

# MASSACHUSETTS MUNICIPAL ASSOCIATION

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## LABOR LAW UPDATE

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January 22, 2016  
Boston, Massachusetts

**PRESENTED BY**

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**January 22, 2016**

**Presented By:**

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**and**

**Nicholas Anastasopoulos, Esquire<sup>2</sup>**

**UPDATE ON LABOR CASES<sup>3</sup>**

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<sup>3</sup> Remarks and handouts are for informational and training purposes only and do not constitute legal advice. You should contact Labor Counsel concerning any specific legal questions you may have. Brian Casaceli, Esq. provided editorial assistance in preparing this presentation.  
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The Supervisor of Records recently decided that drafts of reports prepared by an outside consulting agency for a municipality are not exempt from disclosure under the Public Records Law.

## I. LEGISLATION

1. **An Act Relative to Domestic Violence** – An Act Relative to Domestic Violence mandates that all public employers and private employers, with fifty (50) or more employees, grant up to fifteen (15) days of leave during any twelve (12) month period to any employee affected by domestic violence. An employer has discretion to decide whether the leave is paid or unpaid. An employee will be eligible for domestic violence leave if: (1) the employee, or a family member of the employee, is a victim of domestic violence, sexual assault, stalking or kidnapping; and (2) the employee uses the leave to “obtain medical attention, counseling, victim services or legal assistance; secure housing; obtain a protective order from a court; appear in court or before a grand jury; meet with a district attorney or other law enforcement official; or attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or family member of the employee.”

Additionally, employers are required to notify employees of their rights under the law and, in the event an employee takes leave pursuant to the Act, the employer must ensure that it protects the employee’s confidentiality. In light of this law, employers should ensure that their leave policies provide for domestic violence leave.

2. **An Act Relative to Parental (Maternity) Leave** – An Act Relative to Parent Leave, which amended G.L. Ch. 149 §105D, became effective on April 7, 2015. The Act entitles either a male or female employee, who has completed an initial probationary period not to exceed three months, to eight weeks of parental leave. The Act is significant because such leave had previously only been available to female employees. As amended, however, §105D provides that both male and female employees may take leave for the purpose of:

- Giving birth;
- Adopting a child under the age of 18; and/or
- Adopting a child under the age of 23, if the child is mentally or physically disabled.

The leave authorized pursuant to §105D may be paid or unpaid at the discretion of the employer. Upon return from leave, an employer must reinstate the employee to his or her prior position or a similar position, unless other employees of equal length of service credit and status were laid off due to economic conditions during the employee’s parental leave. Further, if an employee is allowed to take more than eight weeks of parental leave provided under §105D, an employer is required to provide written notice to the employee if the employee will not be reinstated or afforded other rights under §105D because he or she took more than eight weeks of leave. Lastly, the Act clarifies that any two employees of the same employer

are limited to a total of eight weeks of leave for the birth or adoption of the same child.

3. **Minimum Fair Wage** – On January 1, 2016, the Massachusetts minimum wage increased from \$9.00 per hour to \$10.00 per hour. On January 1, 2017, the minimum wage will, again, increase \$1.00 from \$10.00 per hour to \$11.00 per hour. However, state minimum wage increases and the minimum fair wage law itself have been interpreted **not** to apply public employees. Grenier v. Town of Hubbardston, 7 Mass. App. Ct. 911 (1979). Municipalities **must still** pay employees at least the federal minimum wage, which is currently \$7.25.
4. **OPEB Reform Act** – Three years ago, on February 12, 2013, then-Governor Patrick filed legislation to reform health insurance benefits for retirees that he contended would save \$20 billion dollars for the Commonwealth and municipalities over the next thirty years. Ultimately, the new legislation was not adopted. The current law, M.G.L. Ch. 32B §20, provides that a city or town may establish an Other Post-Employment Benefits Liability Trust Fund, and may appropriate amounts to be credited to the fund. Any interest or other income generated by the fund shall be added to and become part of the fund.
5. **Proposed Changes to Fair Labor Standards Act Overtime Exemptions** – On June 30, 2015, the United States Department of Labor (“DOL”) issued proposed rules setting forth a new salary threshold for exempt employees under the Fair Labor Standards Act (“FLSA”). If adopted, the new salary threshold would increase from \$455 per week, or \$23,660 annually, to approximately \$970 per week, or \$50,440 annually, representing a substantial increase from the amount previously proposed by the DOL in 2014. In addition, the DOL proposed raising the salary threshold for so-called “highly compensated” employees from an annual salary of \$100,000 to \$122,148.

Under the proposed rule, the salary test would be tied to the salary at the 40<sup>th</sup> percentile of weekly earnings for full-time salaried employees, as determined by the United States Bureau of Labor Statistics. Similarly, the highly compensated employee threshold would be tied to the 90<sup>th</sup> percentile of weekly earnings for full-time salaried employees. By basing these salary tests on the weekly earnings calculated by the Bureau of Labor Statistics, the salary tests would be automatically adjusted annually to reflect inflation and wage adjustments.

The DOL received over 300,000 comments on the proposed rule. Not surprisingly, many businesses criticized the almost doubling of the salary test. The DOL has announced a delay in issuing the rules until after July 1, 2016. It is expected that the final rules will be issued before the end of 2016.

