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Chapter 16: Labor Law

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CHAPTER 16

Labor Law

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§ 16.1. Commission Post Election Representation Case Procedures. During the *Survey* year the Supreme Judicial Court and the Appeals Court each issued significant decisions involving Labor Relations Commission (Commission) representation case post election procedures.

In *Labor Relations Commission v. Clover Leaf Corporation*[1] the Supreme Judicial Court reversed a three-judge panel of the superior court invoked under the Appellate Procedures governing chapter 150A of the General Laws and affirmed the action of the Commission. The Supreme Judicial Court held that an employer could not challenge the validity of the Commission's certification of the exclusive bargaining agent by refusing to bargain and precipitating an unfair labor practice where the issue could have been, but was not, raised as an objection to the conduct of the election.[2] Where an employee organization receives less than a majority of votes of the eligible voters, albeit more than a majority of the valid votes cast, the employer must file a timely objection to the conduct of the election in order to challenge the certification.

On September 17, 1970, the Chicopee, Holyoke, Westfield Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees International Union Local 116, AFL-CIO (Union) filed a petition for representation with the

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§16.1. [1] 1977 Mass. Adv. Sh. 373, 360 N.E.2d 627.

[2] *Id.* at 377-78, 360 N.E.2d at 630.

Commission, pursuant to section 5(c) of chapter 150A of the General Laws.[3] The Commission, following an investigation, found that a question concerning representation existed and ordered that an election be conducted.[4] In this election seven votes were cast: five for the Union, zero for no union, one protested and one blank or void.[5] At the time of the election there were 21 eligible voters in the unit.[6] No objections to the conduct of the election were filed within the 5-day period set forth in the rules and regulations of the Commission.[7] Consequently, on March 30, 1971 the Commission certified the Union as the collective bargaining representative for the employees in the unit.[8]

On April 2, 1971 and again on April 14, 1971 the Union requested bargaining.[9] The employer failed to respond to these requests and shortly thereafter the Union filed a charge of unfair labor practice with the Commission alleging that the employer was refusing to bargain.[10] The Commission investigated the charge and on November 21, 1972 issued its own complaint of unfair labor practice, and ordered a hearing.[11] Following this hearing, on January 18, 1973, the Commission issued a decision finding that Clover Leaf had refused to bargain and ordered it to bargain on demand.[12]

Clover Leaf appealed the Commission decision to the superior court[13]

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[3] *Id.* at 374, 360 N.E.2d at 628.

[4] *Id.* at 374, 360 N.E.2d at 628-29.

[5] *Id.* at 374 n.2, 360 N.E.2d at 629 n.2.

[6] *Id.*

[7] Rules and Regulations relating to the administration of the Labor Relations Law; Chapter 150A, Art. II, § 9:

> Where the Commission determines that an election by secret ballot shall be held, it shall direct that such election be conducted upon such terms and such matter as it may specify. Within five days after the tabulation of the ballots any party to the proceeding may file with the Commission any objection relative to the election, provided, however, that the objecting party has not waived its right to object. If it appears to the Commission that any such objection raises a substantial material issue with respect to the conduct of the election, it shall issue and cause to be served upon the party a notice of hearing on said objection before the Commission or member thereof. The Commission shall, after the close of such hearing, proceed as set forth in section 8 of this Article. If no objection raising a substantial and material issue with respect to the conduct of the election is filed, the Commission shall proceed to certify to the parties to the proceeding the name or names of the representatives that have been designated or selected, or to make such other disposition of the matter.

[8] 1977 Mass. Adv. Sh. at 374, 360 N.E.2d at 629.

[9] *Id.* at 374-75, 360 N.E.2d at 629.

[10] *Id.*

[11] *Id.* at 375, 360 N.E.2d at 629.

[12] *Id.*

[13] Clover Leaf appealed the Commission decision pursuant to G.L. c. 150A, § 6(f) which provides in part:

and the Commission cross-petitioned for enforcement.[14] The superior court, three-judge panel, reversed the Commission. The superior court held that whereas less than a majority of the employees eligible to vote might select the bargaining representative, if a majority of the votes cast were for the Union, the Commission had an obligation to determine "whether the election was actually representative."[15] Since no such finding was made by the Commission the court remanded this question to the Commission for determination.

Rather than accept the remand, the Commission appealed the matter to the Appeals Court.[16] On its own motion the Supreme Judicial Court removed the matter.[17] Since the Commission had refused the remand the Court initially dealt with the issue of ripeness.[18]

The Court held the case ripe for judicial review relying on two prior Supreme Judicial Court cases reviewing Labor Relations Commission decisions, where the issue before the Court had involved interpretation of law rather than fact.[19] In so doing the Court in effect accepted the Commission's characterization of the issues on review. The Commission characterized the issue as being whether an employer could challenge the conduct of an election by refusing to bargain or whether it was required to file objections to the conduct of the election in order to raise such issues.[20] The effect of the Court's accepting this characterization was to preclude the necessity of taking evidence on the underlying representative character of the election. The Commission had accepted the premise set forth in the superior court decision that it had an obligation to determine the representative character of the election results prior to issuing a certificate of result. The Commission argued, however, that the burden of going forward on this question of fact lay with the challenging party and must be raised by the filing of objections. The Commission then argued, that where the notice posting and actual conduct of the election revealed no deficiencies there was a presumption of validity,

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Any person aggrieved by a final order of the Commission granting or denying in whole or in part the relief sought may obtain a review of such order in the superior court for the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such person resides or transacts business, by filing in such court a written petition praying that the order of the Commission be modified or set aside.

[14] The Commission cross-petitioned for enforcement pursuant to G.L. c. 150A, § 6(e).

[15] 1977 Mass. Adv. Sh. at 375-76, 360 N.E.2d at 629.

[16] *Id.* at 373, 360 N.E.2d at 628.

[17] *Id.*

[18] *Id.* at 376, 360 N.E.2d at 629.

[19] Gallagher v. Metropolitan Dist. Comm'n., 1977 Mass. Adv. Sh. 32, 359 N.E.2d 36; Massachusetts Probation Ass'n v. Commissioner of Administration, 1976 Mass. Adv. Sh. 1814, 352 N.E.2d 684.

[20] 1977 Mass. Adv. Sh. at 375-76, 360 N.E.2d at 629.

justifying the issuance of a certificate.[21] Since no objections had been filed the certificate was valid and could not later be challenged in an unfair labor practice proceeding. Thus the sole issue on review, the Commission argued, should be the issue of whether the employer had in fact refused to bargain. On this issue there was no dispute. With this characterization the Court agreed and held

> [U]nless extraordinary circumstances appear which under statute excuse the failure to file timely objections relative to the certification of the results of an election a party may not subsequently raise such objection in a collateral proceeding.[22]

Since the Court found no reason to excuse Clover Leaf it concluded that Clover Leaf was foreclosed from raising the issue in an unfair labor posture after failing to object to the conduct of an election within five days.[23]

It must be noted that neither of these arguments was raised before the Commission where the issue had been whether it was necessary to obtain a majority of votes of all eligible voters.[24] On this issue both the superior court and the Commission had rejected the employer's contentions.[25]

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[21] The election was adequately publicized by the posting of official notices in conspicuous places on company premises to inform eligible voters of the balloting details (i.e., purpose of election, location of polls, time of voting, eligibility rules) prior to the date of the election. Further, it is patently clear that the Commission cannot force people to vote. Where, as here, the record before the lower court indicated that the representation election conducted by the Commission was fair and regular in every respect, and in the absence of any timely objection to the election by either party, it would be inappropriate to take evidence on the subjective motivation of the nonparticipating eligible voters. . . . As long as no objections were filed with respect to material issues of fairness, proper advertisement, fraud, coercion or intimidation, every election must be deemed "actually representative and will be so certified."

Commission Brief at 36-38.

[22] 1977 Mass. Adv. Sh. at 377-78, 360 N.E.2d at 630. *See also* Clover Leaf Corporation d/b/a The Howard Johnson Motor Lodge, Commission Slip Opinion, UP-2166 (1973) at 56.

[23] 1977 Mass. Adv. Sh. at 379, 360 N.E.2d at 630.

[24] The issues before the Supreme Judicial Court were: (1) Whether an employer could challenge the conduct of an election by refusing to bargain, without previously filing objections to the conduct of the election; (2) whether there is a presumption that the tally is sufficient to find majority status where notice and posting have been proper; (3) in light of this presumption does the burden of proof shift to the employer.

[25] Decision of Superior Court, Suffolk County Equity Nos. 1667, 1838 issued January 30, 1974; J. J. Griffin, Moriarty and Smith.

> Although a literal reading of the language of the statute (G.L.c. 150A, Section 5 (a)) would seem to require a vote by a majority of all of the members of a bargaining unit in order to elect a bargaining representative, we are persuaded that the decisions have stood unchallenged for approximately twenty years. Although Section

There is no doubt that Clover Leaf failed to follow the prescribed route for challenging the issuance of a certification of the results of an election. However, it is equally clear that had Clover Leaf followed the prescribed route and subsequently wished to appeal a Commission decision it would then have had to refuse to bargain. One can argue that by simply refusing to bargain Clover Leaf precluded the possibility that the Commission might have found in its favor, but this does not respond to the fact that the Commission could have, and to some extent did, address this issue in the unfair labor practice decision.[26] While the Commission argued before the Supreme Judicial Court what is in essence a theory of failure to exhaust administrative remedies, the decision by the Commission makes no mention of this defect. Rather, the Commission in its decision focused upon the representative character of the election.[27] The Commission cited several National Labor Relations Board cases in which less than a majority of the eligible voters voted but a majority of those voting voted for one union.[28] In each of these cases the Board had certified the union which received the greatest number of votes. The Commission did not explicitly find that the Clover Leaf election results were representative but the decision clearly implies this finding.[29] However once before the Court, the Commission altered its

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5(a) was enacted before any of the above cited decisions were handed down, that subsection was amended in 1951, and the legislature made no attempt to alter the language in question or to clarify the point.

In our view, the proper rule is that laid down by the Circuit Court of Appeals for the District of Columbia in the *Central Dispensary and Emergency Hospital* Case and by the Circuit Court for the Fourth Circuit in the *Standard Line and Stone* Case. A bargaining agent may be selected or designated by a majority of those employees who vote in an election, even though the number of employees voting in the election is less than a majority of those entitled to vote; *provided however* that the election was *"actually representative."* The question as to whether an election was *"actually representative"* is a question of fact which must be determined by the Commission in the first instance; and that determination must be made on the basis of substantial evidence.

[26] Clover Leaf Corporation d/b/a The Howard Johnson Motor Lodge, Commission Slip Opinion, UP-2166 (1973), at 4.

[27] *Id.*

[28] North Electric Co. and Int'l Union, Allied Ind. vs. Workers of America, AFL-CIO, 165 N.L.R.B. 942, 65 L.R.R.M. 1379 (1967); Stiefel Constr. Corp. and United Steelworkers of America, CIO, 65 N.L.R.B. 925, 17 L.R.R.M. 251 (1946); East Ohio Gas Co. and Natural Gas Workers Union, Local 555, SEIU, AFL-CIO, 140 N.L.R.B. 1269, 52 L.R.R.M. 1220, 1222 (1963).

[29] The Commission issued the following order: Upon the basis of the foregoing findings of fact and conclusions of law, it is *ORDERED* that the Employer shall:

I. Cease and desist from refusing to bargain collectively with the Union, as the exclusive bargaining representative of certain employees of *Clover Leaf Corporation d/b/a/ The Howard Johnson Motor Lodge.*

II. Take the following action which the Commission finds will effectuate the policies of the State Labor Relations Law:

posture and pressed an exhaustion of administrative remedies argument. The Supreme Judicial Court for its part does not address the issue of whether the Commission waived the procedural defect by addressing the merits of the case. Although the Court initially set out to review the Commission decision, it ultimately adopted the Commission's theory[30] which was argued on appeal and never mentioned the underlying Commission decision.

The Court in accepting the Commission's argument took note of the delaying effect of permitting a party to litigate these issues in the context of unfair labor practice as opposed to an objection to the conduct of an election.[31] The Court found that the delay would be contrary to the essential purposes of chapter 150A; "prompt and certain certification of the election results and orderly commencement of collective bargaining."[32] What is perhaps not apparent in the Court decision is that this distinction between filing objections or refusing to bargain was only responsible for six weeks out of a total of six years delay in the matter *sub judice*.[33] Moreover, if prompt resolution is to be considered of paramount importance then one may legitimately inquire as to the need for requiring that unit determinations be appealed by refusing to bargain and subsequently precipitating a *pro forma* unfair labor practice.[34]

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(1) Immediately, upon request, bargain in good faith with the Union;

(2) Post immediately in a conspicuous place where the above-mentioned employees customarily assemble, and leave posted for a period of thirty consecutive days from the date of posting, a copy of this order in its entirety, together with a statement attached thereto that:

1. The Employer will not engage in the conduct from which it is ordered to cease and desist in Paragraph I of this Order;

2. The Employer, upon request, shall bargain in good faith with the Union.

III. Notify the Massachusetts Labor Relations Commission at its office in the Leverett Saltonstall State Office Building, 100 Cambridge Street, Boston, Massachusetts, 02202, within twenty days of the receipt of this Decision and Order of the steps the Employer has taken to comply with this Order.

[30] 1977 Mass. Adv. Sh. at 377, 360 N.E.2d at 630.

[31] *Id.* at 378, 360 N.E.2d at 630 (citing Article II § 9, *supra* note 7).

[32] *Id.*

[33] The Court stated:

It is difficult to imagine a case less conducive to the effectuation of the policies and purposes of the labor relations statutes than the one now before us, in which collective bargaining has been delayed for six years after the election and certification of the bargaining representative.

Id. at 378, 360 N.E.2d at 630. The Cloverleaf election was held on March 4, 1971, the charge of refusal to bargain was filed on April 23, 1971, a complaint was issued by the Commission against Cloverleaf on November 21, 1972 and a formal hearing on the complaint was held on December 19, 1972.

[34] *See* Jordan Marsh Co. v. Labor Relations Comm'n, 312 Mass. 597, 45 N.E.2d 925 (1942).

The method of processing objections to the conduct of an election, and the rules and regulations of the Commission, make it clear that objections are part of the representation case. Article 2, section 9 of the Rules and Regulations relating to the Administration of the Labor Relations Law provides a rule for the filing of objections within the same section which regulates the actual direction of an election. Section 9 provides that

> If it appears to the Commission that any such objection raises a substantial material issue with respect to the conduct of the election, it shall issue and cause to be served upon the parties a notice of hearing on such objection before the Commission or a member thereof. The Commission shall after the close of such hearing, proceed as set forth in Section 8 of this article. If no objection raising a substantial material issue with respect to the conduct of the election is filed, the Commission shall proceed to certify to the parties to the proceeding the name or names of the representatives that have been designated or selected, or to make other disposition of the matter.

Article 8 clearly refers to this as all being part of the "investigation."[35] Since the non-reviewability of representation cases rests, in part, upon the predicate that such hearings are investigatory and non-adjudicatory in nature, it would seem that a determination of the objections would not be reviewable.[36] In keeping with the usual practice it would seem then, that a refusal to bargain would be necessary in order to obtain a review.[37] If such is the case there would seem to be little basis for assuming that objections will be more expeditiously resolved than unfair labor practice proceedings.

Clover Leaf presents an added consideration. Many objections to the conduct of an election are similar to and result in the filing of unfair labor practices. Thus threats or promises by an employer or a union made in anticipation of an election are both unfair labor practices and valid objections to the conduct of the election.[38] Often objections in unfair labor practice charges are consolidated for trial purposes, although the burden of proof and standard applied by the Commission

[35] Article VIII, Administration of Labor Relations.

[36] Sullivan v. Labor Relations Comm'n, 1977 Mass. App. Ct. Adv. Sh. 904, 364 N.E.2d 1099.

[37] *See* Sullivan v. Labor Relations Comm'n, 1977 Mass. App. Ct. Adv. Sh. 904, 364 N.E.2d 1099, where the Appeals Court denied review of objections to the conduct of the election filed by the losing union and reaffirmed its commitment to the principles enunciated in Jordan Marsh v. Labor Relations Comm'n, 312 Mass. 597, 45 N.E.2d 925 (1942).

[38] Medo Photo Supply Corp. v. NLRB, 221 U.S. 678 (1944); Dal-tex Optical Co., 137 N.L.R.B. 1782, 50 L.R.R.M. 1489 (1962); Bernel Foam Products Co., 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964).

may be different.[39] However, the *Clover Leaf* unfair labor practice is not a pre-election conduct unfair labor practice. Rather, it is an objection that goes to the nature of the election as opposed to the parties' conduct. Thus it is much more akin to a refusal to bargain which challenges the unit determination.[40] In essence it challenges the Commission's conduct, not Union conduct. This case then, raises anew, the continued appropriateness of applying the *Jordan Marsh*[41] standard of non-reviewability of representation cases.

A second case, one decided by the Appeals Court, also involved post-election certification procedures. In *Sullivan v. Labor Relations Commission*[42] the losing union, Massachusetts State Employees Association (MSEA), in the state employee elections in Units 1, 2, 6 and 8 sought to preclude the Labor Relations Commission from certifying an employee organization known as the "Alliance" consisting of various locals of the American Federation of State, County and Municipal Employees and Service Employees International Union, as the exclusive bargaining representative, for failing to comply with sections 13 and 14 of chapter 150E.[43] Sections 13 and 14 require an initial filing by a union

[39] Rules and Regulations of the National Labor Relations Board § 102.33(a)(2); Freeport Marble and Tile Co., 153 N.L.R.B. 810, 59 L.R.R.M. 1561 (1965), *enf. in part* 367 F.2d 371 (1st Cir. 1966).

[40] Jordan Marsh Co. v. Labor Relations Comm'n, 312 Mass. 597, 45 N.E.2d 925 (1942).

[41] *Id.*

[42] Sullivan v. Labor Relations Comm'n, 1977 Mass. App. Ct. Adv. Sh. 904, 364 N.E.2d 1099.

[43] G.L. c. 150E, § 13 provides:

> The commission shall maintain a list of employee organizations. To be recognized as such and to be included in the list an organization shall file with the commission a statement of its name, the name and address of its secretary or other officer to whom notices may be sent, the date of its organization, and its affiliations, if any, with other organizations. Every employee organization shall notify the commission promptly of any change of name or of the name and address of its secretary or other officer to whom notices may be sent, or of its affilliations.
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> The commission shall indicate on the list which employee organizations are exclusive representatives of appropriate bargaining units, the effective dates of their certification, and the effective date and expiration date of any agreement reached between the public employer and the exclusive representative. Copies of such list shall be made available to interested parties upon request.
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> In the event of failure of compliance with this section, the commission shall compel such compliance by appropriate order, said order to be enforceable in the same manner as other orders of the commission under this chapter.

Section 14 provides:

> No person or association of persons shall operate or maintain an employee organization under this chapter unless and until there has been filed with the commission a written statement signed by the president and secretary of such employee organization setting forth the names and addresses of all the officers of such organization, the aims and objectives of such organization, the scale of dues, initiation fees, fines

and a subsequent annual statement updating the initial filing. These filings contain information about union officers, by-laws, and finances.

Prior to the election the constituent unions of the Alliance, SEIU and AFSCME locals, each filed the requisite forms for themselves with the Commission. However, no independent forms were filed on behalf of the Alliance. The Alliance was, as its name implies, an alliance of these two unions for the purposes of seeking exclusive collective bargaining representation rights for various state employee bargaining units.

After losing the election MSEA filed a motion with the Commission requesting that the certification not issue and that the election be set aside, alleging that the Alliance was not an employee organization.[44] The Commission denied the motion. However, it advised the parties that it would not issue the certification until the Alliance had complied with sections 13 and 14.[45] MSEA appealed to the superior court pursuant to General Laws chapter 30A, section 14.[46] The superior court dismissed the MSEA petition on the Commission's motion. MSEA then appealed to the Appeals Court. As a preliminary matter the Appeals Court held that this was an issue involving certification and therefore not a final adjudicatory decision within the meaning of 30A section 14.[47] In this the court followed *Jordan Marsh.* In *Jordan Marsh* the Court had initially determined that unit determination and representation case issues would not be reviewable. The Court had held there, that review of unit determination cases could only be obtained by a refusal to bargain and consequent finding of unfair labor practice.[48]

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and assessments to be charged to the members, and the annual salaries to be paid to the officers.

