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# Chapter 9: Labor Law

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*CHAPTER 9*

# Labor Law

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**§9.1. Unlawful Strikes: Civil Contempt.** Section 9A(a) of Chapter 150E provides: "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." [1] Section 9A(b) requires an employer to petition the Labor Relations Commission for an investigation whenever a strike occurs or is about to occur. If after an investigation the Commission determines that a violation of section 9A(a) has occurred or is about to occur, "it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court . . . ." [2]

Section 9A represents an expansion of the prohibition against strikes contained in the predecessor statutes. The scope of the prohibition in earlier statutes ran only against public employees,[3] whereas the prohibition in section 9A also runs against employee organizations.[4] During the *Survey* year, the Supreme Judicial Court, in *Labor Relations Commission v. Boston Teachers Union*,[5] considered the power of the courts to hold a labor organization and its representatives in civil contempt of court orders relating to conduct violative of section 9A(a).

The inability of the Boston School Committee and the Boston Teachers Union to agree on the terms of a collective bargaining contract to cover the 1975-76 school term caused the union membership to vote on September 2, 1975, to authorize a strike against the City school system.

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§9.1. [1] The term "strike" is very broadly defined in the statutes, and includes "a public employee's refusal, in concerted action with others, to report for duty . . . ." G.L. c. 150E, §1.

[2] *See id.* § 9A(b).

[3] *See* former G.L. c. 149, §§ 178F(10) and 178M.

[4] *See* G.L. c. 150E, § 9A(a).

[5] 1977 Mass. Adv. Sh. 2738, 371 N.E.2d 761.

The strike was to begin on September 22, 1975, unless the Committee made an acceptable offer prior to that time.[6] At the same meeting the membership also authorized the union's executive board to draw up a sanction sheet that would enumerate measures to be taken against union members who failed to follow the strike' decision.[7] As a result of that vote, the School Committee filed a petition on September 12 with the Labor Relations Commission for a section 9A(b) strike investigation.[8] The Commission conducted an investigation and, on September 17, issued an interim order.[9] The order contained findings that a strike was threatened and that union representatives had "encouraged and condoned" such action.[10] The union was ordered, *inter alia*, to "cease and desist from encouraging or condoning the threatened strike."[11] On September 18, the union distributed the sanction sheet authorized at the September 2 meeting.[12] That same day the Commission filed a complaint in superior court alleging that neither the School Committee nor the union was complying with its order.[13] A judge of the superior court issued preliminary injunctions enforcing the Commission's order.[14] On September 19, another superior court judge amended the injunction to incorporate as much of the Commission's earlier order as sought to enjoin the union from "encouraging or condoning the threatened strike."[15] Also on September 19, the Commission went to court with a motion to amend its complaint to include, as individuals and as class representatives of other officers, agents and members of the union, specially named officers of the union, and members of its executive board.[16] The court granted the motion to amend.[17] A temporary restraining order sought by the Commission was granted at this time. The order provided in pertinent part that the defendants were restrained from:

> (a) striking, engaging in a work stoppage, or work slowdown or any other conduct proscribed by G.L. c. 150E § 9A(a); (b) instigating, authorizing, ratifying or threatening any of the above

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[6] *Id.* at 2739, 371 N.E.2d at 764.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 2740, 371 N.E.2d at 764.
[12] *Id.*, 371 N.E.2d at 764-65.
[13] *Id.*, 371 N.E.2d at 765. The opinion does not give any indication of how the School Committee was not in compliance with the Commission's September 17 order. In any event, that fact had no relevance to the case.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2740-41, 371 N.E.2d at 765.
[17] *Id.*

acts; (c) making any future threats or taking any action with respect to past threats, in connection with, or otherwise imposing any sanctions or punishments against Union members and Employees represented by the Union who cross a Union picket line or who fail or refuse to strike, to engage in a work stoppage or work slowdown or other conduct proscribed by G.L. c. 150E § 9A(a).[18]

On September 21, the union membership held a meeting, which was chaired by Henry G. Robinson.[19] Robinson, the union's president, was one of the persons specifically named in the court order.[20] The membership approved the union negotiating team's unanimous recommendation to reject the School Committee's latest offer.[21] The motion to approve the team's recommendation was advanced by Joan Buckley, the union's executive vice president and another person specifically named in the court order.[22] No separate vote was taken on the strike issue and no officer or board member took any action to inform the meeting about the consequences that would flow from effectuating the September 2 strike resolution.[23] There being no acceptable offer of the School Committee, a strike commenced on September 22, with picket lines established at Boston schools.[24]

On petition of the Labor Relations Commission,[25] civil contempt proceedings were instituted against the union and five named individuals, including Robinson and Buckley.[26] The court found the defendants to be in civil contempt of court and assessed fines against them.[27] The defendants appealed, and the Supreme Judicial Court transferred the case on its own motion.[28] The Court affirmed the lower court's findings of contempt relative to the strike, but reversed those findings based on the distribution of the sanction sheet.[29]

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18 *Id.* at 2741, 371 N.E.2d at 765.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* The petition alleged that (a) the union membership had adopted Robinson's recommendation to reject the proposal; (b) the union was engaged in a strike proscribed by c. 150E, § 9A(a); (c) the named individual defendants authorized and ratified the strike; (d) as a result of this action, picket lines had been established at several schools and the delivery of education had been impaired; (e) the defendants' conduct constituted "a willful and undoubtful disobedience of this Court's clear and unequivocal commands, contained in its Preliminary Injunction and Temporary Restraining Order." *Id.* at 2742, 371 N.E.2d at 765-66.
26 *Id.* at 2742, 371 N.E.2d at 766.
27 *Id.* at 2738, 2742-46, 371 N.E.2d at 764, 766-67.
28 *Id.* at 2738, 371 N.E.2d at 764.
29 *Id.* at 2738-39, 371 N.E.2d at 764.

The defendants' objections to the findings of contempt were several. As to the merits of the contempt order, they argued that the conduct forming the basis of the contempt proceedings—failure to take action to prevent the union from striking—could not, as a matter of law, be considered a clear and undoubted disobedience of a clear and unequivocal command of a court. They also argued that the Commission's contempt petition had failed to provide them with adequate notice as to what acts allegedly constituted contempt.[30] With regard to the fines imposed, the defendants argued, *inter alia*, that the provisions of chapter 150E, section 15,[31] provided the exclusive remedy, and that fines cannot be assessed against a union *qua* union, due to its status as an unincorporated association.[32]

First addressing the defendant's claim as to the inadequate notice, the Court concluded that all contempt adjudications concerning the distribution of the sanction sheet had to be reversed.[33] It explained:

> It is clear beyond any doubt, that requirements of due process, as well as fundamental fairness, require that one must be given notice of charges prior to a hearing on civil contempt whenever the alleged contemptuous conduct occurred outside the presence of the court. . . . Not only must the charges per se be set forth with adequate specificity, but there must be a description of the specific acts which underlie the charges. [citations omitted].[34]

The Court concluded that because there was no specific reference to the sanction sheet in the Commission's contempt petition, the defendants were not adequately appraised of this allegation prior to the beginning of the hearing.[35] The Court did find, however, that the allegation of the petition stating that the defendants authorized and ratified the strike was sufficient notice to apprise the defendants of the charges prior to the contempt hearing.[36] "The ultimate act, the strike, for which their conduct was called into question, was specifically set forth."[37]

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[30] *Id.* at 2746, 371 N.E.2d at 767.

[31] G.L. c. 150E, § 15 provides in relevant part:

> No compensation shall be paid by an employer to an employee with respect to any day or part thereof when such employee is engaged in a strike against said employer, nor shall such employee be eligible to recover such compensation at a later date in the event that such employee is required to work additional days to fulfill the provisions of collective bargaining agreement.
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> Any employee who engaged in a strike shall be subject to discipline and discharge proceedings by the employer.

[32] 1977 Mass. Adv. Sh. at 2752, 371 N.E.2d at 769.

[33] *Id.* at 2746, 371 N.E.2d at 767.

[34] *Id.* at 2746-47, 371 N.E.2d at 767.

[35] *Id.*, 371 N.E.2d at 767-68. *See* Sodones v. Sodones, 366 Mass. 121, 128-29, 314 N.E.2d 906, 911-12 (1974).

[36] 1977 Mass. Adv. Sh. at 2747-48, 371 N.E.2d at 768.

[37] *Id.* at 2748, 371 N.E.2d at 768.

Having concluded that the notice concerning the strike was sufficient, the Court then considered whether "there was the unquestioned disobedience to clear and unequivocal commands of the court." [38] The major thrust of the defendants' argument with respect to this issue was that the trial judge had, as the Supreme Judicial Court so found, predicated his contempt orders concerning Robinson and Buckley on the view that they were under an obligation to take *affirmative action* to inform the union membership of the outstanding orders of the Court.[39] The defendants argued that such an obligation was not made explicit in the order, and that legal liability could not attach for failure to comply with implicit requirements.[40] The Court, while noting that it was a close question,[41] disagreed with the defendants, and found an explicit obligation to act affirmatively. The Court stated:

> The defendants were also prohibited, however, from condoning or ratifying such actions. We believe that the plain meaning of these latter terms was intended to put, and should have put, the defendants on notice that not only would certain positive acts be the basis of contempt citations, but that the failure to act in appropriate situations would render them similarly liable.[42]

The Court approved the course taken by the superior court in including these terms in the restraining order, since the policy of section 9A could also be impaired under certain circumstances by inaction of a union leader. The Court observed that it was appropriate to impose these duties on the individual defendants because, "as officers of the union they were a natural conduit for communication to the union rank and file." [43] The Court finally stated: "We cannot conclude on these facts that the clearly expressed and presumably understood goals of the Legislature, the commission, and the court could be frustrated by such an ostrich-like attitude on the part of the responsible leaders." [44]

Having found no lack of due process in the contempt orders, the Court then turned to the defendants' objections regarding the fines.[45] With respect to the defendants' argument that the remedies set forth in chapter 150E, section 15, are exclusive, the Court initially noted that the

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[38] *Id.* *See* Nickerson v. Dowd, 342 Mass. 462, 464, 174 N.E.2d 346, 347 (1961), where the Court held that for civil contempt "there must be a clear and unequivocal command and an equally clear and undoubted disobedience."

