Sailors v. Board of Education of the County of Kent*.¹⁰³ It then

⁹⁶ *Id.* at 2044-45, 352 N.E.2d at 919-20. The Court also rejected the town's distinction between "private" and "public" persons in its political accountability argument, *see* Brief for Appellant at 22, having earlier decided that delegations to private persons were not forbidden so long as proper safeguards were provided. 1976 Mass. Adv. Sh. at 2045, 352 N.E.2d at 919, 920, *citing* Corning Glass Works v. Ann & Hope, Inc., 363 Mass. 409, 420, 294 N.E.2d 354, 360-61 (1973). In the same paragraph, the Court found authority for the proposition that a person may be deemed a public official where he is fulfilling duties which are public in nature, "involving in their performance the exercise of some portion of the sovereign power, whether great or small." *Id.*, *citing* Attorney Gen. v. Drohan, 169 Mass. 534, 535, 48 N.E. 279, 281 (1897).

⁹⁷ 1976 Mass. Adv. Sh. at 2046, 352 N.E.2d at 920. These safeguards included the ten standards, the procedure for negotiation, mediation and factfinding, and the guarantee of judicial review. *Id.* at 2044, 2046, 352 N.E.2d at 919, 920.

⁹⁸ *Id.*

⁹⁹ Brief for Appellant at 37-38, *citing* Reynolds v. Sims, 377 U.S. 533 (1964) and Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). The one-man, one-vote principle is grounded on the equal protection clause of the fourteenth amendment. The principle grants to the voter a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted by the apportionment of state legislatures. *See* Reynolds, 377 U.S. at 557-58.

¹⁰⁰ Brief for Appellant at 38-39.

¹⁰¹ *Id.*

¹⁰² The town asserted that the panel made decisions as to resource allocation, disposition of tax revenue, and organizational structure and performance standards. Brief for Appellant at 41-42.

¹⁰³ 387 U.S. 105, 110 (1966). The Court held that an election was not required for county school board members because the offices were administrative and not legislative in the classical sense. In *Town of Arlington*, the town contended that a classically legislative body was one with the "power to make a large number of decisions having a broad range of impacts on all the citizens" of the municipality, as defined by the Supreme Court in *Avery v. Midland County*, 390 U.S. 474, 483. Brief for Appellant at 42.

contended that an arbitration panel exercising legislative functions of this scope must be elected, rather than appointed, in order that it comport with "the fundamental constitutional principle underlying a representative democracy that those persons exercising the basic legislative powers be politically accountable representatives."¹⁰⁴

The Court rejected the first argument, noting that in *Sailors* the county school board had powers greater in scope than those entrusted to the arbitration panel.¹⁰⁵ Even where the board had broad powers the *Sailors* Court had found that the school board was not exercising general legislative powers.¹⁰⁶ Thus, the arbitration panel could not be described as exercising broad legislative powers.

The Court noted that the arbitration panel's role was limited solely to resolving a collective bargaining impasse by selecting one of two final offers of the parties. As such, the Court concluded that the panel could not be described according to the standards generally used to determine legislative responsibility—as "a unit of local government with general responsibility and power for local affairs"¹⁰⁷ or a unit "with general governmental powers over an entire geographic area, . . ."¹⁰⁸ With respect to the second part of the town's argument, that an election was constitutionally mandated, the Court found such an argument to be without merit since in the Court's view the arbitration panel does not perform legislative functions.¹⁰⁹

D. MUNICIPAL FINANCE LAW CONFLICT

The town's final challenge asserted that the provisions of section

The town felt that the arbitration panel fit this description because it made core governmental decisions as to resource allocation, disposition of tax monies within a community, as well as decisions regarding the organizational structure and performance standards of municipal departments. *Id.* at 41-42.

¹⁰⁴ Brief for Appellants at 42, citing MASS. CONST. pt. 1, art. 4. The town argued that the unanswered question of the *Sailors* case, "whether a state may constitute a local legislative body through the appointive rather than the elective process," was squarely presented in this case, once the court decided that the arbitration panel exercised classically legislative powers." *Id.* at 39. See *Sailors*, 387 U.S. at 110.

¹⁰⁵ The Supreme Judicial Court noted that in *Sailors* the county school board was responsible for, "among other things," the appointment of a county school superintendent, preparation of an annual budget and levy of taxes, distribution of delinquent taxes, employment of teachers for special educational programs, and the assignment of areas to particular school districts. 1976 Mass. Adv. Sh. at 2047, 352 N.E.2d at 921, citing *Sailors*, 387 U.S. at 110 n.7.

¹⁰⁶ 1976 Mass. Adv. Sh. at 2048, 352 N.E.2d at 921, citing *Sailors*, 387 U.S. at 110-11.

¹⁰⁷ 1976 Mass. Adv. Sh. at 2047, 352 N.E.2d at 921, quoting from *Avery v. Midland County*, 390 U.S. 474, 483 (1968).

¹⁰⁸ 1976 Mass. Adv. Sh. at 2047, 352 N.E.2d at 921, quoting from *Avery v. Midland County*, 390 U.S. 474, 485-86 (1968).

¹⁰⁹ 1976 Mass. Adv. Sh. at 2048, 352 N.E.2d at 921 (1976). Even assuming that the arbitration panel was a legislative body, the Supreme Court in *Sailors* had reserved the question of whether the state may appoint, rather than have elected, a local legislative body. 387 U.S. at 111. Within the Commonwealth there was authority for the proposition that the Legislature has broad powers to provide that municipal officers be appointed rather than elected. See *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 321-22, 35 N.E.2d 222, 234 (1941).

4¹¹⁰ providing that the panel's selection shall be final and binding upon the parties and upon the appropriate legislative body, were inconsistent with municipal finance laws, and that the latter should prevail.¹¹¹ In support of this challenge, the town asserted that the funding of the arbitration awards in question would be in excess of appropriations for the department of public safety of the Town of Arlington. Consequently, the implementation of the award would violate section 31 of Chapter 44 of the General Laws,¹¹² which provides that a town department may not incur a liability in excess of the appropriations made for its use, except in extreme emergency by majority vote of all selectmen. In addition, the town urged the Court to adopt the rule of past decisions that interpreted the purpose of finance laws as being

... to set rigid barriers against expenditures in excess of appropriations, to prevent the borrowing of money for current expenses, to confine the making of long time loans strictly to raising money for permanent improvements, and in general to put cities upon a sound financial basis so far as these ends can be achieved by legislation¹¹³

Given these important purposes, the town argued, such laws required strict adherence, even at the expense of other laws.¹¹⁴

The Court, in rejecting this argument, pointed to the specific provision in section 4¹¹⁵ that the award be binding upon the appropriate legislative body and enforceable thereafter in the superior court.¹¹⁶ This language was interpreted as a legislative signal that "awards made under the statute shall be satisfied on a mandatory basis by municipal appropriation thereafter."¹¹⁷ Noting its previous interpretation of section 31 of chapter 44 as a municipal control on "irresponsible spending by departments of local governments,"¹¹⁸ the Court distinguished this purpose from requiring local spending to fund a valid

¹¹⁰ G.L. c. 150E, § 4.

¹¹¹ Brief for Appellant at 49.

¹¹² Brief for Appellant at 52-53. G.L. c. 44, § 31 provides in part:

No department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department, each item recommended by the mayor and voted by the council in cities, and each item voted by the town meeting in towns, being considered as a separate appropriation, except in cases of extreme emergency involving the health or safety of persons or property, and then only by a vote in a city of two-thirds of the members of the city council, and in a town by a majority vote of all the selectmen. . . .