Every employee organization shall keep an adequate record of its financial transactions and shall make annually available to its members and to nonmember employees who are required to pay a service fee under section twelve of this act, within sixty days after the end of its fiscal year, a detailed written financial report in the form of a balance sheet and operating statement. Such report shall indicate the total of receipts of any kind and the sources of such receipts, and disbursements made by it during its last fiscal year. A copy of such report shall be filed with the commission.

In the event of failure of compliance with this section, the commission shall compel such compliance by appropriate order, said order to be enforceable in the same manner as other orders of the commission under this chapter.

[44] 1977 Mass. App. Ct. Adv. Sh. 904, 905, 364 N.E.2d 1099, 1100, noting that the several local unions which comprise the Alliance had complied with the reporting requirements of sections 13 and 14. *Id.* at n.3.

[45] *Id.* at 905-06, 364 N.E.2d at 1100.

[46] G.L. c. 30A, § 14 provides that: "Any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding . . . shall be entitled to a judicial review. . . . "

[47] 1977 Mass. App. Ct. Adv. Sh. at 907, 364 N.E.2d at 1100-01.

[48] Jordan Marsh Co. v. Labor Relations Comm'n, 312 Mass. 597, 602, 45 N.E.2d 925, 927-28 (1947).

The decision in *Sullivan* raises problems since it effectively foreclosed the only party who was aggrieved from obtaining review. The MSEA was precluded from obtaining review because prior case law had determined that the case must be framed as a refusal to bargain. The prevailing union, the Alliance, was not likely to challenge its own certification and the employer had little interest in having the matter reviewed. Despite what might appear as a foreclosure of review the Appeals Court stated that the actual Commission determination had been proper.[49] The court held that section 13 and 14 do not require denial of certification, but that the Commission may use its broad statutory authority to condition the grant of certification upon the filing of these forms by the employee organization.[50]

The *Clover Leaf* and *Sullivan* cases would seem to leave the practitioner in somewhat of a quandary since *Sullivan* precludes direct review of certification issues even when the denial effectively precludes any review at all, whereas *Clover Leaf* holds that, initially, all internal procedures respecting a certification case must be exhausted. If *Clover Leaf* is read as permitting review of a decision on an objection to the conduct of an election then it is inconsistent with *Sullivan.* It may, however, be argued that *Clover Leaf* only requires that issues be raised in a timely fashion, a legal concept of general applicability. If this latter reading is correct then it would appear that the employer, Clover Leaf, could have obtained review of the certification by first objecting to the conduct of the election and then refusing to bargain, thus precipitating a finding of unfair labor practice. This would be consistent with the prevailing practice in unit determinations but would hardly expedite case handling.

The authority of the Labor Relations Commission in representation cases, more particularly the authority of the Commission to establish statewide units under G.L. c. 150E, was further affirmed in another case decided by the Supreme Judicial Court during the *Survey* year. Unfortunately, in the process the Supreme Judicial Court may have undermined or at least further confused the *Jordan Marsh* non-appealability of representation cases doctrine.

In *Gallagher v. Metropolitan District Commission* (MDC),[51] the Court affirmed a superior court allowance of the defendant's motion to dismiss and held that MDC employees were not employees of a "district" within the meaning of section 1 of chapter 150E of the General Laws.[52]

Prior to the passage of chapter 150E[53] the employees of the MDC had,

[49] 1977 Mass. App. Ct. Adv. Sh. at 907-08, 364 N.E.2d at 1101.

[50] *Id.* at 909, 364 N.E.2d at 1101.

[51] 1977 Mass. Adv. Sh. 32, 359 N.E.2d 36.

[52] *Id.* at 37-38, 359 N.E.2d at 39.

[53] G.L. c. 150E, effective July 1, 1974 (superceding G.L. c. 149, § 178F) established a

through their certified bargaining representative, Local 1242, bargained directly with the MDC. Pursuant to chapter 149 of the General Laws, section 178(f) through (n) inclusive, the MDC and Local 1242 had entered into a collective bargaining agreement.[54] Following the passage of chapter 150E the Labor Relations Commission decided to establish the bargaining unit structure for state employees by rule-making.[55] The Commission adopted a 10-unit structure of statewide units by occupational groups.[56] Its structure also issued a rule which provided that except in extraordinary circumstances it would not entertain petitions for representations which did not seek to represent employees in units which substantially complied with those set forth in the rules.[57] Subsequent to the promulgation of these rules the Alliance, AFSCME/SEIU filed a petition seeking representation in Units 2 and 3. Each of these units included employees of the MDC who had been in the unit repre-

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uniform collective bargaining scheme for all public employees and expanded the scope of collective bargaining to include "wages, hours, standards of productivity and performance and any other terms and conditions of employment."

[54] 1977 Mass. Adv. Sh. at 34, 359 N.E.2d at 37.

[55] Labor Relations Commission: Notice of Determination of State Employee Bargaining Units, 1 M.L.C. 1318 (1975), *See* Rules of MLRC, 402 CMR 14.07.

[56] The categorization of state employees into the 10 units represented a drastic change from the former situation where state employees were separated into over 200 bargaining units represented by numerous labor organizations.

[57] Rules of MLRC, 402 CMR 14.07: Employees of Commonwealth provides in part:

(1) With respect to employees of the Commonwealth, excepting any employees of community and state colleges and universities, no petition filed under the provisions of Section 4 of the Law shall be entertained, except in extraordinary circumstances, where the petition seeks certification in a bargaining unit not in substantial accordance with the provisions of this section. Bargaining units shall be established on a state wide basis, with one unit for each of the following occupational groups, excluding in each case all managerial and confidential employees as so defined in Section 1 of the Law:

NONPROFESSIONAL EMPLOYEES:

UNIT 1: *Administrative and Clerical*

including all nonprofessional employees whose work involves the keeping or examination of records and accounts, or general office work;

UNIT 2: *Service, Maintenance and Institutional*

excluding building trades and crafts and institution security;

UNIT 3: *Building Trades and Crafts;*

UNIT 4: *Institutional Security,*

including correctional officers and other employees whose primary function is the protection of the property of the employer, protection of persons on the employer's premises, and enforcement of rules and regulations of the employer against other employees;

UNIT 5: *Law Enforcement,*

including all employees with power to arrest, whose work involves primarily the enforcement of statutes, ordinances, and regulations, and the preservation of public order.

sented by Local 1242.[58] On March 31, 1975, Local 1242 demanded bargaining with the Commissioner of the Metropolitan District Commission.[59] The Commissioner of the MDC refused, relying upon G.L. c. 150E[60] and the regulations of the Labor Relations Commission. Local 1242 then brought suit seeking to compel the MDC to negotiate.[61] On April 24, 1975 the Labor Relations Commission notified the parties that a conference would be held on May 14 and 19, 1975 regarding the representation questions raised in Units 2 and 3. Thereupon, Local 1242 brought suit seeking to enjoin the Labor Relations Commission and the Commissioner of the MDC from interfering with its representative status. The suit sought to have the superior court determine the effect of the subsequently enacted G.L. c. 150E on the pre-existing unit structure as well as determining whether MDC employees were employees of a separate "district" or of the Commonwealth as defined by G.L. c. 150E, section 1.[62] Local 1242's position was that the MDC was a district within the meaning of G.L. c. 150E, section 1 and that the employees could not properly be included within the state employee's bargaining units.[63] The two suits were consolidated for trial in the superior court where they were both dismissed on defendant's motion. Local 1242 then appealed to the Appeals Court. The Supreme Judicial Court removed the matter.[64]

The Supreme Judicial Court, concluding that the issue of employer is a question of law, took note of a recent Appeals Court decision which had held that the MDC despite its name was not a district but an agency of the Commonwealth.[65] The Court after reviewing the fiscal structure of the MDC confirmed this "legal" determination of the issue and affirmed the Commission.[66]

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[58] 1977 Mass. Adv. Sh. at 33, 359 N.E.2d at 37.

[59] *Id.* at 36, 359 N.E.2d at 39.

[60] G.L. c. 150E, § 1, altered the definition of the Commonwealth as employer by designating the Commissioner of Administration and Finance as the sole authorized representative of the Commonwealth for collective bargaining purposes.

[61] 1977 Mass. Adv. Sh. at 32, 359 N.E.2d at 37. Local 1242 had for several years been the certified bargaining representative for 1800 MDC employees. *Id.*

[62] 1977 Mass. Adv. Sh. at 33, 359 N.E.2d at 37. The representation issue turned upon whether MDC employees were state employees or whether they were employed by a "district." G.L. c. 150E, § 1.

[63] *Id.* at 38, 359 N.E.2d at 39.

[64] *Id.* at 32, 359 N.E.2d at 37.

[65] Mitchell v. Metropolitan Dist. Comm'n, 1976 Mass. App. Ct. Adv. Sh. 878, 351 N.E.2d 536.

[66] 1977 Mass. Adv. Sh. at 41, 359 N.E.2d at 41. In response to the MDC and the Commission's argument that Local 1242 had failed to exhaust administrative remedies and therefore that the Court should not reach the merits of the dispute, the Court stated:

> The question whether MDC employees are State employees for the purposes of G.L. c. 150E is a pure question of law the resolution of which is not uniquely committed

The Court, apparently realizing that it was coming very close to making factual determinations in the first instance, went on to emphasize that true factual determinations were to be left to the agency.[67] The Court may well have trod this fine line in an effort to avoid unnecessary litigation, although recognizing that it was undermining the doctrine of exhaustion of administrative remedies. The *Gallagher* case treatment of the exhaustion doctrine may then be contrasted with the treatment of the same issue by the courts in *Clover Leaf* and *Sullivan.*

Local 1242 could have chosen to join in an election in Units 2 and 3 and had it won such an election precluded the necessity of litigation. This would support the rationale for the exhaustion doctrine since it would avoid litigating issues which might well become moot. The *Gallagher* case should also be contrasted with the *Clover Leaf* and *Sullivan* cases in its treatment of appeals of representation case matters. The issues in *Gallagher* clearly arise out of a representation case. Local 1242's petition for injunctive relief was in effect an appeal of the Commission's decision to abrogate Local 1242's certification by accepting petitions for its representation in units which included parts of Local 1242's MDC bargaining unit. Under *Jordan Marsh,* it would seem clear that Local 1242 could not challenge the unit determination directly. Under *Sullivan* it would seem that if Local 1242 participated in the election and lost, it would be unable to appeal. Nor would filing objections to the conduct of the election obviate the non-appealability of representation cases. Yet despite the apparent non-appealability of this Commission decision Local 1242 was able to appeal the Commission's decision and get the Supreme Judicial Court to review the case on its merits.

The *Gallagher, Clover Leaf* and *Sullivan* cases would seem to present a panorama of inconsistency on the part of the courts when dealing with representation case matters and their appealability. What emerges is the following situation: if the Commission has decided a representation case on its merits the Court will bypass procedural infirmities and review the Commission on the merits;[68] if the Commission has dismissed on procedural grounds without reaching the merits the Court will seek to affirm on these procedural grounds;[69] if the Court is unable to reach a decision on these procedural grounds it will try to both avoid a remand and affirm the Commission by looking at the merits.[70] While this repre-

to resolution through administrative fact-finding.

Id. The Court gave as reasons for its reaching the merits the fact that administrative proceedings would only further lengthen and complicate the matter. *Id.*

[67] *Id.*

[68] See text at notes 51-67 *supra,* discussing *Gallagher.*

[69] See text at notes 1-41 *supra,* discussing *Clover Leaf.*

[70] See text at notes 42-50 *supra,* discussing *Sullivan.*

sents a nice position for the Commission it hardly assists practitioners in seeking review of representation case matters.

§16.2. Commission Decisions of Procedures. In *Town of Andover,*[1] the Commission affirmed on appeal a Hearing Officer's decision in which the appellant sought to reverse the decision on the premise that the Hearing Officer had not decided the case in a timely fashion. In *Andover* approximately eleven months had passed between the date for submission of briefs and the issuance of the Hearing Officer's decision. Relying on the language of section 11 of chapter 150E of the General Laws, and Article III, section 28 of the Rules and Regulations of the Labor Relations Commission, the appellant argued that the Hearing Officer must decide the case immediately at the time of submission of the briefs.[2] The Commission's response was that such a conclusion would preclude the thoughtful deliberation necessary in making the decision.[3] It might be added that it would also have limited the discretion of the Hearing Officers, most of whom now routinely issue fairly lengthy opinions with their decision.

In *City of Cambridge and Cambridge Hospital House Officers Association,*[4] the Commission interpreted its own general rules and regulations on motions as being sufficiently broad to grant a right to employ summary judgment procedures. The Commission relied on the precedents of the federal courts as well as the NLRB.[5] In *Cambridge City Hospital* the representation case, out of which the unfair labor practice case arose, had been fully litigated. Thus in the unfair labor practice case, which involved an employer's refusal to bargain,[6] the Commission determined that no triable issue of fact remained.[7] The summary judgment in the *Cambridge City Hospital* case is also supported by the express language of section 11 of chapter 10E, which provides:

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§ 16.2. [1] 4 M.L.C. 1086 (1977).

[2] G.L. c. 150E, § 11. At the conclusion of the hearing, the member or agent shall determine whether a practice prohibited under section 10 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 10 has not been committed, he shall iseue an order dismissing the complaint.

[3] 4 M.L.C. at 1091.

[4] 4 M.L.C. 1044 (1977).

[5] *See* 4 M.L.C. at 1050 citing Hamilton Electronics Co. v. NLRB, 475 F.2d 1400, 83 L.R.R.M. 2543 (4th Cir. 1973); Southern Industrial Laundry v. NLRB, 431 F.2d 417, 75 L.R.R.M. 2225 (5th Cir. 1970).

[6] 4 M.L.C. at 1046. The focus of the litigation in the representation case was the issue of whether interns, residents, and fellows of the Cambridge Hospital were employees within the meaning of G.L. c. 150E, § 1. The Commission had examined considerable evidence and had made detailed findings of fact in City of Cambridge, 2 M.L.C. 1450 (1976).

[7] 4 M.L.C. at 1046.

> whenever it is alleged that a party has refused to bargain collectively in good faith with the exclusive representative as required in Section 10 and that such refusal is based upon a dispute involving the appropriateness of a bargaining unit, the Commission shall, except for good cause shown, issue an interim order requiring the parties to bargain pending its determination of the dispute. Where such interim order is issued the Commission shall hold a hearing on the charge in the summary manner and shall speedily determine the issues raised and shall make an appropriate decision.[8]

Although section 11 does not provide for a summary judgment but merely for a summary hearing, such language evinces a clear legislative intent that questions of appropriateness of the bargaining unit once resolved in the representation case be promptly resolved in the unfair labor practice proceedings, presumably so that bargaining or an appeal can be initiated promptly. Thus, the Commission's decision is not inconsistent with the statute.

In *Brockton School Committee and NAGE and SEIU, Local 525,*[9] the Commission was called upon to resolve various objections to the conduct of the election. The issue revolved around two legal contentions made by trustees of Local 525, Service Employees International Union, AFL-CIO (Local 525). The first contention was that a contract between Local 525 and the City of Brockton barred an election conducted on March 31, 1977. The second contention was that a representative of Local 525 who had signed an agreement for a consent election acted without authority.[10] As a preliminary matter the Commission reiterated its commitment to Rules and Regulations Article II, § 14(e) applying an open period of 158-180 days before the expiration of a contract for filing of petitions for representation and election.[11] The incumbent union Local 252 alleged that its contract expired on December 31, 1977, which was the last date under a continuation clause. The Commission found that June 30, 1977, a date which was the final date under the contract, was the actual termination date and utilized that for determining the open period for filing a representation petition. The Commission noted that continuation clauses are a common provision in collective bargaining agreements but that it would not read these clauses as affecting the open period for filing election petitions. The Commission held that to hold otherwise would be to permit a contract to be extended indefinitely.[12]

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[8] G.L. c. 150E, § 11.
[9] 4 M.L.C. 1005 (1977).
[10] *Id.* at 1006.
[11] M.L.R.C. Rules, Article II, § 5.
[12] 4 M.L.C. at 1007.

The incumbent local also challenged the validity of the consent election agreement. Five days before the election the International placed the local under a trusteeship based on the determination that the president of the local had been improperly elected and had therefore exceeded his authority in executing the agreement for consent election.[13] The International then went to court seeking a temporary restraining order to stay the conduct of the election. The superior court refused to stay the election but did agree to order the Commission to impound the ballots. Four days later at the hearing on the preliminary injunction the court vacated its stay and remanded the matter to the Commission for action in accordance with the rules and regulations governing the conduct of the Commission.[14] The International then filed its challenges with the Commission realleging its contention that the improper election of the local president vitiated the consent agreement.

The Commission rejected this argument and held that since the president was elected in November of 1976 and signed the consent election on February 16, 1977, the failure of the International to take any action until March 31, 1977 precluded this from being raised as a proper bar to the conduct of an election. The Commission held that the president had apparent authority and that no other party knew or could have known of the alleged internal irregularity in this election.[15] Finally, the Commission noted that even if the local lacked proper authority the Commission would have ordered an election.[16] While not saying so, the Commission implied that this election would have been ordered since the petition itself showed no irregularity, was timely filed, there was no objection to the unit by the employer, and the union could not have reasonably objected to the appropriateness of the unit since it already represented this unit.

§ 16.3. Duty to Bargain. During the *Survey* year the Commission re-examined its approach to scope of bargaining issues under chapter 150E of the General Laws. Prior to *Town of Danvers*[1] the Commission had been applying private sector precedent in its scope of bargaining

[13] 4 M.L.C. 1005. The consent agreement had been signed by Local 252's president on February 16, 1977 in response to a petition filed on January 12, 1977 by the National Association of Government Employees (NAGE) seeking certification to represent certain employees of the City of Brockton. *Id.*

[14] At a conference held at the Commission offices in the presence of the parties the ballots were counted indicaing that Local 252 had lost the election. *Id.*

[15] 4 M.L.C. at 1008.

[16] *Id.* The Commission noted that there had been no reason to believe that the president of Local 252 lacked authority. There had been no internal challenge to his election and the International had allowed him to operate unchallenged.

§ 16.3. [1] Town of Danvers and Local 2038, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC, 3 M.L.C. 1559 (1977).

decisions.[2] Such precedent, however, was developed under the National Labor Relations Act[3] and had been applied by the Commission without careful analysis as to its propriety in the public sector in general or pursuant to chapter 150E in particular.

In the private sector issues at the bargaining table have traditionally been classified as either mandatory, permissive, or illegal. A party to collective bargaining has traditionally been found to have committed an unfair labor practice by refusing to bargain over a mandatory subject.[4] A party may or may not bargain on a permissive subject of bargaining, but will commit an unfair labor practice if it insists to the point of impasse on the inclusion of its proposal in a contract.[5] There is also a narrow area of illegal subjects of bargaining.[6]

In *Danvers* the International Association of Firefighters argued that the mandatory/permissive/illegal scheme is not applicable under chapter 150E. The Association suggested, rather, that the Commission adopt a "conflicts" test.[7] Under such a proposed test no subject could ever be excluded from the bargaining process. Further, no contract provision could ever be illegal unless it was in conflict with a statute, regulation, or rule omitted from section 7 of chapter 150E.

Section 7 states that when terms of a collective bargaining agreement conflict with certain statutes, regulations, or rules, the terms of the agreement shall prevail.[8] Contending that section 7 of chapter 150E

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[2] Town of Natick, M.U.P.-326, 351 (1973) *enf. denied on other grounds,* Town of Natick v. Labor Relations Commission, 1976 Mass. Adv. Sh. 31, 339 N.E.2d 900.

[3] 29 U.S.C. § 151 *et. seq.* (1976).

[4] NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958).

[5] *Id.*

[6] Associated General Contractor v. NLRB, 465 F.2d 327, 80 L.R.R.M. 3157 (7th Cir. 1972) *cert. denied,* 409 U.S. 1108, 82 L.R.R.M. 2139 (1973).

[7] 3 M.L.C. at 1563.