[39] 1977 Mass. Adv. Sh. at 2748, 371 N.E.2d at 768.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 2749, 371 N.E.2d at 768.

[43] *Id.* at 2749-50, 371 N.E.2d at 768-69, *citing* Oil Workers Internat'l Union v. Superior Court, 103 Cal. App. 2d 512, 557, 230 P.2d 71, 98 (1951).

[44] 1977 Mass. Adv. Sh. at 2751, 371 N.E.2d at 769.

[45] *Id.* at 2752, 371 N.E.2d at 769.

purpose of that section was to limit the penalties which may be exacted by employers against public employees participating in a strike.[46] The Court went on to find that such penalties were not intended to limit the power of the courts to use contempt findings to achieve compliance with lawfully issued judicial orders.[47]

The defendants' argument that the union *qua* union cannot be fined because of its status as an unincorporated association[48] was based primarily on *McCormack v. Labor Relations Commission.*[49] In *McCormack,* the Court held that since the law knew no such entity as an unincorporated association, such an association could not be made a party defendant.[50] In the present case, the Court, without overruling *McCormack,*[51] concluded that the fine against the union should be affirmed:

> When c. 150E, § 1 et seq., was enacted in 1973, it represented a comprehensive revision of the statutory schemes which previously regulated the organizational and collective bargaining rights of public employees. . . . While there are great similarities in both operation and language between c. 150E and the predecessor statutes, G.L. c. 149, §§ 178F-178N, there are also crucial differences. Moreover, the meaning, scope, and effect of the sections must be ascertained in light of the expanded legislative purpose evident in the enactment of c. 150E.
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> . . . .
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> The most crucial difference for purposes of this case lies in the expanded scope of the prohibition against strikes contained in c. 150E, § 9A(a), as compared to the predecessor statutes, G.L. c. 149, § 178F(10), and G.L. c. 149, § 178M. [citations omitted].
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> . . . .
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> Since the Legislature was cognizant of our preexisting rules relative to unincorporated associations, . . . it presumably meant to override those rules if necessary to allow the commission and the courts to implement the strike prohibition. [citation omitted].[52]

The Court thus concluded that, despite the fact that the union was an unincorporated association, fines were properly assessed against it in the contempt proceeding.

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[46] *Id.* at 2753, 371 N.E.2d at 770. See note 31 *supra* for relevant portions of the text of section 15.

[47] 1977 Mass. Adv. Sh. at 2753, 371 N.E.2d at 770.

[48] *Id.*

[49] 358 Mass. 682, 266 N.E.2d 651 (1971).

[50] *Id.* at 684-85, 266 N.E.2d at 652-53.

[51] 1977 Mass. Adv. Sh. at 2755-56, 371 N.E.2d at 771.

[52] *Id.* at 2754-55, 2757, 371 N.E.2d at 770-71, 771. *See* Sherry, *Labor Law,* 1974 ANN. SURV. MASS. LAW § 2.12, at 24-31.

The most potent weapon that labor organizations have to obtain concessions from employers during negotiations is the threat of strike. Accordingly, the prohibition against strikes contained in section 9A plays a critical role in negotiations between public employers and the persons they employ. This decision of the Supreme Judicial Court makes it clear that the Labor Relations Commission and the courts are invested with substantial power to enforce the strike prohibition of chapter 150E. The Court's holding that a labor organization can be made a party defendant to strike prohibition proceedings even though it is an unincorporated association enhances the enforcement power of the courts. But perhaps the most important aspect of *Boston Teachers Union* is the Court's holding that the union officers not only were prohibited from engaging in specific acts which would result in a strike, but also that they were under an affirmative duty from which failure to act in certain situations could result in a finding of contempt. In particular, the Court's finding that Buckley and Robinson had the responsibility not to "condone or ratify" actions that could lead to a strike gives a court in such situations great latitude in issuing and enforcing its orders.

**§9.2. Scope of Managerial Exclusion From G.L. c. 150E.** Chapter 150E of the General Laws gives collective bargaining rights to most employees of the Commonwealth and its political subdivisions.[1] However, certain categories of employees are specifically excluded from the coverage of that statute, including "managerial employees."[2] In *School*

§9.2. [1] *See* G.L. c. 150E, §§ 1-15.

[2] G.L. c. 150E, § 1 reads in relevant part:

> The following words and phrases as used in this chapter shall have the following meaning unless the context clearly requires otherwise:—
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> . . . .
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> "Employee" or "public employee", any person employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, *and other managerial employees or confidential employees,* and members of the militia or national guard and employees of the commission, and officers and employees within the departments of the state secretary, state treasurer, state auditor and attorney general. *Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration. Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.* [emphasis added].

Chapter 150E was inserted in large part by Acts of 1973, c. 1078 and took effect on July 1, 1974, repealing G.L. c. 149, §§ 178D, F-N. *See generally* Sherry, *Labor Law,* 1974 ANN. SURV. MASS. LAW § 2.12, at 24-31.

*Committee of Wellesley v. Labor Relations Commission*,[3] the Supreme Judicial Court, in a case of first impression, considered the parameters of the managerial exclusion.

The Wellesley School Committee for a number of years had recognized the Wellesley Teachers Association as the collective bargaining representative of a unit of school administrators ("unit B employees") that included principals, assistant principals, directors, coordinators, and department heads.[4] After chapter 150E went into effect[5] the School Committee refused to continue its recognition of the Teachers Association, claiming that the administrators were "managerial employees," as defined in the statutory exclusion, and thus no longer had any statutory bargaining rights.[6] The School Committee then petitioned the Labor Relations Commission to have the unit B employees designated as managerial employees.[7] Meanwhile, the Teachers Association filed a complaint of prohibited practice with the Commission, alleging that the Committee had violated its duty under chapter 150E, sections 10(a)(1) and (5), by its refusal to bargain in good faith.[8] The Commission determined that none of the administrators were "managerial" under any of the statutory definitions and that the School Committee's refusal to bargain with the Teachers Association therefore did violate chapter 150E, section 10(a)(1) and (5).[9] Accordingly, the Commission ordered the Committee to bargain collectively and in good faith with the association as the bargaining representative of the unit B employees.[10]

The Labor Relations Commission brought an action to enforce its order in superior court which was consolidated with the School Committee's claim for judicial review of the order.[11] When the superior

[3] 1978 Mass. Adv. Sh. 2207, 379 N.E.2d 1077.

[4] *Id.* at 2207-08, 379 N.E.2d at 1077-08. This recognition of the unit B employees was in accordance with former G.L. c. 149, §§ 178D, F-N.

[5] See note 2 *supra.*

[6] 1978 Mass. Adv. Sh. at 2208, 379 N.E.2d at 1078.

[7] *Id.*

[8] *Id.* G.L. c. 150E, § 10 provides in relevant part: "(a) It shall be a prohibited practice for a public employer or its designated representative to: (1) interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; . . . (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six. . . ."

[9] 1978 Mass. Adv. Sh. at 2208-09, 379 N.E.2d at 1078. *See* Town of Wellesley School Committee, 1 M.L.C. 1389 (1975). For a detailed analysis of the Commission's decision, *see* Sherry, *Labor Law*, 1975 ANN. SURV. MASS. LAW § 8.8, at 159-63.

[10] 1978 Mass. Adv. Sh. at 2209, 379 N.E.2d at 1078. Before its final determination, the Commission had issued an interim order requiring the Committee to bargain with the association pending resolution of the consolidated cases, which the committee in fact did do. Thus the Commission, while holding that the Committee's refusal to bargain was unjustified, noted that the Committee had not acted in bad faith. 1978 Mass. Adv. Sh. at 2209 & nn. 4 & 5, 379 N.E.2d at 1078 & nn. 4 & 5.