6. **Cadillac Tax** – The Cadillac Tax (the “Tax”) is a 40% excise tax on high end health insurance plans, passed by Congress as part of “ObamaCare.” More specifically, the Tax only applies to health insurance plans that have premiums in

excess of \$10,200.00 for individuals, and \$27,500.00 for families. Therefore, every dollar spent in excess of \$10,200.00 for individuals, and \$27,500.00 for families, will be taxed at a rate of 40% (i.e., if an individual's premium costs \$10,500.00, only \$300.00 will be taxed at a rate of 40%). Notably, individual beneficiaries are not responsible for paying the Tax; rather, the Tax is paid by health insurance issuers and sponsors of self-funded group health plans. It is, however, expected that a portion of this tax will be passed on to the consumer by the health insurer.

On December 18, 2015, the President signed the "Consolidated Appropriations Act, 2016," a provision of which delayed the implementation of the Tax from 2018 until 2020.

The Group Insurance Commission, the Massachusetts agency that manages health insurance premiums for state and certain municipal employees and retirees, drafted and sent comments to the Internal Revenue Service voicing certain concerns regarding the Tax's impact on public employers in Massachusetts.

At this point, it is unclear how the Group Insurance Commission will deal with the Tax if, and when, it becomes effective. For example, questions remain regarding how the Tax will impact a municipality's existing health insurance plans, and whether the Group Insurance Plan, itself, will pay the tax, or whether it will pass the Tax's costs on to municipalities.



## II. CASE LAW

1. **Abercrombie & Fitch violated Title VII of the Civil Rights Act when it based its decision not to hire an applicant for employment, in part, because the applicant's headscarf, which she wore for religious reasons, would violate its neutral "Look Policy."**

**Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.,**  
**135 S.Ct. 2028 (2015).**

The United States Supreme Court held that Abercrombie & Fitch Stores, Inc. ("Abercrombie") violated Title VII of the Civil Rights Act of 1964 when it based its decision not to hire an applicant for employment, in part, on its desire to avoid having to accommodate the applicant's religious practice of wearing her headscarf.

Abercrombie operates clothing stores, each with its own "style." To ensure that all Abercrombie employees represent the store's chosen style, it imposes a neutral Look Policy (the "Policy") governing how its employees dress while working. The Policy prohibits its employees from wearing "caps."<sup>1</sup> Samantha Elauf ("Ms. Elauf"), who is a practicing Muslim, and who, consistent with her religious beliefs, wears a headscarf, applied for a position at Abercrombie. Ms. Elauf was interviewed by the store's assistant manager and, pursuant to Abercrombie's system for evaluating applicants, gave Ms. Elauf a score that qualified her to be hired. The assistant manager was, however, concerned that Ms. Elauf's headscarf would conflict with Abercrombie's Policy and sought guidance from her superiors. The assistant manager communicated to the district manager that she believed Ms. Elauf wore her headscarf because of her faith. Notwithstanding the assistant manager's concerns, the district manager stated that the headscarf would violate the Look Policy and directed that Ms. Elauf not be hired.

The EEOC brought suit against Abercrombie on Ms. Elauf's behalf claiming that its refusal to hire Ms. Elauf violated Title VII. Title VII provides that an employer may not "refuse to hire... any individual... because of such individual's... religion."<sup>2</sup> Abercrombie argued that it could not be held liable for refusing to hire her because it did not have "actual knowledge" of the applicant's need for an accommodation. The Supreme Court rejected this argument and instead held that, under Title VII, if an employer suspects or has some reason to believe that an employee needs a religious accommodation, and such speculation is a motive for making an employment decision, an employer could be liable for religious discrimination (unless it can demonstrate an undue hardship). Simply put, "[a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

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<sup>1</sup> The Policy does not offer a definition for the word "caps."

<sup>2</sup> Religion is defined to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate" a "religious observance or practice without undue hardship on the conduct of the employer's business."

Thus, even though Abercrombie alleged not to have “actual knowledge” that Ms. Elauf wore her head scarf for religious reasons when it refused to hire her, it was nonetheless required to reasonably accommodate her or engage her with interactive dialogue.

2. **Former black associate at the law firm Ropes & Gray, who was not chosen for partner because of negative job reviews, failed to offer proof that he was discriminated against on the basis of his race.**

**Ray v. Ropes & Gray, 799 F.3d 99 (1st Cir. 2015).**

The First Circuit Court of Appeals held that the law firm Ropes & Gray did not discriminate against a black associate, John H. Ray (“Ray”), based on his race, when it did not advance him to partner, instead terminating his employment.

Ray joined Ropes & Gray as a fifth-year associate and, during his first year at the firm, received generally positive reviews. In his sixth and seventh years, however, Ray’s reviews were “decidedly less positive” and, in fact, he was informed that he faced an “uphill climb” at becoming partner. Specifically, Ray was cited as having poor interactions with the firm’s staff and other associates, poor leadership skills, had trouble meeting deadlines, and needed to improve his writing skills.

Ray was ultimately informed in 2008 by the Policy Committee (those individuals who promoted associates to partners) that he would not be promoted to partner. As such, Ropes & Gray offered him a sixth month severance package. During the severance period, however, Ray “began to imply that he did not ‘feel the [Policy Committee]’s decision was fair or appropriate.” In May 2009, Ray filed a complaint with the EEOC. Notably, after a lengthy investigation, the EEOC did not find evidence of discrimination. Not to be deterred, Ray, himself, filed a civil action against Ropes & Gray in August 2011. Ropes & Gray argued that Ray was terminated for a legitimate non-discriminatory reason – poor job performance – and that Ray did not present any plausible evidence to rebut its reason for the termination. The court agreed and found in favor of Ropes & Gray.

In support of his allegation of discrimination, Ray identified a number of factual circumstances which, he claimed, evidenced discrimination. First, Ray alleged that he was treated differently than his fellow associates. The court disagreed, citing to the fact that, Ray’s evaluations, unlike his counterparts, demonstrated how he repeatedly insulted co-workers, demeaned junior associates, and passed off work to others. Simply put, Ray’s actions were “distinctively more extreme, and more numerous, than those contained in the evaluations of any of the comparators he offered.”