[8] G.L. c. 150E, § 7 provides:

> (d) 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 regulations of a police chief pursuant to section ninety-seven A of chapter forty-one; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:
>
> (a) The second paragraph of section twenty-eight of chapter seven;
>
> (a-½) section six E of chapter twenty-one;
>
> (b) sections fifty to fifty-six inclusive, of chapter thirty-five;
>
> (c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4), and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;
>
> (e) sections one hundred and eight D to one hundred and eight I, inclusive, and sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one:

focuses attention on the product of collective bargaining rather than the process, the Union argued that chapter 150E mandated a wide-open, if not unlimited, scope of bargaining pursuant to which any topic desired to be discussed by either party could be the subject of negotiation—even if the resulting agreement could not be incorporated into a collective bargaining agreement because of a section 7 conflict.[9]

The Commission, after considerable discussion of the specific language of G.L. c. 150E,[10] its legislative history,[11] and past practice of the

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(f) section thirty-three A of chapter forty-four;
(g) sections fifty-seven to fifty-nine inclusive, of chapter forty-eight;
(g-½) section sixty-two of chapter ninety-two;
(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;
(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;
(j) section twenty-eight A of chapter seven;
(k) sections forty-five to fifty, inclusive, of chapter thirty;
(l) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;
(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;
(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;
(o) section eighty-four, eighty-five, eighty-nine, and ninety-nine B of chapter two hundred and seventy-six, the terms of the collective bargaining agreement shall prevail.

[9] 3 M.L.C. at 1565 n.11.

[10] The Commission focused on section 6 to determine the scope of bargaining under G.L. c. 150E which states:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and *any other* terms and conditions of employment, but such obligation shall not compel either party to agree to a proposal or make a concession. (emphasis added)

The Commission attached little significance to the word "any" as a modifier of the phrase "other terms and conditions of employment" in section 6, because of the lack of consistency throughout the statute. In section 2 the legislature failed to include the word "any" and consequently provided in that section that employees shall enjoy collective bargaining merely "on questions of wages, hours, and other terms and conditions of employment . . . ." Furthermore, if the addition of the word "any" in section 6 were interpreted to mandate a very broad, if not unlimited, scope of bargaining, then the words "standards of productivity and performance" as additional subjects within the scope of bargaining would be superfluous. These additional subjects would be subsumed within an unlimited scope of bargaining. 3 M.L.C. at 1565.

[11] The Commission rejected the argument that the absence of management rights language in section 6 of chapter 150E demonstrates legislative intent to include traditional managerial prerogatives. The Commission concluded that the legislature, by borrowing the traditional language of the National Labor Relations Act, intended to incorporate the mandatory/permissive dichotomy "which in twenty-two years of practice had become

Commission and the courts,[12] concluded that each of these factors supported its conclusion to continue the application of the mandatory/permissive dichotomy in public sector analysis under chapter 150E.

The Commission, while viewing the statutory language of chapter 150E, its legislative history, and case law precedent as support for application of the mandatory/permissive scheme, also relied to a great degree on public policy considerations. Recognizing that collective bargaining is not the appropriate vehicle even in the private sector for all decision-making, the Commission intimated that flexibility to manage the enterprise may be even more compelling in the case of the public employer. Thus, the Commission stated that the public employer has a broader responsibility to the community than its counterparts in the private sector. The government, as employer, must be responsible not merely to narrow corporate interests but to the overall public interest.[13] The Commission recognized that in collective bargaining the influence on the decision-making process of public sector employees is increased over that of citizens who are not public employees.[14] The Commission viewed the collective bargaining process as conferring special access to governmental decision-making on organized public employees. Accordingly, the Commission found that a duty to bargain should extend only to those areas in which public employees' greater influence and special access are appropriate: those decisions which have a direct impact on terms and conditions of their employment.[15] The Commission established a balancing test under which bargaining is mandatory over subject matters which have greater impact on working conditions of the employees than on the level of delivery of public services.[16]

The Commission in *Danvers* adopted a generic approach to scope of bargaining issues. It is clear from the decision that a party which refuses

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virtually synonymous with the method of determining the scope of bargaining." 3 M.L.C. at 1568.

[12] The Commission in Town of Natick, M.U.P.-326, 351 (1973), *enf. denied on other grounds,* Town of Natick v. Labor Relations Commission, 1976 Mass. Adv. Sh. 31, 339 N.E.2d 900, formally adopted the mandatory/permissive framework of analysis. *See* Appendix to Commission decision. *See also* Town of Marblehead, 1 M.L.C. 1140 (1974); Town of North Andover, 1 M.L.C. 1103 (1974); Groton School Comm., 1 M.L.C. 1221 (1974); City of Salem, M.U.P.-309 (1972).

The Court has been presented with numerous opportunities to express its opinion on scope of bargaining issues, but has expressly declined to do so. *See* School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145, and School Comm. of Hanover v. Curry, 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144.

[13] Town of Danvers and Local 2038, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC, 3 M.L.C. 1559, 1570-71 (1977).

[14] *See* Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L. J. 1156 (1970).

[15] 3 M.L.C. at 1571.

[16] *Id.* at 1577.

to bargain over a given proposal must specify its objection to the proposal in order to avoid violation of chapter 150E; a general refusal to bargain over a proposal which, if subjected to the collective bargaining process might give rise to either mandatory or permissive subjects is insufficient.[17] Thus, the Commission stated:

> At the federal level, it has long been held that the generic subject of the assignment of unit work to non-unit personnel is a mandatory subject of bargaining. . . . These and other cases, however, have often made distinctions between the duty to bargain over the impact of such assignments, and the duty to bargain over the initial decision to assign. In this case, since the Town refused to negotiate over the general topic without revealing its specific objections to the Union's initial proposal, we need not reach the issue of impact versus decision.[18]

Following its affirmance of the mandatory/permissive model, the Commission proceeded to apply it to the specific issues raised in *Danvers.* As a result the Commission held that a Union's proposal requiring minimum manning on a per-shift basis in a fire department to be a permissive subject of bargaining.[19] In *Danvers* the Town had refused to bargain over a Union proposal requiring that a minimum number of personnel be on duty at all times; and that personnel absent from a scheduled tour be replaced by people called back to work on an overtime basis. According to the proposal this level of personnel services would be mandated regardless of the number of fire stations or the amount of firefighting equipment maintained by the Town. The Commission found that this proposal would impinge upon the flexibility of elected public officials to determine the level of fire services to be delivered within the Town. The Commission found that safety and workload which were the working conditions to which the Union attempted to relate its proposal were too indirectly affected to classify the proposal as mandatory. Thus, a decision regarding the level of public services which will be delivered is a decision which will be made by all the citizens of the jurisdiction through their elected representatives and is not one which must be subjected to the collective bargaining process.[20]

In *City of Newton,*[21] the Commission was faced with another scope of bargaining issue put forth by firefighters. In *Newton* the Commission affirmed the findings of a hearing officer and held: the number of fire

[17] *Id.* at 1576.

[18] *Id.*

[19] *Id.* at 1573.

[20] *See* Sachman, *Redefining the Scope of Bargaining in Public Employment,* 19 B.C. L. REV. 155 (1977).

[21] City of Newton and Newton Firemen's Welfare Ass'n, 4 M.L.C. 1282 (1977).

fighters on a piece of equipment when it responds to an alarm is a mandatory subject of bargaining.[22] The Commission distinguished the *Newton* "per-piece" coverage proposal from the *Danvers* "per-shift" coverage proposal by indicating that the former does not seek to mandate the level of services to be delivered by controlling the number of firefighters to be maintained in the department, but merely seeks to mandate the number of firefighters to be assigned to a given piece of firefighting equipment as it responds to an alarm.[23] Thus, the municipality is able to increase or decrease the level of fire services delivered to its citizens without bargaining such change with its organized employees, but it must bargain over the number of firefighters who will staff a given piece of equipment as it responds to an alarm.[24]

Not only did the *Newton* proposal not seek to influence the level of services, but it directly affected safety and workload of firefighters who normally perform firefighting tasks as part of a "company." Only after the apparatus leaves the fire station are the safety and workload of the firefighters affected by the number of firefighters available. Thus, the Commission viewed the point of departure from the station house to be a rational point at which to draw the line between permissive and mandatory subjects of bargaining. The Commission stated that nothing in the *Newton* decision should prevent employers from keeping any number of firefighters on duty at all times to staff the needed apparatus.[25]

In *Boston School Committee and Boston Teachers Union, Local 66, AFT,*[26] the Commission held that a rule which establishes household residency as a condition of continued employment, promotion, or transfer within the bargaining unit is a mandatory subject of bargaining. In *Boston School Committee* the employer unilaterally adopted a rule providing:

> ORDERED, that all persons hired or promoted by the School Department after July 1, 1976 shall within three months of such hiring or promotion become residents of the City of Boston. . .[27]

Using the balancing approach of the *Danvers* case, the Commission reasoned that the impact of such a rule on the working conditions of unit employees far outweighed the impact which collective bargaining might have on the employer's ability to manage its enterprise.[28]

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[22] *Id.* at 1283.

[23] *Id.* at 1284.

[24] *Id.*

[25] *Id.*

[26] Boston School Comm. and Boston Teachers' Union, Local 66, AFT, Boston School Comm. and Boston Association of School Administrators and Supervisors, Boston School Comm. and Boston Public School Building Custodians Ass'n, 3 M.L.C. 1603 (1977).

[27] *Id.* at 1604.

[28] *Id.* at 1607-08.

In dictum the Commission indicated that the same considerations would not apply where an employer establishes a residency requirement as a condition of hire.[29] The Commission based the distinction on section 5 of chapter 150E which it interpreted to grant to a union the right to represent only members of the bargaining unit. Section 5 of chapter 150E grants to the exclusive representative "The right to act for and negotiate agreements covering all employees *in the unit* . . . " [emphasis added.][30]

In *City of Boston and Boston Typographical Union,*[31] the Commission held that the City of Boston's economic decision to close its printing plant, subcontract the printing work, and lay off or transfer its printing plant employees was a mandatory subject of bargaining. Prior to the expiration of the then current contract the City informed the Union that it had made a tentative decision to close its printing plant on North Street and to abolish the positions of most of the employees because of the fiscal crisis facing the City.[32] The City did not propose to cut back on printing services. Rather, it proposed to continue the current volume through the use of an expanded copy facility at City Hall and by subcontracting certain services.[33]

The Commission analogized to federal precedent established in *Fibreboard Paper Products v. NLRB*[34] in which the Supreme Court held that the employer was obligated to bargain over the issue of whether to subcontract plant maintenance work for economic reasons. While acknowledging that *Fibreboard* has been variously interpreted by the NLRB and the courts as to the scope of its holding, the Commission refused to adopt either a broad or narrow interpretation of the *Fibreboard* holding. Rather, the Commission applied the *Fibreboard* standard of analysis which balances management needs for discretion to make operational judgments against the legitimate concerns of employees to protect jobs, wages, and working conditions.[35]

A key element in the Commission's finding that the decision to subcontract in this case was a mandatory subject of bargaining was the

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[29] *Id.* at 1608.

[30] *Id.*

[31] City of Boston and Boston Typographical Union #13, 4 M.L.C. 1202 (1977).

[32] *Id.* at 1204.

[33] *Id.*

[34] 379 U.S. 203 (1964).

[35] In finding that the decision to subcontract in *Boston Typographical Union* is a mandatory subject of bargaining the Commission stated:

> Where labor costs are the major factor controlling a management decision it is certainly within the realm of possibility that the bargaining representative could make a response which could alter, modify, or ameliorate those concerns. To deny bargaining under such circumstances is to conclude that the union could make no response capable of making the bargaining unit competitive with the subcontractor.

continuing consumption of a constant level of printing services. For the City's decision to cut back on printing services would be a managerial level of services decision within the meaning of *Town of Danvers*[36] and accordingly would be a permissive subject of bargaining.[37]

Boston Typographical Union provides only minimal guidance to practitioners on the bargainability of changes in the operation of governmental enterprises involving significant capital changes, closure, or technological or operational changes. Such issues will be dealt with on a case-by-case basis.

The Supreme Judicial Court as well as the Commission decided scope of bargaining issues during the *Survey* year. It did so in several arbitration cases in an *ex post facto* manner.

In *School Committee of Boston v. Boston Teachers Union*,[38] the Court affirmed an arbitrator's award even though it also made findings on subjects which are beyond the scope of mandatory bargaining even though submitted to interest arbitration by agreement of the parties pursuant to section 9 of chapter 150E. The School Committee took the position that the award was beyond the arbitrator's authority arguing that the whole abitral process must be restricted to mandatory subjects of bargaining under the fifth paragraph of section 9 of chapter 150E which provides:

> 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 . . . [G.L. c. 150C], 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.[39]

The Court rejected the argument of the School Committee that the word "impasse" in paragraph five of section 9 conveys the thought that only mandatory subjects of bargaining may be arbitrated pursuant to that section.[40] Rather, the Court found that once impasse is reached on mandatory subjects, the parties may agree to submit to interest arbitration both mandatory subjects and unsettled permissive subjects over which they have been bargaining.[41]

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[36] See note 1 *supra*.

[37] See text at notes 16-20 *supra*.

[38] 1977 Mass. Adv. Sh. 1069, 363 N.E.2d 485.

[39] G.L. c. 150E, § 9.

[40] 1977 Mass. Adv. Sh. 1069, 1074-75, 363 N.E.2d 485, 488.

[41] In so finding, the Court analogized to private sector precedent in grievance arbitration, indicating that where nonmandatory items have been included in an agreement containing an arbitration clause the courts have enforced grievance arbitration awards

In this case, the three disputed subjects dealt with the payment of severance pay owing to persons who had retired, resigned, or died, the arrangements surrounding the choice of trustees of a "health and welfare" fund and the provision of reading specialists for programs for pupils with certain reading deficiencies.[42] While not classifying any of these three topics as mandatory subjects of bargaining the Court found each to be a proper subject of voluntary interest arbitration. Citing *Boston Teachers Union v. School Committee of Boston*[43] and two other cases decided during the *Survey* year,[44] the Court warned that there is a limit to the scope of voluntary interest arbitration and that public officials should not regard the fifth paragraph of section 9 as an easy way out of their responsibilities to the electorate.[45] The Court further stated that it would examine such issues on a case-by-case basis.[46]

§ 16.4. Tenure and Job Abolitions. In future histories of public sector labor relations, it may well be that the 1970's will be characterized as the Age of Retrenchment. Although there have been cutbacks among many employee groups, teachers have been particularly hard hit by a combination of factors, chief among which have been decreasing school enrollments and economic pressures leading to a decline in school programs and services characterized as "non-essential." During the *Survey* year, the Appeals Court rendered two decisions involving school employees whose positions were abolished for economic reasons. Both cases affirm the power of a school committee, acting in good faith, to eliminate positions held by tenured teachers for reasons of economy, system reorganization, or educational policy. They also, however, affirm the right of employees to the protections given by tenure statutes.[1]

In order to understand the cases, one must know the relevant portions of the statutes at issue. Section 41 of chapter 71 of the General Laws states that teachers who have served for three consecutive years acquire

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without regard to whether the subject in dispute was a mandatory or permissive subject of bargaining prior to agreement. The Court concluded that the same should result under G.L. c. 150C, § 1. *Id.* at 1075-76, 363 N.E.2d at 488-89.

[42] *Id.* at 1080-82, 363 N.E.2d at 490-91.

[43] 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707. *See also* Grunebaum, *Labor Law*, 1976 ANN. SURV. MASS. LAW § 6.5 at 169.

[44] School Comm. of Danvers v. Tyman, 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877; School Comm. of West Bridgewater v. West Bridgewater Teachers' Ass'n, 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886. For a discussion of the cases see *Student Comment* § 16.6 *infra*.

[45] 1977 Mass. Adv. Sh. 1069, 1079, 363 N.E.2d 485, 490.

[46] *Id.*

§ 16.4. [1] G.L. c. 71, §§ 41, 42, 42A, 43, and 43A. The teacher tenure statutes are complex and cover a multitude of situations. Only those portions relevant to the cases to be discussed will be mentioned.

tenure upon election to their fourth year of service. Under section 42 of chapter 71, a tenured teacher can be dismissed only by a two-thirds vote of the whole school committee. Under the same section, tenured teachers can be dismissed only for good cause and only after a notice of the charges and a hearing, at which they are entitled to counsel.[2] Appeals of tenure dismissals may be brought in the superior court,[3] and successful appellants are entitled to their appeal costs (including attorney's fees) under section 43B of chapter 71.

Section 38H of chapter 71 makes the teacher tenure statutes applicable to school librarians. The plaintiff in *Woodward v. School Committee of Sharon*[4] was employed at Sharon High School as a "library assistant" for one year and a "librarian" for the subsequent three years.[5] During her first year, Mrs. Woodward was paid on a *per diem* rate and worked 181 of the 182 days in that school year.[6] For her three years as a "librarian," she was paid on the union contract scale and worked a full year.[7] For all four years, her duties were the same.[8] In April of 1973, her third year as "librarian," the Sharon School Committee voted to terminate Mrs. Woodward's position at the end of the school year for budgetary reasons.[9] She was notified that she would not be employed for the 1973-1974 school year, but the Committee made no attempt to comply with the procedural provisions of the tenure statute.[10]

Mrs. Woodward filed suit, contending that she was tenured and that the Committee had failed to give her the procedural protections of G.L. c.71, § 42.[11] She sought reinstatement and damages. The superior court

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[2] G.L. c. 71, § 42.

[3] G.L. c. 71, § 43A.

[4] 1977 Mass. App. Ct. Adv. Sh. 130, 359 N.E.2d 966.

[5] *Id.* at 132-33, 359 N.E.2d at 968-69.

[6] *Id.* at 132, 359 N.E.2d at 968.

[7] *Id.* at 133, 359 N.E.2d at 968-69.

[8] *Id.* at 133, 359 N.E.2d at 969.

[9] *Id.*

[10] *Id.*

[11] G.L. c. 71, § 42 provides:

> The school committee may dismiss any teacher, but no teacher and no superintendent, other than a union superintendent and the superintendent of schools in the city of Boston, shall be dismissed unless by a two-thirds vote of a whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other cause, nor unless at least thirty days, exclusive of customary vacation periods, prior to the meeting at which the vote is to be taken, he shall have been notified of such intended vote; nor unless, if he so requests, he shall have been furnished by the committee with a written charge or charges of the cause or causes for which his dismissal is proposed; nor unless, if he so requests, he has been given a hearing before the school committee which may be either public or private at the discretion

entered a judgment which: 1) declared that Mrs. Woodward had been on tenure as a librarian at the critical point in time; 2) declared that the Committee had not complied with the tenure law; and 3) ordered that Mrs. Woodward be reinstated with back pay, all fringe benefits, and interest.[12] The School Committee appealed.

The first issue for the Appeals Court was whether or not the plaintiff was indeed tenured, *i.e.*, whether her year of service as a "library assistant" would count in computing her years of service.[13] If it did not, she would not, as of April 1973, have had the three full years of service required for tenure status since she had not yet completed three full years as "librarian." The court found that plaintiff was tenured.[14] It noted that her service as library assistant had been regular and continuous rather than intermittent since she had worked 181 out of a 182-day school year.[15] Interestingly, and importantly, the court also devoted a paragraph to the insignificance it attached to job titles. The master had found that Mrs. Woodward's position as a "library assistant" involved duties which were no different from those she performed when her title was changed.[16] Quoting from *LaMarsh v. School Committee of Chicopee,*[17] the Appeals Court stated that it is "the character of the labor performed which is . . . important in determining the precise position held when (as here) that is not definitely established by official records."[18]

There was no contention by the Committee that plaintiff had been given the procedural protections of the tenure law. The Appeals Court held that she had been dismissed in violation of the statute.[19] As a

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of the school committee and at which he may be represented by counsel, present evidence and call witnesses to testify in his behalf and examine them; nor unless the charge or charges shall have been substantiated; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. The change of marital status of a female teacher or superintendent shall not be considered cause for dismissal under this section. Neither this nor the preceding sections shall affect the right of a committee to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. In case a decrease in the number of pupils in the schools of a town renders advisable the dismissal of one or more teachers, a teacher who is serving at the discretion of a school committee under section forty-one shall not be dismissed if there is a teacher not serving at discretion whose position the teacher serving at the discretion is qualified to fill. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter.

[12] 1977 Mass. App. Ct. Adv. Sh. at 131, 359 N.E.2d at 968.

[13] *Id.* at 133, 359 N.E.2d at 969.

[14] *Id.* at 135, 359 N.E.2d at 969-70.

[15] *Id.* at 132, 359 N.E.2d at 968.

[16] *Id.* at 133-34, 359 N.E.2d at 969.

[17] 272 Mass. 15, 18, 172 N.E.117, 118 (1930).

[18] 1977 Mass. App. Ct. Adv. Sh. at 134, 359 N.E.2d at 969.