[11] *Id.* at 2209-10, 379 N.E.2d at 1078.

court affirmed the Commission's order, the Committee appealed.[12] The Supreme Judicial Court granted direct appellate review[13] and affirmed the judgment of the superior court.[14]

In its decision, the Supreme Judicial Court initially noted that while the duty of statutory interpretation belongs to the courts, an administrative interpretation of a statute is accorded great deference.[15] In view of the disjunctive wording of the managerial exclusion,[16] the Court, in reviewing the Commission's interpretation of chapter 150E, section 1, proceeded to consider all three segments of the managerial exclusion. The Court ultimately concluded that the Commission had properly interpreted and applied the statute in its finding that the administrators were not within the section 1 managerial exclusion.[17]

The first issue was whether the administrators "participate to a substantial degree in formulating or interpreting policy."[18] The Court noted that the phrase "to a substantial degree" was a clear indication of the legislature's purpose of including in the term "managerial employee" only those with significant responsibility in the decisionmaking process.[19] The Court found, as did the Commission, that in order for participation in policy formulation to be "substantial" the employee must have more than an advisory or consulting role, but does not necessarily have to have the authority to make final decisions.[20] The Court also agreed with the Commission's determination that the policy decisions contemplated by the statute must be of "major importance" and "must impact a significant part of the public enterprise."[21] Applying these standards, the Court went on to conclude that the Commission's finding that the Wellesley administrators did not participate to a substantial degree in formulating or determining policy was supported by substantial evidence.[22]

The Court then turned to the second alternative for defining the employees as managerial: whether the employees "assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of the public employer."[23] Although concluding that the ad-

[12] *Id.* at 2210, 379 N.E.2d at 1078.
[13] *Id.*
[14] *Id.* at 2224, 379 N.E.2d at 1084.
[15] *Id.* at 2210-11, 379 N.E.2d at 1079.
[16] See note 2 *supra.*
[17] 1978 Mass. Adv. Sh. at 2224, 379 N.E.2d at 1084.
[18] See note 2 *supra.*
[19] 1978 Mass. Adv. Sh. at 2211, 379 N.E.2d at 1079. This phrase was added by Acts of 1974, c. 354 *amending* G.L. c. 150, § 1.
[20] 1978 Mass. Adv. Sh. at 2214, 379 N.E.2d at 1080.
[21] *Id.* at 2211, 379 N.E.2d at 1079.
[22] *Id.* at 2211-17, 379 N.E.2d at 1079-81.
[23] See note 2 *supra.*

ministrators did not render substantial assistance in this area,[24] the Commission had found that one elementary school principal whose managerial status was in question had participated in the negotiation of the educational secretaries' contract to the extent of attending one meeting.[25] Furthermore, it also had found that the administrators were occasionally asked their opinion on possible problem areas in the administration of the teachers' and secretaries' collective bargaining agreements.[26] The School Committee did not contend that these limited instances taken alone rose to the level of "substantial" assistance in the preparation for or the conduct of collective bargaining; rather, it argued that this participation, coupled with testimony by the superintendent of schools that he and the School Committee desired more administrative participation and that two administrators had refused to participate in negotiations with the secretaries, did constitute "substantial" involvement.[27] The Court held, however, that the potential for a greater degree of future participation was an insufficient basis for a conclusion concerning the present managerial status of any of the administrators.[28]

The third issue was whether the employees "have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility . . . or in personnel administration."[29] The School Committee contended that the secondary school principals in unit B fell within this classification because of their second tier roles in the grievance procedure for secondary teachers.[30] Looking at the only two grievances that had ever utilized these proceedings, the Commission had found that the principals had no authority to adjust the grievance and acted "merely as a conduit for the processing of the grievance."[31] Accordingly, the Commission had determined that the actualities showed the principals' responsibilities in the grievance proceedings to be initial

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[24] 1978 Mass. Adv. Sh. at 2218, 379 N.E.2d at 1082.

[25] *Id.* at 2217, 379 N.E.2d at 1082.

[26] *Id.* at 2217-18, 379 N.E.2d at 1082.

[27] *Id.* at 2218-19, 379 N.E.2d at 1082.

[28] *Id.* at 2219, 379 N.E.2d at 1082.

[29] See note 2 *supra.*

[30] 1978 Mass. Adv. Sh. at 2220, 379 N.E.2d at 1083. The agreement with the teachers called for a secondary teacher-initiated grievance to be filed with the employee's supervisor, i.e., the teacher's department head, director, or coordinator. If not resolved at this level, the grievance was to be referred to the secondary principal. The next levels of the grievance process involved the superintendent, school committee, and arbitration.

In the elementary schools, all grievances were to be filed with the principal; if not resolved there, a grievance would be referred to the superintendent. *See id.* & n.15, 379 N.E.2d at 1083 & n.15.

[31] *Id.* at 2220-21, 379 N.E.2d at 1083. The language quoted is that of the Court.

and not appellate.[32] The Committee argued that the Commission had erroneously considered only the *actual* grievance powers exercised by the secondary principals and not their *potential* powers.[33] The Court disagreed with the Committee, stating that the Commission had also considered the principals' potential powers and had correctly distinguished "not between actual and potential responsibilities but between actual and potential responsibilities on the one hand and speculative authority on the other."[34] Thus, the Court concluded that substantial evidence undergirded the Commission's findings that none of the unit B personnel were within the statutory definition of managerial employees under either the first, second, or third alternatives.[35]

Because of the narrow interpretation given to the managerial exclusion in chapter 150E, section 1, the effect of the Court's decision in *Wellesley School Committee* is that very few employees will be excluded from chapter 150E under a managerial classification. It is important to note, however, the strong argument which could have been made that certain of the unit B employees could be characterized as "confidential employees" under section 1, and thus would have no bargaining rights.[36] Unfortunately, while this issue was considered in detail in the Commission's decision,[37] it was not addressed in the School Committee's brief and thus was deemed waived.[38]

**§9.3. Extent of Duty to Bargain in Good Faith.** In *Labor Relations Commission v. Board of Selectmen of Dracut*,[1] the Supreme Judicial Court considered the obligations of municipal officials to sponsor and to support enactments necessary to implement the terms of a collective bargaining agreement that predecessor officials had negotiated with the bargaining representatives of certain municipal employees.

In December of 1971, the Board of Selectmen of Dracut voted to recognize the International Brotherhood of Police Officers as the exclusive bargaining agent of its police officers.[2] Negotiations between the union and the Town's three selectmen ensued.[3] By February 1, 1972, the parties had agreed to the terms of a draft agreement which was

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32 *Id.* at 2221, 379 N.E.2d at 1083.
33 *Id.*
34 *Id.* at 2222, 379 N.E.2d at 1083-84.
35 *Id.* at 2224, 379 N.E.2d at 1084.
36 See note 2 *supra*. *See also* Sherry, *Labor Law*, 1975 ANN. SURV. MASS. LAW §8.8, at 162-63.
37 *See* Town of Wellesley School Committee, 1 M.L.C. 1389 at 1409.
38 1978 Mass. Adv. Sh. at 2208 & n.2, 379 N.E.2d at 1078 & n.2.

§9.3. 1 1978 Mass. Adv. Sh. 657, 373 N.E.2d 1165.
2 *Id.* at 658, 373 N.E.2d at 1167.
3 *Id.*

initialed by all three selectmen and by the union.[4] A week later, at a regular meeting of the Board, the bargaining agreement was formally executed by the union and by two of the three selectmen.[5] The third selectman, Selectman Gallagher, refused to sign the agreement, although he had initialed the draft on February 1, ostensibly, as the Court found, "for the purpose of indicating his assent to its provisions."[6] Implementation of the contract required approval of appropriations and other action by the annual town meeting.[7] Under the final provisions of the agreement, the parties were bound to "sponsor and support" the contract before the annual town meeting "as a fair and equitable contract. . . ."[8] The same day the final agreement was executed, the Board of Selectmen also signed the warrant for the annual town meeting.[9]

Before this meeting was held, however, the composition of the Board of Selectmen had been altered by elections and an increase in the size of the Board from three to five members.[10] Two of the three incumbent selectmen, Gallagher and Campbell, were among the members of the new five-member Board.[11] Thus, only two members of the new Board had participated in the collective bargaining with the union, and only one of the five members actually had signed the final agreement.

When the annual town meeting was held on March 11, 1972, the Town's finance committee recommended an appropriation that would meet the negotiated salary increase, but would be insufficient to fund the other economic benefits provided by the collective bargaining agreement.[12] Selectman Gallagher supported this recommended appropriation, and no members of the Board recommended passage of a larger appropriation sufficient to fund all the provisions of the agreement.[13] The town meeting voted to adopt the finance committee's recommended appropriation.[14]

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4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 658-59, 373 N.E.2d at 1168. Appropriations were needed to fund several increased financial benefits, an amendment to a by-law was needed to allow for the agreement's new work week of four days of duty and two off, and the town had to vote to accept G.L. c. 41, § 108L (a local option statute) to meet a provision of the agreement calling for educational incentive pay for the police officers of Dracut. *Id.*

8 1978 Mass. Adv. Sh. at 658, 373 N.E.2d at 1167-68.

9 *Id.*, 373 N.E.2d at 1168.

10 *Id.* at 659, 373 N.E.2d at 1168.

11 *Id.*

12 These economic benefits included a 5.5% salary increase, a clothing and equipment allowance, longevity increases, holiday pay, greater compensation for court appearances, and the "four-two" work week. *Id.* at 659 n.2, 373 N.E.2d at 1168 n.2. See note 7 *supra.*

13 *Id.* at 659-60, 373 N.E.2d at 1168.

14 *Id.* at 660, 373 N.E.2d at 1168.

On April 4, 1972, the union filed a complaint of prohibited practice with the Labor Relations Commission, alleging that the Town had refused to bargain in good faith in violation of chapter 149, section 178L of the General Laws.[15] After investigation and hearings, the Commission found that the Town had engaged in a prohibited practice through the Board of Selectmen's failure to place on the town warrant the articles necessary to implement the agreement and by the Board's failure to support passage of the appropriations necessary to fund the agreement.[16] The Commission ordered the Town to take the necessary steps to place the articles on the town warrant at the next meeting.[17] When the Town failed to act, the Commission brought a petition for enforcement in the superior court.[18] An interlocutory decree was entered in effect ordering the Town to comply with the Commission's order.[19] The case was subsequently reserved and reported to the Supreme Judicial Court.[20]

Because actions taken at subsequent town meetings had rendered the issue moot,[21] the Court did not determine whether the interlocutory decree should be enforced.[22] It did consider, however, whether successor public officials might be required to endorse publicly the terms of a collective bargaining agreement negotiated by their predecessors.[23]

The Court initially noted that since selectmen are publicly elected officials, their constituents are entitled to "the unfettered exercise of their judgment on matters of policy."[24] The Court went on to find that a decision of whether to support publicly a municipal collective bargaining contract constitutes such a policy decision.[25] Accordingly,

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15 *Id.* Former G.L. c. 149, §§ 178D, F-N was the immediate predecessor statute to G.L. c. 150E. *See* Sherry, *Labor Law,* 1974 ANN. SURV. MASS. LAW § 2.12, at 24-31.