Ray also pointed to two racially-charged remarks that were allegedly made by two partners. Even assuming such remarks were made, however, the court was not swayed that they were indicative of discrimination. The Court reasoned this because the remarks were not made by any of the individuals on the Policy Committee, and there was no evidence that such remarks were connected to the Policy Committee’s decision not to promote him to partner.

3. **Town of Foxborough was required to pay Police Officer regular wages pursuant to G.L. c. 41 §96B, as opposed to discounted wages set forth in its By-Laws, during the time the Police Officer was enrolled in officer training.**

**McGrath v. Town of Foxborough, 87 Mass. App. Ct. 1133 (2015).**

The Massachusetts Appeals Court held that Stephen McGrath (“McGrath”), a police officer in the Town of Foxborough (the “Town”), was entitled to be paid “regular wages” during the time he was enrolled in a municipal police training school.

McGrath was appointed as a police officer in the Town’s Police Department starting on September 17, 2006. From September 17, 2006 until February 24, 2007, however, McGrath was a trainee at the police academy, and, during that time, he did not (and could not) exercise police powers. The Town alleged that because McGrath was training during this period, he was not entitled to the same regular wages as other sworn officers exercising police powers, but, rather, was entitled to a discounted rate set by the Town By-Laws. McGrath disagreed and brought suit against the Town for failing to pay him regular wages in accordance with G.L. c. 41 §96B, which, in relevant part, provides that:

... [A]ny person so attending such a [training] school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training school, *provided that such person shall be paid regular wages provided for the position to which he was appointed...*

In light of this language, the Appeals Court found for McGrath holding that, because McGrath’s appointment letter explicitly stated that he was being appointed to the position of Police Officer (and made no reference to him attending a training academy for five months), he was entitled to the same basic pay as regular sworn officers. Pursuant to G.L. c. 41 §96B, however, McGrath was not entitled to the benefits of c. 31 or those set forth in the collective bargaining agreement because G.L. c. 41 §96B specifically exempted him from such benefits.

The Town attempted to argue that it had always paid student officers at the lower rate contained in its By-Laws, and, therefore, McGrath should be paid at that rate as well. The Appeals Court easily dismissed the Town’s argument noting that neither the Town By-Law nor “the fact that third parties have acquiesced to its application can override the requirements of §96B.”

4. **City of Somerville was entitled to reduce the percentage of its contributions for retired employees' health insurance coverage without bargaining with the union.**

**City of Somerville v. Commonwealth Employment Relations Board, 470 Mass. 563 (2015).**

In City of Somerville, Somerville ("City"), and the school committee of Somerville ("School Committee"), without bargaining, decreased the percentage of their contributions for retired employees' health insurance coverage from ninety-nine (99) percent to sixty (60) percent.<sup>3</sup>

The various bargaining units in the City, including the Teachers Association, Police Superior Officers Association, Administrators Association, and Municipal Employees Association (collectively, the "Unions"), alleged that the City's unilateral reduction of its retirees' health insurance contributions violated M.G.L. ch. 150E, §10(a)(5), and, derivatively, § 10(a)(1).

In 1979, the City accepted M.G.L. ch. 32B, §9E authorizing the City to pay more than fifty (50) percent of a retired employee's monthly premium for an indemnity health insurance plan. Until 2009, the City contributed ninety-nine (99) percent of a retired employee's health insurance coverage under the indemnity plan. The retired employees contributed the remaining one (1) percent.<sup>4</sup>

The State Department of Labor Relation's Commonwealth Employment Relations Board (the "Board") found that the City engaged in an unfair labor practice when it did not bargain with the unions before reducing its contributions to retiree health insurance.

The City appealed the Board's decision arguing: (1) that current public employees do not have the right to collectively bargain over the issue of health insurance contribution rates for retirees; and (2) that M.G.L. ch. 32B authorizes a local government to determine the rate at which it contributes to a retired employee's health insurance premiums. The Court agreed and held that the City's contribution rate for retired employees' health insurance coverage was not a mandatory subject of bargaining.

The Court reasoned that M.G.L. ch. 150E, §6 requires a public employer to bargain with a *current, public employee* over his or her terms and conditions of employment.<sup>5</sup> In this particular case, however, the City and School Committee had no obligation to bargain because those individuals whose healthcare premium contribution rates were decreased were retirees.

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<sup>3</sup> The City also decreased the percentage of its contribution for retired employees' health insurance coverage on certain other plans to seventy-five (75) percent.

<sup>4</sup> The City also offered active and retired employees health insurance coverage through several HMOs. The City paid fixed percentages of the total premium costs, which varied between eighty (80) and ninety (90) percent. Employees and retirees paid the remainder of the costs.

<sup>5</sup> An employee's terms and conditions of employment include health insurance premium contribution rates.

According to the Court, “it goes without saying that a retiree cannot bargain over the percentage contributions made by a municipality to the retiree’s health insurance premiums, given that the retiree is no longer employed.”

Further, to permit a current public employee to bargain over a public employee retiree’s health care insurance contribution rates would impermissibly abrogate the City’s statutorily permitted ability to determine the rate at which it contributes to a retiree’s health insurance premiums.

