Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
SJC No. 12054

PLYMOUTH COUNTY

NANCY CHADWICK,
PLAINTIFF-APPELLANT,

v.

DUXBURY PUBLIC SCHOOLS & OTHERS,
DEFENDANTS-APPELLEES.

ON DIRECT APPELLATE REVIEW FROM A DECISION
OF THE PLYMOUTH SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES, INC. AND MASSACHUSETTS MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE DUXBURY PUBLIC SCHOOLS

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Dated: April 11, 2016

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Massachusetts Association of School Committees, Inc., ("MASC") a Massachusetts Corporation incorporated under G.L. c. 180, is located at One McKinley Square, Boston, MA 02109. The members of MASC consist of approximately three hundred and twenty Massachusetts school committees comprising cities, towns and regional school districts. MASC represents the interests of its members in supporting and enhancing public elementary and secondary education in the Commonwealth. MASC's general interest in the matter presented concerns the importance of ascertaining all pertinent evidence necessary to arrive at the truth in order to insure a correct result in litigation. The creation of a union-member testimonial privilege may shield evidence necessary to a school district that has an effect upon the outcome of the litigation. Both the cost of the litigation and any monetary award that may result therefrom will ultimately be borne by the taxpayers, either directly or through increased cost for liability insurance. The issue presented to the Court has substantial implications for our membership.

The Massachusetts Municipal Lawyers Association ("MMLA"), formerly known as the City Solicitors and Town Counsel Association, is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth of Massachusetts. The members of the MMLA include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. MMLA's mission is to promote better local government through the advancement of municipal law. The issue presented to the Court has substantial implications for our membership.

MASC and MMLA request leave of the Court to file a brief as *amici curiae* in support of the Duxbury Public Schools and urge this Court to uphold the Superior Court opinion and the opinion of the single Justice of the Massachusetts Appeals Court and to decline to create a union-member privilege.

STATEMENT OF THE ISSUE BY THE COURT

Whether Massachusetts will recognize a union-member testimonial privilege, such that the plaintiff in this underlying case, in her employment discrimination action against her employer, would not be required to produce in discovery communications between herself and her union representatives.

SUMMARY OF THE ARGUMENT

The Plaintiff requests the creation by the Court of a union-member privilege that is based on her underlying employment discrimination claim. This presents the Court with a case of first impression. The Plaintiff places great reliance on a recently decided case by the Alaska Supreme Court Peterson v. State, 280 P.3d 559 (2012). In this case the Alaska Public Employee Relations Act (PERA), relied upon by the Alaska Supreme Court, has material differences from the corresponding Massachusetts statute G.L. c. 150E. The distinguishing provision of the Alaska law is its Declaration of Intent (AS 23.40.070), and no such provision is contained in the relevant Massachusetts law. The Alaska Supreme Court relied on PERA's Declaration of Intent to provide the rationale

for its decision in Peterson, and quoted directly from AS 23.40.070. The Peterson case was cited in Curry v. Contra Costa County, No. C-12-03940 (N.D. Cal. 2013) an age discrimination case. Curry distinguished Peterson and found that its conclusion rests on the Alaska's public employment statute. Without such a Declaration of Intent in the Massachusetts Public Employee Labor Relations law, the Court is deprived of the clear expression of legislative intent that the Alaska Court found both persuasive and determinative.

In Curry the defendant requested the production of all communication between Curry and her union, relating to alleged discrimination arising from her employment. Among the reasons for withholding the documents asserted by Curry was the union employee communication privilege. The Court rejected the rationale for withholding the production of documents due to Curry's failure to meet the burden of clarifying, explaining and supporting its objections. In an unpublished case Kyei v. Oregon Department of Transportation, 497 Fed. Appx. 711, 713 (9th Cir. 2012) the Court noted that neither the Supreme Court nor the Ninth Circuit precedents provide authority for a union-member union representative privilege. Not

only has the Peterson case been distinguished from Chapter 150E, but also, courts have not generally been receptive to the creation of the union-member privilege especially when its scope is extended to include civil litigation as opposed to grievance matters.

