United States Court of Appeals for the First Circuit

No. 09-1648

DUARTE CALVAO, ET AL.,

PLAINTIFF-APPELLANTS

v.

TOWN OF FRAMINGHAM,

DEFENDANT-APPELLEE

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION, MASSACHUSETTS MUNICIPAL ASSOCIATION AND MASSACHUSETTS CHIEFS OF POLICE ASSOCIATION, INC. IN SUPPORT OF DEFENDANT-APPELLEE TOWN OF FRAMINGHAM AND SUPPORTING AFFIRMANCE

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RULE 26.1 DISCLOSURE

Pursuant to Fed.R.App.Pro. 26.1, Massachusetts Chiefs of Police Association states that it is a non-profit corporation incorporated in Massachusetts which has no parent corporation and in which no publicly held corporation has any ownership interest.

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IDENTITY AND INTEREST OF THE AMICI AND SOURCE OF AUTHORITY TO FILE

Amicus the City Solicitors and Town Counsel Association ("CSTCA") is a nonprofit organization which is the oldest and largest bar association dedicated to the practice of municipal law in Massachusetts. The members of the CSTCA are attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of the CSTCA also include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. The CSTCA's mission is to promote better local government through the advancement of the law which applies to municipalities.

Amicus the Massachusetts Municipal Association ("MMA") is a nonprofit, nonpartisan statewide association of 347 member cities and towns. The MMA provides advocacy, training, publications, research, and other services to its members. The MMA is governed by a Board of Directors composed of mayors, selectmen, managers, councilors, and Finance Committee members from across Massachusetts. It brings municipal officials together to establish unified policies, to advocate these policies, and to share information that increases the efficiency and cost-effectiveness of service delivery to community residents.

Amicus Massachusetts Chiefs of Police Association, Inc. ("MCOPA") is a non-profit corporation whose members are municipal police chiefs throughout Massachusetts. Established in 1887 and incorporated in 1949, MCOPA is the oldest professional association of police executives in the United States. MCOPA is committed to the improvement and professionalism of law enforcement in Massachusetts, sponsors educational and training programs for police chiefs, and advocates for the enactment of appropriate legislation.

The source of authority for this filing is a motion for leave submitted herewith pursuant to Fed.R.App.Pro. 29(b). Defendant-appellee Town of Framingham ("the Town") has consented to the filing but plaintiff-appellants Calvao, et al. ("plaintiffs") have refused consent.

Occasionally, amici file in significant court cases which are likely to have a substantial impact on the cities and towns whose group interests they represent. This is such a case.

When Congress extended the overtime provisions of the Fair Labor Standards Act ("FLSA") to public employers, it recognized the possibility of draconian financial impacts on those employers. It therefore enacted the "partial safety exemption" in 29 U.S.C., § 207(k). That provision permits a public employer to unilaterally adopt a work period for police and fire personnel which establishes a higher hours worked threshold for federal overtime than the usual 7-

day, 40-hour standard in § 207(a). Plaintiffs, who are police officers employed by the Town, ask this court to rule that a municipal employer fails to qualify for this exemption even though it unquestionably selected a 24-day work period with a 147-hour threshold and distributed a document to the applicable town departments declaring that adoption. In the midst of the worst financial crisis since the notorious Great Depression, municipalities have been forced to cut services and functions to the bone. If ever there was a case and a time in which Congress's clear purpose to spare the public fisc must be furthered, it is this case and it is now.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court committed reversible error by ruling that the Town effectively adopted a qualifying 24-day, 147-hour § 207(k) work period for its police officers when it distributed to town officials and departments a memorandum which expressly "declar[ed]" that work period under the FLSA.

ARGUMENT

I. CONGRESS INTENDED THAT AN EMPLOYER BE ABLE TO UNILATERALLY SELECT A QUALIFYING § 207(k) WORK PERIOD. REQUIRING FORMAL NOTICE TO EMPLOYEES AS A PREREQUISITE WOULD SERVE NO PURPOSE BECAUSE THERE IS NO ROLE FOR EMPLOYEES IN DETERMINING THE WORK PERIOD.

In the District Court it was undisputed that on April 11, 1986 the Town's then-Executive Administrator "sent a Memorandum … to the Police and Fire Chiefs, Personnel Director, and the Town Counsel, the subject of which was 'Declared Work Period – Police and Fire Personnel'" [Appellants' Brief, Add. at

4-5]. The memorandum stated "'[p]ursuant to section 207(k) of the Fair Labor Standards Act and 29 C.F.R. Part 553, the declared work period for Police and Fire regular shifts is 24 days'" and "'[t]his declaration is effective with work periods commencing April 13, 1986.'" [Appellants' Brief, Add. at 5]. The court concluded that the Town had "announced" its adoption of a qualifying work period by the "clear[]" language of the memorandum, and had taken "'bona fide steps'" to "implement" by having the memorandum "distributed … to the relevant departments and town offices" [Appellants' Brief, Add. at 6-7]. Accordingly, the court granted the Town's motion for summary judgment and held that under § 207(k) the police officers' right to FLSA overtime is based on a 24-day, 147-hour threshold [Appellants' Brief, Add. at 8].

Plaintiffs' case for reversal is simple. It is also wrong. Plaintiffs say that because they weren't "notified of the Town's decision" and because the Town did not "actually implement a payroll system that computes FLSA overtime", they are entitled to a trial on the issue and, presumably, damages in the form of overtime predicated on the usual 7-day, 40-hour threshold [Appellants' Brief at 22, 59]. The District Court got the answer right and its ruling should be affirmed.

Section 207(k) was enacted in 1974. That section creates a range of qualifying work periods between seven days and twenty-eight days for police and firefighters and a resulting range of overtime thresholds which exceed the usual

40-hour/7-day standard in § 207(a). It also exempts the employer from FLSA overtime liability for hours worked below those thresholds. Section 207(k), however, says nothing regarding any formal action which must be taken by the employer and imposes no conditions or restrictions on the employer's exemption. The legislative history makes clear what the statute suggests – that this is an *exemption* from FLSA overtime liability (albeit partial) and that the employer need only, and in its sole discretion, pick a work period.

Section 207(k) was added to the FLSA in 1974 as part of Pub.L. 93-259, in § 6 (c)(1)(A) of that enactment. A primary purpose of the 1974 amendments was to extend the FLSA's minimum wage and overtime coverage to virtually all state and local non-supervisory employees. *See* House Report No. 93-913 (Mar. 15, 1974), set forth in 1974 U.S.C.C.A.N., at 2837. With respect to fire and police employees, however, the original House bill provided a complete exemption from the standard 7-day/40-hour overtime provision in § 207(a), based on (1) a 1970 Department of Labor study which found that those employees typically work longer workweeks than do employees in other jobs and (2) a congressional intent that the "actual impact" on state and local governments "be virtually non-existent." *Id.* at 2821, 2837-38.

The original Senate bill was different. It provided for (1) a "special overtime compensation provision" for police and firefighters, under which "an agreement between the employer and the employee may be entered into to accept a work period of 28 consecutive days", and (2) overtime payments under the statute for hours during that period which exceeded a specified number (phased in incrementally over the ensuing four years following enactment). Senate Report No. 93-690 (Feb. 21, 1974) at 62. Accordingly, the Senate bill conditioned the special work period on "an agreement or understanding arrived at between the employer and the employee before performance of the work". *Id.* at 88, 24.