5. **Male applicant to the Boston Police Academy who was not chosen from the certification list produced by the Human Resources Division of the Commonwealth of Massachusetts could not prove that he was bypassed in favor of female candidates, but he could prove that he was prevented from standing on equal footing as his fellow female candidates.**

**Caulfield v. Human Resources Division of the Commonwealth of Massachusetts,**  
**2015 WL 5190716 (D. Mass. 2015).**

The Federal District Court for the District of Massachusetts held that John Caulfield (“Caulfield”), a male candidate for the Boston Police Academy (“BPA”), could not prove that he was bypassed in favor of female candidates for a spot at the BPA, but that he could prove that he was prevented from standing on equal footing as his fellow female candidates because the Boston Police Department (“BPD”) took his gender into account when making its employment decisions.

To hire new police officers, BPD sends a request to the Human Resources Division of the Commonwealth of Massachusetts (“HRD”). The HRD administers civil service examinations for police officers, creates lists of candidates based on their scores, and issues hiring certifications to cities and towns. Upon receiving BPD’s request, the HRD sends back a certification list containing the names of eligible candidates, who are ranked in descending order based on their civil service exam performance. Legally, the BPD must consider all candidates listed in order of test rank. BPD may, however, bypass a higher ranked candidate in favor of another candidate with a certain qualification, including gender, provided it obtains authorization from the HRD.

In February and March 2013, BPD engaged in the above procedure seeking to hire forty-five (45) officers of either gender. BPD also sought authorization from the HRD to engage in the bypass procedure to hire ten female officers, which was approved by the HRD. Ultimately, Caulfield was not hired by the BPD. As a result, Caulfield alleged that, had the HRD not authorized BPD to bypass certain candidates to hire ten female officers, he would have been chosen for the BPD. Caulfield also alleged that HRD’s long-standing practice of approving bypasses to permit the hiring of female officers is discriminatory, and that the BPD failed to show a compelling governmental interest in engaging in this practice to hire female officers. Caulfield sought an injunction to prohibit the BPD from continuing to engage in this process.

Regarding Caulfield’s first argument, that he would have been hired had the BPD not engaged in the bypass procedure to hire female candidates, the Court disagreed. Notably, the ten female candidates hired were all ranked above Caulfield on the certification list. Therefore, because of their higher rank, the BPD “would have been obliged to consider them for appointment before considering Caulfield....” Simply put, Caulfield could not offer any evidence, beyond speculation, that he would have been selected had the BPD not engaged in the bypass procedure to hire the ten female candidates.

As to Caulfield's second argument, that bypassing higher ranked candidates in favor of candidates with certain qualifications, including gender, prevented him from competing on an "equal footing," the Court agreed. Caulfield demonstrated that he was likely "to be denied the opportunity to compete on equal footing in the BPD's hiring process on account of his gender" because the BPD engaged in the bypass procedure multiple times since 2010. Accordingly, if, in the future, Caulfield is more highly ranked than a female candidate, but it bypassed him in favor of the female candidate, he would be ineligible for appointment to the BPA "simply because he is male."



6. **The Boston Police Department's promotional exam from sergeant to lieutenant, administered in 2005 and 2008, had a disparate impact on minority applicants and was not sufficiently job-related and consistent with business necessity.**

**Smith v. City of Boston, C.A. No. 12-10291-WGY (D. Mass. 2015).**

The Federal District Court for the District of Massachusetts held that the City of Boston's (the "City") multiple-choice promotional exam (the "Exam") for police sergeants to become police lieutenants had a disparate impact on minority candidates (Black and Hispanic officers), and that the City could not demonstrate that "those who perform better on the exam will be better performers on the job." Accordingly, the Court held that the Exam violated Title VII and M.G.L. c. 151B.

The City requires that all police sergeants seeking a promotion to lieutenant must sit for the Exam. In this action, ten Black police sergeants (the "Plaintiffs") brought a lawsuit against the City alleging that the Exam, administered in 2005 and 2008, had a racially disparate impact on minority candidates and that the Exam was not sufficiently job-related to warrant protection under Title VII. The results of the 2008 Exam were as follows: 91 sergeants sat for the Exam, including 65 White candidates, 25 Black, and one Hispanic candidate. The passing rate for the minority candidates was 69% and the passing rate for whites was 94%. The average score for minorities was 76.6, and for Whites, 83.2. Of the 33 sergeants promoted, 28 were White (out of 65) and five were Black (out of 25). In reviewing whether disparate impact was present, the Court considered promotion rates, pass-fail rates, average scores, and delays in promotions.

To prove disparate impact under Title VII, the Plaintiffs must demonstrate that the City uses "a particular employment practice that causes a disparate impact on" a protected class. In this case, the Plaintiffs were able to demonstrate disparate impact by showing that they were promoted at a lower rate than their White counterparts, that they passed the Exam at a lower rate, that they had lower average scores, and that there were longer delays in their promotions.

In response to the above showing made by the Plaintiffs, the City argued that the Exam was "job-related... and consistent with business necessity...." The Court disagreed with the City, holding that the City failed to demonstrate that "a higher score [on the 2008 exam] is likely to result in better job performance." The Court reasoned that the job analyses reflect that "many skills and abilities are necessary to perform the job of lieutenant, yet the 2008 written Exam tested knowledge almost exclusively." Simply put, there were many other skills that the Exam skipped over, including critical skills and abilities, such as interpersonal skills, presentation skills, reasoning and judgment skills, [and] oral communication skills..."<sup>6</sup>

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<sup>6</sup> Because the Court found that the Exam was not sufficiently "job related...and consistent with business necessity," it did not evaluate the third part of the Title VII analysis which would have required the Plaintiffs to prove "the existence of equally effective alternate practice...." different from the Exam.

