MASSACHUSETTS MUNICIPAL ASSOCIATION

LABOR LAW UPDATE

January 2024

PRESENTED BY
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January 19, 2024

Presented By:

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UPDATE ON LABOR COURT CASES AND LEGISLATION[2],[3]

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[3] 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.

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I. LEGISLATION (2020 - 2023)

1. CROWN Act

On July 26, 2022, Governor Baker signed "An Act Prohibiting Discrimination Based on Natural and Protective Hairstyles" making Massachusetts one of 17 states to make the Creating a Respectful and Open World for Natural Hair Act (CROWN Act) a law. This law became effective as of October 24, 2022.

The CROWN Act expands the definition of "race" and anti-discrimination protections under the Massachusetts General Laws, included in Ch. 151B §4. The act includes "traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles." The act separately defines "protective hairstyle" to "include, but not be limited to, braids, locks, twists, Bantu knots, hair coverings and other formations.

The Massachusetts Commission Against Discrimination (MCAD) is tasked with promulgating the rules and regulations to spell out these new definitions. In addition, with this new act having its genesis from a Massachusetts charter school dispute over hair, the Massachusetts Department of Elementary and Secondary Education (DESE) is tasked with providing written guidance on the new law in school environments.

Violation of the new law could result in liability under Massachusetts antidiscrimination statutes (including damages for emotional distress, lost wages, and attorneys' fees) and therefore, employers should consider reviewing their equal employment opportunity policies as well as grooming and uniform policies.

2. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

As of March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("the Act") was signed into law by President Biden. The Act amends the Federal Arbitration Act and gives employees, who are parties to arbitration agreements with their employers and who had previously agreed to an agreement before claims arose, the option to bring claims of sexual assault or sexual harassment in either arbitration or in court. In addition, these individuals may choose to proceed via a class or collective action even if they had waived the right to proceed collectively before claims arose.

The Act states that the enforceability of these pre-dispute arbitration provisions are "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct…"

The Act gives the court and not an arbitrator the power to determine the validity and enforceability of an agreement that requires arbitration of sexual harassment or sexual assault claims. However, a claimant can still elect to use the arbitration process as opposed to going to court, usually as a means to preserve privacy or because of a belief that the claim will be resolved more quickly.

Future litigation is anticipated over this new law as it still remains to be determined if this law is giving the option to avoid arbitration for just sexual assault or sexual harassment claims, or to all claims at issue in such a case.

3. Police Reform Act

On December 1, 2020, the Legislature adopted the Police Reform Act (the "Act"). The Act addresses a system for certifying and decertifying police officers and created a new State Agency to carry out the law.

The purpose of the New Division of Police Certification is to establish uniform policies and standards for the certification of all law enforcement officers. Municipalities will be required to "maintain a publicly available and searchable database containing records for law enforcement officers." Not just officers, but law enforcement agencies also need to be certified. Municipalities must establish and implement policies regarding use of force and reporting use of force; officer code of conduct; officer response procedures; criminal investigation procedures; juvenile operations; internal affairs and officer complaint investigation procedures; detainee transportation; and collection and preservation of evidence. A Division of Police Standards was created to investigate officer misconduct and make disciplinary recommendations.

The Act includes new reporting requirements that states there are two business days to report for "any complaint". If a preliminary inquiry is conducted by the Agency into the conduct of a law enforcement officer, the officer must be notified within 30 days of commencing the inquiry. Upon completion of an internal investigation of a complaint, it should be determined if there are to be any disciplinary actions such as retraining and suspension or revocation of the officer's certification. Police officer's certifications may also be suspended if arrested, charged, or indicted for a felony or misdemeanor, engaged in conduct that affects the fitness of the officer to serve as a law enforcement officer, or if the suspension is in the best interest of the public.

The Act also addresses a new system to prevent disciplined officers from moving from one system to another, an outright ban on chokeholds, and restrictions on the use of chemical agents, rubber bullets, and no-knock warrants. The Act also includes ways to create police forces that better represent the diverse populations they serve.

The Act also bans racial profiling by law enforcement officers and authorizes the Attorney General to enforce that ban through civil actions in the courts. It establishes a duty to intervene by officers observing other officers using abuse of force and set up a commission to reexamine the state's civil service laws as they apply to police hiring in order to diversify those forces. Lastly, the Act mandates a community policing and behavioral health advisory council to make recommendations on expanding the use of non-police resources, including mental health experts, as part of a crisis-response team.

4. Minimum Fair Wage

As of January 1, 2023, the Massachusetts minimum wage increased from $14.25 per hour to $15 per hour. However, state minimum wage increases and the minimum fair wage law itself have been interpreted **not** to apply to municipal 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.

5. OPEB Reform Act

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.

6. Pregnant Workers Fairness Act

The Federal Pregnant Workers Fairness Act overlaps significantly with the Massachusetts Pregnant Workers Fairness Act. Both protect current and prospective employees from pregnancy discrimination, and require employers to reasonably accommodate pregnant employees. Federal protection for breastfeeding employees primarily falls under the PUMP Act with some overlapping protection for reasonable accommodation for breastfeeding parents falling under the Federal Pregnant Workers Fairness Act. The Massachusetts Pregnant Workers Fairness act protects both pregnant and breastfeeding employees, including accommodating space for breastfeeding employees to breastfeed or express milk.

The Federal Pregnant Workers Fairness Act does not cover employers with fewer than fifteen employees, but the Massachusetts Pregnant Workers Fairness Act covers employers with six or more employees. Employees have 300 days to file a discrimination complaint under both the Massachusetts and Federal Pregnant Workers Fairness Acts.

7. Proposed Civil Service Reform Legislation

There is proposed legislation that would significantly impact the hiring of civil service personnel such as police officers and fire fighters. Due to the developing nature of this matter, municipalities should keep a close watch on this legislation as it progresses. The following is a reproduction in full of the summary of the proposal and the frequently asked questions for the proposal produced by the Special Commission reviewing Civil Service.

Summary of Proposed Changes to the Civil Service Law
to Implement Hybrid Proposal and Streamlining of Cadet Options

Overview of Hybrid Proposal

The product of months of discussion with numerous stakeholders proposed new sections 6D and 59A through 59D of the civil service law (Chapter 31), and if enacted, would expand the pool of candidates for entry-level civil service police and fire positions by allowing cities and towns to

consider candidates who may not have taken a traditional civil service examination, which is currently administered annually, alongside those who applied through the current civil service pathway.

If enacted, this legislation would be the most significant change within the civil service realm in at least a generation. The goal is to introduce more flexibility into the civil service hiring process for municipal public safety personnel while still ensuring quality candidate selections and appropriate accountability.