16 1978 Mass. Adv. Sh. at 660, 373 N.E.2d at 1168.

17 *Id.*

18 *Id.*

19 *Id.* at 660-61, 373 N.E.2d at 1168.

20 *Id.* at 661, 373 N.E.2d at 1168-69.

21 At three special town meetings, articles were approved which provided funding for all the terms of the agreement and gave the town's acceptance of G.L. c. 41, § 108L (the educational incentive pay for police officers statute), but at the ensuing annual town meeting, approval of all these articles was rescinded. *Id.* at 665-67, 373 N.E.2d at 1170-71. The Court determined that the vote of recission was effective: The legislature did not provide in G.L. c. 41, § 108L a means for revoking acceptance of the statute and its terms. Moreover, since rights had vested in the union through the votes of the three special town meetings, they could not be lost by rescinding votes at a later town meeting. *Id.* at 666-69, 373 N.E.2d at 1171-72.

22 *Id.* at 663, 373 N.E.2d at 1169.

23 *Id.* at 663-64, 373 N.E.2d at 1170.

24 *Id.* at 664, 373 N.E.2d at 1170.

25 *Id.*

the Court held that "successor members of a board of selectmen should not be required to adopt a particular position which might not be in accord with their own judgment on a public issue." [26]

The Court went on to distinguish the facts in *Dracut* from those in *Mendes v. City of Taunton*.[27] In *Mendes*, the Court held that a mayor was obliged to submit an appropriation request necessary to fund a collective bargaining agreement executed by his predecessor.[28] The *Dracut* Court reasoned, however, that the action at issue in *Mendes* was "a ministerial one which involved no exercise of a policy making function." [29] Thus, the holding in *Mendes* does not extend to requiring successor public officials to perform "discretionary, judgmental actions" such as those involved in the case at bar.[30] The Court concluded:

> A decision not to support a collective bargaining agreement is a discretionary matter. The exercise of independent judgment concerning such matters serves an important public purpose. We conclude that elected successor public officials cannot be required to endorse publicly the terms of a collective bargaining agreement negotiated by their predecessors.[31]

Thus the Court determined that the selectmen's conduct at the March 11, 1972, town meeting was not in breach of the Board of Selectmen's obligation to bargain in good faith.

The Court's decision in *Dracut* resolves some intriguing questions regarding the responsibilities of elected officials to implement the terms of a collective bargaining agreement. On public policy grounds the Court concluded that *successor* members of an elected municipal body are not obligated to support enactments needed to implement the terms of a bargaining agreement negotiated by their predecessors if the matter involves a question of policy. However, if a purely ministerial act is all that is required to implement the terms of the agreement, then the successor members are indeed bound by the actions of their predecessors. This discretionary/ministerial distinction is a familiar one in the law and thus provides a workable standard. Left open in the *Dracut* decision, however, is whether the *same* members of an elected municipal body can be compelled to give an agreement support if they have con-

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[26] *Id.*
[27] 366 Mass. 109, 315 N.E.2d 865 (1974).
[28] *Id.* at 118-19, 315 N.E.2d at 872-73.
[29] 1978 Mass. Adv. Sh. at 665, 373 N.E.2d at 1170.
[30] *Id.*
[31] *Id.* The Court specifically noted that its decision was based on public policy grounds, and that it was not reaching any first amendment issue raised by requiring elected officials to support a particular position. *Id.* n.7, 373 N.E.2d at 1170 n.7.

tracted to provide it.[32] That issue was not involved in *Dracut* because only one of the five members of the new Board had so agreed,[33] and it would have been futile to compel that single member to support the necessary measures when his support would probably have carried little weight before the town meeting.

§9.4. **Federal Preemption.** The *Survey* year presented the Supreme Judicial Court with two opportunities to address issues involving the impact of the National Labor Relations Act[1] (the Act) on state jurisdiction over conduct related to labor relations matters. In both instances the Court resolved the federal preemption issues in favor of state court jurisdiction over the actions.

The first such case, *Ezekiel v. Jones Motor Co., Inc.*,[2] involved the question of whether or not there should be an absolute and unqualified privilege against slander actions for statements made during the course of a grievance procedure under a collective bargaining agreement.[3] The plaintiff, a former employee of the Jones Motor Company, had been discharged as a result of a police discovery that he was in unauthorized possession of property of the employer.[4] Under the applicable collective bargaining agreement, the employee had the right to appeal his discharge to the New England Joint Area Committee, a union-management grievance board.[5] Ezekiel availed himself of that right.[6] During the course of the hearing before this committee, another employee of Jones Motor Co. made an unsworn statement that he had observed Ezekiel steal a fishing rod and reel from the company.[7] This statement formed the basis for the plaintiff's slander action against plaintiff's former employer and the employee who made the statement.[8]

At trial, the judge instructed the jury that the defendant was entitled only to a conditional or qualified privilege.[9] On the basis of this in-

[32] *Id.* at 664 n.6, 373 N.E.2d at 1170 n.6.

[33] See text at notes 10-12 *supra.*

§9.4. [1] 29 U.S.C. §§ 151-169 (1976).

[2] 1978 Mass. Adv. Sh. 333, 372 N.E.2d 1281.

[3] *Id.* at 335, 372 N.E.2d at 1284. The Court stated the difference between an absolute privilege, which the defendants sought, and a conditional privilege, which is what the Court held to be applicable:

> An absolute or unqualified privilege provides a complete defense to slander and libel suits, immunizing the defendant from all liability even if the defamatory statement is uttered maliciously or in bad faith. . . . With a qualified or conditional privilege, a defendant is protected unless he abuses the privilege.

*Id.* at 336, 372 N.E.2d at 1284.

[4] *Id.* at 334-35, 372 N.E.2d at 1283.

[5] *Id.* at 335, 372 N.E.2d at 1284.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 334 n.3, 372 N.E.2d at 1283 n.3.

struction, the jury found for the plaintiff against each of the defendants.[10] However, the trial judge entered judgments for the defendants notwithstanding the verdict on the ground that the alleged slanderous statements were made in circumstances of an absolute and unqualified privilege.[11] On appeal the Supreme Judicial Court reversed with directions that the jury verdict in favor of plaintiff be reinstated.[12]

The defendants argued, *inter alia,* that an absolute privilege should be extended to statements made in a grievance hearing in order to avoid frustrating the national labor policy of encouraging settlement of labor disputes through the peaceful collective bargaining process.[13] The Court analogized the argument to a federal preemption claim and evaluated it under the principles set out in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25,*[14] which held that the National Labor Relations Act does not preempt a state court action for intentional infliction of emotional distress.[15] Following the principles set out in *Farmer,* the *Ezekiel* Court balanced the potential interference with the scheme of the Act against the state's interest in protecting its citizens from tortious conduct.[16] The Court, noting that protecting its citizens from slander has long been an interest of the state, held that a conditional privilege provided sufficient protection against interference with the national labor policy in favor of resolving disputes through the grievance procedure.[17] In further support of its holding, the Court cited *Linn v. Plant Guard Workers,*[18] where the United States Supreme Court held that the Act does not preempt an action under state law for a malicious libel published during a union organizational campaign.[19]

The Court also rejected a non-preemption rationale for granting an absolute privilege. The defendants argued that since the grievance proceeding had many of the features of a judicial proceeding, the absolute privilege against slander actions which statements made in judicial proceedings enjoy should extend to grievance hearings under a collective bargaining agreement.[20] The Court disagreed with this con-

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10 *Id.* at 333, 372 N.E.2d at 1283.
11 *Id.* at 333-34, 372 N.E.2d at 1283.
12 *Id.* at 346, 372 N.E.2d at 1288.
13 *Id.* at 338, 372 N.E.2d at 1285.
14 430 U.S. 290, 304-05 (1977).
15 1978 Mass. Adv. Sh. at 339-40, 372 N.E.2d at 1285-86.
16 *Id.* at 340, 372 N.E.2d at 1286.
17 *Id.*
18 383 U.S. 53, 64-65 (1966).
19 1978 Mass. Adv. Sh. at 340, 372 N.E.2d at 1286.
20 *Id.* at 337, 372 N.E.2d at 1284-85. The defendants were relying on Neece v. Kantu, 84 N.M. 700, 706, 507 P.2d 447, 453 (1973), where the Court of Appeals of New Mexico held the absolute privilege to be applicable to grievance proceedings under a collective bargaining agreement because of its quasi-judicial nature.

tention, observing that while a witness in a judicial proceeding who might make defamatory statements is subject to the control of the judge and may be prosecuted for perjury or contempt, a witness in a private grievance proceeding "need not give sworn testimony, nor is he subject to the control of a judge to limit his testimony to competent, relevant, and material evidence." [21]

The second preemption case, *Commonwealth v. Noffke*,[22] raised the question of whether the Act preempts application of the Massachusetts criminal trespass statute [23] to a non-employee union organizer disseminating information to employees on private property during an organizational campaign.[24] Noffke was arrested and prosecuted for trespass when he refused to leave the parking lot of a private employer whose employees he was attempting to organize.[25] After he was tried and convicted in the district court of violating chapter 266, section 120, the superior court ruled that the complaint should be dismissed on the ground that the trespass action was preempted by the Act.[26] The superior court stayed the order and reported the issue to the Appeals Court. After review by the Appeals Court,[27] the Supreme Judicial Court granted an application for further appellate review.[28]