¹¹³ Brief for Appellant at 50, *quoting from* Flood v. Hodges, 231 Mass. 252, 256, 120 N.E. 689, 689 (1918).

¹¹⁴ Brief for Appellant at 50-51.

¹¹⁵ G.L. c. 150E, § 4.

¹¹⁶ 1976 Mass. Adv. Sh. at 2048, 352 N.E.2d at 921.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, *quoting from* Board of Health of North Adams v. Mayor of North Adams, 1975 Mass. Adv. Sh. 2708, 2723-24, 334 N.E.2d 34, 41 (1975).

state program.¹¹⁹ Since section 4 was viewed by the Court to be such a valid state program, it directed the town's finance committee and town meeting to fund the arbitrator's award.¹²⁰

E. COMMENT ON CONSTITUTIONAL CHALLENGES

In exploring the Court's analysis of the town's four specific constitutional challenges, it is difficult to conceive of a different conclusion being reached, given the particular constitutional provisions, general laws, and case law that the Court was called upon to examine. Although the Massachusetts Home Rule Amendment is of the "self-executing" variety insofar as a municipality may act without intervening legislative action,¹²¹ the amendment provides "for a sharing of legislative power, rather than for the separation of powers between state and local levels."¹²² This arrangement resembles the relationship between the states and the federal government whereby the states may legislate in areas where the federal government may later assert its supremacy.¹²³ This "sharing" of powers, with its possibility of state preemption by general legislation pursuant to sections 6 and 8 of the Home Rule Amendment¹²⁴ makes the apparent powers granted to municipalities by the Home Rule Amendment illusory. The wages of municipal police and firemen may affect the wages of other municipal employees and also affect the scope of the total budget. As such, the power to set wages is a matter of peculiar local concern. Accordingly, one would have expected the power to set municipal wages to be at the heart of the Home Rule Amendment's grant of power, and the last subject to be taken from local determination. Yet, an amendment which at first glance appears to grant plenary powers to cities and towns also reserves the right to take it all back by general legislation. The fact that the subject of such general legislation was one of fundamental and arguably exclusive local concern was of no consequence to the General Court when it determined that more meaningful collective bargaining rights were needed in this area. The legislature was able to grant these collective bargaining rights by general legislation without violating the Home Rule Amendment.

Town of Arlington's result proves, as the Court suggests, that while the municipality is granted broad powers to act on municipal problems by the Home Rule Amendment, a very narrow area of disability is imposed on the state legislature.¹²⁵ Although section 8 of the amendment denies the legislature the power to single out a town or

¹¹⁹ 1976 Mass. Adv. Sh. at 2048, 352 N.E.2d at 921.

¹²⁰ 1976 Mass. Adv. Sh. at 2049, 352 N.E.2d at 921.

¹²¹ *Bloom v. City of Worcester*, 363 Mass. 136, 143 n.4, 293 N.E.2d 268, 273 n.4 (1973).

¹²² *Id.*, quoting from 1965 SEN. DOC. NO. 950, at 49.

¹²³ *Bloom v. City of Worcester*, 363 Mass. 136, 150 n.9, 293 N.E.2d 268, 277 n.9 (1973).

¹²⁴ MASS. CONST. amend. art. LXXXIX, §§ 6, 8.

¹²⁵ 1976 Mass. Adv. Sh. at 2040, 352 N.E.2d at 918.

municipality for special legislative treatment,¹²⁶ it grants the state legislature the power to make general laws affecting all cities and towns, or any class of not fewer than two, without considering whether the subject matter of the legislation is of peculiar local concern. The General Court may regulate the arguably core concerns of local government in an evenhanded fashion, as long as it does not discriminate against a single local government. Such “general law” power in a Home Rule Amendment that does not explicitly delineate areas of local concern where the state legislature may not become involved results in broad state authority to legislate on municipal problems, with a narrow area reserved to municipalities to regulate only the most unique of local problems. No vote by the representatives of a town which has adopted a home rule charter can negate such a general law, despite its concern with local issues.¹²⁷

Binding arbitration statutes for public sector employees have survived this type of constitutional challenge in other states with similar constitutional provisions.¹²⁸ Only where state constitutions or legislative provisions have reserved to the local legislative body the exclusive authority to set wages, or where statewide legislation is prohibited on matters of “predominantly local concern” and wage-setting is determined to be such a local concern, have statewide binding arbitration statutes similar to chapter 150E failed.¹²⁹ Unless the General Court spells out in future legislation its intention that the power to set wages is one of peculiar local concern in the area of public employee labor relations, challenges similar to that raised by the town under the

¹²⁶ See MASS. CONST. amend. art. LXXXIX, § 8, granting the general court power to make general laws which apply alike to all cities and towns or to a “class of not fewer than two.”

¹²⁷ See *Del Duca v. Town Administrator of Methuen*, 1975 Mass. Adv. Sh. 1792, 329 N.E.2d 748.

¹²⁸ See *Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 397-98 (Me. 1973) (challenge involving improper delegation); *Dearborn Firefighters Union v. Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975) (challenges involving home rule provision of constitution and surrendering of tax power) (equally divided court upheld unanimous decision of an intermediate appellate court which found statute constitutional); *Amsterdam v. Helsby*, 371 N.Y.2d 19, 42, 332 N.E.2d 290, 303, 311 N.Y.S.2d 404, 421 (1975) (challenges involving Home Rule Amendment, delegation of power, and equal protection); *Warwick v. Warwick Regular Firemens Ass'n*, 106 R.I. 109, 117-18, 256 A.2d 206, 211 (1969) (challenge involving improper delegation); *State v. Laramie*, 437 P.2d 295, 305 (Wyo. 1968) (same).

¹²⁹ See *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24, 553 P.2d 1140, 1143, 132 Cal. Rptr. 668, 671 (1976) (unconstitutional delegation by state legislature); *Greeley Police Union v. City Council of Greeley*, 553 P.2d 790, 793 (Col. 1976) (same); *Beaverton v. Int'l Ass'n. of Firefighters Local 1660*, Ore. , 531 P.2d 730, 736-37 (1975) (labor relations statute providing for binding arbitration held to violate state constitution where previous decisions had prohibited statewide legislation on matters “predominantly of local concern”); *Sioux Falls v. Sioux Falls Firefighters, Local 814*, 234 N.W.2d 35, 38 (S.D. 1975) (constitutional provision making the setting of salaries an exclusive legislative function of city precludes state legislation providing binding arbitration for firefighters); *State v. Johnson*, 46 Wash.2d 114, 120-21, 278 P.2d 662, 666 (1955) (fixing of wages a non-delegable legislative function under statute creating city's powers).