[19] *Id.* at 136, 359 N.E.2d at 970.

remedy, however, the court did not order Mrs. Woodward's reinstatement.[20] Rather, it awarded her damages for the period from September 1973 until such time as she was lawfully dismissed in accordance with the requirements of G.L. c.71, § 42.[21] Plaintiff also received her costs of appeal under section 43B of chapter 71.[22]

The *Woodward* court cited as authority for its decision *Nutter v. School Committee of Lowell,*[23] a case it handed down on the same day as *Woodward.* Plaintiffs in *Nutter* were the four tenured school adjustment counselors employed by the Lowell School Committee.[24] In February of 1975, the Lowell School Committee voted 4-3 to abolish their positions at the end of that school year as an economy measure.[25]

Plaintiffs appealed to the superior court under section 43A of chapter 71 of the General Laws.[26] The trial judge found that they failed to prove their allegations that the vote was a subterfuge or had been taken in bad faith. He issued a judgment which declared the vote effective to eliminate plaintiffs' positions. He further declared that the vote was not a vote to dismiss tenured teachers within the meaning of the tenure law. Additionally, however, the superior court, without explanation, ordered plaintiffs to be placed in other positions and gave them their court costs without mentioning attorneys' fees. All parties appealed.[27]

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[20] According to the master's finding the plaintiff had already secured employment as a librarian for the remainder of the school year in question. *Id.* at 137, 359 N.E.2d at 970.

[21] *Id.* at 136-37, 359 N.E.2d at 970. The case was remanded to the superior court on the issue of mitigation of damages since the plaintiff had secured employment as a librarian for the remainder of the school year prior to the Committee's lawful termination of the position in compliance with section 42 of chapter 71. *Id.*

[22] *Id.* at 138, 359 N.E.2d at 970.

[23] 1977 Mass. App. Ct. Adv. Sh. 120, 359 N.E.2d 962.

[24] *Id.* at 120, 359 N.E.2d at 963.

[25] *Id.* at 121 n.4, 359 N.E.2d at 963 n.4.

[26] G. L. c. 71, § 43A provides:

> Any teacher or superintendent of schools, employed at discretion who has been dismissed by vote of a school committee under the provisions of section forty-two or section sixty-three may, within thirty days after the vote of dismissal appeal therefrom to the superior court in the county in which he was employed. The court shall advance the appeal for a speedy hearing and after such notice to the parties as it deems reasonable hear the cause "de novo". If the court finds in favor of the school committee, the vote of the school committee shall be affirmed; otherwise it shall be reversed and the appellant shall be reinstated to his position without loss of compensation. The decision of the court shall be final, except as to matters of law.

[27] It is difficult, if not impossible, to reconcile the remedy granted by the trial court with its conclusions of law. The court appears to have found for the defendant school committee on all issues of law, but then awarded to plaintiffs most of the relief they requested, with the exception of attorneys' fees and reinstatement to positions which had been abolished in compliance with the law. The trial court did, however, order that plaintiffs receive other positions in the school system. In the Appeals Court, plaintiffs prevailed on the legal issues in that the court held that they had been dismissed in violation of the tenure law. In terms

On appeal, the principal question was whether section 42 of G.L. chapter 71 applied.[28] The court held that it did, and that all of the plaintiffs had been dismissed in violation of the tenure law.[29] Its analysis is both sound and useful as an elucidation of the tenure law in the retrenchment situation.

As noted above, a tenured teacher can be dismissed only by a two-thirds vote.[30] The *Nutter* dismissal vote had been 4-3. The Appeals Court began by stating that no one could any longer question that a school committee, acting in good faith, could abolish a position by simple majority vote. If the vote resulted in the dismissal of tenured teachers, however, it had to be a two-thirds vote.[31] Rejecting the School Committee's argument that the vote was a general salary revision under G.L. c.71, § 43, the court found that it was, in fact, a dismissal since plaintiffs were not assigned to other positions and their salary source was completely eliminated.[32]

An additional requirement of the tenure law is that dismissal be for "good cause."[33] The court harmonized a school committee's power to abolish tenured teachers' positions with the tenure law by finding that abolition of a position constitutes good cause for dismissal within the meaning of G.L. c.71, § 42.[34]

The court held that plaintiffs were entitled to their procedural rights.[35] An interesting aspect of the case was the court's rejection of the Committee's futility defense. The Committee had alleged that, under the circumstances, the holding of an adversary type hearing such as that required by the tenure law would have been pointless. The court re-

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of relief, however, plaintiffs, while obtaining an award of attorneys' fees, were not ordered reinstated. Rather, the court ruled that they were entitled to lost wages from the effective date of the illegal dismissal to such time as they were dismissed in compliance with the law. 1977 Mass. App. Ct. Adv. Sh. at 126, 359 N.E.2d at 966. The Appeals Court made no comment on the apparent inconsistencies in this case at the trial court level.

[28] See note 11 *supra* for the text of G.L. c. 71, § 42. Of particular importance is the procedural requirement in § 42 that a tenured teacher may only be dismissed by a two-thirds vote of the school committee.

[29] 1977 Mass. App. Ct. Adv. Sh. 120, 126, 359 N.E.2d 962, 965.

[30] See note 28 *supra*.

[31] 1977 Mass. App. Ct. Adv. Sh. at 124, 359 N.E.2d at 964-65.

[32] *Id.* at 124-25, 359 N.E.2d at 965.

[33] G.L. c. 71, § 42 provides in part:

> In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed, except for inefficiency, incapacity, conduct unbecoming a teacher or superintendent, insubordination or other good cause
>
> . . . .

[34] In so harmonizing the court noted that its solution was consistent with its view that certain other provisions of § 42 excuse compliance where dismissal is prompted by declining enrollments and also with the authority entrusted to school committees under § 37 of chapter 71. 1977 Mass. App. Ct. Adv. Sh. at 126, 359 N.E.2d at 965.

[35] *Id.*

sponded by noting that the 4-3 vote created obvious room for doubt as to whether the proponents of abolition would have succeeded had a two-thirds vote been taken after a hearing.[36]

As relief, plaintiffs were awarded damages from September of 1975 until they were lawfully dismissed. The court noted that they could not be reinstated to positions which had been abolished. Plaintiffs also received their costs, including attorneys' fees.[37]

Neither *Woodward* nor *Nutter* will be reviewed by the Supreme Judicial Court. If cases raising these issues do at some point reach the Court, however, it is fairly safe to assume that the principles enunciated by the Appeals Court would stand. Both decisions are based on sound precedent and solid statutory interpretation. Additionally, they reflect the approach of the Supreme Judicial Court in *School Committee of Braintree v. Raymond*[38] that a school committee does not abolish all of the protection to which a teacher is entitled under a union contract when it abolishes his/her position. It is difficult to believe that the Court would uphold employee rights established through collective bargaining while denying the statutory benefits of the tenure law.

The cases are thought-provoking and establish several significant points. First, they are a caution to public employers that the courts will look to the substance rather than the form of the employment relationship for the purpose of determining tenure rights. Secondly, tenure dismissals are expensive since employees are entitled to adversarial-type procedural rights and to costs and attorney's fees should a dismissal be found to be illegal. From the employee point of view, the cases are clear in stating that economic motivations are good cause for dismissal. Additionally, employees cannot hope for reinstatement to the same position as a remedy for an illegal dismissal. From both an employer and an employee perspective, the cases may also be significant in providing an increased inducement to deal with retrenchments through collective bargaining. Section 8 of chapter 150E of the General Laws provides that, where an employee elects arbitration of his rights in a dismissal case, arbitration shall be the exclusive method of grievance resolution, notwithstanding the tenure law.[39] Thus, it would appear that an employee must elect between redress through his collective bargaining agreement or through the tenure statute. Assuming continued retrenchments, it may be to the advantage of both sides to deal with the problem in an

[36] *Id.* at 126 n.8, 359 N.E.2d at 965 n.8.

[37] *Id.* at 127-28, 359 N.E.2d at 966.

[38] 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145.

[39] G.L. c. 150E, § 8 also gives the Labor Relations Commission the power to order final and binding arbitration when it is not contained in the parties' collective bargaining agreement. For a discussion of Commission cases on so-called "Section 8 orders" see *Student Comment*, § 16.6 *infra*.

orderly, mutually agreeable manner, thus avoiding the lengthy and expensive litigation represented by *Woodward* and *Nutter.*

It should not be thought, however, that these cases answer all questions arising under the tenure law. In *Nutter,* there is some interesting language in an area in which litigation can be expected. Section 42 of chapter 71 states that nothing in the tenure law shall affect a school committee's right to dismiss a teacher "whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable." The *Nutter* court stated that this provision represents the single instance in which compliance with the procedural protections of the statute is excused.[40] This proposition is dicta which will certainly be contested. An additional ambiguity appears in the final provision of G.L. c.71, § 42. This sentence states that, if teachers are to be dismissed because of decreased enrollments, no tenured teacher can be dismissed if there is a non-tenured teacher holding a position the individual with tenure is "qualified" to fill. Litigation disputing the meaning of "qualified" is to be anticipated as the Age of Retrenchment continues.

§ 16.5. Arbitral Authority and Procedure Under the Arbitration Statute. During the *Survey* year, the Supreme Judicial Court handed down a significant series of decisions which brought public sector labor arbitration to maturity within the general framework of longstanding private sector law on both the state[1] and federal[2] levels. The cases are *School Committee of Agawam v. Agawam Education Association,*[3] *School Committee of Danvers v. Tyman,*[4] *Dennis-Yarmouth Regional School Committee v. Dennis Teachers Association,*[5] and *School Committee of West Bridgewater v. West Bridgewater Teachers' Association.*[6]

Since three of these cases involved public employers' statutory authority to appoint teachers and manage the schools,[7] they contain important principles on nondelegable managerial prerogatives in the area of public employee reappointment and termination. Additionally, the cases contribute significantly to the body of grievance arbitration law

[40] 1977 Mass. App. Ct. Adv. Sh. at 126, 359 N.E.2d at 965.

§16.5. [1] *See, e.g.,* Kessler Bros., Inc. v. Board of Conciliation and Arbitration, 339 Mass. 301, 158 N.E.2d 871 (1959); Morceau v. Gould National Batteries, Inc. 344 Mass. 120, 181 N.E.2d 644 (1962); Albert Greene v. Mari and Sons Flooring Company, Inc., 362 Mass. 560, 289 N.E.2d 860 (1972).

[2] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

[3] 1977 Mass. Adv. Sh. 227, 359 N.E.2d 956.

[4] 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877.

[5] 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883.

[6] 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886.

[7] G.L. c. 71, §§ 37, 38 and 41.

the Court began to develop in this area during its 1976-1977 term.[8] Finally, they presented the long-awaited interpretations of the Massachusetts labor arbitration statute, chapter 150C of the General Laws,[9] sought by practitioners faced with conflicting principles in the superior courts.

The substantive aspects of the cases are discussed in a later section.[10] This discussion of the cases will, therefore, be limited to their interpretation of the arbitration statute and clarification of arbitral and judicial roles.

Chapter 150C of the General Laws governs arbitration under collective bargaining agreements in both the private and public sectors. The cases to be discussed involve the provisions on stays of arbitration (section 2), appeals where a stay has been denied (section 16), and vacations of arbitral awards (section 11). The substance of chapter 150C's stay and vacation sections is, in essence, the same as the principles laid down by the U.S. Supreme Court in 1960 in the "The Steelworkers' Trilogy,"[11] hereafter "The Trilogy." In the Trilogy, the Supreme Court definitively declared the private system of arbitration to be the preferred national policy for resolving private sector labor disputes, and adopted a policy of judicial non-intervention in the arbitration process.[12]

Because of the unique plenary statutory authority of public employers, however, both labor practitioners and the superior courts have long had difficulty applying the provisions of chapter 150C of the General Laws in cases where employees sought through arbitration to enforce their collective bargaining rights in areas where employers assert a conflict with their statutory powers.[13] The following cases clarify judicial

[8] School Committee of Leominster v. Gallagher, 1976 Mass. Adv. Sh. 378, 344 N.E.2d 203; School Committee of Hanover v. Curry, 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144; School Committee of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145.

[9] G.L. c. 150C as enacted by Acts of 1959, c. 546.

[10] *See Student Comment* § 16.6 *infra.*

[11] *See* note 2 *supra.*

[12] The Court essentially announced a "hands off" role for the judiciary. It stated that the only function of the courts was to determine whether a party seeking arbitration is making a claim governed on its face by the contract, and all questions of contract interpretation are to be left to arbitrators. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 568. An order to arbitrate should not be denied unless it may be said with "positive assurance" that the arbitration clause is not susceptible of an interpretation covering the dispute, and doubts should be resolved in favor of coverage. United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-583. On appeal of an arbitrator's award, the courts have no business overturning arbitral construction of the contract simply because of a differing interpretation of the agreement's language. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599. A refusal to review the merits on appeal is the proper approach for the courts. *Id.,* at 596, 599.

[13] *See, e.g.,* Eager v. Cronin, Barnstable Superior Court No. 35114, August 6, 1976 (Lynch, J.). This case arose out of the nonrenewal of a nontenured teacher's contract. In

and arbitral roles and clearly enunciate the principle of minimal judicial involvement in the arbitration process.

Sections 2(b) and 2(a) of chapter 150C cover proceedings to stay or compel arbitration respectively. With certain differences not relevant for this discussion, the judicial standard is the same under both sections. Under section 2(a), arbitration *must* be ordered by the superior court unless: 1) there is no agreement to arbitrate, or 2) the claim sought to be arbitrated does not state a controversy covered by the arbitration provision. The court may, pursuant to section 2(b), stay arbitration if there is no agreement to arbitrate or the claim is not covered by the arbitration provision. Under both sections, the court cannot base its order on the ground that the claim in issue lacks merit or because no fault or grounds for the claim sought to be arbitrated have been shown.[14] Thus, the statute commands a court to look only at (1) the contract to see whether there is an arbitration clause, and (2) the grievance to see whether, on its face, it is a controversy over a contract provision covered by the arbitration clause.

School Committee of Danvers v. Tyman arose in the context of an appeal from an order under section 2(b) of chapter 150C granting a stay of arbitration.[15] The Danvers School Committee had denied reappointment, and hence tenure,[16] to a third-year teacher. A grievance was filed alleging violations of the evaluation clause of the collective bargaining agreement between the School Committee and the Danvers Teachers Association.[17] The Committee brought an action under G.L. c. 150C § 2(b) seeking to stay arbitration. The Committee's position was that arbitration of the grievance was barred because, under section 41 chapter 71 of the General Laws, the Committee had absolute power to pass on the question of whether or not a nontenured teacher's contract should be renewed. The superior court held that the claim of evaluation procedure violations which the Association sought to arbitrate did not state a controversy covered by the arbitration provisions of the contract and granted a stay.[18] Pursuant to section 16(2) of chapter 150C the order was appealed.

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an initial arbitration proceeding, the arbitrator determined that he had jurisdiction under the contract. The public employer filed an application under G.L. c. 150C to vacate the threshold jurisdictional decision and stay further arbitration proceedings. The court granted the relief sought, holding that a school committee could not delegate its statutory hiring authority to an arbitrator. *Id.*

[14] G.L. c. 150C, §§ 2(a) and 2(b).

[15] 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877.

[16] See § 16.4, *Tenure and Job Abolition, supra,* text at notes 2-3, for an explanation of teacher tenure laws.

[17] 1977 Mass. Adv. Sh. at 417, 360 N.E.2d at 878.

[18] *Id.*

The Supreme Judicial Court reversed, holding that arbitration should not have been stayed and entering an order under section 2(b) of chapter 150C directing the parties to proceed to arbitration.[19] The Court's analysis focused properly on the two issues involved. First was the section 2(b) question of whether there was a contractual arbitration clause which covered the controversy between the parties. The second issue, raised by the Committee in the superior court, was whether arbitration was barred by virtue of the Committee's statutory authority under section 41 of chapter 71 to appoint teachers.

The Court noted that there was an agreement by the Committee to follow certain evaluation procedures and to arbitrate alleged failures to follow the procedures.[20] Citing one of the Trilogy cases,[21] it affirmed the principle of section 2 of chapter 150C that arbitration should be ordered unless there is positive assurance that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute. The Committee had argued that the Association's claim was not a grievance which could be submitted to arbitration within the meaning of the collective bargaining agreement. The Court unequivocally rejected the notion that the meaning of the agreement was a matter for judicial interpretation. Such questions, the Court stated, are the province of arbitrators, and their decision on questions of interpretation of the contract are final and not subject to review.[22] Thus, the Court's inquiry was limited to a determination of whether or not there was an arbitration clause and a colorable claim of a contract violation which was covered by the arbitration provision.

In dealing with the second issue, the Court rejected the committee's argument that arbitration should not be permitted because an arbitrator might grant relief which impinged on the committee's exclusive and non-delegable statutory authority to award tenure. The Court stated: "Judicial intervention is not warranted where no conflict has arisen between the consequences of the arbitration proceedings called for in the collective bargaining agreement and any nondelegable authority of the school committee."[23] In essence, the Court was applying traditional notions of ripeness to reject the idea that a speculative future event, *i.e.*, the arbitrator's award, might impinge on committee authority. As it noted, the arbitrator might find no contractual violation or award a remedy other than tenure. Arbitration should be ordered, the Court

[19] 1977 Mass. Adv. Sh. at 427, 360 N.E.2d at 882.

[20] *Id.* at 426, 360 N.E.2d at 882.

[21] United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 564, 582-83.

[22] 1977 Mass. Adv. Sh. at 427, 360 N.E.2d at 882.

[23] *Id.* at 421-22, 360 N.E.2d at 880.

stated, "unless no lawful relief conceivably can be awarded by the arbitrator."[24]

It is suggested that *Danvers* is a critically important step in removing certain arguable threshold impediments which threatened both the viability of public sector labor arbitration and the judicial-arbitral balance which must exist if arbitration is to function as an agreed-upon method of dispute resolution. After *Danvers,* it would seem to be a rare case in which an employer will succeed in obtaining a judicial stay of the obligation to arbitrate. That impression is confirmed upon examination of another case during the *Survey* year in which the Supreme Judicial Court clarified an employer's right to appeal when a stay of arbitration was denied by the Superior Court.

In *School Committee of Agawam v. Agawam Education Association,*[25] the Court held that an order denying a stay of arbitration is not appealable under section 6 of chapter 150C of the General Laws.[26] In order to understand the case, it is necessary to realize that an employer seeking to avoid arbitration has three bites at the apple. The employer's claim is that the grievance is not arbitrable, *i.e.,* that an arbitrator lacks jurisdiction to hear the case. The employer's argument can be raised before the superior court in an application to stay arbitration under G.L. section 2 of chapter 150C, before the arbitrator at the hearing, and again in the superior court in an application to vacate an arbitrator's award under section 11 of chapter 150C. In recognition of this three-step process, the Court determined in *Agawam* that a denial of a stay could not be appealed because such an order is not an act finally adjudicating the rights of the parties affected.[27] The parties still have the arbitration itself and court review of the arbitrator's award. It is only after judicial review of the award that a final adjudication of the parties' rights occurs and an appeal is proper. Thus, court action stands in abeyance pending the conclusion of the arbitration.[28]

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[24] *Id.* at 424, 360 N.E.2d at 881.

[25] 1977 Mass. Adv. Sh. 227, 359 N.E.2d 956.

[26] G.L. c. 150C, § 16(a) states:

> An appeal may be taken from (1) an order denying an application to compel arbitration made under paragraph (a) of section two; (2) an order granting an application to stay arbitration made under paragraph (b) of section two; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to the provisions of this chapter. Such appeal shall be taken in the manner and to the same extent as from orders or judgment in an action.

[27] In contrast, an order staying arbitration is a final order since no arbitration will take place and the party seeking redress of collective bargaining rights has no forum other than arbitration. As the Court noted in *Agawam,* orders staying arbitration are final orders which are appealable under G.L. c. 150C, § 16. 1977 Mass. Adv. Sh. 227, 230, 359 N.E.2d 956, 958.

[28] 1977 Mass. Adv. Sh. at 228-29, 359 N.E.2d at 957.