Under the proposal, civil service cities and towns could choose to opt in to a hybrid hiring process through a multi-year written agreement with the state's Human Resources Division (HRD) that will require anti-nepotism, anti-patronage, and anti-favoritism commitments and adherence to basic merit principles during the hiring process.

At least half of new police officer and firefighter appointments will continue to be guided by the results of state-administered competitive entry examinations after application of familiar statutory preferences (e.g., for veterans, local residents, and the offspring of public safety personnel injured or killed in the line of duty).

But those civil service cities and towns that opt in (and it will always be a choice as to whether or not to participate in any alternative pathway) would have the option of making up to 50% of police and fire entry-level appointments that are not contingent on examinations administered by HRD or otherwise derived from ranked eligible lists, but rather stem from locally-generated pools of prospective candidates.

Those unranked prospective hybrid candidates could be considered by a city or town immediately, regardless of whether they have taken a civil service examination in the past and without the need for any certification from HRD, thereby trimming months off the traditional hiring process.

Once prospective local candidates are identified by municipal police or fire departments, they will go through the very same familiar vetting process, including a pre-conditional-offer background check and a post-conditional-offer set of medical, psychological, and physical ability evaluations and tests.

Once all conditions are met, HRD will authorize a candidate's employment in the same manner as it does traditional civil service candidates, subject to completion of a prescribed course of study at an approved police or fire academy if the candidate has not already completed that step.

Civil service communities will also be able to appoint incumbent police officers from non-civil service communities through this hybrid process—for entry-level positions only—and those candidates will be considered original (that is, start-from-scratch) civil service appointments. Any candidate coming from a non-civil-service community police department, even if they have previously been serving as a police officer for a couple of years, will know that if they lateral in under this process that their civil service seniority date will be the date that they are hired by the new civil service department.

Streaming of Initiation of Cadet Programs

Proposed new Sections 59B and 59C would create a streamlined process for launching more police and fire cadet programs. These programs have proven invaluable in diversifying some large and small police departments. Currently, though, a special act of the Legislature is required for cities and towns to secure civil service tenure for entry level police officers and firefighters appointed through an approved cadet program.

By adding a new section to the civil service law, no special Act would be required, and cities and towns would only need HRD program approval to make cadet-based appointments through the alternate path. This reform should open a whole new recruit pipeline because currently only 8 out of 128 civil service police departments are authorized to run cadet programs that guarantee graduates civil service tenure—and fire cadet pathways to tenure currently are even rarer.

The draft legislation allows for regional cadet programs that also could serve as pipelines, particularly for historically underrepresented groups, into smaller departments that nonetheless offer tenured employment status.

The draft legislation closely mirrors the text of special Acts establishing cadet programs previously enacted at the request of various civil service communities. Typically, cadet appointments would not count toward the 50% of permanent appointments that must be made through the traditional exam-results-based selection process. Passage of a qualifying exam, however, and service as a cadet for a minimum of 1-2 years would be obligatory to gain civil service tenure.

FREQUENTLY ASKED QUESTIONS

1. Will the hybrid proposal, if enacted, form part of the civil service system?

Yes. Hybrid is being *incorporated into* the existing civil service system and civil service law. While the local appointing authority will be able to consider additional candidates coming through the hybrid process, all candidates must be appointed consistent with basic merit principles and a vetting process that, beginning with a background check, will be identical to that employed with traditional candidates.

2. What safeguards will be in place to ensure that the hybrid option is not misused and that appointments are made through a fair and impartial process free of favoritism and nepotism?

Appointing authorities will have to enter into a binding memorandum of understanding (MOU) with the state's Human Resources Division (HRD) to: (1) abide by basic merit principles in the hiring process; and (2) adopt stringent anti-nepotism, anti-patronage, and anti-favoritism commitments. HRD and the Civil Service Commission will ensure compliance and curtail hybrid-appointment privileges if abuses arise. Also, all other state and federal laws, including

those related to anti-discrimination and ethics safeguards, must continue to be adhered to regarding all appointments.

3. Would local appointing authorities have to place candidates who enter through a hybrid portal in any rank order?

No.

4. How many candidates could be appointed through the hybrid hiring process?

Up to 50% of candidates may be appointed under proposed hybrid legislation. For those local appointing authorities with a cadet program, no more than 50% of candidates can be appointed through hybrid and cadet pathways, combined.

5. How would hybrid impact statutory protections such as those in place for veterans?

By retaining the traditional civil service model for at least 50% of all appointments, the statutory protections for veterans and other will remain in place for all those who come through the exam-based civil service portal. While no statutory protections for veterans and others restrict the selection of candidates who enter through the hybrid portal, appointing authorities may consider military service as a positive factor when considering hybrid candidates.

6. Will candidates who enter through a hybrid portal be treated the same as all other candidates once appointed?

Yes. Once appointed, all candidates, after serving the required probationary period, become permanent, tenured civil service employees, with all the traditional civil service protections.

7. Will an appointing authority be able to appoint a police officer or firefighter from a non-civil service community through a hybrid hiring process?

Yes. Proposed hybrid legislation would allow local *civil service* appointing authorities to appoint incumbent police officers and firefighters from *noncivil service communities*. This is limited to entry-level positions only, however and the candidate would not bring any seniority with them upon appointment.

8. Would the hybrid proposal impact promotional appointments?

No. Hybrid pertains to entry-level, original appointments only. By incorporating hybrid into the existing civil service system, promotional appointments are preserved by allowing all candidates (regardless of hiring pathway) to be granted the same civil service seniority date and eligibility to sit for future civil service promotional examinations.

9. May a local appointing authority, at its discretion, administer a local qualifying examination for those candidates who enter through the hybrid portal?

Yes, the civil service appointing authority has the *option* to administer a local qualifying examination.

10. Would candidates considered through a hybrid hiring process have the right to file a bypass appeal with the Civil Service Commission if not appointed?

No. Since candidates considered through the initial hybrid-side process are not ranked, there is no resulting bypass if not appointed.

11. What would happen if a hybrid police officer candidate were to fail to graduate successfully from a police academy?

As mandated by current law, this candidate could not be sworn in as a police officer and could not perform the regular duties of a police officer.

12. Can a candidate who appears on a traditional eligible list or certification be considered as a hybrid appointment?

Yes. So long as the appointing authority stays within the 50% cap, it could consider a candidate placed lower on a traditional eligible list an appoint that candidate through the hybrid selection process.

II. CASE LAW (2020-2023)

1. Board Members entitled to qualified immunity in town employee's due process violation claim alleging board members decided to fire her before her pretermination disciplinary hearing.