Home Rule Amendment will ultimately be subordinated to the Legislature's power to make "general law."¹³⁰

The town's improper delegation challenge utilized language in the Commonwealth's Constitution¹³¹ that provided the widest possible scope for the town's political accountability arguments.¹³² This unique approach constituted an attempt by the town to give constitutional content to many of the policy arguments it had set forth under the improper delegation challenge.¹³³ The Court, however, concluded that these policy arguments were ultimately matters of legislative wisdom.¹³⁴ Consequently, the Court reduced the town's challenge to the more familiar delegation considerations that it had discussed in *Corning Glass Works v. Ann & Hope, Inc.*¹³⁵ Applying its *Corning* approach,¹³⁶ the Court was able to distinguish between the improper delegation of legislative power to make laws and the proper delegation of the power to implement the details of a legislative policy. It found that the specific standards provided for the arbitrators, when coupled with negotiation, mediation, factfinding and judicial review, provided adequate protection against arbitrary action.¹³⁷ By placing its faith in the ten standards surrounded by these other procedural safeguards, the Court was able to ignore the town's assertion that it was precisely when the ten standards pointed in different directions that the panel was left free to substitute its own view on such subjective standards as "the interests and welfare of the public."¹³⁸ Whether such views are characterized as equitable or arbitrary, they result from a recognition that no universally accepted objective criteria exist to settle public sector wage and benefit disputes.¹³⁹ Unlike the private sector, public personnel costs reflect a decision more political than economic. Within the collective bargaining relationship that section 4 of chapter 150E envisioned, it seems proper to allow the arbitration panel to consider this political factor of public interest.¹⁴⁰

¹³⁰ MASS. CONST. amend. art. LXXXIX, § 8.

¹³¹ MASS. CONST., pt. 1, art. V.

¹³² See notes 66-87 *supra* and accompanying text.

¹³³ These policy arguments are best summarized by the topical heading of the town's second argument: "Acts of 1973, c.1078, §4, is not consonant with the constitutional exercise of political power in a representative democracy." Brief for Appellant at 13. Identical language appears in the opinion of Levin, J., in *Dearborn Firefighter's Union, Local 412 v. Dearborn*, 394 Mich. 229, 233, 231 N.W.2d 226, 229 (1975). Such broad language, in its political overtones, is matched by the equally broad language of part one, article five, of the Massachusetts Constitution. See note 69 *supra* and accompanying text.

¹³⁴ 1976 Mass. Adv. Sh. at 2049-51, 352 N.E.2d at 921-22.

¹³⁵ 363 Mass. 409, 294 N.E.2d 354 (1973).

¹³⁶ See *id.* at 420-24, 294 N.E.2d at 360-63.

¹³⁷ 1976 Mass. Adv. Sh. at 2042-44, 352 N.E.2d at 919-20.

¹³⁸ Brief for Appellant at 25, *citing* G.L. c.150E, §4, standard (2).

¹³⁹ *Id.* at 24-25.

¹⁴⁰ The Court's approach to the delegation problem, while basically sound, did not view an examination of the practical consequences of allowing such legislative delegation as within the judicial domain. See 1976 Mass. Adv. Sh. at 2049-52, 352 N.E.2d at 921-22. It viewed the procedural safeguards of a neutral arbitrator, hearing, admission

Little can be said in support of the town's contention that the provisions of section 4 conflict with municipal finance laws and that those finance laws should prevail. Section 7 of chapter 150E provides that a public employee collective bargaining agreement prevails over any municipal personnel ordinance, by-law, rule, or regulation.¹⁴¹ Under the 1965 statute, the terms of a public employment collective bargaining agreement were subordinate to municipal ordinances, by-laws, rules, regulations and statutes.¹⁴² Accordingly, the specific language of section 7 indicates a legislative intent that collective bargaining agreements under the new law be elevated to a higher status in order to create more meaningful negotiations from the point of view of the employee organization.¹⁴³ The Court in *Town of Arlington* properly notes that nothing in section 31 of chapter 44¹⁴⁴ prevents the towns from funding by appropriation an arbitration award that results from valid state legislation.¹⁴⁵

The Commonwealth's 1973 binding arbitration statute appears to be a carefully drafted legislative document. The Legislature has seemingly considered and provided for all the potential constitutional challenges based on the Home Rule Amendment, nondelegation theories, and conflicting municipal finance law. Accordingly, it is unlikely that any additional constitutional challenge would affect the Court's position.¹⁴⁶ Notwithstanding that *Town of Arlington* firmly established the constitutional validity of final and binding arbitration, the Legislature must still determine whether such arbitration is responsible public policy.¹⁴⁷ In making such a determination, the Legislature must balance

of evidence, record of proceedings, transcript, and judicial review, see G.L. c.150E, §4, as tipping the scales in its consideration of the "totality of the protection against arbitrariness." *Id.* at 2046, 352 N.E.2d at 920, quoting from K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 54 (Supp. 1970). Professor Davis, while emphasizing the need for procedural safeguards to buttress statutory standards furnished to protect those affected by administrative action from arbitrary results, has also criticized state court opinions which, among other things, fail to consider the practical consequences of allowing the legislature to do what it is trying to do. See K.C. DAVIS, ADMINISTRATIVE LAW TEXT, § 2.06 at 39-40 (1972). This commentary takes the position that the type of practical consequences of chapter 150E, section four, advanced by the town in its non-delegation and political accountability arguments, see Brief for Appellant at 13-37, are best considered by the state's legislative body.

¹⁴¹ G.L. c. 150E, § 7.

¹⁴² Acts of 1965, c. 763, § 1781.

¹⁴³ Sherry, *Labor Law*, 1974 ANN. SURV. MASS. LAW § 2.12, at 28.

¹⁴⁴ G.L. c. 44, § 31. See note 112 *supra* for the relevant text of this section.

¹⁴⁵ 1976 Mass. Adv. Sh. at 2048-49, 352 N.E.2d at 921.

¹⁴⁶ See 1976 Mass. Adv. Sh. at 2050-51, 352 N.E.2d at 922. ("In this opinion we have considered the specific constitutional challenges advanced by the town and found them insufficient to render the act invalid. . . . We see no constitutional impediment to the legislature's structuring municipal labor relations in the manner provided in the act.")

¹⁴⁷ Section 8 of the Acts of 1973, c. 1078, indicates that the provisions of § 4 shall terminate on June 30, 1977. Prior to this date the General Court must determine whether this temporary law shall be repealed, extended to other public employee groups, continued in its present form, replaced, or modified. See note 214 *infra*.

three often conflicting needs: (1) the need of public employees for meaningful collective bargaining rights; (2) the community's need for uninterrupted services in areas critical to the public health, safety, and welfare; and (3) the need of cities and towns to balance their municipal budgets, and to have some control over the costs and efficiency of municipal services.

The remainder of this comment will consider this balancing of needs within the framework of those factors underlying the evolution of public employee labor legislation. It will examine the three basic options available for providing "finality" in collective bargaining: the right to strike, unilateral determination, and binding arbitration. It will conclude that despite its several weaknesses, binding arbitration remains the only viable alternative to resolutions of impasse in the area of police and fire personnel. Finally, it will be submitted that with proper safeguards, the conflicting needs of employees and communities can be fulfilled by the arbitration process.

II. BINDING ARBITRATION AS AN APPROPRIATE PUBLIC SECTOR IMPASSE TOOL

Any discussion of collective bargaining impasse alternatives in the public sector must first examine the interplay between those factors which established the *need* for collective bargaining in this area, and the sovereignty defense, long available to the government-as-employer in denying such collective bargaining rights. This interplay highlights the differences between public and private sector collective bargaining, and the need for different impasse solutions in the two areas.