The provision which actually became law as § 207(k) represented a compromise. The Senate language requiring an agreement or understanding between the parties was rejected, but the *complete* exemption proposed by the House was modified by the use, instead, of a range of longer work periods and greater numbers of hours before the employer becomes liable for federal overtime payments. Senate Conf. Report No. 93-758 (Mar. 28, 1974) at 1, 6-7. What remained, however, was an exemption from liability, although now partial. Section 207(k) as enacted therefore envisions no role for the employee and no requirement that the employee be notified in order for the exemption to apply.[1] This is

[1] Section 207(k) is therefore unlike other FLSA provisions which, similar to the rejected Senate bill, permit an employer to lessen overtime burdens by establishing

consistent with the concept of exemptions generally in the FLSA. The FLSA contains (and contained in 1974) a number of exemptions from FLSA overtime liability. *See, e.g.,* 29 U.S.C., § 213(a), (b), and (d). These exemptions exist based solely on the nature of the employee's job duties and responsibilities and require no involvement of the employee in determining the exemption. *See* 29 C.F.R., § 553.216, describing the § 207(k) work period as only one among "other exemptions" in the FLSA.

Section 207(k) did not take effect until after 1985 because the Supreme Court initially ruled that it could not fully apply to municipalities. *See Garcia v. San Antonio Metrop. Transit Auth.,* 469 U.S. 528 (1985) *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). Following *Garcia,* the Department of Labor promulgated regulations in 1987.

Like § 207(k), the implementing regulation says nothing about any formal requirements or steps which the employer must take in order to fall under the partial exemption. Instead, 29 C.F.R., § 553.224(a) refers merely to a qualifying work period which is "established and regularly recurring". Section 553.224(a) also states clearly that a qualifying work period "need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day." *Cf.* 29

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compensation arrangements and which therefore require notice to, and agreement of, the employee. *See, e.g.,* § 207(o) regarding "compensatory time".

C.F.R., § 553.223(b), which pertains to meal time and which refers to the employer merely "*elect[ing*] to use the section 7(k) *exemption*" [emphasis added]. Moreover, when § 553.224 was promulgated in 1987 the Department addressed a "concern" that this regulation was "unclear as to how a public employer exercises its *right* to use the 7(k) *exemption* and whether it is a one-time or an ongoing alternative to section 7(a)":

> *Unlike FLSA section 7(o)*, which generally requires that there be an agreement or understanding .., *there is no requirement in the Act that an employer formally state its intention or obtain an agreement in advance to pay employees under section 7(k)*. … As to the work period, its length and starting time *may be changed without prior notice to employees*.

52 Fed. Reg. 2024-25 (January 16, 1987) [emphasis added].

The Department therefore articulated what was implicit in the scheme enacted by Congress – that § 207(k) creates an exemption and that there is no role for the employee in selection of a work period which would warrant notice or other formal procedures. Moreover, fiscal concerns were front and center for Congress when it enacted § 207(k). "'Section 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government . . .'". *Martin v. Coventry Fire District*, 981 F.2d 1358, 1361 (1st Cir. 1992) (citing and quoting S.Rep. No. 99-159, 99th Cong., 1st Sess. 5 (1985), reprinted in 1985 U.S.C.C.A.N. 651, 653). Accordingly, the rationale is obvious.

The problem to be addressed was the increased financial burden on public employers which would result from bringing them under the FLSA's overtime umbrella. The intent was to mitigate that burden. The solution was to allow the employer to simply pick a qualifying work period.

In this context, plaintiffs' theory suffers from a mortal flaw. After the Town decided upon a 24-day, 147-hour work period, nothing meaningful was left unfinished. Had plaintiffs been given the formal notice which they now argue was a *sine qua non,* they could have done nothing. They had no right under § 207(k) to dispute the choice; to bargain over it; to require the Town to adopt another period; or to erect any other hurdles to the work period. This court has stated the principle clearly and succinctly. Once the employer has chosen a qualifying work period, "the employees' approval is not required." *O'Brien v. Town of Agawam,* 350 F.3d 279, 291 (1st Cir. 2003) [citation omitted].[2] Moreover, the Town's decision had no impact on anything other than the amount of federal overtime pay which the employees could collect. Their actual hours of work remained unchanged; their place of work was unaltered; their assignments and duties stayed the same; their

[2] Amici address *infra* at pp. 12-20 a state court decision under Massachusetts law which plaintiffs cite and which wrongly held that a state law bargaining requirement for adoption of a § 207(k) work period does not conflict with the FLSA and is therefore not preempted. *See City of Boston v. Comm'th Employment Relations Board,* 453 Mass. 389, 902 N.E.2d 410 (2009) [Appellants' Brief at 48 & n.10].

contractual rights were unaffected and all of their other terms and conditions of employment were kept in place.

Unarmed with any meaningful role which follows the employer's choice, plaintiffs cobble together other instances where the FLSA mandates notice and urge this court to require notice here for the sake of "consistency" [Appellants' Brief at 45-50]. Notably, however, they rely on several sections, including § 207(o), in which Congress expressly required an *agreement* with the affected employees, and on others which explicitly command some sort of notice [Appellants' Brief at 47, 49-50]. But these examples show one thing and one thing only – that when Congress intended notice as a prerequisite, it either said so in plain English or expressly required an agreement which plainly could not be effectuated without notice. Section 207(k) contains neither and the void cannot be filled by this court. In short, the best which plaintiffs can muster is the goal of "consistency". They point to nothing which could have been achieved under the FLSA had they been given the formal "notice" they now urge but which was hindered by the absence of that notice.[3, 4]

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[3] It strains credulity when plaintiffs suggest that the Town's declaration was somehow unknown to them. It is undisputed that the decision was articulated in a document which was circulated to the appropriate town departments. At a minimum this widely-disseminated document plainly qualified as a "public record" under G.L. c. 4, § 7, clause twenty-sixth and G.L. c. 66, § 10 [Appellee's Brief at 11 & n.5].

Plaintiffs' argument that the Town failed to "implement" the 24-day, 147-hour work period because it did not "actually … compute[] FLSA overtime" amounts to insistence on another empty formality [Appellants' Brief at 22]. The mere fact that the Town may have paid *more* to plaintiffs under the overtime provisions of its collective bargaining agreement shows only that the Town was acting in complete accordance with the work period for purposes of their entitlement to FLSA overtime [Appellee's Brief at 25-26, 37-38]. The same result follows with respect to the Town's use of contractual duty cycles which are *consistent* with a 24-day period [Appellee's Brief at 12, 20, 24]. Plaintiffs have failed to show that at the end of the day they are actually owed anything under the chosen work period. As a matter of law, the District Court had no choice but to find that the Town adequately "announced" and "implement[ed]" that work period [Appellants' Brief, Add. at 6-7].

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[4] Plaintiffs apparently rely in part on a footnote in *O'Brien v. Town of Agawam, supra.* That footnote states that the default 7-day, 40-hour provision in § 207(a) applies if the employer "fails to *announce* and take bona fide steps to *implement* a qualifying work period". *Id.* at 291 n.21 [emphasis added]. Amici incorporate herein the Town's discussion of this language and its meaning [Appellee's Brief at 28-31 & nn.7, 8]. *See also Lemieux v. City of Holyoke,* F.R.D. , 2009 WL 2606504 *3-4 (D.Mass. 2009). In *O'Brien,* unlike the case at bar, there was no evidence that the employer had done anything by way of declaring a work period. *Id.* at 291. This fact alone also distinguishes the district court decision in *MacGilvray v. City of Medford,* 585 F.Supp.2d 175, 178 (D. Mass. 2008) [Appellee's Brief at 34-35].