7. **The Hampshire Council of Governments' Personnel Policy created an implied contract between it and its Director of Electricity thereby abrogating the employment-at-will doctrine.**

**O'Rourke v. Hampshire Council of Governments, et al., C.A. No. 14-30216-MGM (D. Mass. 2015).**

The Federal District Court for the District of Massachusetts held that the Hampshire Council of Governments Personnel Policies and Procedures created a "binding employment contract which permitted termination only for cause, following a six-month probationary period."

In this case, the plaintiff, John P. O'Rourke ("O'Rourke"), was hired by the Hampshire Council of Governments as its Director of Electricity. When he was hired, O'Rourke entered into a written employment agreement which stated that the "provisions of the...regulations and rules of the Council relating to personnel policy...shall apply to [O'Rourke]." The personnel manual declared itself to be a "covenant between the employer and the employee" where, during the probationary period, an employee could be terminated without cause. After the probationary period, however, the employee could only be discharged for certain reasons including unsatisfactory job performance, violation of the rules and regulations, and other serious situations. Furthermore, upon such a discharge, the employee was entitled to written notice. Notably, the personnel manual did not contain an at-will disclaimer indicating that an employee's employment could be terminated by either side without cause.

After O'Rourke's probationary period ended, he was terminated "not for cause." O'Rourke brought suit alleging a breach of an implied contract (the personnel policy). The Hampshire Council of Governments alleged that O'Rourke was an employee-at-will and, therefore, no cause was needed to terminate O'Rourke.

The Court ultimately sided with O'Rourke, holding that a "plausible inference can be made that a reasonable employee would have believed the manual entitled 'Hampshire Council of Governments Personnel Policies and Procedures' constituted a binding employment contract which permitted termination only for cause, following a six-month probationary period." The Court reasoned that O'Rourke's continued employment, after receiving the personnel policy, constituted his acceptance of the policy, thereby creating an implied employment contract between the parties.

8. **Civil Service Commission exceeded the scope of its authority when it modified the Town of Maynard's termination of a police officer after the Commission engaged in similar fact finding as the Town.**

**Town of Maynard v. Tony Rego, Case No. 14-P-1124 (Mass. App. Ct. 2015).**

The Appeals Court held that the Civil Service Commission (the "Commission") exceeded the scope of its authority when it modified a penalty the Town of Maynard (the "Town") imposed upon a police officer after the Commission engaged in essentially similar fact finding as the Town.

Tony Rego ("Rego") was a police officer with the Town's police department (the "Department"). In late 2010, the chief of police noticed that "the focuses of certain 'pan, tilt and zoom' cameras were being moved from their preset locations."<sup>7</sup> To prevent any further movement of the cameras, the lieutenant sent an email on behalf of the chief instructing all personnel to refrain from moving or changing the location of the cameras. Notwithstanding this email, certain officers continued to move the cameras. As a result, the chief commenced an investigation and, as part of the investigation, Rego was ordered to meet with two officers. Rego refused to meet with the two officers and a "loud, verbal altercation ensued during which Rego waived a union rights card." The chief placed Rego on paid administrative leave following his outburst.

The internal investigation revealed that Rego moved the cameras nine (9) times after the lieutenant's email, and made a video recording on his personal cellular telephone of the camera monitor displaying a woman in the police department parking lot. Rego claimed the chief directed the camera to follow the women and Rego showed the video to his family and friends. Rego also told the town manager that the female town employee was "scared" that she was being watched. Notably, the female town employee never raised any concerns as Rego alleged. Rego was later terminated for violation of the email order, untruthfulness, improper dissemination of official information, improper communication with public officials, and insubordination for refusing to meet as part of the investigation.

Rego appealed his termination to the Commission which found just cause to discipline him for the issues related to the cameras, but found insufficient cause to discipline him for insubordination for refusing to meet with the two officers.<sup>8</sup> Accordingly, taking into account Rego's actions and two instances of prior discipline, and the fact that no police officer had ever

<sup>7</sup> These cameras were located in the front and back of the police station and could be used to look around the outside of the police station. The cameras could be adjusted manually or by a joystick. There were four joysticks in the police station: in dispatch, the technical room, the chief's office, and the lieutenant's office.

<sup>8</sup> The Commission also found "little useful evidence of discipline at the station comparable to Rego's termination," noting that, while two other officers received written reprimands for moving the cameras, "no other officer had subjected the Department to public ridicule and embarrassment in the manner Rego had."

been terminated for similar conduct, the Commission found “considerable discipline” was required in the form of an almost two-year suspension, but termination was not.

In reviewing the Commission’s decision, the Appeals Court noted that, “[t]he Commission is not free to modify the penalty imposed by the Town on the basis of essentially similar fact finding without an adequate explanation.” Accordingly, after reviewing the above-described fact findings from both the Town and the Commission, the Appeals Court held that there was “no significant differences in view or legal interpretation as to the facts before the Town and those as found by the Commission.” Simply put, if Rego’s misconduct was “sufficiently serious to warrant the suspension of a police officer in a small police department for close to two years...it [was] sufficiently serious to warrant termination.” As such, the Town’s decision to terminate Rego was upheld.

9. **Civil Service employee's termination upheld pursuant to G.L. c. 31 §50 after she was convicted of larceny over \$250.**

**Reuter v. Methuen Public Schools, Case No. 14-P-759 (Mass. App. Ct. 2015).**

The Appeals Court upheld the termination of Beth Reuter ("Reuter"), a civil service employee, after she was convicted of larceny over \$250, despite the fact Reuter and her employer, Methuen Public Schools ("Methuen"), entered into a settlement agreement limiting Reuter's punishment to a demotion and suspension.