Union growth in public employment is commonly attributed to a set of favorable circumstances that coincided in the early 1960's. An executive order by President Kennedy in 1962¹⁴⁸ signaled a more favorable policy toward union recognition in the public sector.¹⁴⁹ Public

November, 1976 (research report made possible by a grant to Massachusetts League of Cities and Towns from the U.S. Civil Service Commission under the Intergovernmental Personnel Act (P.L. 91-6481); available at the offices of Mass. League of Cities and Towns, 6 Beacon St., Boston, Mass.); hereinafter cited as *Somers Report*.

¹⁴⁸ Exec. Order No. 10988, 27 Fed. Reg. 551 (1969) (employee-management cooperation in the federal service). This order gave to employees of the Federal Government the right to form, join, and assist any employee organization, or to refrain from any such activity. *Id.* at § 1(a). Section 2 defined "employee organization" to mean "any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees, or any craft, trade or industrial union whose membership includes both Federal employees and employees of private organizations" This definition expressly did not include any organization that (1) asserted the right to strike against the government or any agency thereof, (2) advocates the overthrow of the constitutional form of government in the United States, or (3) which discriminates with regard to the terms or conditions of membership because of race, color, creed, or national origin. *Id.* at § 2.

¹⁴⁹ Those policies were later to be liberalized in President Nixon's Executive Order No. 11491, 34 Fed. Reg. 17605 (1969). This order established a Federal Labor Relations Council, § 4; a Federal Services Impasses Panel, § 4; Exclusive recognition, § 10; and Grievance Procedures, § 13.

employment was expanding to include new and younger groups, which were both more receptive to unionization and increasingly dissatisfied with the personnel practices of government managers.¹⁵⁰ Job security and retirement benefits, the early attractions of public employment, were being matched or surpassed by the results of collective bargaining in the private sector,¹⁵¹ and public employees were falling behind private employees in wages and benefits.¹⁵² The expansion of government into transit, housing and other fields closely related to private industry brought previously unionized employees into the public sector, and contributed to organizational efforts.¹⁵³

Efforts to achieve collective bargaining rights were also motivated by many of the same factors that inspired employees in private industry to unionize decades earlier. As the number of employees involved in public employment increased and the bureaucracy became more extended, there developed an increasing sense of powerlessness on the part of the individual worker. Workers sensed that the collective voice of all fellow employees was more powerful than individual voices in establishing control over the conditions of employment.¹⁵⁴ Public employees found that as an interest group they could produce political pressure by working to elect local public officials sympathetic to their needs,¹⁵⁵ and that they were capable of presenting a united voice on political issues that went beyond their specific working conditions.¹⁵⁶ It was thought that such an organization could equalize the bargaining power of employer and employee.¹⁵⁷

However, it also became clear that collective pressure could lead to disruption unless existing decisionmaking procedures relative to terms and conditions of public employment were accommodated to include public employees. As in private industry, legislation that allows for unionization and provides collective bargaining rights in the public sector reflects a policy judgment that the benefits of shared decisionmaking outweigh the social and economic costs. According to this policy judgment, the benefit of allowing public employees to participate in the determination of their employment conditions justifies the potential cost of an increase in the price of public employee personnel over that incurred when public employers were free to unilaterally determine the conditions of employment.

¹⁵⁰ See BOK & DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 312-14 (1970).

¹⁵¹ See WELLINGTON AND WINTER, *UNIONS AND THE CITIES* (Studies of Unionism in Government/Brookings Institute), 14 (1971) [hereinafter cited as WELLINGTON AND WINTER].

¹⁵² *Id.*

¹⁵³ BOK & DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 323 (1970).

¹⁵⁴ See WELLINGTON AND WINTER, *supra* note 151, at 8-12.

¹⁵⁵ *Id.* at 13-14.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 13-14. Wellington and Winter note, however, that the unequal bargaining power argument is not as clearly analogous to the private sector, where imperfections relate to economic market pressure. In the public sector, imperfections relate to the political process, where economic considerations are "but one criterion among many."

The considerations of public employee growth, political pressure, and unequal bargaining power clearly suggested a need for some type of legislation regulating public employee labor relations. Without such enabling legislation early attempts at union organization for the purpose of collective bargaining were thwarted by the notion of governmental sovereignty. Sovereignty, the "supreme, absolute, and uncontrollable power by which any independent state is governed . . .,"¹⁵⁸ gave the public employer a defense to employee demands to negotiate for many decades.¹⁵⁹ Collective bargaining, with its notion of countervailing power, would necessarily infringe on the power of the government and the sovereignty of the state.¹⁶⁰ Moreover, since sovereignty also means that the government can be sued only if it consents to suit,¹⁶¹ a governmental entity could not be compelled to enter into any collective bargaining relationship involuntarily. Therefore, collective bargaining agreements, to be enforceable, required legislation mandating that the government take such action,¹⁶² and providing for the enforcement of such agreements

¹⁵⁸ Black's Law Dictionary 1568 (4th ed., 1968), cited in WELLINGTON AND WINTER *supra* note 151, at 36.

¹⁵⁹ See e.g., WELLINGTON AND WINTER *supra* note 151, at 36, citing *Railway Mail Association v. Murphy*, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607, *rev'd on other grounds sub. nom. Railway Mail Association v. Corsi*, 267 App. Div. 470, *aff'd*, 293 N.Y. 315, 56 N.E.2d 721 *aff'd*, 326 U.S. 88 (1945):

To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the State can dictate to the government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that government employees have the power to halt or check the functions of government unless their demands are satisfied, is to transfer to them all legislative, executive, and judicial power. Nothing would be more ridiculous. 180 Misc. N.Y. at 875.

¹⁶⁰ See WELLINGTON AND WINTER *supra* note 151, at 37. See, e.g., *Dade County v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp.*, 157 So. 2d 176, 182 (Fla. 1963).

¹⁶¹ See, e.g., *Osborn v. Bank of United States*, 22 U.S. 738 (1824). Immunity from liability in tort has been waived by the United States in the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1970).

¹⁶² Wisconsin, in 1959, became the first state to enact basic legislation covering municipal employees. 1959 Wis. Laws c. 509, § 1, creating WIS. STAT. § 111.70. In 1961, Wisconsin was the first state to enact mediation and factfinding procedures for resolving municipal disputes. 1961, Wis. Laws c. 633, § 1, amending WIS. STAT. § 11.70. In 1971 Wisconsin passed legislation that provided for law enforcement and firefighting personnel. 1971 Wis. Laws, c. 247, creating WIS. STAT. § 111.77. See generally, Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?*, 58 MARQ. L. REV. 205 (1975).

Some courts have even held, despite the absence of authorizing legislation, that public employers have discretionary authority to bargain collectively and to enter into valid agreements with unions representing their employees. See, e.g., *Gary Teachers Local 4 v. School City of Gary*,—Ind. App.—284 N.E.2d 108 (1972); *Chicago Div. of Ill. Ed. Ass'n v. Board of Education*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

For a discussion of common law collective bargaining rights in the public sector, see A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17

by judicial action. The use of “sovereignty” as a *total* defense to public employee collective bargaining rights has diminished in recent years. This has in large part been due to the tremendous growth in public sector employment, with its corresponding recognition of unequal bargaining power and consequent political pressure applied to obtain such bargaining rights. The issue today becomes not whether government power, or sovereignty, is supreme, but “how government as an employer ought to exercise that power.”¹⁶³ Once the need for public employee collective bargaining has been established, state legislation such as chapter 150E¹⁶⁴ recasts the sovereignty question as *how much* decisionmaking power the public employer will give up instead of refusing to share *all* power defensively labeled “sovereign.” When impasse alternatives are considered, the recast question takes on new significance, and the differences between the public and private labor sectors become apparent.