The two final cases interpreting chapter 150C during the *Survey* year involved applications to vacate arbitration awards pursuant to section 11.[29]

Dennis-Yarmouth Regional School Committee v. Dennis Teachers Association[30] was another nonrenewal of a teacher's contract in her tenure year. Although the school committee felt that the issue of teacher contract renewal could not be delegated to an arbitrator, it proceeded to arbitration and bifurcated the proceeding.[31] The underlying merits of the case involved the committee's alleged failure to follow contractual provisions involving teacher evaluation and maintenance of teachers' files.[32]

At the jurisdictional hearing, the question presented to the arbitrator was: "Is the dispute the Association seeks to arbitrate on the merits which involves the non-renewal of . . . a nontenure teacher, a grievance, and if so, is it arbitrable?" The arbitrator held that the nonrenewal of a nontenured teacher's contract was a proper subject of arbitration under the collective bargaining agreement.[33]

Rather than proceed to the case on the merits, the committee went to superior court under chapter 150C, seeking an order vacating the arbitrator's award pursuant to section 11 and staying further proceedings under section 2.[34] The superior court vacated the award and stayed further proceedings. The legal basis for vacation of the award was that the decision not to renew the contract of a nontenured teacher could not

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[29] G.L. c. 150C, § 11 states that the superior court shall vacate an award upon application by a party within 30 days of delivery of the award if:

> (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law; (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party; (5) there was no arbitration agreement *and* the issue was not adversely determined in proceedings under section two *and* the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it would not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.

[30] 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883.

[31] In arbitration practice, a bifurcated approach involves an initial hearing on the issue of arbitrability (jurisdiction). An award is rendered by the arbitrator either finding jurisdiction or finding no jurisdiction and dismissing the case. When jurisdiction is found, the parties will then schedule a hearing on the merits of the case.

[32] 1977 Mass. Adv. Sh. at 430-31, 360 N.E.2d at 884.

[33] *Id.*

[34] 1977 Mass. Adv. Sh. at 431, 360 N.E.2d at 885.

be the subject of final and binding arbitration.[35] Although ordering that the award be vacated,[36] the *Dennis-Yarmouth* Court did not discuss section 11. Rather, the Court focused on section 2, the provision to stay arbitration. In *School Committee of Danvers v. Tyman,*[37] *supra,* the Court held that a school committee could not legally delegate to an arbitrator its statutory duty and authority to make tenure decisions.[38] As noted above, however, the committee was required to arbitrate alleged violations of contractually agreed-upon evaluation clauses. The Court interpreted the question raised in *Dennis-Yarmouth* in light of the holding in *Danvers* and the command of section 2(b) that a court examine whether or not the dispute was a controversy covered by the arbitration provision.

In a significant interpretation of the arbitration statute, the Court stated: "We regard an agreement to arbitrate a dispute which lawfully cannot be the subject of arbitration as equivalent to the absence of a controversy covered by the provision for arbitration."[39] The decision whether to renew a nontenured teacher's contract and grant tenure could not legally be delegated to an arbitrator under *Danvers.* Thus, the dispute over the teacher's reappointment in *Dennis-Yarmouth* was not, under section 2(b) of chapter 150C, a "controversy [which could be] covered by the provision for arbitration." The arbitrator's award stating that the nonrenewal decision was arbitrable was vacated.[40] Again relying on *Danvers,* however, the Court concluded that arbitration of the employer's alleged violations of the evaluation provisions of the contract would be proper. The Court ordered arbitration of the case on the merits.[41]

Thus, when *Danvers* and *Dennis-Yarmouth* are read together, the principle which emerges is that the ultimate decision on continuation of employment cannot be arbitrated; what can be arbitrated is whether or not that decision arose from contractual violations. It is suggested that the lesson for practitioners is that the issue to be arbitrated must be framed specifically in terms of particular contract violations rather than broadly in terms of whether the nonrenewal decision violated the contract. Assuming a finding of contractual violations by the arbitrator, the critical question then becomes one of remedy, an issue the Supreme Judicial Court faced in the last case.

School Committee of West Bridgewater v. West Bridgewater Teach-

[35] *Id.* at 429, 432, 360 N.E.2d at 884, 885.

[36] *Id.* at 433, 360 N.E.2d at 885.

[37] 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877. See text at notes 15-24 *supra.*

[38] *Id.* at 423-24, 360 N.E.2d at 881.

[39] 1977 Mass. Adv. Sh. 428, 432, 360 N.E.2d 883, 885.

[40] *Id.* at 433, 360 N.E.2d at 885.

[41] *Id.* at 429, 433, 360 N.E.2d at 884, 885-86.

ers' Association[42] involved a teacher who was not in her tenure year when the school committee notified her of her nonreappointment. The grievance filed on her behalf alleged numerous violations of the teachers' contractual evaluation clause. No stay of arbitration was sought, full hearings were held, and the arbitrator had ordered the teacher's reinstatement with full back pay and benefits.[43] The superior court judge vacated the award on the grounds that the nonrenewal decision could not be arbitrated. Further, he stated that, even if the question were arbitrable, reinstatement would not be a permissible form of relief.[44] The Supreme Judicial Court reversed. It confirmed the award of lost wages for the subsequent school year for which the teacher was not rehired as a result of the contractual violations. Further, the Court approved the arbitral remedy of reinstatement for one year to allow the employee to receive the contractually agreed-upon procedures for evaluation for re-employment.[45]

The Court focused on that part of section 11(a)(5) of chapter 150C which reads: " . . . the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award."[46] After noting that an arbitrator could not order that a teacher be placed on tenure, the Court discussed an arbitrator's remedial powers in the context of a case involving public employers' reserved statutory authority. It affirmed the principle that arbitral flexibility in granting relief is desirable. The Court specifically approved a standard arbitral remedy while noting that such a result might not be the expected outcome under common principles of equity or contract law.[47]

It is suggested that the case is significant for several reasons. First, it is a reaffirmation of the principle of narrow judicial involvement in the arbitration process. The Court specifically states, in accordance with the statute and perhaps as a caution to the lower courts, that arbitrators have the authority to grant relief which would not or might not be ordered by the courts. Such an affirmation may be seen implicitly as a confirmation of the private sector case law[48] principle that only in the

[42] 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886. As noted earlier, the focus of the discussion in this *Survey* section is on the arbitration statute and clarification of judicial and arbitral roles. An elucidation of the Court's approach to the relief ordered in *West Bridgewater* is to be found in a later section. See *Student Comment* § 16.6 *infra*. Our concern here is the grounds for vacating an arbitrator's award under G.L. c. 150C, § 11.

[43] 1977 Mass. Adv. Sh. at 434, 360 N.E.2d at 887.

[44] *Id.*

[45] *Id.* at 439, 441, 360 N.E.2d at 889, 890.

[46] *Id.* at 440, 360 N.E.2d at 889.

[47] *Id.*

[48] See notes 1 & 2 *supra*.

most extreme and narrow circumstances will the courts intervene in the arbitration process. Secondly, the case completes the cycle begun in *Danvers* and provides further guidance on how the courts will interpret chapter 150C of the General Laws.

Of necessity, the cases split hairs and draw distinctions along lines which may be less than clear to both employees and public managers. They do, however, result in a reasonable balancing of the tensions between the traditional statutory authority of public employers and the rights of employees to bargain contracts providing meaningful protections. Additionally, they should help to remove the arbitration process from the courts and return it to the parties, thus diminishing judicial burdens and affirming the national principle that problems in the workplace are best resolved through procedures agreed to and honored by those most knowledgeable and involved.

STUDENT COMMENT

§16.6. The Scope of Grievance Arbitration in Public Employment: *School Committee of Danvers v. Tyman*[1] (and two companion cases)[2] (*Trilogy*). The teachers' association and the School Committee of Danvers were parties to an effective collective bargaining agreement which provided for a four step grievance procedure culminating in final and binding arbitration.[3] The agreement also provided, *inter alia*, for procedures to be followed by the Committee in evaluating the work performance of teachers.[4] Anne Tyman was a teacher in her final

§16.6. [1] 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877. Also named as defendants were the Danvers Teachers' Association, the collective bargaining representative of the Danvers school teachers, two representatives of the Massachusetts Teachers' Association, and the Department of Labor and Industries Board of Conciliation and Arbitration of the Commonwealth. The board did not participate in the proceedings. *Id.* at 415 n. 1, 360 N.E.2d at 877 n.1.

[2] Two companion cases decided the same day were *Dennis-Yarmouth Regional School Comm. v. Dennis Teachers' Ass'n*, 1977 Mass. Adv. Sh. 425, 360 N.E.2d 883, and *School Comm. of West Bridgewater v. West Bridgewater Teachers' Ass'n*, 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886. Other defendants in *Dennis-Yarmouth* were the regional teachers' association and certain officers, individually and as representatives of their members and the regional director of the Boston office of the American Arbitration Association (action dismissed against regional director and not challenged on appeal). 1977 Mass. Adv. Sh. at 428 n. 2, 360 N.E.2d at 883 n.2. Other defendants in *West Bridgewater* were certain officers of the association and the teacher, Patricia Mayer, whose grievance was the subject of the proceeding. 1977 Mass. Adv. Sh. at 434 n.1, 360 N.E.2d at 886 n.1. N.E.2d at 886 n.1.

[3] 1977 Mass. Adv. Sh. at 416, 360 N.E.2d at 878.

[4] *Id.* The procedures included notice to the teacher and the right to reply in writing to any derogatory material placed in his or her file. The agreement further provided that the teacher was to be advised promptly and in detail of any complaints against him or her made to the school administration or to the committee. *Id.*

year of nontenured status when she received notification from the Committee that she would not be rehired.[5]

Following the teacher's notification the association, on behalf of the teacher, filed a grievance that the Committee failed to follow the evaluation procedures set forth in the collective bargaining agreement.[6] Subsequently the association requested arbitration of the grievance.[7] Before arbitration began, however, the Committee filed a complaint in superior court seeking a stay of the arbitration proceeding.[8] The Committee contended that arbitration was barred by section 41 of chapter 71 of the General Laws.[9] In so contending the Committee pointed to prior case law interpreting section 41 as granting the Committee nondelegable authority over the decision to renew the teacher's contract.[10] The superior court entered an order staying arbitration on the basis that "the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration."[11]

The Supreme Judicial Court, on its own initiative, transferred the case there for decision,[12] vacated the order of the superior court staying arbitration and HELD: A nontenured teacher's grievance alleging a

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[5] Tyman was in her third year of nontenured status. *Id.* at 416-17, 360 N.E.2d at 878. G.L. c. 71, § 41 provides that the school committee, in re-electing a teacher who has served for the three previous consecutive years, shall employ the teacher to serve at its discretion (tenure). It further requires that a teacher not given tenure must be notified by April 15 or that teacher will be deemed appointed and thus tenured.

[6] The grievance filed in May alleged failure to follow appropriate evaluation procedures, inadequate classroom observation and evaluations, and discrimination. 1977 Mass. Adv. Sh. at 417, 360 N. E. 2d at 878.

[7] Tyman was notified on April 12 and filed her grievance in May. Her grievance alleged seven different violations of the agreement including a letter written by the Chairman of the English Department to the Assistant Superintendent of Schools making several derogatory remarks concerning Mrs. Tyman's ability as an English teacher. See Brief for Appellant to the Appeals Court at 7. It should be noted that the defendants did not seek explicitly to arbitrate the school committee's decision not to reappoint Tyman to a fourth year. 1977 Mass. Adv. Sh. at 417, 360 N.E.2d at 878.

[8] *Id.* at 417, 360 N.E.2d at 878.

[9] G.L. c. 71, § 41 provides:

> Every school committee, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, other than a union superintendent and the superintendent of schools in the city of Boston, shall employ him to serve at its discretion; but any school committee may elect a teacher who has served in its schools for not less than one school year to serve at such discretion. A teacher or superintendent not serving at discretion shall be notified in writing on or before April fifteenth whenever such person is not to be employed for the following school year. Unless said notice is given as herein provided, a teacher or superintendent not serving at discretion shall be deemed to be appointed for the following school year.

[10] See Brief for Appellees, *School Committee of Danvers*, at 17-18.

[11] 1977 Mass. Adv. Sh. at 417, 360 N.E.2d at 878.

[12] *Id.*

school committee's failure to follow evaluation procedures set forth in a bargaining agreement is arbitrable notwithstanding the requirements of section 41, since the arbitration of such a grievance would not infringe upon the school committee's nondelegable authority to make decisions concerning tenure.[13] However, the Court also indicated that deference to the school committee's nondelegable authority sets limits on the remedies which the arbitrator may grant; in particular, while the arbitrator can fashion a remedy short of tenure, he cannot award tenure itself.[14]

The fundamental issue, as defined by the Court, arose from the tension between the lawfully authorized collective bargaining agreement and the traditional authority of the school committee to make tenure decisions.[15] More specifically the Court noted that on one hand, chapter 150E constitutes a full authorization to school committees to agree to arbitrate issues arising out of a contractual grievance procedure and sets no limits on the particular issues which may be the subject of arbitration; on the other hand, school committees have traditionally had the full and nondelegable authority to determine at their discretion whether to award tenure or to renew a nontenured teacher's contract.[16] Moreover, the Court noted that while the legislature has expressly provided that the terms of a collective bargaining agreement override the provisions of certain of the general laws concerning public personnel,[17] the legisla-

[13] *Id.* at 424, 360 N.E.2d at 881.

[14] *Id.* at 424-25, 360 N.E.2d at 881.

[15] The conflict arises between G.L. c. 150E, § 8, which provides that the parties may voluntarily include a grievance procedure culminating in final and binding arbitration, and the traditional authority of the school committee under G.L. c. 71, § 41, which provides that the school committee will have discretion in making tenure decisions. 1977 Mass. Adv. Sh. at 418, 360 N.E.2d at 878-79.

[16] 1977 Mass. Adv. Sh. at 418-19, 360 N.E.2d at 878-79.

[17] The legislature has resolved the conflict in several other instances in § 7(d) of chapter 150E which provides: "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 6 of this Chapter and any municipal personnel ordinance, by law, rule or regulation, . . . the terms of the collective bargaining agreement shall prevail." Personnel ordinances over which the terms of the collective bargaining agreement prevail are those pursuant to the following general laws: the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a½) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight I, inclusive, and

ture has not provided that the terms of agreement override section 41 of chapter 71, the source of the school committee's nondelegable authority in the personnel area. Therefore, the Court indicated that its task was to assess the legislature's overall intention in light of both the full authorization to school committees to agree to arbitration and the continuing statutory discretion of the school committee to decide whether a nontenured teacher is to be reappointed.[18]

In its assessment of legislative intent, the Court declined to infer from legislative authorization to bargain collectively an intent to permit a school committee to bargain away its nondelegable authority to make tenure decisions.[19] At the same time, however, the Court determined that if a school committee agrees to follow evaluation procedures precedent to making a tenure or renewal decision, a grievance alleging a violation of those procedures will be arbitrable.[20] In so determining, the Court reasoned that while the arbitration of the tenure decision would

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sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g½) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section fifty-three C of chapter two hundred and sixty-two.

G.L.c. 150 E, § 7.

[18] 1977 Mass. Adv. Sh. at 418-19, 360 N.E.2d at 878-79. The ad hoc method of dealing with the statutory conflict became apparent in the absence of legislation after three cases decided in the 1976 *Survey* year. *See* Grunebaum, *Labor Law*, 1976 ANN. SURV. MASS. LAW § 6.4, at 166-69. *See also* Boston Teachers Union, Local 66 v. School Committee of Boston, 1976 Mass. Adv. Sh. at 1515, 350 N.E.2d at 707.

[19] The Court stated: "We do not find in legislative authorization for school teachers to bargain collectively concerning wages, hours, and other terms and conditions of employment (G.L. c. 150E, § 2, inserted by Acts of 1973, c. 1078, §2), and to arbitrate grievances (G.L. c. 150 E, § 8), an intent to permit a school committee to bargain away its traditional authority to make tenure decisions if it so wishes." 1977 Mass. Adv. Sh. at 423, 360 N.E.2d at 881.

[20] In a footnote, the Court noted that while the tenure decision itself may not be subject to contractual agreement and thus arbitration, the committee may, as a matter of educational policy, submit a particular tenure decision to arbitration. Footnote 5 states:

> We recognize that, if, as a matter of educational policy, a school committee wishes to submit a particular tenure question to arbitration and to accept the result of the arbitration, it may do so as part of its prerogative. Such an arbitration proceeding and award would not be inconsistent with the school committee's educational policy and, indeed, might be consistent with it. *Teachers Local 66* v. *School Comm. of Boston*, ___ Mass. ___, (1976) (Mass. Adv. Sh. [1976] 1515, 1527-1528. In this case, however, the incumbent school committee has indicated an unwillingness to accept any decision of the arbitrator granting tenure.

Id. at 423 n.5, 360 N.E.2d 881 n.5.

violate section 41 and thus be given no effect, arbitration of grievances concerning evaluation procedures would not violate that section.[21] In thus giving effect to agreements to arbitrate grievances concerning evaluation procedures, the Court expressly reaffirmed the Commonwealth's policies in favor of public sector arbitration.[22] Accordingly, the Court effectively advised school committees that if they wish to except grievances concerning evaluation procedures from a general grievance arbitration clause in a bargaining agreement, they may not do so by implication in reliance upon the nondelegation principles of section 41. Rather, the agreement itself must expressly state such an exception.[23]

While the decision in *Danvers* turned narrowly upon the Court's determination as to scope of arbitration in teacher tenure disputes, and did not directly concern the issue of appropriate arbitral remedies,[24] the Court in dicta nevertheless defined generally the scope of remedies which the arbitrator may permissibly grant upon determining that contractual evaluation procedures have been violated.[25] In particular, as a corollary of its determination that tenure decisions are not arbitrable, the Court indicated that the arbitrator may not interfere with the school committee's nondelegable authority by granting tenure as a remedy for violations of evaluation procedures.[26] However, while it concluded that

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[21] *Id.* at 424, 360 N.E.2d at 881.

[22] In affirming the Commonwealth's policy favoring arbitration the Court applied the federal presumption favoring arbitration indicating that unless there are positive assurances that an arbitration clause is not susceptible to an interpretation covering the dispute, or unless there is no lawful relief conceivable arbitration should not be denied. *Id.*, *citing* United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-583 (1960); G. L. c. 150C, § 2(b).

It is interesting to note that the New York Court of Appeals recently rejected the federal standard favoring arbitration in public sector disputes. In applying the Taylor Law, in the future the Court will not infer coverage by the arbitration clause absent clearly manifested intent but will employ a two-level analysis first determining whether arbitration of the subject is authorized by the Taylor Law and if so whether the parties clearly and unequivocally agreed to arbitrate the dispute. Acting Superintendent v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 399 N.Y.S.2d 189, 369 N.E.2d 752 (1977).

[23] 1977 Mass. Adv. Sh. at 425-26, 360 N.E.2d at 882.

[24] The issue in *Danvers* was whether the superior court was correct in staying arbitration of the grievance concerning teacher evaluation procedures. Thus, the Court indicated that it would be premature to announce any limit on the scope of an arbitrator's award provided it does not award tenure. *Id.*

[25] The Court appears to adopt the position of the New York Court of Appeals in Board of Education, Bellmore-Merrick Cent. High School Dist., Nassau Co. v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 383 N.Y.S.2d 242, 347 N.E.2d 603 (1976) that temporary reinstatement is a permissible remedy. 1977 Mass. Adv. Sh. at 420, 360 N.E.2d at 879-880.

[26] 1977 Mass. Adv. Sh. at 425, 360 N.E.2d at 881. In upholding the arbitrability of contractual evaluation procedures which do not impinge on the school committee's authority to make the ultimate tenure decision, the Court strongly implied that where the

the arbitrator may not grant tenure, the Court intimated that temporary reinstatement for the purpose of re-evaluation could constitute an appropriate remedy.[27]

Having indicated generally its view of the scope of arbitration of alleged procedural violations, the Court stated that it would be premature to announce any further limits on the scope of arbitral awards.[28] Nevertheless, the Court noted by way of dicta that not all procedural violations will be sufficiently serious to warrant relief.[29] Moreover, the Court left open the validity of arbitral relief where there is no showing of a casual connection between the committee's failure to follow procedures and the decision not to re-employ.[30]

Dennis-Yarmouth Regional School Committee v. Dennis Teachers Association[31] was decided the same day as *Danvers* and involved a similar set of facts. The teacher Mary Malloy was in her third year when she was informed by the Committee that she would not be reappointed.[32] Since the teacher was in her third year, her reappointment would have resulted in tenure under section 41 of chapter 71 of the General Laws.[33] The teacher filed a grievance alleging that the school committee had violated certain portions of the collective bargaining agreement including evaluation procedures,[34] more particularly a provision regarding teacher files.[35] In her grievance the teacher claimed that she was entitled to renewal of the contract as well as back pay.[36] Subsequently the teacher and the association sought arbitration of the grievance.[37]

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arbitrator finds a violation of evaluation procedures he may award a remedy short of granting tenure. *Id.*

[27] See *id.* at 425-26, 360 N.E.2d at 882, *citing West Bridgewater,* 1977 Mass. Adv. Sh. 434, 439-41, 360 N.E.2d 886, 889, discussed at text notes 45-66 *infra.*

[28] 1977 Mass. Adv. Sh. at 425, 360 N.E.2d at 882.

