



Local options at work

UPDATE OF MUNICIPAL LAW Developments in 2022

Miyares and Harrington LLP

Donna Brewer

dbrewer@miyares-harrington.com

(617) 804-2423

A potpourri of topics

- **Fallout from decisions of the Supreme Court of the United States**
- **Elections and Residency**
- **Public Records Act**
- **Employment and Labor**
- **Torts**

Fallout from SCOTUS Decisions

Government Speech – [*Shurtleff v. City of Boston*](#), 142 S. Ct. 1583 (2022)

- City denied application by organization to raise a Christian flag on a third flagpole outside City Hall, asserting policy against flying non-secular flags.
- 6-3 decision, Boston did not engage in government speech in determining what flags to fly

General factors for distinguishing government vs. private speech:

the history of the expression at issue

the public's likely likely perception as who is speaking

The extent to which the government actively shapes or controls the expression

Shurtleff (cont.)

General factors applied to Boston's policy

20 or so times a year Boston allows private groups to raise their own flags

“most salient” feature – Boston does not control the private flags or shape their messages at all

Boston could not show that each private flag conveyed a message endorsed by the city

- ☐ flag of Metro Credit Union
- ☐ application form accommodated all, did not review flag itself
- ☐ no written policy or internal guidance
- ☐ Shurtleff's flag was the only one ever rejected

Once determined not to be government speech, city could not discriminate based on content

- ☐ cannot exclude speech based on religious viewpoint

Since it is not government speech, there is no risk of an Establishment Clause violation

Sign Bylaws and Ordinances – City of Austin, TX v. Reagan National Advertising of Austin, LLC, 142 S. Ct. 1464 (2022)

6-3 decision “clarifying” *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015)

Rejects bright line rule – if have to read the sign the regulation is subject to strict scrutiny

Austin prohibited erection of new off-premises signs. Reagan National sought to replace a static billboard with a billboard with electronically controlled changeable copy. The request was denied. Reagan claimed the distinction between off-premises and on-premises signs violated the First Amendment per *Reed*.

SCOTUS ruled in favor of Austin.

Critical factor: Sign ordinance was content-neutral because it distinguished based on location, not on the “topic discussed or idea or message expressed”

Ordinance had to satisfy intermediate scrutiny

- ☐ governmental interest is substantial or important
- ☐ regulation is narrowly tailored or does not substantially burden speech more than necessary

Case remanded

License to Carry – *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)

6-3 decision invalidated New York’s “proper cause” requirement for a license carry a firearm outside the home

Akin to Massachusetts requirement that an applicant for a license to carry have “good reason” for the permit [G.L. c. 140, § 131\(d\)](#)

Post-*Bruen*, statute amended ([Ch. 175 of the Acts of 2022, §§ 4-17A](#))

- ☐ eliminates requirement that applicant show good reason
- ☐ eliminates discretion to grant, suspend, or revoke
 - ☐ if not prohibited or unsuitable, must issue
 - ☐ if prohibited or unsuitable, must deny, suspend or revoke

See also, [Joint Advisory Regarding the Massachusetts Firearms Licensing System After the Supreme Court’s Decision in *New York State Rifle & Pistol Ass’n v. Bruen*](#),
Office of the Attorney General and Executive Office of Public Safety and Security

School Prayer – *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022)

6-3 decision upholding Free Speech and Free Exercise right of high school football coach to have a “brief, quiet” prayer on 50 yard line post-game

Sometimes joined by players, members of the public

Similar analysis as *Shurtleff*, was coach’s prayer in his capacity as a private citizen or constitute government speech?