The lower courts had dismissed the trespass action on the basis of the principles set forth in *San Diego Building Trades Council v. Garmon*.[29] There the United States Supreme Court held that conduct arguably protected or prohibited by sections 7 and 8 of the National Labor Relations Act is subject to the exclusive jurisdiction of the National Labor Relations Board.[30] Subsequent to the Appeals Court decision in *Noffke*, however, the United States Supreme Court decided *Sears Roebuck & Co. v. San Diego District Council of Carpenters*,[31] which the Supreme Judicial Court in *Noffke* characterized as "narrow-[ing] the scope of preemption doctrine set out in the *Garmon* case." [32]

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[21] 1978 Mass. Adv. Sh. at 338, 372 N.E.2d at 1285.
[22] 1978 Mass. Adv. Sh. 2225, 379 N.E.2d at 1086.
[23] *See* G.L. c. 266, § 120.
[24] 1978 Mass. Adv. Sh. at 2227, 379 N.E.2d at 1088.
[25] *Id.* at 2226, 379 N.E.2d at 1087.
[26] *Id.* at 2226-27, 379 N.E.2d at 1987-88.
[27] *See* Commonwealth v. Noffke, 1977 Mass. App. Ct. Adv. Sh. 846, 364 N.E.2d 1274, affirming the decision of the superior court.
[28] 1978 Mass. Adv. Sh. at 2227, 379 N.E.2d at 1088.
[29] 359 U.S. 236, 244-45 (1959).
[30] *Id.* at 245.
[31] 436 U.S. 180 (1978). *See* Casenote, *State Court Jurisdiction Over Trespassory Union Picketing: Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 20 B.C.L. REV. 558 (1979).
[32] 1978 Mass. Adv. Sh. at 2228-29, 379 N.E.2d at 1088.

Using the guidelines set out in *Sears*, the Court reversed the dismissal of the trespass action against Noffke.[33]

The Court explained that in *Sears*, the Supreme Court held that the arguably protected character of a union's trespassory conduct, such as was present in *Noffke*,[34] did not preempt state court jurisdiction where: (1) one party to the dispute could have presented it to the Board but did not; [35] (2) the other party had no acceptable means of bringing it before the Board; [36] and (3) there is not an unacceptable risk of interference with conduct that the Board would find to be protected.[37]

Applying this standard, the Supreme Judicial Court concluded that the trespass prosecution was not preempted, although the defendant's conduct was arguably protected by section 7 of the Act.[38] Under the *Sears* formula, the Court found that: (1) the defendant could have

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[33] *Id.* at 2233, 2234, 379 N.E.2d at 1090.

[34] The picketing in *Sears* was both arguably protected by Section F [29 U.S.C. § 157 (1976)] and by section 8 [29 U.S.C. § 158 (1976)] of the National Labor Relations Act. *See* 436 U.S. at 190. The only question presented in *Noffke*, on the other hand, was whether the prosecution was preempted because the activity was arguably protected. *See* 1978 Mass. Adv. Sh. at 2230 n.6, 379 N.E.2d at 1089 n.6. Therefore, the *Noffke* analysis proceeded under only one branch of the preemption doctrine, namely whether the arguably protected character of the union organizer's trespass provided a sufficient justification for preemption of state court jurisdiction.

The arguably prohibited branch of the preemption doctrine derives from the Supreme Court's determination that the congressional purpose in implementing the National Labor Relations Act evidenced a determination that single administration of specifically designed procedures was necessary to obtain uniform application because "[a] multiplicity of tribunals and diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." Garner v. Teamsters Union, 346 U.S. 485, 490-91 (1953). However, even under the arguably prohibited preemption doctrine, the Supreme Court has recognized an exception allowing state jurisdiction over conduct that touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Analyzing this exception in *Sears*, the Supreme Court held that "[t]he critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the State Court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." 436 U.S. at 197.

In *Sears*, the Court held that the trespass action was not preempted by the arguably prohibited nature of the union's conduct, because if that question had been presented to the Board, the issue would have been the union's purpose for the picketing whereas in the trespass action the only issue was the location of the picketing. 436 U.S. at 198. Therefore the Court held that the controversy was not the same as that which might have been presented to the Board.

[35] 1978 Mass. Adv. Sh. at 2230, 379 N.E.2d at 1089.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 2231, 379 N.E.2d at 1089.

presented the dispute to the Board but did not do so;[39] (2) the employer had no acceptable means of bringing the case to the Board since organizational solicitation on an employer's property by nonemployers is not within the proscriptions of the Act;[40] and (3) there was not an "unacceptable" risk that the assertion of jurisdiction would interfere with conduct which the Board would find protected.[41] The Court therefore concluded:

> The assumption by a State court of jurisdiction over the conduct of the defendant here, which is within the category of trespassory activity referred to in *Sears*, does not, therefore, create a risk of interference with federally protected activity which is sufficiently high to justify preempting the only alternative for peaceful resolution of the dispute.[42]

Despite the Court's easy application of the formula articulated in *Sears*, it is questionable whether the result in *Noffke* should have been so automatic. First, the *Noffke* trespass is not within the category of trespassory activity referred to in *Sears; Sears* involved trespassory-area-standards picketing[43] while the activity in *Noffke* was campaigning leading up to an NLRB election.[44] The Supreme Court had noted in *Sears* that "several factors make the argument for protection of trespassory-area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation."[45] Second, the *Sears* decision also revolved around the union's "fair opportunity" to present the matter before the National Labor Relations Board.[46] As in *Sears*, the union in *Noffke* could have presented the matter to the Board, but because an election was pending, different considerations apply in assessing the "fairness" of that opportunity. The matter could have been presented to the Board either in the form of objections to

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[39] *Id.* There was some evidence that a charge had been filed by the defendant with the NLRB and that the Regional Director had refused to issue a complaint. *Id.* at 2231 n.7, 379 N.E.2d at 1089 n.7. However, the Court did not consider this evidence because it was not a matter of record before the Court. *Id.* See text and notes at 45-46 *infra*.

[40] 1978 Mass. Adv. Sh. at 2231-32, 379 N.E.2d at 1089.

[41] *Id.* at 2232, 379 N.E.2d at 1089. In support of this finding, the Supreme Judicial Court cited National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) which states the general rule that an employer may prohibit nonemployees from union solicitation on his property. 1978 Mass. Adv. Sh. at 2232, 379 N.E.2d at 1089-90.

[42] 1978 Mass. Adv. Sh. at 2233, 379 N.E.2d at 1090.

[43] 436 U.S. at 185-87.

[44] 1978 Mass. Adv. Sh. at 2225-26, 379 N.E.2d at 1087. A petition for an election had been filed with the Board and an election had been directed. *Id.* at 2226, 379 N.E.2d at 1087.

[45] 436 U.S. at 206 n.42.

[46] *Id.* at 207.

the election results if the union lost the election, or in the form of an unfair labor practice charge. If charges were filed before the election, the union could have requested either that the election be suspended pending the resolution of the charges or that the election proceed without prejudicing the union's right to file subsequent objections. The major distinction between that situation and *Sears* is that if it is subsequently determined that the union should have been allowed access, the employees' organizational rights have been impinged, and their opportunity for a fully informed choice on the question of union representation has been delayed. Thus, while the union has an opportunity to present the question to the Board, the "fairness" of that opportunity, from the point of view of the employees, is questionable. Assuming that *Sears* was properly decided, the Supreme Judicial Court should have more carefully examined the applicability and effect of *Sears* to the facts involved in *Noffke*.

**§9.5. Grievance Arbitration in Public Sector Disputes.** The vast majority of collective bargaining agreements contain procedures for the resolution of disputes over the interpretation and application of their provisions. Most such procedures provide for an ultimate determination by a neutral arbitrator or panel of arbitrators. The resolution of disputes in this manner is a cornerstone of the national labor relations policy,[1] as well as the Massachusetts labor relations policy.[2] Section 8 of chapter 150E of the General Laws specifically authorizes the inclusion of such a provision in public sector collective bargaining agreements and also authorizes the Labor Relations Commission to order binding arbitration of disputes concerning the application or interpretation of the agreement in the absence of such a provision.

Most arbitration cases are resolved without recourse to judicial proceedings. Moreover, the authority of the courts to overturn arbitration awards is substantially restricted by the limited grounds set forth in section 11 of chapter 150C. Certain troublesome judicial issues are raised, however, by arbitration in the public sector, particularly by the potential conflict between arbitration awards and the statutory rights and duties of public bodies to manage their operations.[3] In recent years the Supreme Judicial Court has frequently confronted issues

§9.5. [1] *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577-78 (1960).

[2] *See* Morceau v. Gould National Batteries, Inc., 344 Mass. 120, 124, 181 N.E.2d 664, 667 (1962).

[3] *See generally* Grunebaum, Litton & Dolan, *Labor Law*, 1977 ANN. SURV. MASS. LAW §16.5 [hereinafter cited as *Labor Law*]; Student Comment, *The Scope of Grievance Arbitration in Public Employment: School Committee of Danvers v. Tyman (and two companion cases) (Trilogy)*, 1977 ANN. SURV. MASS. LAW §16.6 [hereinafter cited as *Scope of Grievance Arbitration*].

involving grievance arbitration in the public sector,[4] and it did so again this *Survey* year in the context of three decisions.