Lawless v. Town of Freetown, 63 F.4th 61 (2023)

Background

Diane Lawless was hired in 2013 as Treasurer of the Town of Freetown under a contract for three years terminable only for cause following a six month probationary period. In 2015, the Board of Selectmen gave Lawless notice of their reasons for disciplining her, put her on administrative leave, and initiated disciplinary proceedings. At Lawless' pre-termination hearing which took place over three days, she was represented by counsel, questioned the board's witnesses, did not call her own witnesses though she was permitted to, and spoke on her own behalf. Ultimately, the Board terminated Lawless after the hearing without deliberating further. The Town does not have a post-termination appeal process. Statements by board members about Lawless' performance and in the lead up to the hearing could permit a finding of prejudgment or personal bias against Lawless. Bias based on a protected characteristic was not alleged in this case.

Lawless initiated a due process action in Bristol County Superior Court naming the Town of Freetown and the individual board members who presided over her pretermination hearing. Lawless alleged that she was deprived of due process because the board members were biased against her and that they decided to fire her before the hearing, rendering the hearing a "sham." The Town and the Board filed a joint answer to the complaint which did not raise the defense of qualified immunity. The Defendants filed for summary judgement based on qualified immunity. The district court denied the motion for summary judgment on the basis that the board members did not have qualified immunity because the "sham" pre-termination hearing clearly did not satisfy due process. The board members appealed the denial of the qualified immunity defense.

First Circuit Court of Appeals Reasoning

The First Circuit Court first considered the waiver argument. A failure to disclose an affirmative defense in the first responsive pleading does not preclude the use of that affirmative defense if the affirmative defense is asserted without undue delay and that the plaintiff is not unduly prejudiced by the delay. The court reasoned that the delay in asserting the defense or defend the delay means it would be appropriate for a judge to find that the defense was waived. However, since the Superior Court Judge's decision did not rely on waiver or forfeiture and Lawless did not argue that the Superior Court Judge erred in that respect, nor asserted that she was prejudiced by the delay in raising the defense, the Appeals Court proceeded to considering the qualified immunity defense on the merits.

The doctrine of qualified immunity shields government officials sued individually for money damages unless their conduct violates "clearly established statutory or constitutional rights of

which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009). The First Circuit Court considers two aspects when weighing whether a statutory or constitutional right is "clearly established," which are (1) how clear the law is on the subject and (2) how clear it would be to the government official that the law reasonably applied to the facts at hand. The First Circuit Court held that there was not a clearly established right to an absolutely impartial adjudicator in quasi-judicial proceedings such as Lawless's pre-termination hearing. Therefore, since it was not clearly established that Lawless had a right to an absolutely impartial adjudicator, the board members were protected by qualified immunity.

2. **The Massachusetts Appeals Court, reversing the Commonwealth Employment Relations Board (CERB), held that the City of Everett could promote the Fire Chief without bargaining to impasse or resolution with the Everett Firefighters as managerial positions are not within the scope of the Collective Bargaining Agreement.**

City of Everett v. Commonwealth Employment Relations Board, Mass. App. Ct. (2022)

Background:

On August 27, 2021, the Commonwealth Employment Relations Board (CERB) issued a final decision and order holding that the City of Everett violated Section 10(a)(5) and Section 10(a)(1) of G.L. c. 150E by using an Assessment Center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to impasse or resolution with the Everett Firefighters (the Union). The Board held that all of the potential promotees were bargaining unit members and that their participation outweighed the City's interest in maintaining it "managerial prerogatives". The Board claimed that promotions are an important condition for employees who aspire to the promotional position due to the relationship of increased pay, benefits and prestige and movement on a career ladder. The Appeals Court reversed the Board's decision.

Appeals Court Analysis:

The Appeals Court reviewed the question of whether the Board erred in ruling that the City had to bargain over aspects of the promotional process for fire chief as it would not interfere with core managerial prerogatives. However, a public employer's duty to bargain is only applicable to mandatory subjects of bargaining, such as "terms and conditions" of employment of bargaining unit employees. The Board's own precedents, as set in Newton v. Commonwealth Employment Relations Board, 100 Mass. App. Ct. 574, states that the process for choosing managerial employees such as fire chiefs are not subject to mandatory bargaining as a managerial employee is outside of the bargaining unit.

The concern that the processes for selecting a fire chief will impact the "terms and conditions" of employment of the deputy chiefs or other bargaining unit employees is not accurate. It does not alter, change, or impose upon these other positions. Rather, being promoted to fire chief would make one leave the bargaining unit and become part of the City's managerial

team. The argument that the fire chief position is part of the "promotional ladder" for deputy chiefs in incorrect as fire chief would be a fundamentally different job, not just a promotional ladder step.

Overall, the proposed subject of bargaining for this position under the provision that it would impact employment terms and conditions of bargaining unit members, does not apply.

3. The strong chief statute does not grant fire chiefs lifetime appointments.

Tetrault v. Board of Selectmen of Lynnfield, 103 Mass. App. Ct. 330

Background

The Town of Lynnfield established its fire department subject to G.L. c. 48 § 42, which is also known as the strong chief statute, and adopted the strong chief duties into the municipal code. The statute states that a chief "may be removed for cause by the selectmen at any time after a hearing," but the term "removed" is not defined. In December 2013, the board of selectmen of Lynnfield appointed Tetrault to the position of fire chief, subject to contract negotiations and a 6 month probationary period. The final contract was for a term of three years, with an automatic renewal of one year after that three-year term, unless either party gave written notice to the other of its intention to renegotiate or not renew the contract at least six months prior to the end of the initial or extended term. The contract also stipulated that Tetrault "may be disciplined or discharged only for just cause, upon proper notice and only after a hearing." In June 2018, the board voted to not renew Tetrault's contract and gave Tetrault notice on June 26, 2018, just over six months before the end of the extended contract term on December 31, 2018. Tetrault, believing that the strong chief statute grants a lifetime appointment that can only be terminated for cause, initiated a wrongful termination action in August 2018 in the Superior Court. A Superior Court judge granted Tetrault summary judgement, holding that under the strong chief statute and the town's bylaws, Tetrault was owed a hearing and a showing of cause for ending his employment. The town of Lynnfield appealed.