[29] The Court noted that some violations of evaluation procedures may be too trivial to justify any relief and cautioned that other violations of teachers' rights may not justify reinstatement. *Id.* at 425, 360 N.E.2d at 881-882.

[30] *Id.* at 426, 360 N.E.2d at 882.

[31] 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883.

[32] Malloy had been appointed to serve for the school year 1971-1972 and her contract had been renewed for the two succeeding school years when she was informed on April 11, 1974 that she would not be reappointed for the 1974-1975 school year. *Id.* at 429-30, 360 N.E.2d at 884.

[33] *Id.* at 430, 360 N.E.2d at 884.

[34] *Id.*

[35] See *id.* at 430 n.3, 360 N.E.2d at 884 n.3 indicating that "Article III of the agreement describes circumstances in which teacher files are to be maintained, giving a teacher notice of the filing of derogatory material and the right to respond." Article III F of the agreement set forth procedures for evaluating teacher performance.

[36] *Id.* at 430, 360 N.E.2d at 884.

[37] *Id.* at 429-30, 360 N.E.2d at 884. The teachers' association argued that nonrenewal of a nontenured teacher was a subject for arbitration under the contract. *Id.* at 429, 360 N.E.2d at 884.

The school committee and the association stipulated the issue to be arbitrated as the merits of the committee's decision not to renew Miss Malloy's contract.[38] Consequently, the arbitrator passed only on the arbitrability of the non-renewal decision under the agreement, giving no consideration to the issue of the committee's alleged violation of evaluation procedures.[39] Following the arbitrator's decision that renewal was arbitrable under the contract, the committee sought and obtained from the superior court vacation of the award and a stay of further arbitration.[40]

Citing its decision in *Danvers*, the Supreme Judicial Court upheld the superior court's judgment vacating the arbirtator's decision.[41] However, the Court modified the order staying arbitration and entered judgment ordering arbitration of the grievances regarding teacher files and evaluation procedures.[42] In so doing the Court, consistent with *Danvers*, HELD: The merits of a tenure decision are not arbitrable, but grievances alleging violations of evaluation procedures may be arbitrated.[43] Accordingly, in *Dennis-Yarmouth* the Court indicated that grievants seeking arbitration of disputes regarding tenure will not obtain such arbitration if they stipulate the issue solely in terms of the merits of the tenure decision.[44]

In *School Committee of West Bridgewater v. West Bridgewater Teachers' Association,*[45] unlike in *Danvers*[46] or *Dennis-Yarmouth,*[47] arbitration had been concluded when the case reached the superior court.[48] The arbitrator had determined that the school committee had failed to follow certain teacher evaluation procedures in violation of the collective

[38] *Id.* at 430, 360 N.E.2d at 884 ("Is the dispute the Association seeks to arbitrate on the merits, which involves the non-renewal of Miss Malloy, a non-tenured teacher, a grievance, and if so, is it arbitrable?").

[39] *Id.* at 430-31, 360 N.E.2d at 884.

[40] *Id.* at 431, 360 N.E.2d at 885.

[41] *Id.* at 431-32, 360 N.E.2d at 885. The Supreme Judicial Court did so despite arguments from the teachers' association that judicial relief was premature and that arbitration should be concluded on the merits before consideration in superior court. In rejecting the association's arguments the Court noted that G.L. c. 150C, § 2(b) authorizes the superior court to stay arbitration if the court finds "(2) that the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration." *Id.* Thus, the Court concluded that an agreement to arbitrate a dispute which cannot lawfully be the subject of arbitration (i.e. the tenure decision) was tantamount to the absence of a controversy, therefore bringing it within the purview of G.L. c. 150C, § 2 (b) authorizing a stay by the superior court. *Id.*

[42] *Id.* at 432-33, 360 N.E.2d at 884-85.

[43] *Id.*

[44] *Id.* at 432, 360 N.E.2d at 885.

[45] 1977 Mass. Adv. Sh. 434, 360 N.E.2d 886.

[46] 1977 Mass. Adv. Sh. 415, 360 N.E.2d 877. See text at notes 1-30 *supra.*

[47] 1977 Mass. Adv. Sh. 428, 360 N.E.2d 883. See text at notes 31-44 *supra.*

[48] *Id.* at 434, 360 N.E.2d at 887.

bargaining agreement.[49] Having made this determination, the arbitrator had ordered the teacher reinstated immediately with full pay,[50] and the teacher was reinstated in accordance with the arbitrator's order. The school committee, however, brought an action in superior court seeking an order vacating the arbitrator's award.[51] The superior court granted such order on the grounds that the school committee's decision not to renew the contract of the nontenured teacher was not arbitrable and, that even if its decision were arbitrable, reinstatement would not be a permissible form of relief.[52]

The Supreme Judicial Court on direct appellate review vacated the superior court's order,[53] affirmed the arbitrator's award and HELD: An arbitrator may award a remedy of compensation for all or part of the subsequent school year upon determining that the school committee's failure to adhere to contractual evaluation procedures resulted in nonrenewal of the teacher's contract.[54] Moreover, after noting that the committee's reinstatement of the teacher had mooted the issue as to the case at hand, the Court nevertheless concluded by way of dicta that temporary reinstatement is an acceptable arbitral remedy for a nonsupervisory teacher who has been treated unfairly by a committee's failure to follow evaluation procedures in its decision not to renew the teacher's contract.[55]

In analyzing the permissibility of the compensation remedy, the Court stated that where a failure to follow evaluation procedures results in harm to the teacher, an arbitrator clearly may make an award of compensation.[56] The Court indicated that such a compensation award is permissible even if it is determined that the arbitrator has no author-

[49] *Id.* at 436-37, 360 N.E.2d at 887-88. The collective bargaining agreement provided that all observations of teacher performance were to be conducted openly and with full knowledge of the teacher. Written reports of performance were to be given to the teacher and discussed with her. The teacher was also entitled to file an answer in writing to any complaint. The arbitrator found, however, that Mayer was not advised of classroom observation, nor was she advised of a prior recommendation not to reemploy her made to the school committee before a March 1975 evaluation meeting at which she was shown only favorable evaluations. Moreover, she was not advised of this recommendation until after the committee had voted on it. Accordingly the arbitrator reasoned that this latter circumstance made it impossible for Mayer (1) to answer certain arguably unwarranted conclusions on which the recommendations not to renew were based, (2) to make corrections in her performance and (3) to disclose to the school committee the absence of opportunity to rebut complaints against her. *Id.* at 436-37, 360 N.E.2d at 887-88.

[50] *Id.* at 437, 360 N.E.2d at 888. Full pay was deemed to include seniority and other benefits less any interim earnings from other employment. *Id.*

[51] *Id.* at 434-35, 360 N.E.2d at 887.

[52] *Id.* at 435, 360 N.E.2d at 887.

[53] *Id.*

[54] *Id.* at 439, 360 N.E.2d at 888.

[55] *Id.* at 440-41, 360 N.E.2d at 889.

[56] *Id.* at 439, 360 N.E.2d at 888.

ity to order reinstatement.[57] Moreover, the Court noted that the expiration of a collective bargaining agreement would not affect the permissibility of such a remedy.[58]

Turning to the permissibility of reinstatement as an arbitral remedy, the Court focused upon section 11(a)(5) of chapter 150C of the General Laws, which provides the standard for vacating or confirming arbitral awards. Particularly, the Court noted that section 11(a)(5) provides in part that " 'the fact that the arbitrator's award orders reinstatement of an employee with or without back pay or grants relief . . .' that a court could or would not grant 'shall not be ground for vacating or refusing to confirm the award'."[59] Thus, the Court reasoned that section 11 recognized reinstatement as an acceptable result of arbitration, although under standard principles of contract law and of equitable remedies such a result would not or might not be ordered.[60] Having thus found reinstatement awardable as a matter of general arbitration principles, the Court considered, in light of *Danvers,* whether temporary reinstatement would nonetheless be impermissible as infringing upon the school committee's nondelegable prerogatives. Reasserting its determination that an arbitrator cannot order tenure itself, the Court nevertheless recognized temporary reinstatement as an acceptable result of arbitration.[61] In particular, the Court reasoned that in awarding temporary reinstatement the arbitrator still leaves in the hands of the committee the ultimate determination as to whether to grant the employee tenure.[62] The Court concluded that the temporary reinstatement of a nonsupervisory teacher harmed by a breakdown in required teacher evaluation procedures does not constitute an infringement upon committee prerogatives.[63] Moreover, the Court determined that its result, the allowance of reinstatement in addition to back pay as arbitral remedies, would tend to effectuate rational decisionmaking in that it would give effect to agreed-upon evaluation procedures. In particular, the Court cited various policy benefits which it found inherent in contractual proce-

[57] *Id. See* School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 404, 343 N.E.2d 145, 149.

[58] 1977 Mass. Adv. Sh. at 439, 360 N.E.2d at 889. The Court noted that a contrary result would bar relief where the violation ocurred in the last year of the agreement.

[59] *Id.* at 440, 360 N.E.2d at 889.

[60] *Id.*

[61] *Id.* at 441, 360 N.E.2d at 889. The Court also indicated that an arbitral remedy which allows the school committee to choose between a year's salary or reinstatement would be permissible. *Id.* at 440, 360 N.E.2d at 889.

[62] *Id.* at 441, 360 N.E.2d at 889.

[63] *Id. citing* Board of Education, Bellmore-Merrick Cent. High School Dist., Nassau Co. v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 173, 383 N.Y.S.2d 242, 245-46, 347 N.E.2d 603, 607 (1976) (holding that temporary reinstatement for the purposes of reevaluation is a permissible remedy).

dures for teacher evaluation.[64]

Having indicated that temporary reinstatement and compensation are permissible arbitral remedies, the Court nevertheless issued two caveats to arbitrators. First, the Court advised arbitrators that they should "not award reinstatement of a teacher whose presence, on substantial grounds, would be inappropriate."[65] Second, the Court recognized that cases may exist in which an award of reinstatement would be vacated as violative of "some fundamental principle concerning management of a school system and a school committee's right to decide who should teach in its system."[66]

The significance of the *Trilogy* decision lies in its determination that the nondelegation principles limit the scope of arbitration only so as to prohibit arbitration of the tenure decision itself; and that accordingly the arbitration of contractual evaluation procedures precedent to the tenure or renewal decision is not forbidden by nondelegation principles. Earlier Massachusetts cases had indicated that certain school committee decisions would not be arbitrable to the extent that these decisions infringed on the nondelegable authority of a school committee.[67] However, before the *Trilogy* the extent to which contractual teacher evaluation procedures would be arbitrable remained unclear. By upholding the arbitrability of teacher evaluation procedures the *Trilogy* effectuates within the educational personnel area the Commonwealth's statutory policy favoring grievance arbitration in the public sector.[68] Importantly, in the *Trilogy*, the Court has provided much needed guidance to the superior courts as to the circumstances under which arbitration should be stayed under subsection 11(a)(3) or vacated under subsection 11(c) of chapter 150C of the General Laws. Additionally, the *Trilogy* has advised arbitrators as to the remedies which are permissible when a violation of contractual teacher evaluation procedures is found. Significantly, the Court specifically sanctioned the remedies of compensation and temporary reinstatement. Moreover, in light of the Court's reasoning in *West Bridgewater* it may be possible that other remedies subsequently will be deemed acceptable provided that they do not infringe upon the school committee's authority to make tenure decisions.[69]

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[64] *Id.* at 437, 360 N.E.2d at 888. See note 168 *infra* for a listing of those benefits.

[65] *Id.* at 441, 360 N.E.2d at 890.

[66] *Id.* at 441-42, 360 N.E.2d at 890.

[67] See text at notes 91-114 *infra.*

[68] See G.L. c. 150E, § 8. *See also* Note, *Grievance Arbitration in the Public Sector: The New Massachusetts Law,* 9 SUFFOLK U. L. REV. 721, 728 (1975).

[69] For example, where faculty have negotiated evaluation procedures designed to benefit teachers by providing feedback and opportunity to improve, an arbitrator might include in-service training as part of the reinstatement remedy. Such a remedy would not appear to infringe upon any nondelegable duty of a school committee.

After a brief introduction to grievance arbitration in the public sector, this comment will examine the sources and policies underlying the nondelegation principle as applied in Massachusetts case law prior to the Court's holdings in the *Trilogy*. Then the comment will discuss generally the conflict which arises where the legislature has failed to give any indication of the relationship between the nondelegable authority of school committees under the education laws and the authorization to arbitrate and bargain under state collective bargaining enabling acts. Turning to an analysis of this conflict in the tenure context, the comment will first review how the conflict has been resolved by courts in other jurisdictions. Having considered approaches of several jurisdictions to the problem of accomodating the nondelegable nature of tenure decisions with the statutory authorization to bargain collectively and to arbitrate, the comment will turn to the *Trilogy* and analyze its reasoning. Specifically, the comment will conclude that the accomodation reached in the *Trilogy* represents a sound compromise in that it gives effect to teacher's rights to bargain and to arbitrate without vitiating the traditional nondelegable authority of school committees to make tenure decisions. Having examined the accomodation reached in the *Trilogy* as to the issue of the arbitrability of grievances concerning tenure decisions and teacher evaluation procedures, the comment will focus upon the *Trilogy's* approach to the issue of arbitral remedies. While noting that the reinstatement remedy sanctioned in the *Trilogy* will often be impracticable, the comment will also suggest that the narrow limitation on arbitral remedies implicit in the *Trilogy* would appear to allow arbitrators broad scope in fashioning remedies supplemental to or in lieu of temporary reinstatement. Finally, the comment will discuss the indications in the *Trilogy* that the scope of arbitration of arbitral remedies may be limited in certain circumstances by factors unrelated to nondelegation principles.

I. Introduction: The Elements of the Accommodation Struck in the *Trilogy*: Grievance Arbitration and the Nondelegation Principle

A. Grievance Arbitration in the Public Sector in Massachusetts

In 1965 the legislature granted public employees the rights of unionization and collective bargaining, rights previously accorded only to private employees.[70] However, the 1965 legislation did not provide public

[70] Acts of 1965, c. 763. This act 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.

While public employees had the right to form unions and present proposals with respect

employees with either the right to strike or the right to binding arbitration of labor disputes.[71] Public employee organizations pressed for legislation instituting such rights in the public sector, contending that without the right to strike or to arbitrate, public employees would be powerless to effectuate their newly created rights of unionization and collective bargaining.[72] Responding to strong public employee pressure the legislature in 1973 enacted chapter 150E providing for binding arbitration in the public sector.[73] The arbitration provided for in chapter 150E is of two kinds; impasse arbitration and grievance arbitration. Impasse arbitration is the arbitration of disputes arising out of the collective bargaining process.[74] Grievance arbitration, in contrast, is the arbitration of disputes which arise over the meaning and application of terms within the collective bargaining agreement. Grievance arbitration is provided for in section 8[75] and impasse arbitration in section 9 of chapter 150E.[76]

A legislative policy broadly favoring arbitration in general, and grievance arbitration in particular, appears to underlie the statutory provisions. Thus section 8 not only broadly authorizes public employers to enter into agreements to arbitrate grievances, but also authorizes the Labor Relations Commission to order arbitration of grievances in certain

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to salaries and conditions of employment as early as 1958, Acts of 1958, c. 460, they remained dependent on legislation for increases and wages until 1965. *See* Segal, *Labor Law: Municipal Bargaining,* 1971 ANN. SURV. MASS. LAW § 6.2, at 99.

[71] Acts of 1965, c. 763. *See* Sherry, *Labor Law,* 1974 ANN. SURV. MASS. LAW § 2.12, at 25.

[72] Additionally, several other important policy considerations militated in support of the employees' position favoring arbitration. For instance, grievance arbitration acts as a device to balance the power between public employers and employees. In the absence of the right to strike the balance is tilted in favor of the public employer. Furthermore, grievance arbitration can serve to identify for public managers and officials problem areas to be resolved in future negotiations. Finally, grievance arbitration can serve as a much needed release valve for employee frustration. *See generally* DeWolf, *The Enforcement of the Labor Arbitration Agreement in the Public Sector,* 39 ALB. L. REV. 393, 395 (1975).

[73] Acts of 1973, c. 1078, § 2 (codified at G.L. c. 150E). *See* Sherry, *Labor Law,* 1974 ANN. SURV. MASS. LAW § 2.12, at 25, 31.

[74] G.L. c. 150E § 9.

[75] G.L. c. 150E § 8. During the last *Survey* year the constitutionality of binding arbitration was upheld in Town of Arlington v. Board of Conciliation and Arbitration, 1976 Mass. Adv. Sh. 2035, 352 N.E. 2d 914. One significant aspect of *Town of Arlington* was whether a town could delegate to an arbitrator the power to resolve a dispute that would affect the tax rate and thus be in violation of the Home Rule Amendment. In upholding the arbitration statute against constitutional challenge the Court indicated that the arbitration statute was not constitutionally forbidden where proper safeguards and standards for the delegation were provided. *Id.* at 2045-46, 352 N.E.2d at 920. *See also* Student Comment, *Labor Law: Public Employee Impasse Procedures,* 1976 ANN. SURV. MASS. LAW § 6.10, at 194.

[76] G.L. c. 150E, § 9.

instances where the parties have not so provided it in their agreement.[77] Moreover, section 1 of chapter 150C provides that a collective bargaining agreement between a labor organization and an employer to submit grievances to arbitration "shall be valid, enforceable and irrevocable."[78] Finally, the legislative provisions which provide that collective bargaining agreements override other laws concerning personnel policy,[79] when viewed in conjunction with other provisions of chapter 150E, imply a strong policy favoring grievance arbitration.

While the statutory provisions thus embody a policy favoring broad rights for public employees and employers to agree to arbitrate grievances,[80] the legislature left open the possibility that in certain instances other public policies or laws may require limitations on such rights.[81] In particular, in the area of public education, the legislature left it to the Court to determine the extent to which the right to arbitrate school committee personnel decisions may be limited by the traditionally accepted principle that school committees have nondelegable authority to make such decisions.[82]

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[77] G.L. c. 150E, § 8 provides that the parties may elect to include in their bargaining agreement a written grievance procedure culminating in final and binding arbitration. Furthermore, the Commission may order arbitration at the request of either party.

[78] G.L. c. 150E, § 1.

[79] G.L. c. 150E, § 7(d). See note 17 *supra*.

[80] *See* Note, *Grievance Arbitration in the Public Sector: The New Massachusetts Law*, 9 SUFFOLK U. L. REV. 721, 728 (1975).

[81] In Boston Teachers Union, Local 66 v. School Comm. of Boston, 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707, the Court recognized the existence of a statutory conflict between authorization to arbitrate and the nondelegation principle implicit in the education laws. The Court there held that an agreement to hire substitute teachers was arbitrable. *Id.* at 1527, 350 N.E.2d at 714. Then the Court discussed more generally the role of the legislature in resolving the statutory conflict:

> The Legislature can remove considerable uncertainty concerning which subjects are proper matters for collective bargaining between teachers and school committees. It might define those subjects which can or cannot be incorporated in a binding collective bargaining agreement. It might state that, to the extent certain matters are made part of a collective bargaining agreement, the school committee has lost its prerogative during the term of the bargaining agreement to exercise its otherwise exclusive control over matters of educational policy, except perhaps in certain circumstances. In the absence of further statutory definition the subject of the scope of permissible, binding collective bargaining and the enforceability of such agreements will have to be dealt with on a case by case basis.

Id. at 1527-28 n.5, 350 N.E.2d at 714 n.5. *See also Danvers*, 1977 Mass. Adv. Sh. at 423 n.5, 360 N.E.2d at 881 n.5, *citing Boston Teachers Union, Local 66.*

[82] 1977 Mass. Adv. Sh. at 418-19, 422, 360 N.E.2d at 78-79, 80.