*School Committee of Southbridge v. Brown*[5] involved an arbitration over a school committee's denial of a request for sabbatical leave. The applicable collective bargaining agreement contained a provision that "sabbatical leave may be granted to members of the Southbridge Teachers Association by the Superintendent of Schools for approved scholarly programs."[6] When Brown's request for a sabbatical leave was denied, he pursued the matter under the grievance procedures set forth in the agreement, and ultimately demanded arbitration on the issue.[7] The School Committee responded by commencing an action under chapter 150C, section 2(b)(2), to stay the arbitration proceeding.[8] When an order granting the stay was issued, the grievant appealed and was granted direct appellate review.[9] The Supreme Judicial Court reversed.[10]

The agreement defined a grievance as "any alleged violation, misinterpretation or inequitable or unfair application of the provisions of this agreement."[11] The Court accepted the proposition that while it could not decide the merits of an arbitrable matter, it could properly determine whether the parties had agreed to arbitrate a particular dispute.[12] The Court then held that the dispute was not arbitrable,

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[4] *See* School Committee of Danvers v. Tyman, 372 Mass. 106, 360 N.E.2d 877 (1977); Dennis-Yarmouth Regional School Committee v. Dennis Teachers Ass'n, 372 Mass. 116, 360 N.E.2d 883 (1977); School Committee of West Bridgewater v. West Bridgewater Teachers' Ass'n, 372 Mass. 121, 360 N.E.2d 886 (1977) [all discussed in *Labor Law* and *Scope of Grievance Arbitration, supra* note 3]; School Committee of Hanover v. Curry, 369 Mass. 683, 343 N.E.2d 144 (1976); School Committee of Braintree v. Raymond, 369 Mass. 686, 343 N.E.2d 145 (1976).

[5] 1978 Mass. Adv. Sh. 1688, 377 N.E.2d 935.

[6] *Id.* at 1689, 377 N.E.2d at 936.

[7] *Id.* at 1690, 377 N.E.2d at 936.

[8] *Id.* This subsection states:

> Upon application, the superior court may stay an arbitration proceeding commenced or threatened if it finds . . . (2) that the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration and disputes concerning the interpretation or application of the arbitration provision are not themselves made subject to arbitration.

The collective bargaining agreement contained no provision for arbitration of disputes concerning the interpretation or application of the arbitration provision. *Id.* at 1690 n.2, 377 N.E.2d at 936 n.2.

[9] *Id.* at 1688, 377 N.E.2d at 935.

[10] *Id.* at 1694, 377 N.E.2d at 938.

[11] *Id.* at 1689, 377 N.E.2d at 936.

[12] *Id.* at 1691, 377 N.E.2d at 936-37. The Court specifically declined to consider whether there should be a presumption of arbitrability or of nonarbitrability in public school disputes, noting that the New York Court of Appeals, in Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 180 (1977), re-

either as an alleged violation or as a misinterpretation of the provisions of the agreement, because the agreement itself, consistent with a statute,[13] committed the grant or denial of sabbatical leaves to the discretion of the School Committee.[14] In support of this holding, the Court reasoned that "in the absence of explicit contrary language, discretionary decisions are not 'violations' subject to arbitration under the collective bargaining agreement involved here"[15] and that "the parties [did not] intend that a discretionary decision concerning a sabbatical leave might be a 'misinterpretation' of the agreement."[16]

However, the Court refused to stay the arbitration on the ground that the grievance, although it did not so allege by its terms, might involve an "inequitable or unfair application" of the provisions.[17] The Court held that allowing an arbitrator to determine whether Brown's application was "apprised in good faith and on equal terms with all others" would not unduly interfere with the Committee's prerogative.[18] It expressly left open the question of whether or not decisions to grant sabbatical leaves are a matter which a school committee may not agree, in advance, to delegate to an arbitrator for decision, and what type of relief, if any, would be appropriate in an instance where the arbitrator determines that a school committee has acted unfairly.[19]

The other two grievance arbitration cases decided by the Supreme Judicial Court involved the authority of arbitrators to order school committees to place employees in particular positions. The first case, *Bradley v. School Committee of Boston*,[20] involved sixteen principals in the Boston school system whose requests for transfers had been denied.[21] An arbitrator held that these denials violated the agreement and ordered the Committee to approve all sixteen transfers.[22] The arbitrator found that the Committee had not rejected the transfers because the principals were unqualified, but rather had denied their requests in order to fill vacancies in accordance with procedures involving community participation.[23]

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jected a presumption of arbitrability, requiring instead a "clear, unequivocal agreement" to arbitrate. 1978 Mass. Adv. Sh. at 1691 & n.3, 377 N.E.2d at 937 & n.3.

[13] *See* G.L. c. 71, § 41A, which gives school committees discretion to grant leaves of absence for study.

[14] 1978 Mass. Adv. Sh. at 1692-93, 377 N.E.2d at 937.

[15] *Id.* at 1692, 377 N.E.2d at 937.

[16] *Id.*

[17] *Id.* at 1693, 377 N.E.2d at 937.

[18] *Id.*

[19] *Id.* at 1693-94, 377 N.E.2d at 937-38.

[20] 1977 Mass. Adv. Sh. 1514, 364 N.E.2d 1229.

[21] *Id.* at 1515, 364 N.E.2d at 1230.

[22] *Id.* at 1515-17, 364 N.E.2d at 1231.

[23] *Id.* at 1516-17, 364 N.E.2d at 1231. The collective bargaining agreement provided that vacant principal positions were to be filled through a promotional

The School Committee sought to vacate the award on two grounds: first, that the question of interschool transfers of incumbent personnel was a matter within the exclusive managerial prerogative of the Committee; [24] and second, that even if an arbitrator had authority to consider the principals' transfer rights, he had no remedial authority to order the approval of the transfers.[25] The Supreme Judicial Court rejected both arguments.[26]

The Court noted that the case did not present the question of a school committee's right to appoint appropriate principals, but rather was limited to the question of the manner of filling positions, there being no question that the principals were qualified for the positions they sought.[27] The Court found that the manner of filling vacant school principalships involved both conditions of employment and issues affecting educational policy. It therefore sought to determine "whether the issues of educational policy which are implicated in the criteria for filling vacant principalships so outweigh the similarly implicated issues of employment conditions that the committee cannot make even voluntary agreements on this subject." [28]

Applying this test, the Court found that the balance weighed on the side of the principals: the decisions involved were not exclusively managerial because the agreement did not eliminate the Committee's right to disapprove transfer requests, it did not prevent the Committee from deciding that a particular school required a principal selected through procedures involving community participation, it did not require the Committee to approve transfer requests of qualified incumbents after the agreement's expiration, and it did not conflict with any "established committee educational policies." [29] The Court also held that the order to approve the transfers did not impinge on the Committee's exclusive managerial prerogatives nor by-pass the required approval procedures since the Committee had never questioned the suitability of the principals for the positions they sought.[30] On that basis the Court characterized the action as one where the Committee had found the applicants to be qualified and appropriate to fill the

rating system involving community participation, except if the positions were filled through transfers of competent incumbents. *Id.* Thus, the arbitrator characterized the parties' dispute as concerning the *criteria* for transfer disapproval and not the committee's established contractual right to disapprove incumbent transfers on their merits. *Id.* at 1517 n.4, 364 N.E.2d at 1231 n.4.

[24] *Id.* at 1517, 364 N.E.2d at 1231-32.

[25] *Id.*, 364 N.E.2d at 1232.

[26] *Id.* at 1518, 364 N.E.2d at 1232.

[27] *Id.* at 1518-19, 364 N.E.2d at 1232.

[28] *Id.* at 1519-20, 364 N.E.2d at 1232-33.

[29] *Id.* at 1520-21, 364 N.E.2d at 1233.

[30] *Id.* at 1523, 364 N.E.2d at 1234.

vacancies.[31] In these circumstances, the Court held, the arbitrator had not exceeded his authority by ordering the transfers because the Committee had voluntarily agreed to approve transfers of qualified incumbent principals.[32]

In the third case involving grievance arbitration, *School Committee of West Springfield v. Korbut*,[33] the Court upheld an arbitration award ordering a teacher reinstated to his position as coordinator of language arts for one school year.[34] Korbut had held this department chairmanship for two school years, but was not reappointed for the third year.[35] An arbitrator found that the collective bargaining agreement required that a department chairman whose nonreappointment resulted from a predominantly disciplinary motive be given written notice of the decision and an opportunity to be heard.[36] Since Korbut had not been accorded these procedures, the arbitrator ordered back pay and reinstatement.[37] Only the issue of Korbut's reinstatement, and not the issue of back pay[38] was before the superior and appellate courts. Accordingly, the scope of review before the Supreme Judicial Court was similarly limited.[39]

The School Committee argued that the award was deficient both because it exceeded the scope of reference and because the order of reinstatement was in excess of the arbitrator's authority.[40] The Court rejected both arguments.

With regard to the first argument, the Committee claimed that the arbitrator "changed" the issue from whether the agreement was violated to a question of whether the nonreappointment was for disciplinary purposes.[41] The Court agreed that arbitrators are required to act within the scope of the reference to them, but found that consideration of the motive for the nonreappointment was "secondary to and not a separate issue from" the question of whether the procedures required by the agreement had been followed.[42] The Court noted that the Committee's argument constituted an objection that the arbitrator had committed an error of law in interpreting and applying the agreement.[43]

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[31] *Id.*
[32] *Id.* See note 23 *supra.*
[33] 1977 Mass. Adv. Sh. 2548, 369 N.E.2d 1148.
[34] *Id.* at 2548-49, 369 N.E.2d at 1149-50.
[35] *Id.* at 2549-50, 369 N.E.2d at 1150.
[36] *Id.* at 2550-51, 369 N.E.2d at 1150.
[37] *Id.*
[38] *Id.* at 2551, 369 N.E.2d at 1150.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 2552, 369 N.E.2d at 1151.
[42] *Id.*
[43] *Id.* at 2552-53, 369 N.E.2d at 1151.