II. THIS COURT SHOULD CLARIFY WHAT IS REQUIRED TO ELECT A § 207(k) WORK PERIOD BY HOLDING THAT THE IMPOSITION OF A STATE LAW COLLECTIVE BARGAINING REQUIREMENT UNDER A RECENT MASSACHUSETTS STATE COURT DECISION IS PREEMPTED BECAUSE IT ACTUALLY CONFLICTS WITH CONGRESS'S INTENT THAT THE EMPLOYER HAVE UNFETTERED FREEDOM OF CHOICE.

Plaintiffs assert that in fact there *is* something which employees in Massachusetts can do if they receive formal notification that the employer has chosen a qualifying work period. As noted, they cite a state court decision which holds that employees can force the employer to negotiate its choice and which amici respectfully submit is erroneous because it conflicts with the FLSA [Appellants' Brief at 48 & n.10]. Plaintiffs, of course, are long-barred from bringing an unfair bargaining practice charge under state law at this late date, *see* 456 CMR 15.03 Affirmance here therefore does not depend on evaluation of the state court ruling because the District Court correctly decided the FLSA question before it. This court, however, will issue a decision which determines the § 207(k) rights and obligations of *all* municipal employers in Massachusetts, as well as the rights and obligations of their peers in three other states and in Puerto Rico. The issue raised by the state court ruling is a purely legal question, the resolution of which should not, and need not, await the percolation of another case through the judicial system. An answer is required for a full disposition of the issue presented

and for the guidance of the several state agencies, state courts, and federal district courts which will inevitably encounter this question.

In *City of Boston v. Comm'th Employment Relations Board, supra,* the Supreme Judicial Court affirmed a ruling by a state agency that the employer's election of a § 207(k) work period is conditioned on meeting its collective bargaining obligation under state law, G.L. c. 150E, § 6. *Id.* at 399; 418. The court rejected the city's argument that application of chapter 150E was barred under the federal doctrine of "conflict" preemption because it directly frustrated Congress's purpose that the employer be able to soften the financial impact of the FLSA overtime provisions by unilaterally selecting a different work period. The court's analysis was fatally flawed in two respects. First, it turned on the obvious but meaningless distinction that the employer's election is "permissive", not "mandatory". *Id.* at 397; 417.[5] Second, ignoring Congress's clear purpose to protect municipal employers in enacting § 207(k), the court focused, instead, on the general, but here irrelevant, purpose of the FLSA – to "improve the working conditions of employees". *Id.* at 398; 417. Having misidentified the target, the court inevitably brought down the wrong game. This court should rule that the

[5] That, of course, is implicit in the word "elect". *See* 29 C.F.R., § 553.223(b).

imposition of a state law bargaining requirement on the employer's § 207(k) election conflicts with the statute and that *City of Boston* was wrongly decided.[6]

Both the state agency and the state court wrongly looked to § 218(a) of the FLSA. *City of Boston, supra* at 397; 417. That section expressly bars a state from enacting its own laws which provide *less* generous substantive rights to employees than does the FLSA but permits a state to adopt its own, *more* generous substantive statutes. *See, e.g., Cranford v. City of Slidell,* 25 F.Supp.2d 727, 728 and cases cited (E.D. La. 1998). The preemption category in question is fundamentally different, because *City of Boston* did not involve the enactment of a substantive statute by the Massachusetts legislature regarding the overtime rights of police officers. Likewise, contrary to the state court's analysis, *id.* at 397; 417, that case did *not* raise an issue of express preemption where "Congress has explicitly mandated the pre-emption of state law", nor did it involve a question of implicit field preemption where Congress "has adequately indicated an intent to occupy the field of regulation". *Brown v. Hotel and Restaurant Employees and Bartenders Internat'l Union, Local 54*, 468 U.S. 491, 501 (1984). Instead, it concerned the administrative and judicial amendment of a *federal* statute by adding a condition

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[6] While *City of Boston* is binding on this court as to questions of Massachusetts state law, it also decided a question of *federal* preemption. *Id.* at 395-99; 415-18; *see also City of Boston*, 33 MLC 1, 7 (2006), discussing and deciding "federal preemption". As to that ruling, this court is free to decide the question differently and correctly, and should do so.

under state law which "actually conflicts with federal law." *Id.* A state law is displaced if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the federal legislation. *Id.* [citations omitted]. "If the state law *regulates conduct that is actually protected by federal law* . . . pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right". *Id.* at 503 [emphasis added].

Congress's purpose in § 207(k) was crystal clear. In order to lessen the heavy fiscal burden imposed on governmental employers by extending the FLSA to their employees, Congress intended that these employers be free to unilaterally choose an alternative work period. *See O'Brien v. Town of Agawam, supra* at 290, observing that "[t]he effect of the § 207(k) partial exemption is to soften the impact of the FLSA's overtime provisions on public employers in two ways …". Accordingly and as amici already have pointed out, unlike other FLSA provisions such as § 207(o), § 207(k) is an exemption and contains no reference to bargaining or agreement with employees. *O'Brien v. Town of Agawam, supra* at 291. Congress, of course, could have opted for this condition but chose to eschew it. In fact, as already shown the legislative history establishes that Congress deliberately *rejected* any such requirement. When the provision finally took effect, the Department of Labor described the choice of work period as a "right" of the employer and explicitly stated that it could be changed without notice. *See* 52 Fed.

Reg. 2024-25 (January 16, 1987). Federal courts have routinely held that the work period is a matter of employer election and nothing more. *See, e.g., O'Brien v. Town of Agawam*, *supra* at 291, stating that "the employees' approval is not required." The state court's emphasis that this choice is "permissive" rather than "mandatory", *City of Boston, supra* at 397; 417, is a textbook example of the "red herring" because the congressional purpose in question is that the employer have *unfettered* freedom of choice. Likewise, the state court's focus on the general purpose of the FLSA to "improve the working conditions of employees", *id.* at 398; 417, also misses the mark because the problem here involves Congress's intent in § 207(k) to *mitigate* the effects of the statute's overtime provisions. When the inquiry is properly channeled, there can be but one conclusion – the application of state collective bargaining law is barred as a matter of federal conflict preemption.

Merely requiring the employer to negotiate before adopting a work period obviously conflicts with § 207(k) because the employer can no longer simply select an alternate period. But the intrusion on the employer's federal right goes far beyond that. First, an employer cannot simply go through the motions. In Massachusetts, it must come to the table prepared to "bargain with an open and fair mind, have a sincere purpose to find a basis for an agreement, and make reasonable efforts to compromise [the] differences." *Town of Hudson*, 25 MLC 143, 146-47

(1999). Whether the work period itself ends up being compromised or is held hostage for compromise of other issues, the employer's freedom of action intended by Congress has been eliminated. Moreover, reaching impasse is no easily-accomplished task in Massachusetts. The state agency's test for deciding that further negotiation will be futile is stiff. It requires proof that further negotiation would be "fruitless" because after suitably extensive bargaining the parties are "deadlocked". *Comm. of Massachusetts,* 22 MLC 1039, 1051 (1995). Most important, impasse does not end the process.