B. THE PRINCIPLE OF THE NONDELEGABILITY OF SCHOOL COMMITTEE PERSONNEL DECISIONS

Massachusetts courts in delimiting the powers of school committees have been guided by the principle that school committee personnel decisions may not be delegated to third parties.[83] Unlike the once favored federal "nondelegation" doctrine, the principle that school committee personnel decisions[84] are nondelegable does not appear to rest upon constitutional foundations. Rather, that principle has its source in the Massachusetts courts' interpretation of the state's education laws as broadly committing matters of local educational personnel policy to the local school committees.[85] This broad interpretation of the education laws, in particular of section 42A of chapter 71, was evident in *Demers* v. *School Committee of Worcester,*[86] in which the Court held that the authority to employ was vested solely in the school committee and could not be discharged by the superintendent.[87] Similarly, in other cases the Court has indicated that an attempt to delegate the power to determine teacher salaries to the mayor or other city officials would be void, since the legislature has vested this power in the school committee.[88]

As an important corollary to the Court's interpretation of the education laws, the Court has generally interpreted statutes concerning labor relations in the public sector in a manner which would not impinge upon the nondelegable authority of school committees.[89] In particular, the Court has indicated that, in the absence of express statutory language overriding school committee authority in the personnel or policy area,

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[83] School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145. See also text at notes 91-114 *infra*; DeCanio v. School Comm. of Boston, 358 Mass. 116, 120, 260 N.E.2d 677, 680 (1970), *appeal dismissed and cert. denied sub nom.* Fenton v. School Comm. of Boston, 401 U.S. 929 (1971) (school committee had plenary power in discharge of probationary teacher; where legislature has limited the powers of the school committee it has done so explicitly); Sullivan v. School Comm. of Revere, 348 Mass. 162, 165, 202 N.E.2d 612, 614 (1964) (school committee's supremacy under § 37 could not be fettered by three year contract with superintendent); Murphy v. Cambridge, 342 Mass. 339, 341, 173 N.E.2d 616, 618 (1961) (school committee not bound by vote of past committee creating and appointing academic personnel to new positions); Demers v. School Comm. of Worcester, 329 Mass. 370, 373, 108 N.E.2d 651, 652 (1952) (authority to employ vested in the school committee not superintendent); O'Brien v. Pittsfield, 316 Mass. 283, 285-86, 55 N.E.2d 440, 441 (1944) (power to determine salaries vested solely in the school committee cannot be delegated to superintendent).

[84] See K. DAVIS, ADMINISTRATIVE LAW §§ 2.01-2.02 (1958).

[85] See cases cited in note 83 *supra.*

[86] 329 Mass. 370, 108 N.E.2d 651 (1952).

[87] *Id.* at 373, 108 N.E.2d at 652.

[88] Leonard v. School Comm. of Springfield, 241 Mass. 325, 329-330, 135 N.E. at 459, 461 (1922).

[89] *See, eg.* School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145.

the Court will not infer from legislative acts an intent to override such authority.[90] Such a judicial approach was clearly evident in pre-*Trilogy* cases in which the Court held that the recently enacted public sector collective bargaining and arbitration statutes were not intended to override the nondelegable authority of a school committee to abolish certain supervisory positions in its school system.

*Nondelegation as a Limitation on Arbitration in Pre-*Trilogy *Cases*

Since the passage of statutes providing for collective bargaining and arbitration in the public sector, the Supreme Judicial Court has reaffirmed the principle of nondelegation.[91] In particular, the Court has held that, despite the facial generality of the collective bargaining and arbitration statutes, those statutes were not intended to override the nondelegable authority of school committees.[92] Thus, school committees may not, through collective bargaining in general or through agreements to arbitrate grievances in particular, delegate their authority to make decisions concerning educational personnel or policy.[93]

The Court's reaffirmance of the nondelegation principle in the face of the passage of chapters 150C and 150E was illustrated by two decisions rendered during the previous *Survey* year.[94] Both of those cases involved the issue of the arbitrability of a school committee's decision to abolish

[90] For cases outside the arbitration context in which the Court has refused to infer legislative intent to override the broad powers of the school committee see DeCanio v. School Committee of Boston, 358 Mass. 116, 120, 260 N.E.2d 676, 679 (1970) *appeal dismissed and cert. denied sub nom.* Fenton v. School Committee of Boston, 401 U.S. 929 (1971) (holding that a school committee may discharge a probationary teacher at any time); Dowd v. Dover, 334 Mass. 23, 26-27, 133 N.E.2d 501, 503-04 (1956) (holding that the issue of whether to maintain a town high school or send pupils on a tuition basis to a high school in another town is for school committee decision not voter referendum).

[91] School Comm. of Hanover v. Curry, 1975 Mass. App. Ct. Adv. Sh. 467, 325 N.E.2d 283, *aff'd* 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144; School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145. See text at notes 107-114 *infra.*

[92] See text at notes 91-114 *infra* discussing *Hanover* and *Braintree.*

[93] See School Comm. of Hanover v. Curry, 1975 Mass. App. Ct. Adv. Sh. 467, 477-78, 325 N.E.2d 282, 286, *aff'd* 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144; and School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. at 401, 343 N.E.2d at 148. In *Danvers* the Court followed *Hanover* and *Braintree* indicating that a school committee may not bargain away its traditional authority to make tenure decisions. 1977 Mass. Adv. Sh. at 423, 360 N.E.2d at 881. See also footnote 5 where the Court indicates that while a school committee may not contractually delegate the tenure decision to an arbitrator it may as a matter of educational policy submit a particular tenure question to arbitration. *Id.* See also text at note 20 *supra.*

[94] School Comm. of Hanover v. Curry, 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144, *aff'g* 1975 Mass. App. Ct. Adv. Sh. 467, 325 N.E.2d 282; School Comm. of Braintree v. Raymond, 1976 Mass. Adv. Sh. 399, 343 N.E.2d 145, discussed in Grunebaum, *Labor Law,* 1976 ANN. SURV. MASS. LAW. § 6.4, at 166.

unilaterally supervisory positions. In *School Committee of Hanover v. Curry*[95] the school committee had unilaterally abolished the position of supervisor of music effective after the expiration of the collective bargaining agreement.[96] The agreement provided for grievance arbitration.[97] After the announcement of the abolition of the supervisor's position, the teachers' association sought grievance arbitration on behalf of the supervisor, alleging that the school committee had violated the agreement by eliminating the position of supervisor of music.[98] The arbitrator determined that the grievance was arbitrable and upheld the assocation's contentions that the school committe had violated the terms of the agreement by unilaterally abolishing the position.[99] Accordingly, the arbitrator ordered the employee reinstated to the supervisory position with back pay.[100] The school committee sought and obtained a superior court order vacating the award.[101] After the association appealed the superior court order, the Appeals Court held that abolition of the position "was committed to the exclusive, nondelegable decision of the school committee . . ." by section 37 of chapter 71 and therefore should not have been submitted to arbitration.[102] Accordingly, the court concluded that the award was a nullity, and vacated the award.[103]

The Supreme Judicial Court affirmed the Appeals Court decision and held that a school committee's decision to eliminate a supervisory position is not arbitrable.[104] In so holding the Court first reasoned that "[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or, in neither, may . . . restrict the freedom to arbitrate . . . ."[105] More particularly, the Court reasoned that there are legitimate areas of management prerogative over educational policy, although not statutorily prohibited, which cannot be bargained away because of the necessity to safeguard public control over such decisions.[106]

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[95] 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144.

[96] *Id.* at 396, 343 N.E.2d at 144.

[97] 1975 Mass. App. Ct. Adv. Sh. at 468, 325 N.E.2d at 283, *aff'd* 1976 Mass. Adv. Sh. 396, 343 N.E.2d 144.

[98] *Id.* at 469 n.3, 325 N.E.2d at 284 n.3.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 480-81, 325 N.E.2d at 287, *aff'd,* 1976 Mass. Adv. Sh. 396, 343 N.E.2d at 144.

[103] *Id.* at 481, 325 N.E.2d at 287.

[104] 1976 Mass. Adv. Sh. 396, 397, 343 N.E.2d 144, 145.

[105] *Id.* at 398, 343 N.E.2d at 145, *citing* Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 37 N.Y.2d 614, 616-17, 376 N.Y.S.2d 427, 429, 339 N.E.2d 132, 133 (1975).

[106] *Id.* Language in the Appeals Court opinion was more explicit. 1975 Mass. Adv. Sh. at 480, 325 N.E.2d at 287. ("There is a legitimate area of managerial prerogative over

The Court in *Hanover* emphasized that its holding should be read in conjunction with *School Committee of Braintree v. Raymond,*[107] a companion case similar on its facts to *Hanover.*[108] In *Braintree* the school committee had abolished a supervisory position held by the grievant Raymond through its consolidation with another position.[109] The teachers' association sought arbitration, contending that the decision violated a clause in the collective bargaining agreement.[110] The arbitrator concluded that the grievance was arbitrable and the committee had violated the agreement by unilaterally abolishing the position.[111] Accordingly, the arbitrator ordered the grievant reinstated with back pay.[112] Upon application of the school committee the superior court vacated the award and the association appealed.[113] The Supreme Judicial Court on direct appellate review held that the school committee exceeded its powers in binding itself not to abolish a supervisory position for a period extending beyond the school year notwithstanding the terms of the agreement.[114]

In *Braintree* and *Hanover* the Court thus established the proposition that the scope of the arbitrability of school committee personnel decisions is limited by the nondelegability of such decisions. While those cases seemed clearly to imply the nonarbitrability of tenure decisions, the Court was not called upon expressly to consider whether tenure decisions were arbitrable. Another more difficult issue left open by *Hanover* and *Braintree* was whether, assuming that the actual decision whether or not to grant tenure is not arbitrable, terms in an agreement mandating certain evaluation procedures may nevertheless be arbitrated where grievance arbitration is called for in the agreement.

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educational policy which is committed to the school committee and which it cannot bargain away, as it could if it were a private party not subject to public control.")

[107] 1976 Mass. Adv. Sh. at 397, 343 N.E.2d at 145.

[108] It should be noted that the Court in *Braintree* discounted any difference between the *Braintree* and *Hanover* cases predicated on the fact that *Hanover* arose under the old collective bargaining statute (G.L. c. 149, §§ 178D, 178F, 178N, repealed by Acts of 1973, c. 1078, §§ 1, 2, adding G.L. c. 150E). 1976 Mass. Adv. Sh. 399, 401, 343 N.E.2d 145, 147.

[109] *Id.* at 400, 343 N.E.2d at 147.

[110] See *id.*

[111] *Id.* at 400-01, 343 N.E.2d at 147.

[112] *Id.*

[113] *Id.* at 401, 343 N.E.2d at 147.

[114] *Id.* at 404, 343 N.E.2d at 148. At the same time the Court held that under a collective bargaining agreement an arbitrator could award compensation where he could not award reinstatement. *Id.* at 405, 343 N.E.2d at 149.

II. ARBITRATION OF TENURE-RELATED GRIEVANCES

A. APPROACHES OF OTHER JURISDICTIONS

Prior to the enactment in Massachusetts and in other states of statutes granting collective bargaining rights to public employees, state courts generally upheld the principle that school committees may not delegate their authority to make tenure decisions.[115] That principle, however, has been subjected to close analysis in some state courts since the enactment of public sector collective bargaining and arbitration statutes.[116] Closer analysis than theretofore had been accorded the nondelegation principle was seen as required because collective bargaining provided a mechanism by which the school committee could "delegate" certain aspects of the tenure-granting process while retaining its authority over other aspects thereof.[117] In particular, through collective bargaining school committees could agree to follow certain procedures in evaluating teachers for tenure purposes.[118] Thus, the question was raised as to whether, assuming the substance of tenure decisions may not be delegated, the school committee may nevertheless agree to follow certain evaluation procedures and to arbitrate grievances concerning such procedures. At the same time, a more general question persisted in Massachusetts and other states as to whether the collective bargaining and arbitration statutes were intended to override altogether the traditional tenure-granting authority of school systems.

The courts of several states, prior to the *Trilogy,* considered the issues of whether public sector collective bargaining and arbitration statutes were intended to override the nondelegable authority of school commit-

[115] See DeWolf, *The Enforcement of the Labor Arbitration Agreement in the Public Sector*, 39 ALB. L. REV. 393, 408 (1975).

[116] As a result of these enactments, public education employees have in many cases extended the protection afforded probationary employees through the negotiation of just cause provisions. The typical "boilerplate" just cause provision reads: "No teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause." Such provisions interpreted by arbitrators eliminate the authority of a school committee to dismiss without just cause the employment of a nontenured teacher at the end of his or her probationary period. *See generally* Note, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation* (hereinafter cited as *Due Process*) 89 HARV. L. REV. 752, 753 n.11 (1976) (indicating that as of September 1975 some 28 states permit the establishment of grievances culminating in arbitration. See also *id.* at 757 n.28 surveying state courts' treatment of scope of arbitration on this issue.

[117] *Id.* at 753 n.11, 757 n.28.

[118] This is true where the legislature has not by statute limited the scope of bargaining by prohibiting bargaining over certain subjects. For a list of jurisdictions limiting the scope of bargaining by statute see *id.* at 753 n.8.

tees over tenure systems;[119] and whether, assuming that those statutes were not so intended, bargaining and arbitration concerning evaluation procedures could be consistent with upholding the school committee's nondelegable authority over tenure decisions.

The cases from other jurisdictions generally indicated three approaches taken by the courts where the legislature failed to indicate expressly whether statutorily authorized bargaining rights overrode the authority of school committees in the tenure area.[120] According to the first approach, the enactment of a comprehensive collective bargaining statute preempted or impliedly repealed prior legislation governing personnel decisions in the public sector. Under this approach, therefore, full effect should be given to a collective bargaining agreement even when it would appear to override the nondelegable prerogatives of school committees, such as the prerogatives to make decisions concerning tenure.[121] At the other extreme, the second approach holds that the scope of arbitration is strictly limited by statutory prohibitions governing public sector personnel relations and, therefore, no effect should be given to an agreement to arbitrate concerning any matters touching upon tenure decisions. The second approach would negate collective bargaining or arbitration concerning evaluation procedures as well as concerning the actual tenure decision.[122] The third approach represents an intermediate position which looks not only to specific prohibitions but to enactments and procedures as expressions of public policy, and attempts to harmonize contractual rights with public law by giving effect to those provisions of the agreement not repugnant to the public law.[123] This approach would give effect to agreements to arbitrate concerning violations of evaluation procedures. At the same time, it would not allow a school committee to commit the actual tenure decision itself to an arbitrator.

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[119] See discussions of these cases in *Danvers* at 1977 Mass. Adv. Sh. at 419-21, 360 N.E.2d at 879-80, *citing* VanGorder v. Matanuska-Susitna Borough School Dist., 513 P.2d 1094 (Alas. 1973); Illinois Educ. Ass'n Local Community High School Dist. 218 v. Board of Educ. of School Dist. 218, Cook Co., 62 Ill. 2d 127, 340 N.E.2d 7 (1975); Wesclin Educ. Ass'n v. Board of Educ. of Wesclin Community Unit School Dist., 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975); Trustees of Junior College Dist. No. 508, County of Cook v. Cook County College Teachers Union, Local 1600, 62 Ill. 2d 470, 342 N.E.2d 473 (1976); Kaleva-Norman-Dickson School Dist. No. 6 v. Kaleva-Norman-Dickson Teachers' Ass'n, 393 Mich. 583, 227 N.W.2d 500 (1975); Board of Educ. Bellmore-Merrick Cent. High School Dist. Nassau Co. v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 383 N.Y.S.2d 53, 358 N.E.2d 878 (1976); Legislative Conference of the City Univ. v. Board of Higher Educ., 31 N.Y.2d 926, 340 N.Y.S.2d 924, 293 N.E.2d 92, *aff'g* 38 A.D.2d 478 (App. Div. 1972).

[120] See Note, *Due Process, supra* note 104 at 753. See generally Sachman, *Redefining the Scope of Bargaining in Public Employment,* 19 B.C. L. Rev. 155 (1977).

[121] See text at notes 124-129 *infra.*

[122] See text at notes 130-133 *infra.*

[123] See text at notes 134-141 *infra.*

The first approach, adopted by the Michigan Supreme Court, upholds the arbitrability not only of grievances pertaining to alleged violations of evaluation procedures, but also of grievances alleging the incorrectness of the tenure decision itself. In *Kaleva-Norman-Dickson School District No. 6 v. Kaleva-Norman-Dickson School Teacher's Association*[124] a probationary teacher sought to arbitrate the school committee's decision not to renew her contract on the grounds that nonrenewal violated the just cause provision[125] of the agreement, against claims by the school committee that arbitration was barred by the "function of management" reservation clause.[126] The Court, in finding the federal policy favoring arbitration[127] appropriate under the state's public employment relations act, held the teacher's claim arbitrable.[128] In so holding the Michigan court appeared to rely on earlier cases holding that because the arbitration agreement itself limits the authority of the arbitrator to deciding matters within the agreement, the employer, by accepting the contract, does not delegate its policy-making authority to the arbitrator.[129]

The second approach has been adopted by the Illinois courts, which have held that the scope of arbitration is limited by specific statutory prohibitions in the state's education laws. In *Wesclin Education Association v. Wesclin Community Union School District,*[130] two teachers sought to arbitrate the school board's failure to follow contractual evaluation procedures precedent to a decision not to renew their contract.[131] In holding that the school board could not impose upon itself conditions

[124] 393 Mich. 583, 227 N.W.2d 500 (1975).

[125] *Id.* at 589-90, 227 N.W.2d at 501-503. The union and the teacher contended that the school board had violated a specific provision of the contract that a teacher would not be dismissed except for just cause, and that the violation was arbitrable by virtue of a broad arbitration clause providing that disputes over interpretation of the contract were arbitrable. *Id.*

[126] The school committee contended that it had retained and reserved the powers, duties and responsibilities conferred upon it under Michigan laws to hire and dismiss employees by virtue of Art. II. *Id.* at 590, 227 N.W.2d at 503.

[127] *Id.* at 591, 227 N.W.2d at 504 *citing* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (holding that a claim which on its face is governed by the contract is arbitrable). See also *id.* at 592, *citing* United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding that "[a]n order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute. Doubts should be resolved in favor of arbitration").

[128] *Id.* at 595, 227 N.W.2d at 506.

[129] *See* Local 953, Int'l Union of American Federation of State, County and Municipal Employees v. School Dist. of Benton Harbor, 56 LC ¶ 51,775 (Mich. 1967) *referred to in* Fishback, *Grievance Arbitration in Public Employee Disciplinary Cases,* 22 LAB. L. J. 780, 781 (1971).

[130] 30 Ill. App. 3d 67, 331 N.E.2d 335 (1975).

[131] *Id.* at 69, 331 N.E.2d at 336.

precedent to the dismissal of a nontenured teacher, the court found that a board could not delegate or limit the power to dismiss granted to it by the legislature.[132] Significantly, the court concluded not only that the arbitration of just cause provisions was prohibited, but that arbitration of violation of evaluation procedures was prohibited. Emphasizing that the legislature had at no time seen fit to impose upon the public schools a duty to evaluate and train probationary teachers, the court accordingly concluded that arbitration of such procedures could not be harmonized with the duty and responsibilities of a school board.[133]

Representative of the third approach to the relationship between grievance arbitration and the non-delegability of tenure decisions is the New York Court of Appeals decision in *Cohoes City School District v. Cohoes Teachers Association.*[134] In *Cohoes* the arbitrator had awarded reinstatement of the teacher which would have automatically ripened into tenure,[135] on the grounds that the school board had violated the evaluation procedures and the just cause provision in the contract.[136] In response to the school district's action to vacate the award the trial court confirmed the award. Subsequently, however, the award was modified to require the reinstatement of the teacher but without tenure.[137] The New York Court of Appeals affirmed on somewhat broader grounds and held that the just cause provision was unenforceable to the extent that it limited the school board's discretion with respect to its ultimate and nondelegable responsibility to make tenure decisions.[138] However, the Court held in addition that, because the right to bargained-for supplemental evaluation procedures is not rendered a nullity due to the board's right to deny tenure without explanation, temporary reinstatement for the purpose of re-evaluation is a proper remedy.[139] In reasoning that the responsibility and authority to select and screen teaching personnel must be exercised by the board and cannot be delegated,[140] the Court noted that while the New York Education Laws do not explicitly

[132] *Id.* at 76-77, 331 N.E.2d at 341.

[133] *Id.* It is interesting to note the Illinois court's view of teacher evaluation procedures designed to benefit the teacher. By way of dicta the Illinois court has indicated that the purpose of the school system is not to evaluate, train, supervise, or guide teachers. *Id.* Thus the Illinois court would not appear to view such teacher evaluation procedures as in the public interest. *Id.* at 77, 331 N.E.2d at 341-42. *Cf. West Bridgewater,* 1977 Mass. Adv. Sh. 434, 437, 360 N.E.2d 888 (indicating that teacher evaluation procedures may serve the public interest).