In response to this implied challenge, the Court stated the settled rule that a court may not vacate or modify an arbitration award resting on error of law or fact, absent fraud.[44]

With respect to the question of the arbitrator's authority to order Korbut's reinstatement, the Committee argued that the award violated chapter 71, sections 37 and 38, by requiring the Committee to surrender its discretion on matters of educational policy.[45] The Court held, however, that what was involved was not an area of the Committee's exclusive prerogative,[46] distinguishing the facts in Korbut from those present in *School Committee of Hanover v. Curry*[47] and *School Committee of Braintree v. Raymond*.[48] Those cases held that school committees possess a nondelegable right to abolish supervisory positions.[49] The Court also pointed to a number of other cases holding that the authority of school committees to appoint and reappoint academic personnel is nondelegable.[50] However, the Court distinguished these cases on the ground that *Korbut* involved only the *procedures* to be followed for the reappointment or nonreappointment of the individual, not the Committee's *right* to refuse Korbut's reappointment.[51] The Court analogized this issue to earlier cases, such as *School Committee of Danvers v. Tyman*,[52] in which it held that arbitrators may order reinstatement of non-tenured personnel if a school committee has failed to follow agreed-upon evaluation procedures.[53] Finally, the Court pointed out that the award would not give Korbut tenure in the position and that his continued service beyond one year was discretionary with the Committee assuming all procedural requirements were met.[54]

*Korbut* is noteworthy in its failure to address the issue of "harmless error." In *Tyman* the Court noted that not all violations of teachers'

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[44] *Id.* at 2553, 369 N.E.2d at 1151.
[45] *Id.*
[46] *Id.* at 2553-55, 369 N.E.2d at 1151-52.
[47] 369 Mass. 683, 343 N.E.2d 144 (1976).
[48] 369 Mass. 686, 343 N.E.2d 145 (1976).
[49] 1977 Mass. Adv. Sh. at 2555, 369 N.E.2d at 1152.
[50] *See id.* at 2555-56, 369 N.E.2d at 1152-53 for cases cited.
[51] *Id.* at 2557, 369 N.E.2d at 1153.
[52] 372 Mass. 106, 114-15, 360 N.E.2d 877, 882 (1977).
[53] 1977 Mass. Adv. Sh. at 2557, 369 N.E.2d at 1153. The *Tyman* court stated:
> Once a school committee agrees to follow certain procedures and to permit binding arbitration concerning its alleged failure to adhere to those practices, we see no public policy considerations which prevent full implementation of the terms of the agreement, subject, however, to the retention in favor of the school committee of its nondelegable rights. Indeed, adherence to the evaluation procedures may be expected to provide information to the school committee which will permit it to make a fairer and more informed judgment concerning a teacher.

372 Mass. at 114-15, 360 N.E.2d at 882.
[54] 1977 Mass. Adv. Sh. at 2559, 369 N.E.2d at 1154.

rights justify reinstatement [55] and stated, "[w]e leave open the question of the validity of an award which imposes sanctions because of the failure of a school committee to follow evaluation procedures although no teacher was harmed by the omission." [56] In this case, the question of whether Korbut had been harmed by the violation of his procedural rights would have been simple to determine. Whether Korbut was harmed by the Committee's failure to provide him with notice and a hearing was dependent upon whether he would have been reappointed had the procedural requirements been met. This could have been resolved by remanding the case for hearing required by the agreement. This situation is distinguishable from the evaluation procedures cases [57] inasmuch as the purpose of evaluations is to give the teacher an opportunity to improve his or her performance.[58] Here, however, there is nothing that Korbut could have done to change his performance even if he had been afforded notice and an opportunity to be heard. Thus his rights could have been fully protected if the matter had been remanded to provide him those rights. The fact that the Court went beyond this and ordered his reinstatement appears to indicate that it is prepared to accept sanctions against a violation of procedures even without a demonstration that harm has occurred. If that is the result of the case it seems inconsistent with the balancing principles applied in *Bradley v. School Committee of Boston.*[59]

**§9.6. Interest Arbitration: Effect of Judicial Modification of an Award: Severability.** In *Marlboro Firefighters, Local 1714, IAFF, AFL-CIO v. City of Marlboro,*[1] the Supreme Judicial Court considered the authority of the courts to enforce a final and binding award of an arbitration panel where the court has set aside a portion of the award as illegal.[2] One of the items in the union's proposal submitted to the panel was a "minimum manning" provision dealing with the number of firefighters on duty during each shift.[3] The City had taken the position that this

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[55] 372 Mass. at 114, 360 N.E.2d at 882, *citing* Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286 (1977).

[56] 372 Mass. at 114, 360 N.E.2d at 882.

[57] *See Tyman;* Dennis-Yarmouth Regional School Committee v. Dennis Teachers Ass'n, 372 Mass. 116, 360 N.E.2d 883 (1977); School Committee of West Bridgewater v. West Bridgewater Teachers' Ass'n, 372 Mass. 121, 360 N.E.2d 886 (1977).

[58] *See School Committee of West Bridgewater,* 372 Mass. at 124-25, 360 N.E.2d at 888.

[59] See text at notes 20-32 *supra.*

§9.6. [1] 1978 Mass. Adv. Sh. 1820, 378 N.E.2d 437.

[2] The award at issue was a "last and best offer" arbitration made by an arbitration panel formed pursuant to a statutory procedure applicable to firefighters and police officers. *See* Acts of 1973, c. 1078, § 4 *before amendment by* Acts of 1977, c. 347, § 2.

[3] 1978 Mass. Adv. Sh. at 1822, 378 N.E.2d 438-39.

issue was a matter of managerial prerogative about which it was not obliged to bargain, and it put forth its own offer.[4] The union countered with the contention that the issue was sufficiently related to safety and working conditions to be a mandatory subject of collective bargaining.[5] The panel, authorized to select one of the two offers but not to propose an alternative solution of its own,[6] selected the union's offer, which included the "minimum manning" provision.[7] The only other item that had truly been at issue was the subject of the firefighter's salaries.[8]

Dissatisfied with the panel's selection, the City brought an action in superior court.[9] Upon agreement of the parties, this action was consolidated with the union's subsequent enforcement action.[10] The superior court held that the award was partially invalid in that the manning provision lay outside the scope of mandatory bargaining, and thus was beyond the panel's jurisdiction.[11] The City then argued that the entire award must be denied enforcement because of its partial invalidity, and therefore, inasmuch as the union's offer was not enforceable it followed that the City's offer must be accepted as the award.[12] The union took the position that severance was reasonable and appropriate here, and it further argued that in all cases of partial invalidity the party whose offer has been selected should have the right to decide whether to accept severance of the invalid portion or to seek vacation of the entire award.[13] The superior court, concluding that the separation of the invalid portion of the award could be done without doing an injustice, entered an order enforcing the portion of the award that it considered valid.[14]

When the case reached the Supreme Judicial Court only the question of the effect of the partial invalidity of the award was in issue because the case proceeded on the assumption that the manning item had been improperly included in the offer and the award.[15] The Supreme Judicial Court affirmed the judgment enforcing the valid portions of the award.[16] The Court noted that courts have frequently severed portions of an

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[4] *Id.*, 378 N.E.2d at 439.
[5] *Id.* at 1822-23, 378 N.E.2d at 439.
[6] *Id.* at 1821, 378 N.E.2d at 438.
[7] *Id.* at 1821, 1823, 378 N.E.2d at 438, 439.
[8] *Id.* at 1826, 378 N.E.2d at 440.
[9] *Id.* at 1821-22, 378 N.E.2d at 438.
[10] *Id.*
[11] *Id.* at 1823, 378 N.E.2d at 439.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1823-24, 378 N.E.2d at 439.
[15] *Id.* at 1823, 1824, 378 N.E.2d at 439.
[16] *Id.* at 1824, 378 N.E.2d at 439.

arbitrator's award which exceeded the arbitrator's power and enforced the remainder,[17] citing, as an example, its recent decision in *School Committee of Braintree v. Raymond.*[18] The Court, quoting *McCormick v. Gray,*[19] stated the proper standard for severance to be that the lawful portion of the award should not appear to be affected by the court's alteration of the arbitrator's award.[20] One instance where the entire award ought to be vacated is when a "functional relationship" between the legal and illegal portions of the award would cause enforcement of the legal portion to lead to "an untoward and unworkable result." [21] Another instance mentioned by the Court is "where it can be seen that the arbitrator's decision as to the legal part was influenced by his disposition of the part later found to be illegal." [22] It then proceeded to analyze the award to determine whether in this case the legal portion was sufficiently independent of the illegal portion to stand alone.

The Court concluded that neither problem was present in this award. Seeing "no practical difficulty or awkwardness" in administering the remainder of the contract without the "minimum manning" provision,[23] it turned to the inquiry of whether "the panel's judgment regarding the manning provision was so far related to its judgment on the other items, that the latter judgment would not have been reached if manning had been absent from the union's offer as it was from the City's." [24] The Court experienced no difficulty in reaching the conclusion that the panel would not have acted differently, stressing that the salary portion of the award had a solid justification independent of the justification for the union's tendered manning offer, and vice versa.[25] Finally the Court rejected as "speculative and unreal" [26] the City's argument that, in the absence of the manning proposal, the parties would have advanced different last offers; it remarked that the City's actual offer was pred-

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17 *Id.*
18 369 Mass. 686, 343 N.E.2d 145 (1976).
19 54 U.S. (13 How.) 26, 39 (1851).
20 1978 Mass. Adv. Sh. at 1825, 378 N.E.2d at 440.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.* at 1825-26, 378 N.E.2d at 440.
25 The Court stated:
> To put the matter in a different way, it seems clear that the panel would have chosen the union's offer even if manning had not been included; indeed there is no serious contention to the contrary. We may say that as the manning provisions represented advantages to the union, their omission would have produced a more modest offer perhaps more acceptable to the panel than the one in fact submitted.