Appeals Court of Massachusetts Reasoning

The Appeals Court of Massachusetts first considered whether G.L. c. 48 § 42 granted chiefs a lifetime appointment. Tetrault argued that the prohibition in the statute against "removing" a chief except for cause confers a lifetime appointment. "Removal" is not defined in the statute, but failure to rehire or extend a contract is generally not considered a removal. The court was unpersuaded by the argument that the statute's inclusion of language permitting towns with populations under 5,000 to limit chiefs to three-year terms precluded larger towns like Lynnfield from so limiting chief terms as the statute included no language mandating or suggesting chief terms for larger towns like Lynnfield. Further, the statute lacked language specifying or implying a lifetime appointment, such as using the term "tenure" as the Massachusetts legislature has done in other statutes. Further, G.L. c. 41 § 108O, which Tetrault argued supported his interpretation that the strong chief statute grants a lifetime appointment, specifies that an employment contract may set conditions of reappointment. Tetrault provided

other statutes which specify that failure to extend a contract term was a "removal" or that an appointment is a life appointment to argue that the court should read in those terms into G.L c 48 § 42. However, the Appeals Court found that the fact that the legislature had specified that an appointment is a lifetime appointment, or that removal includes failure to extend a contract in other statutes, bolsters the interpretation that the legislature chose not to use such language in G.L. c. 48 § 42 and refused to read in language that the legislature did not choose to include. Therefore, the Appeals Court held that the strong chief statute does not grant a lifetime appointment.

Further, the Appeals Court held that Tetrault would have waived the right to a lifetime appointment if G.L. c. 48 § 42 granted such a right. Tetrault signed the employment contract knowing that it gave both him and the board the option to not renew the contract, and G.L. c. 48 § 42 does not forbid individuals from contracting for different terms than those provided in the statute.

Regarding the town bylaws, the Appeals Court deferred to the Town's interpretation that the town bylaws did not grant Tetrault a lifetime appointment.

4. **The Supreme Judicial Court of Massachusetts held that a municipal civility code requiring "respectful and courteous" remarks at public meetings violated the First Amendment and articles of the Massachusetts Declaration of Rights and that board members were not entitled to qualified immunity.**

Barron v. Kolenda, 203 N.E.3d 1125 (2023)

Background:

Louise Barron is a Southborough resident who attended a public meeting of the Southborough Town Board. Board meetings are subject to G.L.C. 30A §§ 18 which requires that the meetings, including deliberations, be public. In 2018, the Attorney General determined that the Board had violated the open meeting law and ordered the individual Board members to attend an open meeting law training. On December 4, 2018, the Board held a public meeting and discussed raising real estate taxes, the open meeting law violations, and other matters. Before opening the meeting for public comment, the chair Daniel Kolenda informed the attendees of the town's public comment policy, which includes that "remarks must be respectful and courteous, free of rude, personal or slanderous remarks." Barron criticized the Board for "spending like drunken sailors" and for the open meeting law violations. In response, Kolenda accused Barron of slandering the board for bringing up the open meeting law violations, and closed the public comment session. Barron called Kolenda "a Hitler" twice. Kolenda announced a recess, turned off his microphone, and yelled "You're disgusting!" at Barron. Kolenda threatened to have Barron "escorted out" and Barron left before that could happen.

Later, Barron, her husband, and another town resident filed a complaint in Superior Court alleging federal and state causes of action. The defendants removed the case to Federal court, but it was remanded to Superior Court after the plaintiffs withdrew the Federal claims. The

defendants filed a motion for a judgement on the pleadings, and the motion was allowed as to all counts. The plaintiffs appealed and the Supreme Judicial Court transferred the appeal to itself.

Supreme Judicial Court Analysis:

The Supreme Judicial Court held that the town civility code violated Articles 19 and 16 of the Massachusetts Constitution which protects the right of Massachusetts citizens to assemble and right to free speech respectively. The Supreme Judicial Court looked to the history of the Massachusetts constitution to interpret Article 19, including the writings and philosophies of Samuel and John Adams which spoke passionately about the freedom of assembly and the importance of citizens bringing their grievances to their representatives, including at town assemblies. The Supreme Judicial Court found that Barron bringing her grievances to the town board was firmly within what the drafters of the Massachusetts Constitution intended to protect with Article 19, and that the town civility code infringed on Barron's rights. On Article 19, the Supreme Judicial Court applied strict scrutiny and found that there was not a narrow, compelling state interest in enforcing the broad civility code to political speech, and that the town civility code "appears to cross the line into viewpoint discrimination." Further, the Supreme Judicial Court found that the town civility code was so overbroad and vague that the constitutional and unconstitutional aspects were not severable or salvageable.

The Supreme Judicial Court held that Kolenda was not protected by qualified immunity in this case, and that the Superior Court erred in dismissing the Massachusetts Civil Rights Act (MRCA) claim. A state actor is protected by qualified immunity unless the actor clearly interferes with a constitutional right. The Supreme Judicial court found that Kolenda used threats to interfere with Barron's clearly established rights under Articles 16 and 19 of the Massachusetts constitution and, therefore, was not eligible for qualified immunity. The test for determining a claim under the MCRA is that "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with or attempted to be interfered with; and (3) such interference was by threats, intimidation and coercion." Currier v. National Bd. Of Med Examiners, 462 Mass. 1, 12 (2012). The Supreme Judicial Court found that the video evidence was sufficient basis to establish a prima facia MCRA claim, and the Superior Court erred in dismissing the claim under a theory of qualified immunity.

5. The Massachusetts Appeals Court held that G.L. c. 41 § 96B requires municipalities to pay police academy students the same rate as sworn officers.

Lanctot v. Brewster, 102 Mass. App. Ct. 739 (2023), review denied, 492 Mass. 1106 (2023)

Background:

Several recently sworn-in Town of Brewster police officers filed suit for declaratory relief in Superior Court alleging that they were entitled under G.L. c. 41 § 96B to the same rate of pay as sworn-in police officers while they studied at the police academy. The statute requires that any "student officer" receive the "regular wages provided for the position to which [the student officer] was appointed." The plaintiffs had responded to Brewster's call for applicants for a "Police Officer Entrance Examination," and after successfully passing the examination, applied

for the position of "Police Officer." The candidates Brewster accepted into the police academy were hired as "Cadets" and paid a lower rate of pay than sworn-in officers. The cadet employment contracts included a provision saying that the cadets would be sworn in as police officers upon successful completion of training. After the plaintiffs filed their suit, Brewster claimed that the plaintiffs were appointed to the position of "cadet" and, therefore, cadet pay was the correct rate of pay under the statute. The plaintiffs and Brewster filed cross motions for summary judgement on an agreed statement of facts, and the Superior Court decided to issue summary judgement in favor of Brewster. The plaintiffs appealed.

Appeals Court Analysis:

Much of the case boiled down to the interpretation of G.L. c. 41 § 96B. Brewster argued that the statute should not apply to the plaintiffs because the plaintiffs were appointed to the position of cadet and paid as cadets, and that cadets should not be considered "a position on a full-time basis in which [the appointed] will exercise police powers."