[134] 40 N.Y.2d 774, 390 N.Y.S.2d 53, 358 N.E.2d 878 (1976).

[135] *Id.* at 776, 390 N.Y.S.2d at 54, 358 N.E.2d at 879.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 776-77, 390 N.Y.S.2d at 55, 358 N.E.2d at 880.

[139] *Id.* at 778, 390 N.Y.S.2d at 56, 358 N.E.2d at 881.

[140] *Id.* at 777, 390 N.Y.S.2d at 55, 358 N.E.2d at 880.

forbid bargaining with respect to the ultimate tenure decision, such a prohibition on the scope of arbitration is implicit in public policy.[141]

B. THE *Trilogy*: THE MASSACHUSETTS APPROACH

1. *Scope of Arbitration in Tenure-Related Grievances*

Against the background of recent Massachusetts cases[142] standing for the proposition that the scope of arbitration is limited by the nondelegability of certain school committee decisions and against the background of other jurisdictions taking various approaches to the relationship between arbitration statutes and tenure statutes,[143] the Court in *Danvers* sought to accomodate section 8 of chapter 150E[144] with section 41 of chapter 71.[145] In particular, premising that tenure decisions under section 41 may not be delegated to an arbitrator, the Court sought to determine whether the procedures to be followed in evaluating teachers for tenure purposes may nevertheless be arbitrated. In concluding that such procedures may be arbitrated, the Court struck an accomodation between chapter 150E and chapter 71 which rested on two touchstones. The first touchstone was the Court's refusal to infer from legislative authorization to bargain an intent to permit the school committee to bargain away its traditional authority to make tenure decisions.[146] The second was the Court's recognition of a legislative policy favoring grievance arbitration.[147] Such recognition led the Court to construe narrowly the inroads which the nondelegation doctrine may make on the arbitrability of tenure-related grievances.

It is submitted that the accomodation struck by the Court represents a sound solution for several reasons. First, the Court appropriately exercised judicial restraint by not inferring from the legislative author-

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[141] *Id.* at 778, 390 N.Y.S.2d at 55-56, 358 N.E.2d at 880-81.

[142] See text at notes 91-114 *supra.*

[143] See text at notes 115-140 *supra.*

[144] G.L. c. 150E, § 8.

[145] G.L. c. 71, § 41.

[146] See text at note 19 *supra.* It is submitted that the *Trilogy* holdings are significant and should also be analyzed as decisions limiting the scope of bargaining in public education. While that analysis is not within the scope of this article, practitioners representing teachers' associations should be alert to the fact that agreements reached with the school committee which touch matters of educational policy may be voidable. The lack of enforceability of these agreements further brings into question whether the traditional classifications of subjects of bargaining as mandatory, permissive, or illegal is appropriate in the public sector. In particular, the *Trilogy* suggests that at least so far as public education bargaining is concerned some topics may be both permissive and illegal. See Sachman, *Redefining the Scope of Bargaining in Public Employment*, 19 B.C. L. Rev. 155 (1977).

[147] See text at note 20 *supra.*

ization to bargain and to arbitrate a sweeping intent to override the discretion of the school committee to make tenure decisions. Second, the Court's restraint in not inferring a legislative intent to override the nondelegation principle, consistent with recent decisions in *Hanover*[148] and *Braintree*[149] and the approach to other statutes delegating authority, is particularly justified in light of the policies implicated by the tenure statute.[150] Third, in a practical sense, the Court's decision that grievances concerning evaluation procedures may be arbitrated will tend to encourage more rational decision making while at the same time not vitiating the traditional and final authority of school committees.

The Court's refusal in *Danvers* to infer generally from chapter 150E and more particularly section 8, authorizing voluntary arbitration, an intent to override the school committee's discretion in making tenure decisions is well founded. To have inferred such an intent would have required the Court to legislate the Commonwealth's policy in an area which is fraught with many political questions that the judiciary is ill-equipped to decide.[151] Moreover, section 7 of chapter 150E,[152] specifying instances in which the collective bargaining agreement shall prevail over prior statutory schemes,[153] appears to negate any inference of legislative intent to preempt the education laws by rendering school committee decisions delegable. The Court's refusal to infer such a legislative intent is further supported by a long line of case law holding that statutes affecting the education laws will be strictly construed and that whenever the legislature has limited the powers of the school committee it has done so explicitly.[154]

Nonadherence to delegation principles would have been inconsistent, however, not only with the Court's traditional interpretation of the education laws as committing broad discretion to school committees and with the structure of chapter 150E, but nonadherence to those principles would have been inconsistent as well with the Court's recent holdings in *Hanover*[155] and *Braintree*.[156] Those cases, while narrowly concerned

[148] See text at notes 95-106 *supra*.

[149] See text at notes 107-14 *supra*.

[150] See text at notes 156-58 *infra*.

[151] Both the United States Supreme Court and the Massachusetts Supreme Judicial Court have recognized the principle that a court acts appropriately when it exercises judicial restraint in resolving issues best left to the political process or another branch of government. Baker v. Carr, 369 U.S. 186, 217 (1962); Commonwealth v. Diaz, 326 Mass. 525, 531-32, 95 N.E.2d 666, 670 (1950); Schaeffer v. Leimberg, 318 Mass. 396, 400, 62 N.E.2d 193, 195 (1945).

[152] G.L. c. 150E, § 7.

[153] See note 17 *supra*, setting out the language of § 7.

[154] See generally notes at 83-88 *supra*.

[155] See text at notes 95-105 *supra*.

[156] See text at notes 107-114 *supra*.

with school committee decisions abolishing supervisory positions, appeared to imply the nondelegability of other personnel decisions such as decisions to grant or withhold tenure. Furthermore, it appears that there may have been even stronger public policy reasons for upholding nondelegation principles in the *Trilogy* than were present in *Hanover* and *Braintree*. Particularly, a tenure decision may have a broader impact on questions of long range educational policy than would the reversible and potentially short-term decision to eliminate a particular supervisory position. By granting tenure the school committee may commit itself to curriculum decisions which shape the educational policy of the community for many years to come. Tenure decisions, therefore, may impact not only on educational policy but ultimately on the allocation of resources and the level of services to be provided—an issue better reserved for the political process.[157] Given the potential long range effects of tenure decisions, the courts might understandably be disinclined to allow school committees, which are politically accountable to their communities, to delegate tenure decisions to third parties such as arbitrators, who are not politically accountable. Thus, the *Trilogy*'s determination that tenure decisions are nondelegable would seem even more compelling than the holdings of *Hanover* and *Braintree* that decisions to abolish supervisory positions are nondelegable.

Just as strong considerations of policy and precedent support the *Trilogy's* premise that tenure decisions remain nondelegable notwithstanding public sector arbitration, so do compelling reasons support the Court's holding that grievances concerning evaluation procedures may be arbitrated. First, that holding appears consistent with the Court's premise as to the nondelegability of tenure decisions. In particular, rather than eviscerating the nondelegation principle, the Court refined its approach to that principle and its sources in the education laws. In refining that approach the Court properly recognized that, while the nondelegability of the actual tenure decision had traditionally been upheld, the question of delegability of evaluation procedures was one of first impression occasioned by the passage of the arbitration statute.[158] Thus, the Court correctly concluded that nothing in the traditional nondelegability principle precluded the arbitration of grievances concerning evaluation procedures.

In addition to recognizing that evaluation procedures posed an issue of first impression, the Court noted that the tenure statute itself militates against any contention that school committees are to have unbri-

[157] *See* Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1177-1183 (1974).

[158] 1977 Mass. Adv. Sh. 415, 418-19, 360 N.E.2d 877, 879. For discussion see also text at note 15 *supra*.

dled discretion in the tenure area.[159] Thus, for example, section 41 provides that failure of the school committee to send timely notice will result in the automatic granting of tenure.[160] Accordingly, the Court correctly concluded that holding the tenure process nondelegable in all its aspects was not only not required by prior precedent, but also would be inconsistent with the tenure statute itself.

In addition to its consistency with the Court's upholding of the nondelegability principle, the holding that evaluation procedure-related grievances may be arbitrated will, in a practical sense, tend to encourage more rational decision making on the part of school committees. The Court in *West Bridgewater* recognized this foreseeable benefit and stated: "Proper teacher evaluation processes, therefore, reasonably may be expected to improve the quality of teaching, to mitigate the harsh abruptness of an unexplained, last-minute negative renewal decision, and to enhance the quality of decisions concerning employment and tenure."[161] Therefore, the Court properly concluded that delegation under these circumstances would promote the public policies implicit in the education laws.

Having determined that grievances relating to evaluation procedures may be arbitrated while the tenure decision itself may not, the Court in *Danvers* impliedly limited the arbitral remedies available where contractual evaluation procedures have been violated. In particular, the *Danvers* Court hinted that deference to the nondelegability of tenure decisions required that, where an arbitrator determines that evaluation procedures had been violated, the remedies he could award may not amount to a grant of tenure.[162] Subsequently, in *West Bridgewater* the Court considered explicitly the extent to which non-delegation principles may limit arbitral awards.

2. *The Scope of Arbitral Remedies*

Against the backdrop of the *Danvers* holding that nondelegatility limits the extent of arbitrability, the Court in *West Bridgewater* examined whether back pay and temporary reinstatement are permissible arbitral remedies. Concluding that such remedies are permissible, the Court established that nondelegation principles restrict the allowability of arbitral remedies by requiring that such remedies may not amount to a grant of tenure.

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[159] 1977 Mass. Adv. Sh. 415, 423, 360 N.E.2d 877, 881 (indicating that the tenure statute has the effect of reducing the traditional wide discretion of school committees) *citing* Bonar v. Boston, 1976 Mass. Adv. Sh. 240, 244-45, 248, 341 N.E.2d 684, 687-88.

[160] G.L. c. 71, § 41.

[161] 1977 Mass. Adv. Sh. at 438, 360 N.E.2d at 888.

[162] 1977 Mass. Adv. Sh. 415, 425, 360 N.E.2d 877, 881.

Turning first to the Court's holding that compensation is a permissible remedy, it is submitted that this holding is consistent with the public policy considerations implicit in the Court's decision regarding the scope of arbitration. A remedy of compensation would not infringe upon the school committee's discretion in determining whether teachers will teach in the public schools. Furthermore, the permissibility of a compensation remedy is consistent with the Court's earlier holdings in *Hanover* and *Braintree.*[163] In *Braintree* the Court upheld an arbitrator's award of compensation where the arbitrator had interpreted the collective bargaining agreement as providing that an employee be made whole where his position is unilaterally abolished.[164]

Although the Court in *West Bridgewater* determined that the committee's reinstatement of the teacher had effectively mooted the issue of reinstatement as an appropriate arbitral remedy,[165] the Court nevertheless properly saw fit to express its views on temporary reinstatement as a remedy. The Court thereby provided arbitrators, teachers and school committees guidance which may result in the avoidance of unnecessary challenges to arbitral awards in the future. It is important to note, in light of the Court's earlier holding in *Danvers,* that a permissible reinstatement remedy cannot amount to the granting of tenure.[166] Thus, the temporary reinstatement remedy approved by the Court would not result in tenure under section 41 of chapter 71 of the General Laws.[167]

The Court's determination that temporary reinstatement is an appropriate remedy where the school committee has failed to adhere to the contractual evaluation procedures is also consistent with the Court's narrow interpretation of nondelegation which underlies the *Danvers* holding. Moreover, the remedy of reinstatement to re-evaluate the teacher furthers certain public policy interests outlined by the Court in *West Bridgewater.*[168]

While the Court's approval of temporary reinstatement as a permissible arbitral remedy represents sound policy, reinstatement as a remedy nevertheless presents several practical problems. With the exception of clearing the teacher's record by indicating in the teacher's file that the

[163] See text at notes 95-114 *supra* for discussion of the Court's holding.

[164] See note 114 *supra.*

[165] 1977 Mass. Adv. Sh. at 438, 360 N.E.2d at 888.

[166] 1977 Mass. Adv. Sh. at 425, 360 N.E.2d at 881.

[167] G.L. c. 71, § 41.

[168] 1977 Mass. Adv. Sh. at 437, 360 N.E.2d at 888. The Court listed the following circumstances to indicate how teacher evaluation procedures may serve the public interest: by (1) assisting the teacher to improve performance in order to avoid an adverse decision, (2) providing advanced warning to the teacher that he or she should seek alternative employment, and (3) permitting the teacher to complete or correct information which the school committee will consider in its renewal decision. *Id.*

decision not to renew was the result of a failure on the part of the school committee to follow evaluation procedures, reinstatement will often be an ineffective remedy because of the time constraints inherent in the grievance and arbitral process. In particular, in order for reinstatement to be a meaningful remedy the grievance would have to go to arbitration sufficiently early, in most cases before the school year has ended, so that the teacher could be reinstated for the following school year. By the time the parties exhaust a four-step grievance procedure, following notification of nonrenewal in April,[169] the aggrieved teacher will have been forced to seek other employment. In most cases, unless the school committee is willing to let the grievant continue teaching, pending the outcome of arbitration, the temporary reinstatement will have little effect other than to clear the teacher's record. However, the temporary reinstatement could be made a more effective remedy if more expeditious grievance procedures are adopted.[170]

Assuming that the above practical problems militating against reinstatement can be overcome, either by more expeditious grievance procedures or voluntary reinstatement pending arbitration, *West Bridgewater* may imply the availability to teachers of a broad range of supplemental arbitral remedies. Thus, as long as the school committee retains the final decision on tenure,[171] the grievant or the association might seek, for example, in-service training or transfer as part of the arbitral remedy. This would appear to be an appropriate remedy where one of the purposes of the evaluation procedures is to aid the teacher in improving his or her performance. In *West Bridgewater*, the Court, by way of dicta, recognized such a purpose as acceptable and in fact consistent with the public interest.[172] Thus, where the purpose of evaluation procedures is to benefit the teacher, there may be instances in which, where the circumstances call for it, the temporary reinstatement remedy might be accompanied by a directive to transfer the teacher or to provide the teacher with in-service training.

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[169] Under G.L. c. 71, § 41 the school committee is required to notify the teacher of its nonrenewal decision by April 15.

[170] The practical problems thus inherent in an arbitral remedy of temporary reinstatement may suggest that the teachers' association may wish to challenge defects in evaluation procedures as they occur rather than waiting until the school committee has made a negative decision based upon such evaluations.

[171] 1977 Mass. Adv. Sh. at 425, 360 N.E.2d at 881. *See,* Smith, Edwards and Clark, *Labor Relations in the Public Sector* (1974), at 945 n.3, indicating that courts are likely to be more active in reviewing the merits of public sector arbitration awards involving (1) constitutional questions; (2) conflicting statutory regulations; (3) important questions of "public policy"; (4) tenure questions in public education; (5) public fiscal and budgetary matters. *See also* 1977 Cumulative Supplement at 133-137 for more recent cases reviewing arbitrators' awards in the public sector.

[172] See note 168 *supra.*

Finally, the *Trilogy* was concerned only with remedies which the arbitrator can award the teacher, and thus left open the question of remedies which the arbitrator can award the union when evaluation procedures are not complied with.[173] It is submitted that a denial of proper evaluation procedures may be of equal significance to the union as to the individual teacher, for where improper evaluation occurs, teachers as a group have been denied a bargained-for-benefit. Therefore, where violations are substantial, the union may wish to seek a reopener in order to renegotiate other items or wages traded off in exchange for the arbitration clause.[174]

III. Limits on Arbitration Beyond Those Required by Nondelegation Principles: Questions Raised by the *Trilogy*

The accomodation reached by the *Trilogy* is sound so far as the extent of issues resolved, but the Court left open several questions which will continue to concern teachers seeking arbitration of grievances. These questions go beyond the nondelegation doctrine and cannot be answered by the *Trilogy* accomodation. The first question raised is whether the Court will uphold grievance arbitration or an arbitrator's award for violation of evaluation procedures where the record indicates that the teacher would not have been granted tenure in any event. Second, even if causation can be demonstrated, the *Trilogy* implies that an arbitral award may be vacated because it violates some "fundamental principle" implicit in the education laws.

The first unanswered question, that of the permissibility of arbitral relief where causation is disputed, is bound to present problems for teachers, school committees and arbitrators. Although not necessary to

[173] See generally 1977 Mass. Adv. Sh. at 438-42, 360 N.E.2d 888-90. The Court fails to consider remedies available to the union when bargained-for evaluation procedures are violated.

[174] *See* School Committee of Boston v. Boston Teachers Union, 1977 Mass. Adv. Sh. 1069, 1077, 363 N.E.2d 485, 489 stating:

> In a large sense, it seems evident that if voluntary interest arbitration is to make an appeal to the parties and carry out its purpose of avoiding strife, it must, optimally, imitate the range of negotiations which it supercedes. The interplay and "tradeoff" of mandatory and other items which are described as "the very fabric of effective collective bargaining," Oil Workers Int'l Local 3-89 v. NLRB, 132 U.S. App. D.C. 43, 405 F.2d 111, 117 (1968), have their place in voluntary arbitration of the terms of a labor contract and will tend to improve and make more livable the arbitral results.

In the *Trilogy*, the argument for a reopener is suggested by the fact that the right to arbitrate may be illusory where teacher evaluation procedures are concerned. While the arbitrator may require procedures to be followed as a remedy, the school committee still makes the final determination on tenure.

its holding in *Danvers,* the Court raised and left open the validity of an arbitration award which imposes sanctions on a school committee for failure to follow evaluation procedures even though no teacher was harmed by the omission.[175] The issue, although unresolved by the *Trilogy,* is of importance to both the school committee and the union. For undoubtedly, in the case of a teacher who clearly would not have been rehired in spite of flaws in evaluation, the school committee will want to challenge an award of reinstatement on the grounds that such a sanction is too harsh and violates public policy.

While an arbitrator is not bound by the Court's caveat, it is submitted that there are sound policies why the arbitrator should carefully examine causation to determine his award. Clearly an undeserving teacher should not be able to take advantage of technical error on the part of the school committee in violation of the public policies favoring teacher evaluation procedures.

Even if the union can show causation, an arbitral award may still be subject to challenge to vacate by the caveat of *West Bridgewater.*[176] The principle that an arbitration award may be vacated if it violates some fundamental principle concerning the management of a school and the committee's right to choose its teachers[177] appears intended to apply to the egregious situation of teacher misbehavior or incompetence. Thus, the caveat places no new restrictions on arbitration remedies beyond the established principles that an arbitrator may not award a remedy in violation of public policy as by ordering the commission of an unlawful act.[178] For example, an arbitration award ordering reinstatement of a teacher where the presence of the teacher would constitute a serious threat to the health or safety of students would constitute an illegal award and therefore would be vacated under common law principles governing arbitration awards. As a practical matter school committees may attempt to invoke this limitation on arbitral remedies by seeking to vacate reinstatement awards where the alleged incompetency of the teacher threatens to harm student learning. Such an allegation must be carefully weighed by a court in order that the principles implicit in the *Trilogy* accommodation are not abrogated.

CONCLUSION

The *Trilogy* clarified the extent to which the Court will apply nondelegation principles to limit the scope of arbitration in teacher tenure dis-

[175] 1977 Mass. Adv. Sh. at 426, 360 N.E.2d at 882.

[176] 1977 Mass. Adv. Sh. at 441-42, 360 N.E.2d at 890.

[177] *Id.*

[178] F. Elkouri and E. A. Elkouri, How Arbitration Works 38 (3d ed. 1973).

putes. In accomodating the right to bargain and authorization to arbitrate with the nondelegable duty of school committees to make tenure decisions the Court has defined the scope of arbitration to exclude the tenure decision itself while at the same time upholding the arbitrability of contractual teacher evaluation procedures. In so doing the Court has thus indicated to school committees, teachers, and arbitrators the Commonwealth's policy regarding the arbitrability of public education disputes. Furthermore, the *Trilogy*, while leaving some questions unresolved, provides guidance to arbitrators concerning the permissibility of compensation and reinstatement remedies. The decision is of particular significance to school committees in that it warns school committees that if they wish to extend grievance arbitration to grievances concerning teacher evaluation procedures they must explicitly provide so in the agreement. Of significance to teachers' associations is the fact that despite agreements to arbitrate and other negotiated procedural protections in the form of evaluation procedures, the tenure decision itself cannot be subject to arbitration.

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