Massachusetts has established the Joint Labor Management Committee ("JLMC") to handle bargaining impasse in police and fire negotiations. *See* St. 1973, c. 1078, § 4A(3)(a), as amended by St. 1987, c. 589, § 1. The JLMC "is empowered to order police and firefighter collective bargaining disputes to *binding arbitration* to avoid job actions in these critical public safety functions." *Local 201, Internat'l Ass'n of Firefighters v. Town Of Bellingham,* 67 Mass.App.Ct. 502, 507 (2006), 854 N.E.2d 1005, 1009, *aff'd* 450 Mass. 1011 (2007) (rescript) [emphasis added]. Among the subjects committed to JLMC resolution are "wages" and other matters within the scope of chapter 150E. St. 1973, c. 1078, § 4A(3)(a). Accordingly, as a result of *City of Boston* a municipal employer cannot merely bargain to "resolution or impasse" . If it fails to reach the agreement on which Congress refused to condition its federal right, the employer must then surrender

its authority in the matter to the JLMC or to an arbitrator. The intrusion does not even end there, however. When the JLMC ruling is submitted to the legislative body for funding, the employer is required by statute to accompany the submission with "his recommendation for approval" and "shall support" the JLMC's decision, just as the employer must support a provision which it voluntarily agrees to under G.L. c. 150E, § 6. *See* St. 1973, c. 1078, § 4A(3)(a). Even if the legislative body disapproves the request, that doesn't terminate the process. Instead, by statute "the matter shall be returned to the parties for further bargaining." *Id.* Finally, the JLMC at that point "may take such further action as it deems appropriate." *Id.* While one such action is "inquiring as to the municipal legislative body's vote", this is merely an example of the JLMC's authority because it is preceded by the phrase "including *without limitation*". *Id.* [emphasis added].

How this forced surrender by the employer of its freedom under § 207(k) poses no conflict with Congress's intent defies any rational explanation. Congress struck a fair and balanced statutory symmetry by enacting § 207(k). It has long been the law that an employer cannot bargain with a union for less generous overtime rights than are granted by the FLSA. *See, e.g., Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 463-64 (1948). When it extended these costly, non-bargainable obligations under the FLSA to public employers, Congress provided a partial exemption which also need not be negotiated. The *City of Boston* decision

destroys that symmetry and directly frustrates the legislative purpose. A more clear-cut case of federal conflict preemption cannot be imagined.

The *City of Boston* ruling creates another fundamental, and fatal, conflict. The FLSA is intended to establish a set of standards which is consistent throughout the country. *See Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 741 (1981), stating that in the FLSA "'Congress intended, …, to achieve a national uniform policy'" [quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 602-03 (1944)]. This reflects the rule "that federal statutes are generally intended to have uniform national application." *Miss. Board of Choctaw Indians v. Holyfield,* 490 U.S. 30, 43 (1989). The Massachusetts court's decision plainly undermines that scheme. This consequence of *City of Boston* is unavoidable. Municipal employers in Massachusetts can no longer freely and unilaterally select an alternative work period under § 207(k). Instead, unlike their peers in the neighboring states of Maine, New Hampshire, Rhode Island, Vermont, and Connecticut, their choice now is cabined by stringent bargaining obligations and, ultimately, is surrendered to a state agency or to an arbitrator. In fact, so far as amici are aware no other court in the country has engrafted onto § 207(k) a requirement that the employer negotiate for the employees' agreement.[7] It is

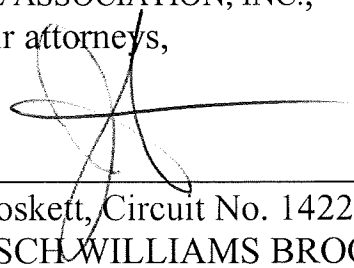
[7] An administrative agency in Oklahoma has issued two perfunctory decisions which reached a similar conclusion under Oklahoma law. *Local 2839, IAFF v. City of Okmulgee,* Case No. 00125 (1987) and *Local 2171, IAFF v. City of Del City,*

essential that the rights of employers under § 207(k) be clarified in this circuit. This court should squarely hold that the municipal employer's right to elect a qualifying work period is unfettered by any state law procedural or bargaining conditions.[8]

CONCLUSION

For the reasons set forth herein and in the Town's brief, the District Court's judgment must be affirmed.

CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION, MASSACHUSETTS MUNICIPAL ASSOCIATION AND MASSACHUSETTS CHIEFS OF POLICE ASSOCIATION, INC.,
By their attorneys,



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Dated: October 16, 2009

Case No. 00176 (1989). Amici, however, have found no Oklahoma judicial decisions on this question.

[8] Even those sections of the FLSA which require an agreement do so with uniform national application. *See, e.g.*, § 207(o). In those instances Congress has deferred to the laws of the various states solely on the issue of *who* is authorized to act on behalf of the employees. *Id.*

United States Court of Appeals
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

No. 09-1648

DUARTE CALVAO, ET AL., *Plaintiff-Appellants,*

v.

TOWN OF FRAMINGHAM, *Defendant-Appellee.*

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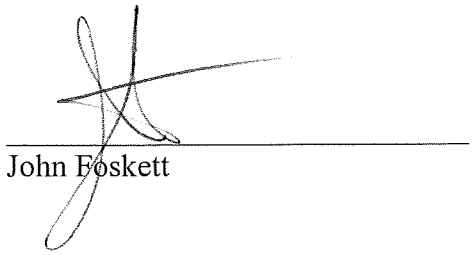

John Boskett

United States Court of Appeals
for the First Circuit

No. 09-1648

DUARTE CALVAO, ET AL.,

PLAINTIFF-APPELLANTS

v.

TOWN OF FRAMINGHAM,

DEFENDANT-APPELLEE

CERTIFICATE OF SERVICE

John Foskett, counsel for Amici Curiae, City Solicitors and Town Counsel Association, Massachusetts Municipal Association and Massachusetts Chiefs of Police Association, Inc., hereby certifies that he has served the Motion of Amici Curiae for Leave to File Amicus Brief and Brief of Amici Curiae by causing one copy of the Motion and two copies of the Brief to be delivered by first class mail, postage prepaid to counsel for Plaintiff-Appellants, Jack J. Canzoneri, Esq., McDonald, Lamond and Canzoneri, 153 Cordaville Road, Suite 320, Southborough, MA 01772 and counsel for Defendant-Appellee, Peter L. Mello, Esq., Petrini and Associates, P.C., 372 Union Avenue, Framingham, MA 01702.

John Foskett

Dated: October 16, 2009

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ADDENDUM

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Calendar No. 666

93D CONGRESS, 2d Session } SENATE { REPORT No. 93-690

FAIR LABOR STANDARDS AMENDMENTS OF 1974

FEBRUARY 22, 1974.—Ordered to be printed
Filed, under authority of the order of the Senate of February 21, 1974

Mr. WILLIAMS, from the Committee on Labor and Public Welfare, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2747]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 2747) to amend the Fair Labor Standards Act of 1938, as amended, to extend its protection to additional employees, to raise the minimum wage to $2.20 an hour, and for other purposes, having considered the same, reports favorably thereon with amendments, and recommends that the bill as amended do pass.

SUMMARY

The present minimum wage of $1.60 an hour was established by amendments to the Fair Labor Standards Act enacted in 1966. For most workers the $1.60 rate went into effect on February 1, 1968 (an interim raise from $1.25 to $1.40 was effective February 1, 1967). For newly covered non-farmworkers (employees of medium-size retail and service establishments and certain state and local government employees), the rate increased from $1.00 per hour effective February 1, 1967, by 15¢ per hour per year, until the $1.60 rate was reached February 1, 1971. For farmworkers, the rate of $1.00 was established effective February 1, 1967, with increases of 15¢ per year until the present rate of $1.30 was reached, effective February 1, 1969.