State statutes that regulate the collective bargaining of public employees, although varying in structure and detail, generally contain a procedure for determining questions of recognition of the collective bargaining unit through some form of petition, investigation, and election conducted by the labor relations commission,¹⁶⁵ and an impasse procedure to be used when a public employer and union cannot agree upon the terms of a new contract.¹⁶⁶ Ideally, a voluntary agreement at the bargaining table between the two parties would be the most effective technique for determining terms and conditions of employment. When such a voluntary agreement is not reached in the private sector, the most potent economic weapon possessed by unions to produce the necessary collective bargaining finality is the strike. However, the strike has been declared illegal for public employees in all but very few jurisdictions.¹⁶⁷ This creates the need for an impasse procedure to replace the forbidden strike in order to produce finality.

In determining what constitutes an appropriate impasse procedure, the Legislature must balance three conflicting needs. First, the need of public employees for meaningful bargaining rights must be protected. This would seem to be the purpose of enacting legislation recognizing public employee unions and granting those unions the right to bargain collectively. Such a need implies that public employees share equally with the public employer the responsibility of determining the terms and conditions of their employment. It means more than merely requiring the employer to meet and confer with the employees before deciding what the next employee contract will contain. It requires that employees have a method of settling impasses

¹⁶³ WELLINGTON AND WINTER, *supra* note 151, at 37.

¹⁶⁴ G.L. c. 150E.

¹⁶⁵ See, e.g., G.L. c. 150E, § 4.

¹⁶⁶ G.L. c. 150E, §§ 4 (police and fire), 9, 9A. For a recent compilation of state public sector collective bargaining statutes, see A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. IND. & COM. L. REV. 993, 994, n.5 (1976).

¹⁶⁷ For an example of a state statute authorizing strikes by public employees under limited circumstances, see ORE. REV. STAT. § 243.726 (Supp. 1975-76).

that does not result in a form of unilateral determination by the employer.

The second need that must be satisfied in any legislative scheme is the community's need for uninterrupted services in areas critical to the public health, safety, and welfare. This need varies with public employee groups. It receives highest priority in the area of public safety, *i.e.*, police and fire personnel, which is being considered here. While a community can tolerate, at least for a period of time, an interruption in the services of its department clerks, or park employees, or even school teachers, it cannot tolerate such an interruption in police and fire service. The immediate social cost in both life and property would simply be too high.

Finally, the need of cities and towns to balance their municipal budgets, and to have some control over the costs and efficiency of police and fire employee services, must be considered. Because the competitive and market pressures of the private sector do not exist in the public sector, and because municipal budgetmaking is essentially a political process, care must be taken to protect this need.

Those who advocate the right to strike,¹⁶⁸ or a limited or graduated right to strike,¹⁶⁹ as an impasse procedure in the public sector, believe that by putting collective bargaining in the public sector on the same footing as private negotiations, the time consuming process of negotiation would be reduced.¹⁷⁰ Moreover, advocates of a right to strike contend that since in general strikes of public employees do not burden the community more than strikes in the private sector, public employees who perform services identical to those performed by private employees who have the right to strike should be no less favorably situated.¹⁷¹ Anti-strike legislation, if unduly harsh in the penalties it imposes on employee and union violators, may in fact result in public sympathy for labor's cause, and create a need for specially-enacted legislation to alleviate the consequences of such a law—a self-defeating

¹⁶⁸ See Guinan, *The Unreal Distinction Between Public and Private Sectors*, MONTHLY LAB. REV. 46, 47, (Sept., 1973), commenting on New York City's public transportation employees illegal strike of January, 1966, which resulted in the best agreement in the industry's history, and special legislation exonerating all the strikers from the drastic penalties of the no-strike laws. *Id.*

¹⁶⁹ See Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971).

¹⁷⁰ See BOK AND DUNLOP, LABOR AND THE AMERICAN COMMUNITY, at 334 (1970).

¹⁷¹ See *id.* See generally "Pickets and City Hall"—*Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment*, GOV'T EMPL. REL. REP. (BNA) RF-1, 51:151 at 155-157 (1970). The task force agreed that strikes should be prohibited while parties are negotiating, or in mediation, or before a factfinding body, but split on whether strikes should be allowed when disputes have not yielded to negotiation, mediation and factfinding recommendations. Those who approved of a right to strike at this point did so on the basis that fairness required such a right when the government employer refused to accept the factfinder's recommendations after they had been made public. But even they believed that this limited right to strike should be restrained when public health or safety are threatened.

proposition.¹⁷² Proponents of a right to strike further argue that collective bargaining, without the power to strike, is an “exercise in futility,”¹⁷³ because it provides no point at which the parties must either agree or test the economic or political strength of their position.

Those opposed to strikes in the public sector point to the peculiar nature of the public employee strike. Unlike a strike in the private sector, a public employee strike is not checked by the forces of competition and other market pressures.¹⁷⁴ The effectiveness of such a strike derives from its power to inconvenience the public enough to bring community pressure to bear on elected officials.¹⁷⁵ Strikes in the public sector may therefore distort the political process if they result in some public employee groups obtaining too much power relative to other interest groups.¹⁷⁶ Moreover, when such strikes must be enjoined, the determination that the health and safety of the public are unduly jeopardized involves political considerations and value judgments that the judiciary is ill-suited to make.¹⁷⁷

The Massachusetts Legislature, prior to enacting its new public employee law, briefly considered departing from the absolute prohibition of public employee strikes if an impasse in negotiations continued after mediation and factfinding.¹⁷⁸ In rejecting the strike weapon, it is

¹⁷² See Guinan, *The Unreal Distinction Between Public and Private Sectors*, MONTHLY LAB. REV. 46, 47 (Sept., 1973).

¹⁷³ *Id.*

¹⁷⁴ See BOK & DUNLOP, LABOR AND THE AMERICAN COMMUNITY 334. Such pressures include entry of non-union competitors, impact of foreign goods, substitution of capital for higher priced labor, shift of operations to low-cost areas, contracting out of high-cost operations to other enterprises, shut-down of unprofitable plants and operations, redesign of products to meet higher costs, and managerial option to go out of business entirely. *Id.*

¹⁷⁵ *Id.* at 335. Many employees with relatively little power to “inconvenience” the public would obviously be better off under some alternate method of resolving disputes. The statutory grant of the right to strike for these groups would be of little value unless work stoppages could be carried out in association with other groups of public employees working in more critical areas. Those members of the *Twentieth Century Fund Task Force*, see note 170 *supra*, who favored a blanket prohibition of the right to strike in the public sector believed that government workers constituted a special category in the labor force, who, having accepted public employment, committed themselves to public service, which should not be interrupted by dissatisfaction over working conditions. Public employee strikes, under this view, disrupt the functioning of government and therefore undermine it. “*Pickets at City Hall*”—*Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment* GOVT EMPL. REL. REP. (BNA) RF-1, 51:151, at 156.

¹⁷⁶ WELLINGTON AND WINTER, *supra* note 151, at 167.

¹⁷⁷ See COX & BOK, LABOR AND THE AMERICAN COMMUNITY 335 (1970). Since public sector collective bargaining involves the allocation of public resources, it can be argued that decisions affecting the wages, hours, and working conditions of public employees are more political than economic, and that a system of political settlement is preferable to settling impasses by economic coercion. See Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969).