*Id.* at 1827, 378 N.E.2d at 441.
26 *Id.*

icated upon no change in the existing manning.[27] Moreover, it assumed that the union would not have changed the other aspects of its offer if the manning proposal had not been raised.[28]

Both the Supreme Judicial Court and the superior court acted soundly in reaching the conclusion that partial invalidity had no effect in this case. The courts were readily able to determine that the salary issue was quite unrelated to the manning issue. Thus the changed award worked no unfairness on the parties. On the question of whether the arbitration panel would have acted differently, the courts were aided by the panel's written opinion explaining its reasons for the award.[29] But where an arbitrator is not required to write such an opinion, it will be more difficult for the reviewing court not to undermine the arbitration process by substituting its own judgment when it is called on to determine whether the arbitrator would have made the particular award that he did, had he known part of the award would later be invalidated.

§9.7. **Open Meeting Law.** Chapter 39, sections 23A-24, of the General Laws constitutes the open meeting law as it applies to municipal bodies.[1] That law provides, with certain enumerated exceptions, that meetings of governmental bodies must be open to the public. One exception is where the law is inconsistent with other laws;[2] another is for conducting collective bargaining sessions.[3] During the *Survey* year, the Supreme Judicial Court considered both these exceptions in two separate decisions.

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[27] *Id.*

[28] *Id.* The Court's assumption that the deletion of the manning provision would not have affected the other aspects of the union's offer is contrary to the realities of collective bargaining. The union's final offer, at least in theory, should have been based on an estimation of what the City could afford to pay for the overall settlement. If it had not included the manning provision, the union would have been reasonable in increasing its other demands. But whether or not that would have affected the union's decision is, at best, speculative.

[29] *See id.* at 1822 n.3, 378 N.E.2d at 438 n.3. While the panel was not at that time required to write an opinion, the statute has since been amended to require written opinions. See note 2 *supra.*

§9.7. [1] The open meeting law applicable to state and county bodies can be found in G.L. c. 30A, §§ 11A and 11A½ and G.L. c. 34, §§ 9F and 9G.

[2] G.L. c. 39, § 24 states in relevant part: "The provisions of this chapter shall be in force only so far as they are not inconsistent with the express provisions of any general or special law. . . ."

[3] G.L. c. 39, § 23B states in relevant part: "Executive sessions may be held only for the following purposes: . . . (3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, and to conduct collective bargaining sessions. . . ." Section 23A states that an executive session is "any meeting of a governmental body which is closed to certain persons for deliberation on certain matters."

The "inconsistency" exception was considered in *Attorney General v. School Committee of Northampton,*[4] where the Court determined that the School Committee had violated the open meeting law by failing to disclose the names of candidates for the position of Superintendent of Schools.[5] A screening committee had submitted a list of sixteen candidates to the School Committee, which considered the list in public session. The discussion at the public meeting, however, referred to the candidates by number without identifying them by name.[6] A local reporter's request for a list of the candidates' names was denied by the Committee.[7] The Attorney General subsequently brought an action seeking a declaration that the list of the sixteen candidates was a public record under chapter 4, section 7, and that the Committee's refusal to disclose the names at the meeting was a violation of the open meeting law.[8]

The superior court, in a memorandum decision held that the Committee's refusal to disclose the names at the meeting did violate section 23B of chapter 39.[9] It ordered disclosure via amendment of the minutes of the meeting, but not before (1) the undisclosed applicants had consented to disclosure of their names, and (2) the court had determined *in camera* whether the privacy interests of non-consenting applicants warranted continued non-disclosure.[10] The School Committee appealed but the Supreme Judicial Court affirmed the judgment of the superior court, giving its approval to the procedure adopted by that court.[11]

With respect to the open meeting law, the Committee argued that its concern for the candidates' anonymity[12] was in accordance with the "inconsistency" provision of section 24,[13] through the state right of privacy law, which protects a person against "unreasonable, substantial, or serious interference with his privacy."[14] The Court stated that if a

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[4] 1978 Mass. Adv. Sh. 1108, 375 N.E.2d 1188. The case is also discussed in Delaney, *State and Local Government, supra* § 2.8 at 53-55.

[5] *Id.* at 1110-11, 375 N.E.2d at 1190.

[6] *Id.* at 1108-09, 375 N.E.2d at 1189.

[7] *Id.* at 1109, 375 N.E.2d at 1189.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 1110, 375 N.E.2d at 1190.

[11] *Id.* at 1115, 375 N.E.2d at 1191-92.

[12] The superior court had found that disclosure of some applicants' names could adversely affect their attempts to obtain future employment, ability to function in their present positions, or their standing in their communities. *Id.* at 1115 n.5, 379 N.E.2d at 1191 n.5.

[13] See note 2 *supra.*

[14] G.L. c. 214, § 1B provides in full: "A person shall have a right against unreasonable, substantial, or serious interference with his privacy. The superior

showing of this statutory right to privacy had been made with regard to a particular candidate, then the open meeting law would have had to give away.[15] Since the Committee had failed to show that the disclosure of any candidate's name would constitute an unreasonable, substantial, or serious interference with his privacy, the Committee's reliance on chapter 214, section 1B, was misplaced.[16]

The Court then turned to the issues of whether the list of names was a public record and whether the judge had acted properly in deciding to make *in camera* reviews of particular candidates' requests for privacy. Although noting that the Attorney General had not appealed and that it thus "need not consider whether more complete disclosure was required than may result under the terms of the judgment,"[17] the Court chose to rule on the Committee's "premature" claim that there was an absolute bar to disclosure of the names as a matter of public record.[18]

The Committee argued that the list was not a public record because the applicants' privacy interests were recognized and protected by statutes.[19] The Committee again pointed specifically to chapter 214, section 1B, as well as to chapter 4, section 7, twenty-sixth.[20] The Court, determining that chapter 4, section 7, recognizes a privacy interest on a standard more favorable to non-disclosure than does chapter 214, section 1B, considered only the impact of section 7.[21] It determined that the superior court correctly applied section 7 when, finding that disclosure might amount to an invasion of some applicants' privacy, the court adopted an applicant-by-applicant approach to the privacy question.[22] The fact that some names ought not be revealed did not entitle the committee to suppression of all names. The superior court's decision was viewed by the Court as "wholly consistent with the basic purpose of the public record law which presumes in favor of disclosure."[23]

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court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."

15 1978 Mass. Adv. Sh. at 1112, 375 N.E.2d at 1190.

16 *Id.*

17 *Id.* at 1113, 375 N.E.2d at 1191.

18 *Id.* The Court termed the Committee's claim to an absolute bar against disclosure premature because no judgment had been entered by then directing disclosure of the name of any applicant whose privacy would be infringed.

19 *Id.* at 1113-14, 375 N.E.2d at 1191.

20 *Id.* at 1114, 375 N.E.2d at 1191. G.L. c. 4, § 7, twenty-sixth excludes, *inter alia,* the following from the definition of public records: material and data which are "(a) specifically or by necessary implication exempted from disclosure by statute; . . . (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy."

21 1978 Mass. Adv. Sh. at 1114-15, 375 N.E.2d at 1191.

22 *Id.* at 1115, 375 N.E.2d at 1191-92.

23 *Id.*, 375 N.E.2d at 1192.

Finding no contrary statutory policy of non-disclosure, the Court thus affirmed the decision of the superior court.[24]

The second case, *Ghiglione v. School Committee of Southbridge*,[25] involved the "collective bargaining sessions" exception to the open meeting law.[26] The question in *Ghiglione* was whether this exception extended to grievance proceedings under an existing collective bargaining agreement. At the conclusion of a regularly scheduled meeting of the Southbridge School Committee, the chairperson announced that it would consider a teacher's grievance stemming from denial of a requested sabbatical leave.[27] The hearing was closed to the public according to the teacher's request and the applicable collective bargaining agreement, and a citizen was forcibly removed from the room.[28]

Three voters commenced an action in superior court charging a violation of chapter 39, section 23B, and seeking disclosure of the minutes of the hearing.[29] The superior court ruled that the grievance hearing was not subject to the open meeting law, the plaintiffs appealed, and the Supreme Judicial Court affirmed.[30]

Even assuming that the hearing was a "meeting," the Court held that it came squarely within the "collective bargaining session" exception.[31] "Collective bargaining sessions" include not just the negotiations leading up to an agreement, but grievance resolution pursuant to the agreement as well.[32] In support of this reasoning, the Court quoted a statement by the United States Supreme Court that "[t]he grievance procedure is, in other words, a part of the continuous collective bargaining process."[33]

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[24] *Id.*

[25] 1978 Mass. Adv. Sh. 2150, 378 N.E.2d 984.

[26] See note 3 *supra.*

[27] 1978 Mass. Adv. Sh. at 2150-51, 378 N.E.2d at 986. Questions relating to the arbitration of this grievance were considered in School Committee of Southbridge v. Brown, 1978 Mass. Adv. Sh. 1688, 377 N.E.2d 935. The *Brown* decision is discussed in § 9.5 *supra* at 194-95.

[28] 1978 Mass. Adv. Sh. at 2151, 378 N.E.2d at 986.

[29] *Id.* at 2150, 2151, 378 N.E.2d at 985, 986.

[30] *Id.* at 2152, 378 N.E.2d at 986.

[31] *Id.* at 2153-54, 378 N.E.2d at 987.

[32] *Id.*

[33] *Id.* at 2154, 378 N.E.2d at 987, *quoting* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).