The purpose of this bill is to incorporate into the Fair Labor Standards Act a breadth of coverage and a minimum wage level sufficient to bring the Act closer to meeting its basic, stated objective—the elimina-

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16".

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce."

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection:

"(f) Any employee—

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)."

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection:

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph:

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph:

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

such period during the fourth year, and 160 hours in such period thereafter.

The Committee intends that the provisions of section 5341 of title 5, United States Code, requiring the section 6(a)(1) rate for prevailing rate system employees, will continue to apply.

STATE AND LOCAL

There are a number of reasons to cover employees of State and local governments. The Committee intends that government apply to itself the same standards it applies to private employers. This principle was manifested in 1972 when the Senate overwhelmingly voted to apply Federal equal employment opportunity standards to public sector employers. Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business. The Senate has also applied wage ceilings to the wages paid public employees. The Committee sees no reason, therefore, why these employees should not be protected by the wage floor provided by the FLSA.

The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government empoyees and the activities and magnitude of all levels of government have an effect on commerce as well.

The Committee anticipates that the financial impact on local government units will be minimal.

The Department of Labor has supplied the Committee with figures on impact of minimum wage coverage on state and local governments. They indicate that the cost of increasing state and local employees covered in 1966 and those covered in this bill to $1.80 per hour will be .3% of the annual wage bill or $128,000,000. The following year, there will be a .5% increase in the annual wage bill or $162,000,000.

The Committee has also made an effort to minimize any adverse effects of overtime requirements by providing for a phase-in of those public employees who are most frequently required to work more than forty hours per week, the public safety and fire fighting employees.

The bill includes a special overtime standard for law enforcement and fire protection employees including security personnel in correctional institutions. For such workers, if there is an agreement or understanding with their employers the bill provides for a standard work period of 28 days instead of the basic standard of a 7-day week for purposes of determining overtime compensation. Time and one-half the regular rate of pay is required for all hours over 192 in the 28-day period during the first year; over 184, during the second year; over 176, during the third year; over 168, during the fourth year; and over 160 hours at the beginning of the fifth year and thereafter.

The question of treatment of employees who work 24 hour shifts was raised in the Committee. The matter of hours worked for such employees has been treated by the Secretary of Labor for many years with respect to 24 hour shift operations of nonpublic workers such as telephone and power company employees and watchmen. These regulations state the following:

INTERPRETATIVE BULLETIN ON HOURS WORKED

Sleeping Time and Certain Other Activities

Section 785.22 DUTY OF 24 HOURS OR MORE.

(a) GENERAL.—Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (*Armour* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift*, 323 U.S. 134 (1944); *General Electric Co.* v. *Porter*, 208 F. 2d. 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); *Bowers* v. *Remington Rand*, 64 F. Supp. 620 (S.D. Ill. 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946), cert. denied 330 U.S. 843 (1947); *Bell* v. *Porter*, 159 F. 2d 117 (C.A. 7, 1946), cert. denied 330 U.S. 813 (1947); *Bridgeman* v. *Ford, Bacon & Davis*, 161 F. 2d 962 (C.A. 8, 1947); *Rokey* v. *Day & Zimmerman*, 157 F. 2d 736 (C.A. 8, 1946); *McLaughlin* v. *Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor Cases para. 64, 606 (N.D. Ind. 1948); *Campbell* v. *Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) INTERRUPTIONS OF SLEEP.—If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See *Eustice* v. *Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946).)

The Committee intends this regulation to be applicable to the numerous local firefighting units which work 24 hour shifts. It is the Committee's expectation that the Secretary of Labor will exclude from "hours worked" calculations, those regularly scheduled bona fide meal periods and sleeping periods of not more than eight hours which either the employer and employee expressly agree are regularly scheduled meal and sleep periods, or, where no such express agreement exists, which can be assumed to be implicitly agreed upon by the employer and employee on the basis of the existence over a reasonable period of time of regularly scheduled meal and sleeping periods.

CANAL ZONE

The bill raises the minimum wage in the Canal Zone at the same rate as the mainland, maintaining the historical parity between workers in the Canal Zone and their counterparts on the mainland.

The Committee believes that current conditions do not warrant exempting the Canal Zone from minimum wage increases, or restricting those increases in respect to mainland increases.

The argument was made to the Committee that further raises in the minimum wage would serve to accelerate the disparity in wage rates between workers in the Republic of Panama and workers in the Canal Zone. In response to this same argument, the Senate, in the 1957 Committee report on an amendment specifying the Congressional intent that the minimum wage should apply to the Canal Zone, stated that:

> It is generally agreed that relatively few Panamanian citizens benefit by the present coverage of the minimum wage. The continued application of the . . . minimum can hardly be construed, therefore, as disrupting the economy of a nation of 800,000 inhabitants. On the other hand, United States citizens employed in the Canal Zone, may be adversly affected by permitting the employment of competing local labor at substandard rates of pay.

This Committee is aware of the opposition of the Department of State and the Canal Zone Government to increasing the minimum wage for Canal Zone workers but fails to find justification for this position. By giving a minimum wage increase to these workers, the Committee continues its long-standing practice of not discriminating against these workers of the Canal Zone. Although the objections to this increase are based on predictions of a $6 million annual increase in cost to the Canal Company and ultimately to the United States Government unless canal tolls are increased, the Committee finds this claim difficult to believe in view of the fact that the average wage for a manual laborer in the Canal Zone is already $2.10 per hour.

With respect to the question of increasing tolls, oversight of Canal operations is not within the jurisdiction of this Committee and we take no position on that matter. We do note, though, that tolls have not been increased during the almost sixty years the Canal has been in operation. We also note that the Canal Zone Government admits an increase has been under active consideration for over two years and was not initiated by anything this Committee has done with respect to the FLSA.

Finally, we note that the Government of the Republic of Panama has flatly stated that failure to increase the minimum wage applicable in the Canal Zone along with that applicable in the United States will adversely affect relations between our two countries.

THE NEED FOR NEW ENFORCEMENT PROVISIONS

The amendment on the maintaining of suits by state employees was recommended by the Department of Labor and unanimously concurred in by the Committee and was made necessary by the Supreme Court's

opinion in *Employees of the Department of Public Health and Welfare of Missouri* v. *Department of Public Health and Welfare of Missouri*, —— U.S. —— (1973). There, the court held that Federal Court suits for enforcement of the FLSA brought by state employees pursuant to Section 16(b) of the Act could not be maintained and did so on the express ground that the Act does not authorize them. "(W)e have not found a word in the history of the 1966 amendments to indicate the purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the Federal Courts." (Slip op. at p. 6.) This amendment makes this committee's and Congress' intent clear.

The amendment provides that employees of a public agency (defined to include the Government and agencies of the United States, a State or political subdivision, or any interstate governmental agency) may maintain an action against that public agency under section 16(b) in any Federal or State court of competent jurisdiction, and suspends the statute of limitations to preserve rights of actions of State or local government employees which would otherwise be barred as a result of the Supreme Court's decision. It is emphasized that this provision is a limited suspension of the statute of limitations and is applicable only to certain public employees.

The Court did not question its earlier decision in *Maryland* v. *Wirtz* which upheld the extension of the Act to state-operated schools and hospitals. Nor did the Court indicate that, although Congress could thus extend coverage, it is powerless to provide what Congress considers meaningful and necessary enforcement devices. Indeed, the majority opinion suggests the contrary when it refuses to infer, in the absence of clear language to this effect, "that Congress conditions the operation of these facilities on the forfeiture of immunity from suit in a federal forum." (*Id.* at slip op., pp. 6–7.)