Massachusetts in a case examining the same chapter of the General Laws (G.L. c. 150E) as relied on by Chadwick, has established a principle that "it is expected that a radical departure from prior policy would be clearly indicated, and not left to doubtful implication." Newton quoting from School Committee of Danvers v. Tyman, 372 Mass. 106, 113 (1977). Chadwick has relied primarily on G.L. c. 150E to establish, by implication, the authority that purports to validate "a radical departure from prior policy" such as the recognition by this Court of a union-member privilege. In general, no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce a writing, or prevent another from doing the same. Mass. G. Evid. § 501 (2012). The creation of a union-member privilege would be a radical departure from the current status of Massachusetts law that does not recognize such a privilege. The material

difference in the Alaska and Massachusetts statutes renders the Peterson holding to be inapplicable to an analysis, by implication, of G.L. c. 150E that has been put forward by Chadwick. Furthermore, the failure of courts to adopt the holding in Peterson leads to the conclusion that Chadwick pursuant to Newton relies on doubtful implication and should not be the basis for the creation by the Court of a union-member privilege.

For all those reasons, the Superior Court's order as affirmed by the Single Justice of the Massachusetts Appeals Court should be upheld.

ARGUMENT

I. MASSACHUSETTS SHOULD NOT RECOGNIZE A UNION-MEMBER TESTIMONIAL PRIVILEGE SUCH THAT THE PLAINTIFF, IN HER UNDERLYING EMPLOYMENT DISCRIMINATION ACTION AGAINST HER EMPLOYER, WOULD BE ALLOWED TO SHIELD COMMUNICATIONS BETWEEN HERSELF AND HER UNION REPRESENTATIVES RELATED TO THE CASE.

A. The Recognition Of The Union-Member Privilege When It Has Been Created In A Few Jurisdictions Been Limited To Labor Relations Matters.

It is undisputed by the Parties to this action that a union-member testimonial privilege has not been recognized by the Massachusetts Legislature or Courts. The Superior Court found that "[W]hile there are a handful of cases from other jurisdictions supporting

the recognition of a union-member privilege, the weight of the authority is against judicial creation of such a privilege at this time." Chadwick v. Duxbury Public Schools, Plymouth Superior Court PLCV2014-01305 pg. 5.

The seminal case that provided the foundation for the union-member privilege emerged from the National Labor Relations Board. In Cook Paint and Varnish Co., 258 N.L.R.B. 1230 (1981) the U.S. Court of Appeals for the District of Columbia, 648 F.2d 712 (1981) remanded the case to the Board for further proceedings consistent with its holding that there may be fundamental differences between an interview of an employee and an interview of a union steward. Furthermore, the Court cautioned the Board against promulgating a "blanket rule" immunizing stewards from investigatory interviews relating to pending arbitrations. The Court held that "As part of a contractual arbitration procedure, an employer may conduct a legitimate investigatory interview in preparation for a pending arbitration. … however, that interview may not pry into protected union activities." 648 F.2d at 723. The Board held that the employer's interview of the Union Steward, in the

circumstances of this case, constituted an unwarranted infringement on protected union activity and, therefore violated Section 8(a)(1) of the National Labor Relations Act. The Board found that the Union Steward's sole involvement from the beginning was due to his union position. The Steward did not get involved in this matter as a result of his own misconduct nor was he an eyewitness to the incident. Nonetheless, he was ordered by the employer to hand over his notebook that he kept to carry out his union functions, and that he informed the employer contained, among other matters, contemporaneous notes relating to the pending arbitration. Ultimately, the Board noted the Court's admonition against establishing a "blanket rule" and further emphasized that its ruling does not mean that all discussions between employees and stewards are confidential and protected by the Act, nor did the decision of the Board hold that stewards are, in all instances, insulated from employer interrogations. In summary the NLRB decision was limited and carefully circumscribed, and does not apply in Chadwick, which involves a civil lawsuit concerning employment discrimination.

The plaintiff-appellant relies heavily upon a recently decided case by the Alaska Supreme Court, Peterson v. State, 280 P.3d 559 (2012), a wrongful termination suit in which the State subpoenaed the union representative to appear for a deposition with the union's grievance file. The Alaska Supreme Court granted the employee's petition for review to consider if a union-relations privilege exists in Alaska. The Court first ruled out the application of the attorney-client privilege because the Alaska Evidence Rule 503 did not extend to union representation.[1] The Court concluded no evidentiary privilege currently recognized is applicable.