Reuter was employed as a permanent senior building custodian by Methuen. On March 7, 2013, Methuen terminated Reuter's employment after she was convicted for larceny over \$250. As punishment, Reuter received a one-year sentence in a house of correction, for which she was to serve thirty days, and spend the remaining 11 months on probation.

Reuter appealed her termination to the Civil Service Commission. While her appeal was pending before the Commission, Reuter and Methuen entered into a settlement agreement which provided that Methuen agreed to re-employ Reuter under certain terms and conditions, including a suspension and demotion. The settlement also stated that Methuen would not undertake any further disciplinary actions against Reuter related to the theft charges. Notably, the settlement agreement arose *after* Reuter was charged with the theft, but *before* she was convicted.

Notwithstanding the settlement agreement, after Reuter was convicted, her employment was terminated pursuant to G.L. c. 31 §50. §50 provides that "no person...shall be appointed to or retained in any civil service position...within one year after [her] conviction of any crime [with certain statutory exceptions]...." Because Reuter was convicted of the larceny, and did not qualify for any of the statutory exceptions, she was disqualified from employment with Methuen for a year. Reuter argued to the contrary, claiming that her termination was precluded by the settlement agreement between her and Methuen.

The Civil Service Commission, the Superior Court, and the Appeals Court all found in favor of Methuen. Under the plain language of the statute, Reuter was prevented from being employed by Methuen within one year of February 13, 2013, the date she was convicted of the larceny. The Court reasoned that Methuen had no discretionary authority to contract around §50's requirement that no civil service employee could be retained within one year of their conviction of a crime. Accordingly, Reuter's termination was upheld.

10. **City of Worcester Chief of Police was within his discretion to suspend, revoke, and deny a citizen's application to carry a firearm after that citizen physically abused his wife.**

**Chief of Police of the City of Worcester v. Raymond J. Holden, Jr., 470 Mass. 825 (2015).**

The Supreme Judicial Court upheld the Worcester Chief of Police's (the "Chief") finding that Raymond Holden ("Holden") was not suitable to have a license to carry a firearm after Holden physically abused his wife.

Holden was arrested for assault and battery on his wife after he punched her in the face while the two were sitting in an automobile, walked around to the passenger's side door, pulled her out of the vehicle, and threw her to the pavement. Holden's wife suffered a swollen lip, a scratch over her right eye, and scrapes and bruises on her left arm.

On September 14, 2005, two days after Holden was arraigned for assault and battery, the Chief suspended Holden's license to carry firearms. The Chief based his decision on Holden's arraignment for assault and battery. Two weeks later, the charges against Holden were dropped at the request of his wife. After the charges were dropped, Holden petitioned to have his license restored, which was granted by a superior court. Almost immediately after Holden's license was restored, the Chief revoked Holden's license. The Chief based his decision to revoke Holden's license on the police incident report detailing Holden's domestic violence.

In 2010, Holden's revoked license to carry firearms expired. As a result, Holden applied for a new license. Holden's application for a new firearm license was, however, denied. The Chief denied Holden license for a firearm permit on the grounds that Holden was not a suitable person to hold such a license, in accordance with M.G.L. c. 140 §131 (d) and (f). §131 provides that, "[t]he licensing authority may deny the application or renewal of a license to carry, or suspend or revoke a license issued under this section if, in a reasonable exercise of discretion, the licensing authority determines that the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry." The purpose of §131 is to limit access to deadly weapons by irresponsible persons or evildoers.

Holden appealed the Chief's decision, and, after some procedural maneuvering, the case reached the Massachusetts Supreme Judicial Court. There, Holden contended that the "suitable person" standard in M.G.L. c. 140 §131 (d) and (f) violated the Second Amendment, the right to keep and bear arms. The Massachusetts Supreme Judicial Court, citing to the U.S. Supreme

Court, disagreed.<sup>9</sup> The Massachusetts Supreme Judicial Court made clear that, to ensure firearm licenses were only given to “law-abiding, responsible citizens,” the licensing authority (i.e., the Chief) was granted “considerable latitude” or “broad discretion” when deciding whether to issue such licenses. Applying this broad discretion standard to Holden, the Supreme Judicial Court held that the Chief acted legally when, relying on specific and reliable information that Holden had beaten his wife, suspended, revoked, and denied Holden’s application for a firearm license.

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<sup>9</sup> The U.S. Supreme Court made clear of the need for suitability determinations regarding the issuance of firearm licenses, when it stated that the Second Amendment granted the right of “*law-abiding, responsible* citizens to use arms in defense of hearth and home.”

### III. DECISION OF SUPERVISOR OF RECORDS, SHAWN A. WILLIAMS

In 2014, the Town of Falmouth (the "Town") retained the Matrix Consulting Group ("Matrix") to analyze whether the Town should consolidate all of its dispatch functions into one entity. At the time, the Town had individual dispatch services for police, fire, marine and environmental services and public works. As part of its analysis, Matrix produced draft reports of its conclusions and findings and shared such reports with the Town. Ultimately, Matrix prepared a final report.

After the final report was produced to the Town, the International Association of Firefighters Local 1397 union (the "Union") requested copies of the *draft reports* that Matrix had prepared during its evaluation of the dispatch services. In response, the Town provided the Union with a copy of the final report, but withheld the copies of the draft reports pursuant to Exemption (d) of the Public Records Law. G.L. c. 4 § 7(26)(d). Exemption (d), the deliberative process exemption, allows the withholding of:

Inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based. Id.