Experience under the 1966 Amendments has shown that voluntary compliance with the Act's requirements cannot be expected from the state so as to render enforcement mechanisms unnecessary. Experience during that same period demonstrates that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily. Since the 1974 Amendments extend FLSA coverage to additional state government employees, it is now all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights.

AGRICULTURAL COVERAGE

S. 2747 does not change the basis under which agricultural employers become subject to the FLSA. The requirement remains at least 500 man-days (one-man-day being any day during which an employee performs any agricultural labor for not less than one hour) during the peak quarter of the preceding year. However, S. 2747 does alter the computation of man-days by adding to the definition of "employee" the previously excluded group of all local, seasonal hand-harvest laborers. The effect will be to increase the number of covered farms, but its percentage vis-a-vis all farms in the nation will remain relatively small. At present, only 3% of all farms are under the FLSA

ees covered by a wage order whose wage is increased by a subsidy (or income supplement) the increases prescribed by the 1974 Amendments shall be applied to the wage rate plus the amount of the subsidy (or income supplement). For newly covered employees under the 1974 amendments, a special industry committee shall recommend the highest minimum wage rates which shall not be less than 60 percent of the otherwise applicable rate under section 6(b) or $1.00 an hour whichever is greater. Effective dates of rates recommended by this special industry committee shall not be effective before sixty days after the effective date of the 1974 Amendments and shall be increased in the second and each subsequent year as provided in the 1974 Amendments. Wage rates of any employee in Puerto Rico or in the Virgin Islands shall not be less than 60 percent of the otherwise applicable rate or $1.00, whichever is higher, on the effective date of the wage increases. Wage order rate prescribed in the 1974 Amendments may be increased by a wage order issued pursuant to a special industry committee recommendation but not decreased.

Section 5(c)(1) amends section 8(b) by requiring that special industry committees to recommend the otherwise applicable rate under section (a) or 6(b) except where substantial documentary evidence, including pertinent financial data or other appropriate information establishes that the industry or portion thereof is unable to pay such wage rate. Minimum wage rates in wage orders may, upon review, be specified by a court of appeals.

Section 6

Section 6 amends section 3(d) and 3(e) to include under the definitions of "employer"and "employee" the United States and any State or political subdivision of a State or intergovernmental agency. This will extend minimum wage and overtime coverage of the law to civilian employees in agencies and activities of the United States (except the armed forces). Elected officials, personal staff, appointees on the policy making level, or immediate advisors in State and local governments are exempt. Coverage of State and local hospitals, nursing homes, schools, and local transit companies is provided under present law. A special overtime compensation provision is included in the 1974 Amendments for Federal, State and local government employees, in fire protection or law enforcement activities including security personnel in correctional institutions.

In the special overtime compensation provision for fire protection and law enforcement activity an agreement between the employer and the employee may be entered into to accept a work period of 28 consecutive days in lieu of a workweek of 7 consecutive days and overtime compensation to be paid for work performed in excess of 192 hours in such work period during the first year, 184 hours during the second year, 176 hours during the third year, 168 hours during the fourth year and 160 hours in such period thereafter. The United States Civil Service Commission is to administer the Act for Federal employees (other than Postal Service, Postal Rate Commission and Library of Congress employees).

Section 7

Section 7 amends section 2(a) to establish that persons in domestic service in households affect commerce and are therefore within the

coverage of the Act. Sections 6 and 7 are amended to establish, for domestic service workers earning wages qualified as such under the Social Security Act (requiring at least 50 in a calendar quarter for Social Security coverage), minimum wages at rates for employees newly covered by the 1974 Amendments and for overtime coverage, except that "live-in" domestic employees are included for minimum wage coverage but are excluded from overtime coverage. Casual baby-sitters or companions are exempt from both minimum wage and overtime coverage.

Section 8

Section 8 amends section 13(a)(2), the special dollar volume test for retail and service establishments, by phasing out the dollar volume establishment test from the present $250,000 to $225,000 on July 1, 1974, to $200,000 on July 1, 1975; and to repeal the test on July 1, 1976. This amendment would gradually expand the coverage of retail and service activities to include employees of all small establishments of chain store operations in which the total chain operation has gross annual sales of more than $250,000. This provision applies also to employees of establishments which are part of covered conglomerate operations.

Section 9

Section 9 amends section 7 and section 13 relating to tobacco employees. A limited overtime exemption (14 weeks, 10 hours per day, and 48 hours per week) is provided for certain employees engaged in activities related to the sale of tobacco. These employees are currently covered by the section 7(c) exemption pursuant to determination by the Secretary of Labor. Section 13 is amended to cover employees engaged in the processing of shade grown tobacco prior to the stemming process for use as cigar wrapper tobacco for minimum wages but not for overtime.

Section 10

This section repeals the minimum wage exemption and phases out the overtime exemption for persons engaged in handling telegraph messages for the public under an agency or contract arrangement with a telegraph company, if they are so engaged in retail or service establishments exempt under section 13(a)(2) and if the revenues for such messages are less than $500 a month, as follows: 48 hours in the first year beginning with the effective date of the 1974 Amendments, 44 hours in the second year; and repealed thereafter.

Section 11

This section amends section 13(b)(4) relating to fish and seafood processing employees, by phasing out the overtime exemption for such workers, as follows. 48 hours in the first year after the effective date of the 1974 Amendments; 44 hours in the second year; and repealed thereafter.

Section 12

This section amends section 13(b)(8) as it relates to nursing home employees by replacing the limited overtime exemption for employees of nursing homes (overtime compensation required for hours of employment in excess of 48 hours in a week) by the overtime exemption

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital *or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises* shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) No public agency shall be deemed to have violated subsection (a) with regard to any employee engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of twenty-eight consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed for his employment in excess of—

(1) one hundred and ninety-two hours in each such twenty-eight day period during the first year from the effective date of the Fair Labor Standards Amendments of 1974;

(2) one hundred and eighty-four hours in each such twenty-eight day period during the second year from such date;

(3) one hundred and seventy-six hours in each such twenty-eight day period during the third year from such date;

(4) one hundred and sixty-eight hours in each such twenty-eight day period during the fourth year from such date; and

(5) one hundred and sixty hours in each such twenty-eight day period thereafter.

(l) Subsection (a)(1) shall apply with respect to any employee who in any workweek is employed in domestic service in a household unless such employee's compensation for such work would not because of section 209(g) of the Social Security Act constitute "wages", for purposes of title II of such Act.

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a)

without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek.

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsecetion shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employeee's regular employment.

WAGE ORDERS IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 8. (a) The policy of this Act with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment, the objective of [the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry.] *the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c).* The Secretary of Labor shall convene an industry committee or committees, appointed pursuant to section 5, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of

93D CONGRESS 2d Session | SENATE | REPORT No. 93-758

FAIR LABOR STANDARDS AMENDMENTS OF 1974

MARCH 28, 1974.—Ordered to be printed

Mr. WILLIAMS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 2747]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2747) to amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974".

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201–219).

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6 (a) (1) is amended to read as follows:

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;".

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less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee.

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committtee convened under section 8) fixing a higher minimum wage rate."

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)". (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

FEDERAL AND STATE EMPLOYEES

SEC. 6. (a)(1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

(2) Section 3(e) is amended to read as follows:

"(e)(1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

(B) by striking out "or" at the end of paragraph (3),

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or",

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

(6) Section 3 is amended by adding after subsection (w) the following:

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.".