- ☐ his prayers were unrelated to his job**
- ☐ time period was post-game free time**
- ☐ location on the field of play “not dispositive”**

**Censure of Board Member –
Houston Community College
System v. Wilson, 142 S. Ct. 1253
(2022)**

Unanimous decision – Public board does not violate First Amendment by censuring board member for his speech and actions

Board member charged the Board with violating its bylaws and ethical rules in media and robocalls to constituents, hired private investigator to surveil a member, filed several lawsuits against Board

In response, Board voted to reprimand him publicly and ultimately censured him

No First Amendment violation

- ☐ elected bodies have historical practice of power to censure**
- ☐ censure itself was exercise of free speech by other board members**
- ☐ censure does not constitute materially adverse action capable of deterring member from exercising his own right to speak**

**Elections and
Residency –
Lay v. City of
Lowell, 101
Mass. App. Ct.
15 (2022)**

A vacancy arose on the Lowell School Committee when a member resigned mid-term. St. 1954, c. 230 required that the vacancy be filled by the defeated candidate who received the highest number of votes.

City Elections Commission refused to seat Dominick Lay

Lay not a city resident based on:



Candidate's declaration of homestead for Boston property



city records showing candidate owned property in Lowell but owner's address was Boston



candidate's car not assessed excise tax by Lowell

Lay v. Lowell (cont.)

Lay's evidence of domicile in Lowell:

- Boston property co-owned with sister, who lives there
- registered to vote in Lowell, not registered in Boston
- co-owns with sister property in Lowell, where he lives and intends to remain indefinitely
- sister manages finances so bills sent to her in Boston
- drivers license, miscellaneous records addressed to him in Lowell
- sold car to sister, registration canceled
- previously ran for office in Lowell and served on Lowell School Committee

Lay v. Lowell (cont.)

Court: reverses decision of Elections Commission

Residence = domicile

- domicile takes into consideration facts and intent
- depends on where one's home is

Home = where person dwells and the center of domestic, social, and civic life

- domicile changes when person changes where he lives and where he intends to make his home for some time

No one form of record was superior to another in proving domicile

**Public
Records Act –
*Gatehouse
Media, LLC v.
City of
Worcester,*
slip op. (Jan.
11, 2023) (R.
23.0)**

Per G.L. c. 66, § 10A(d)(2), a court may award reasonable attorneys' fees and costs when a requester of public records obtains records per court action or records are provided after filing a complaint. (2016 amendment)

- **presumption in favor of an award**

Gatehouse Media sought records relating to misconduct of Worcester police officers. After 3 years of litigation, the city provided redacted records.

- **sought \$214,000 in fees and costs, trial court awarded \$98,000**

Gatehouse Media (cont.)



Appeals Court vacates and remands

trial court erred in denying entirely fees associated with preparing fees petition based on finding that time was excessive

50% reduction in compensable time was error

- block billing is a reason to cut time
- concerns of overstaffing, duplication of efforts don't support such a deep discount
- strong public policy in favor of public access to governmental records



Trial Court to reconsider -

some award for preparation of fee petition
appropriate discount for overstaffing, duplication
less than 50%

Employment and Labor

Wage Act Violation – [*Reuter v. City of Methuen*](#), 489 Mass. 465 (2022)

City terminated employee but did not pay her accrued vacation time on date of termination. Instead paid three weeks later (\$8,952.15)

Then offered to pay \$185.42 for three weeks' interest (trebled), plaintiff rejected

Clear violation of G.L. c. 149, §§ 148, 150 to not pay on date of termination

SJC held: employee entitled to treble the amount of late wages, not just trebled interest

as strict liability statute, treble damages even if employer makes an honest error

Also attorneys' fees and costs

Plaintiff entitled to \$26,856.45 for trebled accrued vacation time, awarded \$75,695.76 in fees and costs, including fee for unsuccessful motion for class certification

SJC remanded for determination regarding fees for class certification, invites request for appellate attorneys' fees and costs

Employment and Labor (cont.)

Independent Contractor vs. Employee – [Harrison v. Mass. Bay Transportation Authority](#), 101 Mass. App. Ct. 659 (2022)

MBTA contracted with two companies who provided workers to provide IT services.

MBTA paid companies

Companies issued W-2s to workers

Workers claimed they should be paid as MBTA workers

The Appeals Court affirmed the trial court's ruling that the claims were barred by sovereign immunity. It refused to read G.L. c. 149, § 148B, the independent contractor statute, as applying to municipalities

Rejects argument that the independent contractor statute and its antiretaliation provision applies to public employment

Employment and Labor (cont.)