The Union appealed the Town's withholding to the Supervisor of Records in the Public Records Division of the Secretary of Commonwealth, who, on December 4, 2015, sided with the Union, finding that such draft reports were not exempt under Exemption (d). The Supervisor of Records appeared to base his decision on the fact, in his view, because a final report had been produced and the deliberative process complete, any documents generated during the deliberative process, including the draft reports, were subject to disclosure.

The Supervisor's decision that draft reports are subject to disclosure has the potential to have a significant adverse impact on a municipality's ability to engage in frank decision-making where municipal officials may be discouraged from engaging in candid internal discussions before a final report on a matter is adopted.

The Town has moved for reconsideration of the State Supervisor's Order.



## ATTORNEY BIOGRAPHY



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#### **Practice Groups and Specialty Areas**

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Human Resource-Related Advice and Training  
Labor Law and Collective Bargaining  
Education Law  
Municipal Law

#### **Education**

JD, *magna cum laude*, Boston University Law School, senior editor, *Boston University Law Review*

BA, *magna cum laude*, University of Massachusetts at Amherst

#### **Bar and Court Admissions**

Massachusetts  
U.S. District Court for Massachusetts

#### **Professional/Community Affiliations**

College of Labor and Employment Lawyers, fellow

Worcester Regional Chamber of Commerce, past chair

Worcester Regional Research Bureau, director

Business Education Foundation, chair

American Bar Association

Massachusetts Bar Association

Worcester County Bar Association, Labor and Employment Law Committee, a founder and past chair

Military Service: U.S. Army, Captain

D. is a member of the firm's Labor, Employment and Employee Benefits Group. He has extensive experience in labor and employment law. He has frequently represented management in labor and employment cases before government agencies, including the National Labor Relations Board, the Department of Labor and the Massachusetts Commission Against Discrimination. He has personally conducted more than 600 labor negotiations, including numerous negotiations involving teachers, factory workers, hospital employees, and public employees. D. also practices education law and represents public and private schools in Massachusetts. Presently, D. is labor counsel for various private and public employers in Massachusetts and regularly advises employers on labor and employment law issues.

He drafted a portion of the Massachusetts Labor Statute and is a founder and former management chair of the State Joint Labor Management Committee (Dunlop Commission) and the Worcester County Bar Association Labor and Employment Law Committee.

In 2013, D. received the 2013 Cushing-Gavin Labor-Management Counsel Award. Also in 2013, D. was awarded a rare honorary membership in the International City Management Association (ICMA). Honorary membership in ICMA is rarely awarded and is given to an individual outside of the profession of local government management because of his or her distinguished public service and contributions to the improvement and strengthening of local government.

*Human Resource Executive Magazine* and *Lawdragon* have recognized D. as being one of the "Top 100 Corporate Employment Attorneys in the United States" in 2010, 2011, 2012, 2013 and in 2014 elected him to the Human Resources Hall of Fame. D. was selected by his peers for inclusion in *The Best Lawyers in America* ©2016 in the field of Employment Law – Management; Labor Law – Management (Copyright 2016 by Woodward/White, Inc., of Aiken, SC). D. was also named Best Lawyers' 2013 and 2014 Worcester Employment Law – Management "Lawyer of the Year." In 2007, the Massachusetts Municipal Personnel Association selected him as the recipient of its annual Emil S. Skop Award for outstanding contributions to human resources management. D. has been named one of Massachusetts "Super Lawyers" by *Boston* magazine and *Law & Politics* every year since 2006. D. has received an AV® Preeminent Peer Review Rating by *Martindale-Hubbell*, the highest rating available for legal ability and professional ethics. In 2015 the Worcester County Bar Association gave D. their Distinguished Service Award.

He is a fellow of the College of Labor and Employment Lawyers which includes the leading labor lawyers in the U.S.

He is a lecturer of labor relations at Clark University.

## ATTORNEY BIOGRAPHY – DEMITRIOS M. MOSCHOS

### Publications (Partial Listing)

- “Workplace Emergencies,” *HRMA Perspectives* (October 2013)
- “How to Conduct an Employment Investigation,” *HRMA Perspectives* (October 2012)
- “Federal Court Upholds NLRB’s Notice-Posting Rule, but Invalidates Enforcement Penalties Contained in Final Rule, (April 2012)
- “Summary of Seminar on Lobbying Law,” WCBA, Legal Lines (May 2011)
- “2010 Amendments to the Massachusetts Personnel Records Law,” *HRMA Perspectives* (October 2010)
- “New Wage Law Prompts Review of Pay Practices,” *HRMA Perspectives* (September 2008)
- “Identity Theft,” *HRMA Perspectives* (February 2007, updated April 2008)
- “U.S. Department of Labor Proposes to Review Overtime Regulations,” *HRMA Perspectives* (May 2003)
- “Change in Employer and Individual Liability Under Harassment Law,” *MBA Journal*, Section Report (Spring 2001)
- “Employers Can Be Held Liable for Sexual Harassment that Takes Place Without Their Knowledge,” *Boston Business Journals*, June 20-July 6, 2000

## ATTORNEY BIOGRAPHY



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### Bar and Court Admissions

Massachusetts

U.S. District Court for Massachusetts

U.S. Court of Appeals for the First  
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### Professional/Community

#### Affiliations

Department of Labor Relations  
Advisory Council, chair

Labor and Employment Relations  
Association, MA Chapter chair

Massachusetts Bar Association, Labor  
and Employment Section Council

National Association of College and  
University Attorneys, Continuing  
Legal Education Committee