(b) Section 4 is amended by adding at the end thereof the following new subsection:

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.".

(c)(1)(A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection:

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

CHAPTER 1078 OF THE ACTS OF 1973, AS AMENDED

Joint Labor Management Committee

. . . .

Section 4A.

(1)(a)(i) There shall be in the executive office of labor, but not subject to the jurisdiction thereof, a committee to be known as the joint labor-management committee, in this section referred to as the

committee. The committee shall be composed of fourteen members, including a chairman and a vice-chairman and such alternate members as the committee shall approve. Twelve committee members shall be appointed by the governor as follows: three firefighters from nominations submitted by the Professional Firefighters of Massachusetts, International Association of Firefighters, AFL-CIO; three police officers from nominations submitted by the International Brotherhood of Police Officers, NAGE, SEIU, AFL-CIO, and the Massachusetts Police Association; and six from nominations submitted by the Advisory Commission on Local Government established under section sixty-two of chapter three of the General Laws. Said twelve members shall be appointed for a term of three years; provided however that in making his initial appointments, the governor shall appoint one member nominated by said professional firefighters organization for a term of one year, one such member for a term of two years, and one such member for a term of three years; one member nominated by said professional police organization for a term of one year, one such member for a term of two years, and one such member for a term of three years; and two members nominated by said advisory commission for a term of one year; two such members for a term of two years, and two such members for a term of three years. Any member of the committee may be removed by the governor for neglect of duty, malfeasance in office, or upon request by the nominating body.

(ii) The chairman and vice-chairman shall be nominated by the committee, and appointed by the governor for a term of three years. The chairman shall be the chief administrative officer of the committee. The vice-chairman shall assist the chairman and may be authorized by the chairman to act for him in his absence and shall have the full powers of the chairman when so authorized and he shall vote only in the absence of the chairman.

(iii) Alternate members may serve for such term and under such conditions, as the committee shall determine. Said professional police organizations, professional fire organizations, and said advisory commission shall specify alternate members to represent their respective members, subject to the approval of the full committee.

(b) In matters exclusively pertaining to municipal firefighters, committee members nominated for appointment by professional police officer organizations shall not vote. In matters exclusively pertaining to municipal police officers, committee members nominated for appointment by professional firefighter organizations shall not vote. All committee members shall be eligible to vote on matters of common and general interest. The number of committee members representing the local government advisory committee and the number of committee members representing the professional firefighter or police organizations entitled to vote on any matter coming before the committee shall be equal. The chairman may cast the deciding vote on any matter relating to a dispute concerning negotiations over the terms and provisions of a collective bargaining agreement, including any decision to take jurisdiction over a dispute.

(c) Members and alternate members of the committee shall serve without compensation, but shall be entitled to reimbursement, out of any funds available for the purpose, for reasonable travel or other expenses actually incurred in the performance of their committee duties. The chairman and vice-chairman shall be compensated for time spent for the committee business on a per diem basis at a rate to be determined by the secretary of administration and finance. The committee may purchase supplies and equipment, and may employ clerical staff and other personnel who shall not be subject to the provisions of section nine A of chapter thirty or chapter thirty-one of the General Laws, as they deem necessary to the conduct of committee business out of any funds available for the purpose. Members and alternate members of the committee employed by a municipality shall be granted leave, if on duty, by the municipal employer for those regularly scheduled work hours spent in the performance of committee business.

(2)(a) The committee shall have oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters. The committee shall, at its discretion, have jurisdiction in any dispute over the negotiations of the terms of a collective bargaining agreement involving municipal firefighters or police officers; provided, however, that the committee may determine whether the proceedings for

the prevention of any prohibited practices filed with the labor relations commission shall or shall not prevent arbitration pursuant to this section.

(b) After notification by the committee, the parties to any municipal police and fire negotiations shall file with the committee, in such time as the committee orders:

(1) copies of all requests to bargain and of all bargaining agenda;

(2) notification of the apparent exhaustion of the processes of collective bargaining;

(3) notification of all pending unfair labor practice proceedings between the parties;

(4) copies of any fact-finding reports;

(5) notification of any impasse extending beyond completion of fact-finding procedures;

(6) copies of any collective bargaining agreements, and any relevant personnel ordinances, by-laws, and rules and regulations; and

(7) such other information as the committee may reasonably require.

(c) Notwithstanding the provisions of the first paragraph of section nine of chapter one-hundred and fifty E of the General Laws to the contrary, when either party or the parties acting jointly to a municipal police and fire collective bargaining negotiations believe that the process of collective bargaining has been exhausted the party or both parties shall petition first the committee for the exercise of jurisdiction and for the determination of the apparent exhaustion of the process of collective bargaining.

The committee shall forthwith review the petition and shall make a determination within thirty days whether to exercise jurisdiction over the dispute. Subject to the second paragraph of clause (d) of this subdivision, if the committee declines to exercise jurisdiction over the dispute or fails to act within thirty days of receipt of the petition on jurisdiction, the petition shall be automatically referred to the board of arbitration and conciliation hereinafter referred to as the board, for disposition in accordance with the provisions of section nine of chapter one hundred and fifty E of the General Laws.

The petition to the committee shall identify the issues in dispute, the parties, the efforts of the parties to resolve the dispute and such other information as may be prescribed in the rules of the committee.

Said board shall not accept any petition from a party to a municipal police and fire negotiation under section nine of chapter one hundred and fifty E of the General Laws if the petition has not been first reviewed in accordance with the provisions of this section by the committee.

(d) The committee or its representatives or mediators appointed by it may meet with the parties to a dispute, conduct formal or informal conferences, and take other steps including mediation to encourage the parties to agree on the terms of a collective bargaining agreement or the procedures to resolve the dispute. The committee shall make every effort to encourage the parties to engage in good faith negotiations to reach settlement through negotiation or mediation, and may, upon a vote of the committee, initiate fact-finding proceedings.

The committee after consultation with the board of arbitration and conciliation may remove at any time from the jurisdiction of the board any dispute in which the board has exercised jurisdiction, and the board shall then take no further action in such dispute. The committee may, at any time, remand to the board any dispute over which the committee has exercised jurisdiction. The board shall assist and cooperate with the committee in its performance of the committee's duties. Disputes over which the committee does not exercise jurisdiction shall be governed by all other applicable provisions of law.

(3)(a) The committee shall have exclusive jurisdiction in matters over which it assumes jurisdiction and shall determine whether issues in negotiations have remained unresolved for an unreasonable period of time resulting in the apparent exhaustion of the processes of collective bargaining. If the committee makes such a determination it is authorized to hold a hearing to identify:

(1) the issues that remain in dispute;

(2) the current positions of the parties;

(3) the views of the parties as to how the continuing dispute should be resolved; and

(4) the preferences of the parties as to the mechanism to be followed in order to reach a final agreement between the parties.

If the committee, after a full hearing, finds there is an apparent exhaustion of the processes of collective bargaining which constitutes a potential threat to public welfare, it shall so notify the parties of its findings.

Within ten days of such notification, the committee shall also notify the parties of its intent to invoke such procedures and mechanisms as it deems appropriate for the resolution of the collective bargaining negotiations. Such procedures and mechanisms may include, but need not be limited to:

(1) any form of arbitration, including, but not limited to, conventional arbitration, issue by issue or last best offer;

(2) arbitration for all or any issue in dispute; provided, however, that the committee may direct the parties to conduct further negotiations concerning issues not specified for arbitration;

(3) single arbitrators, including the chairman, vice-chairman or an outside neutral arbitrator;

(4) an arbitration board, which may include labor and public management representatives as voting or non-voting members;

(5) separate stages or procedures for the executive and legislative bodies of a municipality.