The Appeals Court was not persuaded by Brewster and held that persons in the "cadet" position were student officers under the statute. The legislature did not intend for the name of the position to be dispositive, and instead thoroughly described the features of positions covered by the statute. The statute defines "student officers" as persons who are appointed to a full-time position where they "will exercise police powers" after completing "a prescribed course of study." Student officers are "exempted from the provisions of chapter thirty-one and any collective bargaining agreement…provided that such person shall be paid regular wages provided for the position to which [the student officer] was appointed.

The history of the statute bolstered the interpretation that the legislature intended for persons training in police academies to receive the pay of sworn-in officers regardless of title. The Legislature amended the statute several times, including amending the description of covered appointees from those appointed "as a police officer" to those appointed to positions where they "will exercise police powers." The Appeals Court found that the plaintiffs were student officers because the employment contracts made it clear that they would exercise police powers after successfully completing training, and that they were appointed to the position of police officer as Brewster made it clear that the plaintiffs were training to ultimately become police officers, and the position was referred to as a police officer position multiple times through the application process.

The Appeals court vacated the entry of summary judgement and remanded to the superior court for declaratory relief in favor of the plaintiffs.

6. **The Massachusetts Supreme Judicial Court held that the Department of Housing and Community Development did not act outside of its statutory authority when it conditioned funding for Local Housing Authorities on compliance with its guidelines for executive director contracts.**

Fairhaven Housing Authority v. Commonwealth, 493 Mass. 27 (2023)

Background:

The Department of Housing and Community Development (DHCD) issues guidelines regarding executive director contracts and enforced those guidelines by conditioning funding for local housing authorities on adherence to the contract guidelines. The guidelines limit compensation and hours, require certain provisions such as binding arbitration for dispute resolution, and prohibit certain provisions such as longevity payments. The DHCD withheld funding and budget approvals for local housing authorities with non-conforming executive director contracts. Several local housing authorities filed suit in the Superior Court seeking declaratory judgement that the DHCD exceeded its statutory authority in its enforcement of the contract guidelines. The Superior Court allowed DHCD's motion to dismiss, and the plaintiffs appealed. The Supreme Court voluntarily transferred the case from the Appeals Court to itself.

Supreme Judicial Court Analysis:

The issue of whether DHCD exceeded its statutory authority primarily rested on interpretation of G.L. c. 121B § 7A. The plaintiff local housing authorities argued that the statute's use of the term "guidelines" indicated that the legislature gave DHCD the power to suggest not mandate. However, the statute expressly gives DHCD the power to "review all contracts between housing authorities and executive directors" and permits the DHCD to "strike contract provisions that do not conform to the guidelines." The express description of the powers of the DHCD to enforce the guidelines severely undermines the contention that the DHCD does not have statutory power to enforce its contract guidelines. The Supreme Judicial Court found that the DHCD oversight did not interfere with the local housing authoritys' ability to "determine [executive director] qualifications, duties and compensation" per G.L. c. 121B § 7. Therefore, the Supreme Judicial Court upheld the Superior Court's decision to dismiss the declaratory judgement complaint.

7. **The First Circuit found that the City of Malden did not violate G.L. c. 44 § 53C nor the Wage Act because Malden police officers received a higher rate of pay than the collective bargaining agreement required.**

Owens v. Malden, 85 F.4th 625 (1st Cir. 2023)

Background:

City of Malden police officers brought suit against the City alleging violations to G.L. c. 44 § 53C known as the Municipal Finance Law (MFL), and G.L. c 149 § 148 known as the Massachusetts Wage Act (Wage Act). The Collective Bargaining Agreement required that the city pay the Officers a detail rate "one and a half times the maximum patrolman's rate of pay

including night differential." The MFL allows the City to charge parties hiring a private detail an additional ten percent as an administrative fee. The Officers alleged that the city subtracted the ten percent administrative fee from their private detail pay instead of requiring the third party hiring the private detail to pay the fee as required under the MFL. Further, the Officers alleged that deducting the administrative fee was an impermissible reduction in wages under the Wage Act, entitling them to treble damages.

The City countered that the Officers received a pay rate greater than the Collective Bargaining Agreement (CBA) required even after the alleged deduction because the pay rate included augmentations not specified in the agreement. The Officers disputed the City's interpretation of the contract language, arguing that the contract language was ambiguous, and that the "maximum patrolman's rate of pay" should include all of the augmentations and not just the base rate. The District Court sided with the Officers, finding violations of the Wage Act and the MFL. The judge awarded the Officers an $8.3 Million judgement. The City Appealed.

First Circuit Analysis:

The First Circuit evaluated whether the Officers' failure to file a complaint with the Attorney General before initiating the wage claim did not defeat the claim. Massachusetts case law holds that the purpose of the requirement to file a Wage Act complaint with the Attorney General before initiating a private suit is to ensure that the Attorney General is aware of the claim. The First Circuit agreed that the Officers' belated filing with the Attorney General was sufficient to put the Attorney General on notice, and that the District Court correctly allowed the litigation to proceed.

To determine whether the contract term was ambiguous, the First Circuit applied the principle of *expression unius est exclusion alterius*, which is the presumption that items not included in a list of items of a similar class in a document are intentionally excluded. The City argues that the detail pay was only intended to include the highest patrolman's base salary plus the expressly listed night differential, and excluded all of the augmentations not listed, such as educational incentives, longevity pay, and hazardous duty pay. The Officers argue that the excluded augmentations are contractually included in the detail pay. The First Circuit was not convinced by the Officers' argument, given that other rates of pay in the CBA expressly list every augmentation, indicating that the drafters knew they could include every augmentation in a pay rate determination if desired. Ultimately, the First Circuit sides with the City's interpretation that the detail rate as set in the CBA did not include any augmentations except the expressly listed night differential.

The First Circuit held that there cannot be a Wage Act violation for pay rate deductions when the employees received compensation beyond what the contract required. The First Circuit calculated that the highest patrolman base salary of $30.30 an hour plus the six percent night differential would be $32.12 per hour, which multiplied by 1.5 comes to $48.18 per hour, which is $11.74 less than the $59.92 per hour that the Officers actually received. The First Circuit held that improper reduction of wages under the Wage Act did not encompass situations where the employee received compensation greater than the contract required.

The District Court had held that an MFL violation is de facto a Wage Act violation, but the First Circuit found that there was no MFL violation. The First Circuit concluded that administrative fee was not deducted from the Officer's rate of pay. Officers received the same

compensation for private and public details, which was $59.92 per hour. The City invoiced private parties $65.91 per hour per officer. $59.92*1.1=$65.91, which indicates that the City calculated the private detail rate by adding an additional ten percent to the private detail rate. If the City paid the Officers ninety percent of the amount charged for private details, the Officers would have received $59.32 per hour, as $65.91*.90=$59.32. The First Circuit also noted that the Detail Board which calculates the detail rate is comprised completely of police officers and police union members. Therefore, the District Court held that even if an MFL violation was a de facto Wage Act violation, the District Court erred in finding an MFL violation.