Town of Sherborn, Personnel Board

Greek Orthodox Metropolis of  
Boston Council, Board of Directors

### Practice Groups and Specialty Areas

Labor, Employment and Employee Benefits

Employment Litigation

Education Law

Human Resource-Related Training

Labor Law

Litigation

Public and Municipal

Municipal Law

Nick is a member of the firm's Labor, Employment and Employee Benefits Group and chair of the Higher Education Group. His practice includes traditional private- and public-sector labor law, litigation of employment disputes, and counseling on labor, employment and human resource matters. While maintaining a diverse practice, he has developed a significant emphasis on labor relations. Nick regularly counsels clients on traditional labor issues, including election campaigns, complex contract formation disputes, grievance adjustment and arbitration, unfair labor charges, strikes, picketing, and other work stoppage issues and reduction-in-force planning. Nick regularly counsels colleges, universities and community colleges on a wide range of legal issues. Nick has negotiated over 150 collective bargaining agreements and successfully represented public sector clients at the JLMC. He has appeared before numerous state and federal agencies including the National Labor Relations Board, the Massachusetts Department of Labor Relations, the Equal Employment Opportunity Commission, and the Massachusetts Commission Against Discrimination.

*Boston* magazine and *Law & Politics* have recognized Nick a Massachusetts "Super Lawyers" since 2013 and a Massachusetts "Rising Star" from 2006 to 2010. He was also selected by the *Worcester Business Journal* as one of "40 Under Forty" young professionals honored for their professional achievements and community service. In September 2010, Nick was appointed by Governor Patrick to the Department of Labor Relations Advisory Council and currently serves as the Department of Labor Relation's chair.

### Representative Matters

- Successfully represented City in obtaining permanent stay of arbitration based upon unenforceable "Evergreen" clause
- Successfully negotiated sweeping municipality-wide (including School Unions) plan design changes through informal coalition bargaining
- Developed strategies for a health care provider during picketing and work stoppage
- Successfully guided a service-industry client during union organizing, including defending related unfair labor charges, and card-check election
- Co-represented an employer and union in union duty of fair representation litigation in federal court
- Represented a municipality in a \$4 million arbitration related to health insurance premium contribution for unionized employees

## ATTORNEY BIOGRAPHY – NICHOLAS ANASTASOPOULOS

### Representative Matters (Continued)

- Represented a higher education institution in a complex union recognition dispute
- Defended an unfair labor charge related to a municipality's decision to lay off police officers

### Publications/Presentations

- "MOOCs: When Opening Doors to Education, Institutions Must Ensure that People with Disabilities Have Equal Access," *The New England Journal of Higher Education*, August 2013 (co-author)
- "Yeshiva Redux: Religiously Affiliated Institutions and the Right to Unionize," National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2013
- "What the Presidential Election Means for Non-Unionized Workplaces," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2013
- "Laboratory Safety (and Liability) in the Research Environment," NACUA, Fall 2012 CLE Workshop, November 2012
- "OSHA and Criminal Prosecution of UCLA," College of Worcester Consortium, November 2012
- "OSHA Announces Extended Compliance Date for New Residential Construction – Fall Protection Directive," ABC, Inc./Gould Construction Institute, June 2011
- "The Future Employee Voice in the Workplace—Union and Non-Union," 32<sup>nd</sup> Annual Labor and Employment Law Spring Conference, Massachusetts Bar Association, June 2011
- NLRB Labor Law Update, in-house client presentation, June 2011
- Public Sector Labor Law Update, Massachusetts Municipal Management Association, June 2011
- "Labor Law Update," Massachusetts Municipal Management Association, June 2011
- "EFCA" Seminar, in-house client presentation, June 2011
- Records Management and Documentation, Massachusetts Municipal Personnel Association, May 2011
- "Collective Bargaining in the Brave New World: Exploring the Impact of Electronic Media on Negotiations, Protected Activity and Privacy in the Modern Workplace," 38<sup>th</sup> National Conference, National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 2011
- "What Every Non-Unionized Employer Needs to Know About the New National Labor Relations Board (NLRB)," Mirick O'Connell Labor, Employment and Employee Benefits Seminar, March 2011
- "Employee Documentation," in-house client presentation, March 2011
- "CORI and Personnel Records," in-house client presentation, March 2011
- "Organizing Activity in a Non-Union Workplace," Healthcare Program, January 2011
- "The Ins and Outs of OSHA – Preparing for an Audit," Gould Construction Institute, May 2010
- "Workplace Investigations: An Overview of When, Why, and How to Conduct a Workplace Investigation," April 2010
- "College Campuses and Labor Law," Colleges of Worcester Consortium, April 2010
- "OSHA: Preparing for an Audit and Legislative Update," Mirick O'Connell Labor and Employment Law Update Seminar, March 2010
- "Union Avoidance in the EFCA ERA," Mirick O'Connell Seminar, February 2009
- "President Starts Making Good on Campaign Promises to Unions" *HRMA Perspectives*, February 2009
- "The New Family and Medical Leave Act" HRMA Seminar, January 2009
- "NLRB Addresses Two Significant Issues: Voluntary Recognition and Unfair Labor Practice Charge Involving Union Salts," *HRMA Perspectives*, December 2007
- "Balancing Employee Privacy Rights with an Employer's Need to Know," Mirick O'Connell Labor and Employment Law Update Seminar, November 2007
- "Collective Bargaining and the GIC; What Are Your Options?" Association of Town Finance Committees Annual Meeting, November 2007
- "Basic Legal Aspects of Collective Bargaining," lecture, UMass/McCormack Graduate School, Topics in Municipal Governance, Fall 2006-present
- "Communicating across Generational and Gender Gaps in the Workplace," Mirick O'Connell Labor and Employment Law Update Seminar, November 2006
- "NLRB Strengthens Employers' Ability to Maintain Harassment-Free Workplace," *HRMA Perspectives*