The factors to be given weight in any decision or determination resulting from the mechanism or procedures determined by the committee to be followed by the parties in order to reach final agreement pursuant to this section shall include, but not be limited to:

(1) such an award which shall be consistent with: (i) section twenty-one C of chapter fifty-nine of the General Laws, and (ii) any appropriation for that fiscal year from the fund established in section two D of chapter twenty-nine of the General Laws;

(2) the financial ability of the municipality to meet costs. The commissioner of revenue shall assist the committee in determining such financial ability. Such factors which shall be taken into consideration shall include but not be limited to: (i) the city, town, or district's state reimbursements and assessments; (ii) the city, town or district's long and short term bonded indebtedness; (iii) the city, town, or district's estimated share in the metropolitan district commission's deficit; (iv) the city, town, or district's estimated share in the Massachusetts Bay Transportation Authority's deficit; and (v) consideration of the average per capita property tax burden, average annual income of members of the community, the effect any accord might have on the respective property tax rates on the city or town;

(3) the interests and welfare of the public;

(4) the hazards of employment, physical, educational and mental qualifications, job training and skills involved;

(5) a comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities;

(6) the decisions and recommendations of the factfinder, if any;

(7) the average consumer prices for goods and services, commonly known as the cost of living;

(8) the overall compensation presently received by the employees, including direct wages and fringe benefits;

(9) changes in any of the foregoing circumstances during the pendency of the dispute;

(10) such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service or in private employment;

(11) the stipulation of the parties.

Any decision or determination resulting from the mechanism or procedures determined by the committee if supported by material and substantive evidence on the whole record shall be, subject to the approval by the legislative body of a funding request as set forth in this section, binding upon the public employer and employee organization, as

set forth in chapter one hundred and fifty E of the General Laws, and may be enforced at the instance of either party or the committee in the superior court in equity; provided, however, that the scope of arbitration in police matters shall be limited to wages; hours, and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees; and provided, further, that the scope of arbitration in firefighter matters shall not include the right to appoint and promote employees. Assignments shall not be within the scope of arbitration; provided, however that the subject matters of initial station assignment upon appointment or promotion shall be within the scope of arbitration. The subject matter of transfer shall not be within the scope of arbitration, provided however, that the subject matters of relationship of seniority to transfers and disciplinary and punitive transfers shall be within the scope of arbitration. Notwithstanding any other provisions of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum manning of shift coverage, with an employee organization representing municipal police officers and firefighters. Nothing in this section shall be construed to include within the scope of arbitration any matters not otherwise subject to collective bargaining under the provisions of chapter one hundred and fifty E of the General Laws. The employer shall submit to the appropriate legislative body within thirty days after the date on which the decision or determination is issued a request for the appropriation necessary to fund such decision or determination, with his recommendation for approval of said request. Notwithstanding the foregoing, where the legislative body is a town meeting, such request shall be made to the earlier of (i) the next occurring annual town meeting, or (ii) the next occurring special town meeting. The employer and the exclusive employee representative shall support any such decision or determination in the same way and to the same extent that the employer or the exclusive representative, respectively, is required to support any other decision or determination agreed to by an employer and an exclusive employee representative pursuant to the provisions of said chapter one hundred and fifty E of the General Laws. If the municipal legislative body votes not to approve the

request for appropriation, the decision or determination shall cease to be binding on the parties and the matter shall be returned to the parties for further bargaining. The committee may take such further action as it deems appropriate, including without limitation, inquiring as to the municipal legislative body's vote.

The commencement of a new municipal finance year prior to the final awards by the arbitration panel shall not be deemed to render a dispute moot, or to otherwise impair the jurisdiction or authority of the arbitration panel or its award. Any award of the arbitration panel may be retroactive to the expiration date of the last contract.

If a municipal employer, or an employee organization willfully disobeys a lawful order of enforcement pursuant to this section, or willfully encourages or offers resistance to such order, whether by strike or otherwise, the punishment for each day that such contempt continues may be a fine for each day to be determined at the discretion of said court. Such fine shall be in addition to such other remedies as the court may determine.

No member of a unit of municipal police officers or firefighters who is employed on a less than full-time basis shall be subject to the provisions of this clause.

When the parties to a municipal police or fire collective bargaining negotiation jointly design their own dispute resolution procedures, they may divest the committee of jurisdiction by presenting a written agreement of their procedures to the committee; provided, however, that the committee finds that said procedures provide for a final resolution of the dispute, without resort to strike, job action, or lockout; and provided, further that if the committee subsequently finds that either of the parties fails to abide by said procedures, the committee shall assume jurisdiction of the dispute. (Section 3 of chapter five hundred and eight-nine of the acts of 1987 provides that clause (a) of subdivision (3) of section four A shall cease to be operative on April first, nineteen hundred and ninety, and any arbitration proceeding pending on April first, nineteen hundred and ninety shall be completed under the provisions of said clause (a).)

(b) In any dispute resolution conducted by other than the committee or its members or staff, the parties shall share and pay equally the costs involved in such resolution; provided, however, that pursuant to a vote of the committee and subject to the availability of funds for the purpose thereof, said costs may be paid by the committee.

(c) The committee shall have jurisdiction in any particular dispute concerning job titles over which the parties have negotiated or to remove specific job titles from collective bargaining for individuals performing certain specific management duties.

(4) The committee shall promulgate rules and regulations necessary for the performance and enforcement of the responsibilities and powers set forth in this act; provided, however, that said committee file a copy of any regulations or amendments thereto with the clerks of the senate and the house of representatives who, with the approval of the president of the senate and speaker of the house of representatives, shall refer such regulations to an appropriate committee of the general court. Within thirty days after such filing, the appropriate committee of the general court shall hold a hearing on such regulations and shall issue a report and file a copy with the joint labor-management committee. Said joint labor-management committee shall consider such report and make revisions in the regulations as it deems appropriate in view of such report and shall forthwith file a copy of the final regulations with the chairman of the committee of the general court to which the regulations were referred.

On or before the first Wednesday of each year in which the provisions of clause (a) of subdivision (3) of this section are in effect, the committee shall file with the clerks of the senate and the house of representatives, and with the chairmen of the special commission on dispute resolution established under chapter two of the resolves of nineteen hundred and eighty-four, a report assessing the efficacy of the provisions of said clause in decreasing the length and severity of municipal public safety bargaining disputes, and the other impacts, if any, of said provisions of the collective bargaining process. Such report shall include a full listing of any matters in which the provisions of said

clause were invoked during the previous twelve months, and the final disposition of any such matters, together with the committee's recommendations, if any, for the modification or extension of said provisions.

The provisions of chapter thirty A of the General Laws, unless otherwise provided, shall apply to the committee.

The committee shall have the power to administer oaths to require by subpoena the attendance and testimony of witnesses, production of books, records, and other evidence relative to or pertinent to the issues presented to the committee[2]

[2]Chapter 589 of the acts of 1987, which amended Chapter 1078 of the Acts of 1973 provides that, notwithstanding the provisions of section one of this act to the contrary, any person serving as a member of the joint labor-management committee immediately preceding the effective date of this act shall continue in such service for a period of one year, after which period initial appointments shall be made by the governor, pursuant to the provisions of this act. It further provides that the terms of any collective bargaining agreement in effect prior to the effective date of this act shall remain in full force and effect until the expiration date of said agreement.