8. **Evidence that employer school discouraged former employee from re-applying after former employee filed wage act and discrimination claims was sufficient to establish a prima facia case for the adverse employment action of failure to rehire under Massachusetts and Federal law.**

Cafarella vs. Massachusetts Inst. of Tech., D. Mass., No. 1:23-CV-11032-IT (Nov. 2, 2023)

Background:

MIT abruptly dismissed Cafarella after fourteen years of employment as the Office Manager of the dental department citing "a lack of work resulting in the elimination of [his] position" on February 3, 2022, effective the next day. Cafarella was not accused of misconduct and had no history of disciplinary issues during his employment with MIT. At the time of his dismissal, "Cafarella believed that there was sufficient work available to justify his position and was aware of several open positions…for which he was qualified but which were not offered to him." One of those other positions was later given to someone with the same title as Cafarella but younger. MIT failed to pay Cafarella his earned wages by February 4, 2022 as required by the Massachusetts Wage Act (Wage Act). Cafarella filed a Wage Act complaint with the Attorney General's Office and in Cambridge District Court. Cafarella notified MIT of the claim.

When MIT posted a position which closely resembled his previous position less than a month after he was terminated, Cafarella withdrew his Wage Act claim and notified MIT that he believed MIT discriminatorily fired him due to his age. When Cafarella and MIT discussed the position, MIT claimed Cafarella was not suited for the position. Cafarella decided against applying for the position after MIT's discouragement. Cafarella and MIT negotiated to settle the claim, but Cafarella refused to agree to a settlement agreement with the language that he "shall not be entitled to any employment with MIT now or any time in the future, and he will not apply for employment with MIT any time in the future," and MIT would not agree to a settlement agreement without that language. Despite the failure of the settlement negotiations in general, MIT still agreed to pay Cafarella the full amount for the Wage Act claim. Cafarella dismissed the Wage Act claim and filed an age discrimination claim with the Massachusetts Commission Against Discrimination (MCAD). Cafarella withdrew the MCAD complaint then filed the complaint in Middlesex Superior Court. In early 2023, Cafarella heard that a position he was qualified for at MIT would be posted soon, but MIT filled the position before posting it which was not MIT's previous practice. MIT removed the case to the U.S. District Court because Cafarella's suit include claims based on federal law.

MIT brought a partial motion to dismiss alleging that Cafarella failed to state a claim for retaliation. MIT also moved to strike paragraphs in the complaint which referred to statements made during settlement negotiations.

Supreme Judicial Court Analysis:

The District Court denied MIT's motion to strike paragraphs referring to discussions which occurred during settlement negotiations. The applicable rule is that settlement negotiation discussions cannot be used to prove or disprove the validity of an underlying claim, or to determine the amount of a settlement. Settlement negotiation discussions are admissible for other purposes, such as evidence of an independent violation which allegedly occurred during the course of settlement negotiations. Further, the bar for motions to strike is high "as they are a drastic remedy." Cafarella used material discussed in the settlement negotiations in his complaint not to argue the validity of the underlying claim or as evidence of a monetary settlement amount, and therefore District Court denied the motion to strike.

Next, the court considered whether Cafarella had alleged prima facia cases for retaliation, including failure to rehire. To establish a prima facia case for retaliation, a plaintiff like Cafarella "must make a *prima facia* showing that (1) he engaged in protected conduct; (2) he was subjected to an adverse action, and (3) a causal connection exists between the protected conduct and the adverse action." Neither party disputes that Cafarella engaged in protected conduct, so the analysis moves to the other two prongs.

In general terms, an adverse employment action is an action which materially disadvantages a current or former employee by objectively affecting the work environment. For the purposes of a retaliation claim, an employment action is adverse if a reasonable employee may have been dissuaded from pursuing or supporting a charge of discrimination. Massachusetts and federal courts recognize failure to rehire as a potential adverse employment action, but under different standards. The First Circuit generally requires that a plaintiff apply for a vacant position as a pre-requisite for establishing failure to hire, but Massachusetts recognizes failure to rehire in situations where an employer indicates to an employee that an application would likely be unsuccessful. In dicta, the First Circuit has acknowledged that there may be failure to rehire if the facts show that applying for the position was clearly futile. Though Cafarella did not apply for a position at MIT following his dismissal, MIT allegedly discouraging Cafarella from applying on multiple occasions creates a question of fact under both under Massachusetts and federal law, and so this element does not fail at the motion to dismiss stage.

Under both Massachusetts and federal law for retaliation claims, there is a low bar to establishing the prima facia element of causal connection. The adverse action occurring close in time after the protected action may meet the burden of establishing this element, unless the employer did not know of the protected activity before the alleged adverse employment action. MIT was aware that Cafarella had engaged in protected activity when it discouraged Cafarella from applying to a vacant position. Therefore, the temporal proximity of the protected activity and the alleged adverse employment action is sufficient to establish the prima facia element of causal connection.

As Cafarella had established all three prima facie elements for retaliation under both federal and Massachusetts law, the District Court denied MIT's partial motion to dismiss.

9. The Supreme Judicial Court ruled that if a grievance occurred before a change in union representation, the employer must arbitrate it with the successor union based on the prior Collective Bargaining Agreement.

Chelsea vs. New England Police Benevolent Ass'n, Inc., Local 192, Mass., No. SJC-13331 (2023)

The Supreme Judicial Court transferred the case from the Appeals Court and was tasked with the question of whether a dispute was arbitrable.

Background:

The City of Chelsea's emergency dispatchers had been represented by Local 25, who had bargained with the city and executed a Collective Bargaining Agreement (CBA) for the period of July 1, 2016 to June 30, 2019. Local 25 sent a letter disclaiming interest in representing the dispatchers in January 2020. Subsequently, the New England Police Benevolent Association (NEPBA) was certified as the dispatchers' representative after an election. During this time a dispatcher was terminated, and the new Union moved to invoke the grievance procedure in the Collective Bargaining Agreement. However, the City disputed that it was required to arbitrate the grievance. An arbitrator ruled that it was arbitrable, and the City filed to vacate the arbitration award in Superior Court. A Superior Court judge upheld the arbitrator's decision, which the City once again appealed.

Supreme Judicial Court Analysis:

The Supreme Judicial Court found that there were three questions in this case that needed to be answered: 1) is the issue in dispute covered by the arbitration provision in the CBA; 2) did the CBA expire or was it extended by the parties; and 3) what is the effect of change in union representation?