¹⁷⁸ 1973 HOUSE DOC. NO. 6194, app. B (bill modeled on Hawaiian legislation which granted public employees a limited right to strike. HAW. REV. STAT. § 89-1 to 89-20 (Supp. 1975)). See also 1973 SENATE DOC. NO. 1771 and 1973 HOUSE DOC. NO. 7715.

submitted that the General Court made the proper decision that those issues of public policy involved in setting a municipal budget are more political than economic in nature, and thus are too important to be decided by the economic force of a particular group. Municipal police and fire personnel would wield considerable pressure if granted the right to strike, precisely because such a work stoppage would evoke alarm in the community and concern for the public health and safety,¹⁷⁹ thereby creating support for a quick settlement on union's terms. Public safety personnel with the right to strike would be the most powerful political interest group in the city since it would possess the power to compel a quick settlement on its own terms. In addition, the public's need for uninterrupted police and fire service precludes any consideration of the right to strike. Such a collective bargaining right must be subordinated to the public's continuing need for essential services and the municipality's need to establish its budget through political rather than economically coercive processes.

Once the right to strike has been removed as a possible impasse alternative, the absence of a procedure that can overcome impasse both creates frustration and increases the threat of illegal action.¹⁸⁰ Two alternate solutions that can produce the necessary finality are unilateral dispute resolution by the appropriate legislative body,¹⁸¹ or a form of third party compulsory and binding arbitration.

The first alternative, legislative dispute resolution¹⁸² would take effect after recommendations have been made by the factfinding body. If further mediation does not resolve the dispute, the appropriate legislative body reviews the dispute and enacts a statute prescribing the terms and conditions of employment. Factfinders' recommendations have presumptive validity but are not binding on the legislature. Such a procedure may work when the "appropriate legislative body" is entirely distinct from the government employer. Problems arise however, when the two are the same,¹⁸³ or are closely related, or when the legislative body has created the impasse by refusing

The Joint Legislative Committee on Public Service recommended that unions be given the right to strike under limited circumstances. See Segal, *A Preliminary Analysis of the New Public Employees' Law in Massachusetts*, BOSTON BAR J. 5, 9 (January, 1974).

¹⁷⁹ Conversely, a strike by municipal librarians, or gardeners, would evoke little community pressure for immediate settlement, and would not threaten public health and safety. Such a right would have little value.

¹⁸⁰ The strike prohibition does not deter union threats of strikes to achieve a stronger bargaining position during negotiations. On occasion, these threats have been carried out. See Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 932 (1969). Moreover, having forbidden a pattern of conduct allowed in private sector labor relations, the state's prosecution of strike prohibition violators can create as much sympathy and honor for union leaders as it does public sentiment against the illegal action. *Id.* at 936. See also Guinan, *The Unreal Distinction Between Public and Private Sectors*, MONTHLY LAB. REV. 46 (Sept., 1973).

¹⁸¹ See BOK & DUNLOP, LABOR AND THE AMERICAN COMMUNITY 334 (1970).

¹⁸² *Id.* at 337-38.

¹⁸³ This would be the result when, for example, a school committee both negotiated the contract and had independent fiscal authority to insure appropriation.

to fund a collective agreement negotiated by the government employer.¹⁸⁴ Because on the municipal level the role of government as the employer is likely to influence the exercise of its judgment in its role as the appropriating authority, such a legislative body is properly viewed as incapable of performing an impartial role in the collective bargaining process. On the one hand, decision by a legislative body would insure continuous service in the public safety area by providing the necessary finality, presuming that police and fire personnel did not engage in an illegal strike. Additionally, it would guarantee that cities and towns were able to exercise fiscal responsibility, because they would directly control, in the end, the cost of personnel service in this area. On the other hand, however, decision by a legislative body could accomplish such results only at the expense of meaningful collective bargaining rights for public employees. Such a result would obtain since the government employer could through its legislative body exert final control over the conditions of employment, thereby substantially reducing the significance of the employees' collective bargaining rights.

Once the strike has been removed as a coercive method for resolving public sector impasses, and legislative finality has been ruled out as eliminating meaningful collective bargaining rights, impartial third party determination becomes the only logical method for providing finality in police and fire collective bargaining.¹⁸⁵ Binding arbitration insures that police and fire service will continue uninterrupted. It substitutes for the right to strike the power to submit impasses that have proceeded beyond mediation and factfinding to a panel of arbitrators for resolution. Arbitration also guarantees that public employees will have effective bargaining rights and not simply the right to attempt to influence a legislative body that is perceived as closely aligned to the government employer. Effective bargaining rights are guaranteed because each side, having failed to reach voluntary agreement, retains a spokesman on the arbitration panel to present its position to the neutral arbitrator. Further, if used properly, arbitration can survive challenges that it destroys attempts to maintain municipal fiscal responsibility and upsets the traditional political framework. In this context, an informed evaluation of the ten standards set out in section 4,¹⁸⁶ with proper emphasis placed on the municipality's capability to

¹⁸⁴ Under G.L. c. 150E, § 7 this might occur in all areas of public employment within the Commonwealth except police and fire services.

¹⁸⁵ There are three basic forms of compulsory and binding arbitration. Under conventional arbitration, the arbitrator may grant an award that differs from the final offers of both parties. In final offer arbitration, the arbitrator proceeds on an issue-by-issue basis choosing one of the parties' final offer, and is not free to fashion his own award. The third method, employed by the Commonwealth in G.L. c. 150E, § 4, is known as "total-package" final offer arbitration. Here the arbitrator must select the final offer of one party or the other. Such final offer may include a number of issues, but the arbitrator is not free to pick the best offer of one side or the other on each issue.

¹⁸⁶ G.L. c. 150E, § 4.

meet cost¹⁸⁷ and a comparison with the wages and benefits received by other municipal employees,¹⁸⁸ can result in an arbitration award that is not fiscally irresponsible and does not upset the traditional political framework of budget allocation.

The policy arguments against compulsory arbitration are well documented.¹⁸⁹ Third party settlement may encourage the parties to abdicate their responsibility to settle disputes, stifling or making perfunctory any collective bargaining prior to arbitration.¹⁹⁰ Compulsory arbitration also does not produce a voluntary agreement between the parties, a paramount goal of collective bargaining. Rather, it imposes one from outside the bargaining relationship.¹⁹¹ Finally, the arbitration panel makes an important governmental decision when it issues an award, but unlike the government, it is not a politically accountable body.¹⁹²

These arguments are not without merit. Ideally, meaningful collective bargaining, in which each side recognizes the motives and conditions faced by the other, and the condition of public employment, results in voluntary agreement. The parties may be encouraged to reach this voluntary agreement through mediation, even in the final stages of factfinding and prior to the arbitration award, but the emphasis remains on peaceful voluntary agreements that are not imposed from outside the bargaining relationship. Arbitration is third party settlement. Unless it is used only as a last resort it will, as its critics recognize, "chill" good faith bargaining between parties.¹⁹³ Additionally, the arbitration panel's decision is one that, were it not for collective bargaining, would be made by a body of government officials who were politically accountable. Any discussion of the relative merits of binding interest arbitration must recognize at the outset that it is not an ideal solution, or one that can succeed if it is overused.