Unused Vacation and Pension Benefits – [*O’Leary v. Contributory Retirement Appeal Board*](#), 490 Mass. 480 (2022)



SJC holds a public employee’s unused vacation time paid out through an annually elected vacation buyback cannot count toward the employee’s calculation of pension benefits.



Participation in buyback program and amount due cannot be predicted so payments were not recurrent or repeated, therefore not “regular compensation” as used in G.L. c. 32



Invalidates a guidance memorandum from the Public Employee Retirement Administration Commission issued 2012 and applies holding retroactively

Employment and Labor (cont.)

Post-Retirement Criminal Activity and Pension Benefits – [*Mahan v. Boston Retirement Board*](#), 490 Mass. 604 (2022)

Plaintiff retired as a county sheriff with a work-related injury. He received workers' compensation benefits and a disability retirement allowance but to remain eligible for workers' compensation, he had to certify every 6 months that he was not working or deriving income from work.

At some point, he began working for his wife's car dealership. He pled guilty to workers' compensation fraud and admitted that he was capable of working and had worked while receiving benefits.

PERAC voted to revoke plaintiff's retirement benefits pursuant to G.L. c. 32, § 15(4)

SJC holds – retirement benefits may be forfeited based on criminal conduct engaged in after leaving public service

Employment and Labor (cont.)

Police Promotional Exam – [*Tatum v. Commonwealth of Massachusetts*](#), C.A. No. 0984CV00576 (Suffolk Super. Ct. Oct. 27, 2022)

In a 75-page decision, Superior Court Judge Douglas Wilkins found the police sergeant promotional examination administered by the Human Resources Division to be discriminatory on racial and national origin grounds.

The test did not adequately test for relevant job qualifications, abundant evidence that it had a known and unjustified disparate impact

Court will hold Phase II trial to determine remedy

Employment and Labor (cont.)

POST Commissions and Certification – *Hovsepian v. Massachusetts Peace Officer Standards and Training Comm’n*, C.A. Nos. 2284CV00906, 2285CV00555 (Suffolk Super Ct. June 27, 2022)

POST enjoined from asking two questions in connection with officer recertification process as part of determining whether an officer is of “good moral character”

Question 6 – social media entry that “could be perceived” as biased is overly broad and too vague for First Amendment analysis

Question 7 – membership in organization that is or could be perceived as biased says nothing about officer’s bias, infringes on free association and belief

Employment and Labor (cont.)

Bad Faith Communications With JLMC – [In re Town of Chelmsford](#), MUP-7227

Town acted in bad faith when Town Counsel engaged in *ex parte* communications with management representative on Joint Labor Management Committee when panel engaged in confidential deliberations, gaining unfair advantage and by intending to influence the opinion and modify the Award.

Bad faith for Town Counsel to draft a dissenting opinion for management representative

Town failed to bargain in good faith when it misled Town Finance Committee by not disclosing role of Town Counsel in influencing award

Employment and Labor (cont.)

Bargain Fitness-for-Duty Examination Procedures – [City of Newton v. Commonwealth Employment Relations Board](#), 100 Mass. App. Ct. 574 (2021)

City has managerial right to order a fitness-for-duty exam but must impact bargain over means and methods, i.e., the criteria and procedures

Bargain Over Vaccine Mandates – *Boston Police Superior Officers Federation v. Wu*, No. 22-J-31 (Appeals Ct. Feb. 15, 2022)

City enjoined from imposing vaccine mandate without bargaining its impact

Torts – Ineffective Presentment Under MTCA

***Doe v. Cambridge Public Schools*, 101 Mass. App. Ct. 482 (2022)**

Student sued for negligent infliction of emotional distress as a result of his suspension from school. His presentment letter as required by G.L. c. 258, § 4 was addressed to the superintendent of schools.

Superintendent is not a statutorily-designated executive officer to whom presentment must be made (G.L. c. 258, § 1)

Plaintiff failed to prove that proper executive officer had notice of the claim

- irrelevant that executive officer not prejudiced by lack of actual notice**