The first two questions are not in dispute as the arbitration provision states, "any protest against discipline, suspension or discharge shall be handled under the grievance and arbitration procedure provided for in the agreement" clearly indicating the dispatcher's termination applies to this arbitration. In addition, the City admits that the contract was extended as the City made attempts to bargain a new contract. However, the City claims that the extension ended when union representation changed, which leads to the third question.

The City had agreed to arbitrate with Local 25, but not necessarily with the successor Union, NEPBA. In a prior case, the court ruled that if a grievance arises before a change in Union representation, the employer must arbitrate with the successor union. The agreement had already been extended with Local 25 when the grievance occurred, so the successor Union can continue with the prior agreement and enforce arbitration.

The Supreme Judicial Court based their conclusion off of three aspects of the labor relations act:

1. The statute favors arbitration as a means of resolving employment disputes;

2. The statute provides for employees' free choice in union representation. By prohibiting a successor union from arbitrating a grievance this would "penalize and indirectly intrude on the employees' right to select new union representation" and force them to choose between either sticking with union representation that is no longer favored or giving up their bargained for grievance process based off of the prior contract. The right to arbitrate grievances cannot be revoked just because the union representation changed; and

3. An employer cannot unilaterally change terms and conditions of employment. Until a NEPBA and the City agree on a new contract or bargain to impasse, conditions of employment of the prior CBA must remain in effect.

The SJC affirmed the Superior Court Judge's order of confirming the arbitration award.

10. Massachusetts Appeals Court reversed Superior Court decision and held that an insurer that refuses to take action in defense of insured without a reservation of rights, when the insurer knew or should have known that the claim was covered, can be found to have breached its duty to the insured.

John Moriarty & Associates, Inc. v. Zurich American Insurance Co., 102 Mass. App. Ct. 474 (2023)

Background:

John Moriarty & Associates, Inc. (JMA) was a general contractor on a construction project, and they hired PJ Spillane Company, Inc. (PJ) as a subcontractor under the condition that PJ maintain a general liability insurance policy and include JMA as an additional insured on that Policy. PJ obtained the necessary insurance coverage from Zurich American Insurance Co. (Zurich). On May 15, 2020, a PJ foreman brought a negligence action against JMA and Triple G Scaffold Services Corp. (Triple G) after he was injured on the worksite. JMA requested that PJ take action to ensure that Zurich defended and indemnified JMA. On July 24, 2020, Zurich agreed to defend and indemnify JMA without a reservation of rights and assigned counsel to JMA's defense. JMA then requested that Zurich reimburse JMA for defense costs already incurred, which JMA did not do at that time. On August 11, Triple G demanded that JMA defend and indemnify them, and JMA requested that Zurich defend and indemnify JMA against Triple G's claim. In response, Zurich rescinded its acceptance of coverage, refused to defend and indemnify JMA against Triple G's claim, and refused to continue tendering defense of JMA in the underlying claim with the foreman without a reservation of rights. On October 15, 2020, Triple G rescinded its claim against JMA. JMA requested that Zurich withdraw its reservation of rights since Triple G rescinded its claim, but Zurich doubled down on the reservation of rights instead, including expressly reserving the right to recover defense expenses for liability not potentially covered, if allowed by law. Zurich claimed that there was a factual uncertainty as to whether the claim was covered, because if Triple G created the dangerous condition, then there would be no liability for PJ Spillane. JMA responded on December 18, 2020 by informing

Zurich that JMA's defense counsel would continue to defend them and would continue to send invoices to Zurich for payment. Zurich did not respond further.

On February 24, 2021, JMA sued Zurich for breach of contract, and requested declaratory relief regarding Zurich's contractual obligations to JMA, and violations of G.L. cc. 93A and 176D. On May 11, 2021, Zurich moved to dismiss the complaint, and cross-moved for judgement on the pleadings. Further, on October 19, 2021, Zirich paid the invoice for the defense costs JMA incurred before Zurich agreed to defend and indemnify JMA on July 24, 2020, excluding costs related to the coverage litigation between JMA and Zurich, and paid the August 2020 through July2021 invoices on November 9, 2021, again excluding costs relate to the coverage litigation between JMA and Zurich. After the hearing on the motions, and receiving supplemental pleadings from the parties, including an affidavit detailing the partial invoice payments that Zurich made, a Superior Court judge decided on the motions. The judge allowed the motion to dismiss, relying on the partial payments Zurich made after the initiation of the suit and Zurich's acknowledgement of a duty to defend subject to a reservation of rights, finding that there was no actual controversy because the reservation of rights was limited to what the law allows and Zurich made no attempt to recoup costs, even though it is an open question in Massachusetts whether an insurer can recoup defense costs. The judge also held that any request regarding duty to indemnify was premature because liability had not been determined. Finding no breach, the judge also dismissed the claim for violation of G.L. cc. 93A and 176D. JMA appealed this decision to the Appeals Court.

Massachusetts Appeals Court Analysis:

The Appeals Court considered first whether there was a breach of contract. In Massachusetts, the duty to defend is broader than the duty to indemnify, and the duty to indemnify is triggered if the third party's allegations against the insured are "reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms." Billings v. Commerce Ins. Co., 458 Mass. 194, 200 (2010). It was previously established in Herbert A. Sullivan Inc. v. Utica Mut. Ins. Co., 439 Mass. 387 (2003) that an insurer cannot refuse to defend the insured without a reservation of rights, and "the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." Therefore, since Zurich refused to relinquish its reservation of rights, JMA had the right to retain the defense counsel of its choosing and seek reimbursement from Zurich, and Zurich was required to reimburse reasonable attorney's fees. Since Zurich failed to reimburse JMA despite the duty to reimburse, prompting JMA to file a breach of contract claim, the Appeals Court held JMA adequately plead a breach of contract claim.

The Appeals Court also held that JMA adequately pled a violation of G.L. cc. 93A and 176D. According to 176D § 3 (9) (g), "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds" is an unfair claim settlement practice, and JMA has alleged facts sufficient to support such a claim. Further, insurance claim settlements are conduct in trade or commerce, which means that JMA has adequately stated a claim under

G.L. c. 93A § 11, which protects consumers from "unfair or deceptive acts or practices in the conduct of any trade or commerce".

11. The Fifth Circuit reversed an NLRB decision holding that requiring employees to wear a uniform instead of a union t-shirt violated section 8(a)(1) of the NLRA.