However, once the state legislature has made a policy judgment that public employees be given collective bargaining rights,¹⁹⁴ any unilateral determination of employment terms by the government employer is inconsistent with those bargaining rights. Collective bargaining implies mutual participation in resolving impasse disputes, not unilateral imposition by one of the parties. The legislative finality alternative presents the possibility that the employer will be able to impose his terms on the employees. The right to strike presents the alternate possibility that public safety personnel will be able to coerce the employer, through community pressure, to return essential ser-

¹⁸⁷ *Id.*, standard (1). See note 28 *supra*.

¹⁸⁸ *Id.*, standard (4). See note 28 *supra*.

¹⁸⁹ See Brief for Appellant at 13-37, and text at notes 66-87.

¹⁹⁰ See, e.g., *Somers Report*, *supra* note 147, at 22-27.

¹⁹¹ Bernstein, *Alternatives to the Strike in Public Sector Labor Relations*, 85 HARV. L. REV. 459 (1971).

¹⁹² See Brief for Appellant at 23-25, and text at notes 77-87.

¹⁹³ See, e.g., *Somers Report*, *supra* note 147, at 22-27.

¹⁹⁴ See notes 142-43 *supra* and accompanying text.

vices by submitting to employee demands. Only an independent third party can produce the desired finality by peacefully resolving impasse disputes while balancing the conflicting needs of the parties. This third party must be given proper standards to guide its decision,¹⁹⁵ and it must consciously represent the public interest.

Arbitration, not as the uniform method of resolving public sector labor disputes which replaces good faith negotiations, but as a mechanism that produces finality when all efforts to encourage voluntary settlement have failed in the critical area of public safety, is the only alternative to withdrawing from these employees the right to influence the terms and conditions of their employment.

To remain a viable alternative, binding arbitration must not have a "chilling" effect on collective bargaining. The General Court, in enacting chapter 150E, chose final offer, "total package" arbitration as the favored method of third party settlement in police and fire collective bargaining impasses. Under this method, the cost of losing an award is potentially severe, for unlike conventional or issue-by-issue arbitration, the arbitrator lacks the power to create an award that differs from either party's offer (conventional arbitration), or to fashion an award by picking between the final offers of the parties on each issue (issue-by-issue). The requirement that the arbitrator choose one entire offer or the other seeks to compel the parties to bargain seriously prior to an impasse that ultimately reaches arbitration, rather than to submit offers to an arbitrator with the assurance that his award will reflect a compromise of the two. Ideally, "total package" arbitration should narrow both the total number of issues in dispute that go to arbitration and the particular position of the parties on each issue.¹⁹⁶

The need for public interest representation is perhaps the most unique characteristic of public employee collective bargaining. Public interest requires uninterrupted service in the area of public safety, which the binding arbitration statute produces. But it also requires service to taxpaying citizens focusing on efficiency, productivity, cost of service and quality of service.¹⁹⁷ The public interest is diffuse, difficult to apply, and not capable of being represented at the bargaining table by the government employer acting in an adversary role. If public interest is inconsistent with the notion that the most powerful employee organization be able to coerce settlements with the employer through the strike,¹⁹⁸ it is also inconsistent with the notion that the employer be able to impose his demands on the employee groups. Both notions run counter to the legislative endorsement of meaningful public employee collective bargaining rights in chapter 150E, and the selection of arbitration as a means of balancing public employer-employee power in the area of public safety personnel.

¹⁹⁵ See, e.g., G.L. c. 150E, § 4.

¹⁹⁶ See *Somers Report*, *supra* note 147, at 22-27.

¹⁹⁷ See Bennett, *The Public Interest in Labor Disputes*, 25 LAB. L.J. 673 (1974).

¹⁹⁸ See notes 168-80 *supra* and accompanying text.

Finally, the arbitration panel must guard the need of the municipality to be fiscally responsible. One essential standard that guides the arbitration panel in making its award is the "ability to pay" of the town or municipality.¹⁹⁹ This standard protects the crucial need of cities and towns to balance their budgets and control the costs and efficiency of employee service. It is central to the effectiveness and acceptability of arbitration. Ideally an arbitration panel would reach the most equitable decision when it developed expertise in the areas of sources of revenue, budget allocations, borrowing capability of municipalities, total labor costs including other labor groups not before it, and possible effects of its award on other employee groups. Where only public safety personnel may use compulsory arbitration, their awards will affect the municipality's ability to pay other employees. This effect, however, is almost impossible to gauge by the arbitration panel unless it has mastered the entire budgetary process of the municipality. This task is unrealistic for the ad hoc arbitration panel. A permanent arbitration board, however, given its own research staff to gather data independent of that offered by either party, might over a period of time obtain the sophistication that one-time, ad hoc panels have been criticised as lacking.²⁰⁰ Therefore, the arbitration procedure can meet the need for sophisticated evaluation of municipal finance, and for realistic determinations of the municipality's ability to "meet costs" by substituting an arbitration board for ad hoc panels, and equipping that board with a research staff to compile meaningful financial data. The criteria for selection to that board would be expertise both in labor relations and municipal finance.

The timeliness of the panel's award is also crucial to the effectiveness of arbitration in protecting the fiscal responsibility of the local government. As the Court in *Town of Arlington* recognized, an arbitration panel is without the power to determine how municipal government must meet financial obligations.²⁰¹ It does not have the power to tax directly, or to allocate resources, or to determine levels of service.²⁰² Yet, because of the influence it exerts on these decisions, it is crucial that negotiations be coordinated with the appropriate municipal fiscal year, so that proposed increases can be taken into account for the coming year. Increases in compensation after a budget has been established mean either deficit spending or reordering of public priorities.²⁰³ Despite statutory time restraints, it often takes a year or

¹⁹⁹ G.L. c. 150E, § 4, standard (1).

²⁰⁰ This is not to say that the limited tenure of ad hoc panels implies political irresponsibility. Such panels are economical in preventing additional state bureaucracy. But where the overriding concern is for sophisticated evaluation of municipal finance, consideration of such a change might be warranted.

²⁰¹ 1976 Mass. Adv. Sh. at 2044, 352 N.E.2d at 919-20.

²⁰² Such power is clearly not granted by the statute creating arbitration panels for police and fire impasse resolution. See G.L. c. 150E, § 4.

²⁰³ The latter can result in money being taken from capital budgets, agencies less able to resist cuts, and from services whose recipients have the least political muscle. See BOK & DUNLOP, LABOR AND THE AMERICAN COMMUNITY 330 (1970). Additional problems can

longer for collective bargaining to pass through the impasse stages of mediation, factfinding, and arbitration.²⁰⁴ Where such impasse proceeds through arbitration, every effort must be made to conform to the time constraints of the new law if municipal fiscal deadlines are to be met.²⁰⁵

An arbitration panel capable of rendering a timely decision when called upon to do so, and one which can properly determine what the municipality can afford to pay, will be able to protect the need of cities and towns to manage their budgets. In addition, since the arbitration process also guarantees that police and fire personnel will have meaningful bargaining rights, and that the community will have uninterrupted service in the area of public safety, it will have balanced the needs of those three interest groups most concerned with safe, efficient, and meaningful public employment.

CONCLUSION

The success of binding arbitration as an impasse procedure for police and fire personnel in the Commonwealth can be measured in many ways.²⁰⁶ Employee groups may bargain to impasse during the new device's initial years in an effort to test the arbitration procedure. This "curiosity factor" must be accounted for in any analysis of the efficacy of the statute.²⁰⁷ Any decision about the long-term future of

result when public officials seek to estimate probable wage increases in establishing their budgets for the ensuing year. Negotiation tends to involve a search for these allowances on the part of employee organizations and a race among organizations to secure their share before allowances for increases have been used up. *Id.*

²⁰⁴ *Somers Report*, *supra* note 147 Appendix, Exhibit 10.

²⁰⁵ It is suggested that formation of an arbitration board would have the added benefit of saving time where conflicting schedules of ad-hoc arbitrators might often create considerable time delay. In addition, since arbitration is preceded by factfinding at which both parties presumably submit the same evidence that ultimately will be submitted to the panel, the factfinder's recommendations should be treated as the basis of the panel's considerations, with the parties having the burden of persuading the panel to revise the factfinder's report.

²⁰⁶ The *Somers Report*, *supra* note 147 appears to be the first quantitative analysis which adopts a framework in which to test the new law's effectiveness. The procedural and operational tests the report employs are discussed in Feuille, *Final Offer Arbitration: Concepts, Developments and Techniques*, PELR 50 (Chicago: International Personnel Management Association, 1975), 56 pp.

²⁰⁷ While the "curiosity factor" is mentioned in the *Somers Report*, *supra* note 147 at 22, it appears to be taken into account only for the first year. This commentary suggests that it be taken into account for at least three years.

Exhibit 9 of the *Somers Report* indicates that in the years 1970-1976 police and fire bargaining units increased from 163 to 380. Many units are negotiating agreements for the first time. Both sides may be initially hesitant to compromise, for political and other reasons. Each time municipal officials are elected, a new bargaining relationship must be established with the union.

Although third party settlement, and the threat thereof, should ideally induce parties to reach voluntary agreement, such settlement does have political advantages in the public sector. It is possible that arbitration decisions will confirm decisions which the parties have made, but which they prefer to have issued as arbitration awards rather

binding arbitration, or its extension to other public employee groups, should therefore be withheld until there has been more experience under the 1973 statute.²⁰⁸

The binding arbitration procedure, to be successful, must prevent illegal strikes in the area of public safety.²⁰⁹ It must be acceptable to the parties involved in more than just a constitutional sense²¹⁰ and must not appear to favor one side or the other.²¹¹

Additionally, it is of critical importance that the procedure not be viewed as a complete substitute for meaningful collective bargaining. The risks inherent in "total package" final offer arbitration should encourage the parties to settle prior to arbitration. The mediation power given to the factfinder as well as the arbitration panel provides flexibility and encourages two-party settlement up to the time a third party award is issued.²¹² Such two-party agreement is far superior to one

than their own agreements, for political reasons. Or, when militants on either side press for arbitration, the process becomes "a quasi-strike weapon in the sense that it is the ultimate impasse step which evidences unrelenting aggressiveness as well as belief in the justice of one's own cause." Lowenberg, *What the Private Sector Can Learn from the Public Sector in Interest Arbitration: The Pennsylvania Experience*, ARBITRATION-1974 PROCEEDING OF THE TWENTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 71 (1974).

²⁰⁸ This position was also taken by the *Interim Report of the Governor's Task Force on Chapter 150E and Impasse Procedures*, Pub. No. 9102-14-35-8-76-CR.

²⁰⁹ *Somers Report supra* note 147 at 13. The finality produced by binding arbitration, by reducing the frustration existing when police and fire personnel had nothing beyond factfinding to compel public employer collective bargaining, should result in no strikes whatsoever if the statute is working effectively. Any incidence of work stoppage would be cause for serious question as to the new law's effectiveness.

²¹⁰ *Id.* at 13. The *Town of Arlington* decision was rendered after the *Somers Report* data had been collected, and should significantly reduce non-compliance cases grounded on constitutional challenges. The terms of the new law provide that the arbitration panel's award may be enforced in the superior court in equity if supported by material and substantive evidence on the whole record. See G.L. c. 150E, § 4. Initial cases seeking judicial review of arbitration panel awards are not indicative of any broad non-compliance movement.

²¹¹ The *Somers Report, supra* note 147 finds that "final offer" outcomes under the statute appear to favor unions at a two-to-one ratio, and concludes that unions have a distinct advantage under the procedure. *Id.* at 14; Appendix, Exhibit 3. Additionally, the report's findings indicated that the *use* of arbitration leads to excessive wage increase, *id.* at 16, Table 1; that the *threat* of arbitration has had an upward influence on negotiated police and fire wage settlements, *id.* at 18, Appendix at Exhibit 7; and that the *existence* of arbitration has a spillover effect which directly benefits non-public safety groups. *Id.* at 19, Table 1 at 16. From this the report concludes that the economic impact of arbitration has been "unduly excessive," *id.* at 19, and characterizes the arbitration process as "seriously flawed," *id.*

There are inherent problems with properly defining what is "unduly excessive," despite one's persuasion. The new law gave more meaningful bargaining rights to public safety personnel. Subsequent awards might be characterized as "catching up." It should come as no surprise that third party settlement produces an award slightly higher than that previously reached by the public employer after non-binding factfinder's reports. The ability to compel arbitration can be viewed as a bargaining chip which compels more realistic mutual negotiations that will produce a contract short of arbitration.

²¹² Rehmus, *Is a "Final Offer" Ever Final? Lessons from Interest Arbitration in the Public Sector*, ARBITRATION-1974 PROCEEDING OF THE TWENTY-SEVENTH ANNUAL MEETING, NA.

imposed by a third party no matter at what point in the negotiation it occurs.²¹³

The key test in judging the law's ability to generate meaningful collective bargaining will be whether or not government employers and public safety employee groups, having gained additional expertise in bargaining under the new law, insist on returning to arbitration in successive years on a regular basis. Such a finding, beyond the initial experimentation, would indicate that the law was not having a positive effect on the collective bargaining it was meant to foster, and that the parties, having once submitted an impasse to third party settlement, were in danger of abdicating their responsibility to bargain in good faith.

Upon balancing the needs of public police and fire personnel for meaningful bargaining rights, of the community for uninterrupted police and fire service, and of municipal and town governments for creating fiscally responsible budgets, it appears that only compulsory arbitration preserves essential bargaining rights while protecting the public from harmful economic coercion. However, arbitration in the public sector will not succeed unless neutral arbitrators, with the ability to determine what cities and towns can practically afford to pay in wage settlements, are capable of making decisions that are timely in relation to the funding of the municipal budget, and that do not inordinately distort the political process surrounding municipal budgetmaking. Arbitration will also fail insofar as it encourages constant reliance thereon rather than responsible two-party negotiation. Because additional time is needed to measure the effect of the new law beyond initial experimentation, the extension of chapter 150E for three more years, without major modifications, is warranted.²¹⁴

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TIONAL ACADEMY OF ARBITRATORS at 78. For alternative techniques along these lines, see Kagel, *Combining Mediation and Arbitration*, MONTHLY LAB. REV. (Special Section: Exploring Alternatives to the Strike) (September, 1973). Under Kagel's med—arb, the mediator (perhaps more familiar with the parties' positions and concerns on each issue than the arbitrator), becomes the arbitrator of the unresolved issues. The mediation process is conducted in a more informal way than the arbitral process, and may promote better communication between the parties. Such a procedure also places more incentive on the parties to come to their own agreements.

²¹³ *Id.*

²¹⁴ Following the close of the *Survey* year, the binding arbitration provisions of G.L. c. 150E, §4, were extended by the General Court for an additional two year period.