Tesla, Inc. v. Nat'l Labor Relations Bd., 73 F.4th 960 (5th Cir. 2023)

Background:

The crux of the dispute is whether Tesla's uniform policy violates the right of employees under the NLRA to engage in concerted activity. Tesla has a "Team Wear" uniform policy requiring Tesla employees to wear a t-shirt or sweater with the Tesla logo on it in a color corresponding work area, and forbidding workers from wearing clothing with zippers or pins. The purpose of the Team Wear policy is to prevent "mutilation" or damage to vehicles in the production line, and help supervisors visually see that employees are in their correct area. The employees in this action were designated to wear the color black and were permitted to wear black Union shirts or plain black shirts for several months in 2017. However, in response to an increase in mutilations, supervisors began limiting workers to the approved Tesla shirts or plain black shirts. Other designs, regardless of content, were covered with tape that prevented mutilations, but employees were permitted to wear Union stickers of any size and in any number.

The Union brought suit to the NLRB alleging that the uniform policy and enforcement violated Section 9(a)(1) of the NLRA. An administrative law judge found that the prevention of mutilations and visual identification of employees were not "special circumstances" sufficient to justify preventing private employees from wearing union shirts. Tesla filed exceptions, and the NLRB upheld the Administrative Law Judge's decision, holding that "when an employer interferes in any way with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference." 371 N.L.R.B. No 121, slip op. at 20 (2022). The decision functionally made "all employer dress codes unlawful." Id. at 21. Tesla petitioned the Fifth Circuit United States District Court for review, and the NLRB cross-applied for enforcement. The Fifth Circuit granted the petition for review.

Fifth Circuit Analysis:

The Fifth Circuit reviews NLRB decisions de novo, generally deferring to the NLRB except in interpreting Supreme Court Rulings. The Supreme Court has held that the NLRB must balance the "undisputed right of self-organization…and the equally undisputed right of employers to maintain discipline in their establishments. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945). Tesla's uniform policy is content neutral, nondiscriminatory, and permits the attachment of union insignias to any piece of the uniform, but the fact patterns in the cases the NLRB relied on in making its decision all lacked one or more of the aforementioned elements. The Fifth Circuit reasoned that if Congress had intended to make all uniform policies presumptively illegal, Congress would have made that explicit, and therefore the NLRB's holding was inconsistent with the NLRA. The Fifth Circuit held that the NLRB failed to balance

the interests of labor and employers, and returned to the policy that the "special circumstances" test does not apply to uniform policies that are content neutral, nondiscriminatory, and permit attachment of union insignias to the uniform.

12. Pending in the Norfolk Superior Court is an appeal by Town of Brookline of the award of a 4% Stipend for holding a certification from the POST Commission.

Town of Brookline v. Brookline Police Union, Norfolk Superior Court Docket No. 2382CV00594 (June 30, 2023)

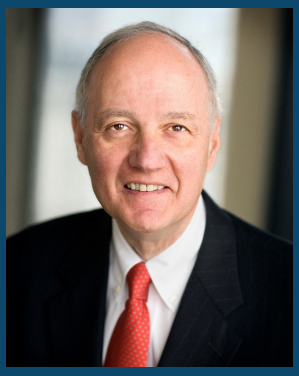
The Town and the Union bargained unsuccessfully for a successor agreement to the collective bargaining agreement that expired on June 30, 2020. On April 28, 2022, the JLMC exercised its jurisdiction to resolve the labor dispute. The JLMC ordered the parties to binding arbitration. The JLMC included the matter of annual certification stipends among the issues to be arbitrated. The annual certification stipend was a percentage of base pay paid to the officers so long as they retained certification from the Police Training and Standards Commission (POST Commission).

The arbitration panel awarded cost of living increases, shortened the twenty-year senior step to a ten-year senior step, and extending educational incentive benefits to all employees. The Town does not object to those portions of the award. The award also granted a 4% of base pay POST Certification stipend amount and required payments earlier than the Union proposed. The arbitration board reasoned that the POST Commission would significantly impact the officers and that the POST Commission "weakened the job protections gained by police officers." The dissenting member of the board argued that the POST stipend should be left to the parties to negotiate, and that the Chair wrongfully permitted the matter to be negotiated under G.L. c 150E §4A(3)(a), as the stipend was a "new benefit."

The Town filed an appeal of the award, with its arguments mirroring those of the dissent. Municipalities should watch this appeal as it progresses, as the decision of this case will inform the boundaries of the authority of the JLMC.

DEMITRIOS M. MOSCHOS

PARTNER



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Mr. Moschos represents clients in education matters throughout the Commonwealth, affecting both public and private schools, including colleges. He has represented various colleges in employment and Labor matters on a wide range of issues including faculty issues, FMLA, and discrimination claims.

He participated in the drafting of Massachusetts Labor Statute; Mr. Moschos is a founder and former management chair of the State Joint Labor Management Committee (Dunlop Committee) and the Worcester County Bar Association's Labor and Employment Law Committee and was awarded with the WCBA's Distinguished Service Award ®. He is also adjunct professor of Labor Relations at Clark University.

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Human Resource Executive Magazine and Lawdragon have recognized Mr. Moschos as a "Top 500 Corporate Employment Attorneys in the United States" and elected him to the Human Resources Hall of Fame.

Mr. Moschos is recognized as The Best Lawyers in America© 2022 in the fields of Employment Law – Management; and Labor Law – Management and since 1995, recognized as Best Lawyers® Worcester "Lawyer of the Year" in 2013 and 2015. He has been named one of Massachusetts "Super Lawyers" by Boston magazine and Law & Politics since 2006. He holds an AV® Preeminent Peer Review Rating by Martindale-Hubbell, the highest rating available for legal ability and professional ethics. Mr. Moschos is the recipient of the Massachusetts Municipal Personnel Association's Emil S. Skop Award for outstanding contributions to human resources management.

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- The Best Lawyers in America© - Employment Law –Management, and Labor Law – Management
- Boston Magazine and Law & Politics - Super Lawyers
- Martindale-Hubbell- AV® Preeminent Peer Review Rating
- Emil S. Skop Award- Massachusetts Municipal Personnel Association
- Chamber Advocate Award- Worcester Regional Chamber of Commerce
- Distinguished Service Award® - Worcester County Bar Association

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- Worcester Regional Chamber of Commerce, former chair
- Worcester Regional Research Bureau, director and clerk
- Worcester Regional Chamber of Commerce Foundation, director and 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
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PUBLISHED WORKS

- "MCLE Publication on School Law, Co Author of the Chapter on General School Employment Law" (2023)
- Quoted in "Banks could be ripe targets for age-bias lawsuit," American Banker (November 13, 2020)
- "New Regulations Surrounding the Paid Medical Leave Act," Worcester Regional Chamber of Commerce Webinar (October 28, 2020)"NEW Federal Employment Acts (Emergency Sick Leave, Emergency FMLA Amendment and Payroll Protection Act)," Worcester Regional Chamber of Commerce Webinar (April 2, 2020)
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