It then decided that the privilege exists by implication of Alaska statutes, thereby reversing the Superior Court ruling and remanding the case to the lower court for the privilege to be applied to the discovery dispute. The Alaska Supreme Court has the

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[1] First, a union representative is not a lawyers representative, which is defined as "one employed to assist the lawyer in the rendition of professional legal services." … "Second, a union representative is not exclusively an employee's representative … a union representative is more accurately characterized as a representative of the union collectively, and not an employee individually." Id., 280 P.3d at 561, 562.

authority pursuant to Evidence Rule 501 to recognize new privileges.[2]

The Peterson case cited in addition to Cook Paint and Varnish, the City of Newburgh v. Newman, 70 A.D.2d 362 (N.Y. App. Div. 1979). In Newburgh the President of the Police Union, who was also a member of the police department filed an improper practice charge against the police commissioner and the City alleging that it was improper for the employer to question the union president regarding his communications with a union member who had sought his assistance concerning disciplinary charges that had been filed against him. The Supreme Court of New York, Appellate Division, Third Department[3] after finding the Union's contention that the decision of the Board to find a privilege is on a par with the attorney-client privilege to be

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[2] Evidence Rule 501 provides that "except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person … has a privilege."

[3] Unlike Massachusetts and most other states the Supreme Court of N.Y. is the trial level court of general jurisdiction and the highest court of New York is the Court of Appeals.

without merit, the Court specifically limited its application. The Court stated as follows:

> Any privilege established by the decision of the board is strictly limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty.

Newburgh, 70 A.D.2d at 366. Such a privilege as found in Newburgh would provide no benefit to the plaintiff-appellant in the private action case before you.

In another case referenced in the Peterson decision Seelig v. Shepard, 578 N.Y.S.2d 965 (N.Y. Ct. 1991), the Court revisited the scope of communications covered by the union-relations privilege as determined in Newburgh, supra. A New York City commissioner investigating correction officers issued a subpoena on Seelig, the corrections officers' union president, seeking information. Seelig sought to quash the subpoena, arguing that any information he may have emanates from his role as union president and is privileged under Newburgh. The Seelig Court denied the motion to quash and, by way of analogy to the attorney-client privilege found that the union-

relations privilege is not absolute and does not protect communications between the union president and non-union members. Nonetheless the Peterson Court relying, in part, on Seelig concluded that the Alaska statutory scheme concerning public sector labor relations, by implication, included a union-relations privilege. Peterson, 280 P.3d at 564. The Peterson decision limited the union-relations privilege to:

> communications made: (1) in confidence; (2) in connection with representative services relating to anticipated or ongoing disciplinary proceedings: (3) between an employee (or the employees attorney) and union representatives; and (4) by union representatives acting in official representative capacity. The privilege may be asserted by the employee or by the union on behalf of the employee. Like the attorney-client privilege, the union-relations privilege extends only to communications, not to underlying facts.

Peterson, 280 P.3d at 567.

The Peterson Court further considered but rejected the case of American Airlines v. Superior Court, 114 Cal. App. 4th 881, 8 Cal. Rprtr. 3d 146 (2003) concerning a wrongful termination lawsuit filed by an employee, who claimed that his union representative had information that would support his claims of racial discrimination. The union representative refused under oath to answer questions

identifying other union employees, who told him about the discrimination and asserted a union representative-union member evidentiary privilege. The American Airlines Court concluded that no union member privilege exists and directed the trial court to grant American's motion to compel the testimony of the union representative. American Airlines rejected the argument that the California Labor Code implies such a privilege, id. at 150-151, which is contrary to the conclusion reached in Peterson's review of the Alaska Public Employment Relations Act. The Peterson decision disregarded American Airlines, in part, because the union was formed under the Railway Labor Act and not the National Labor Relations Act and, because this case focused broadly between a union official and other union employees. Peterson, 280 P.3d at 566.

The Peterson case was cited in Curry v. Contra Costa County, No. C-12-03940 (N.D. Cal. 2013). In Curry, the County requested production of all communications between Curry and her union, Local One, relating to discrimination or harassment based on age and retaliation arising out of her employment with the County. Id. at 2. Curry withheld documents on the basis of the union employee communication privilege,

the right to privacy and the attorney-client privilege. The Court rejected all of the reasons for withholding the documents put forward by the plaintiff. The party opposing discovery has the burden of showing that discovery should not be allowed, and also has the burden of clarifying, explaining and supporting its objections. LA. Pac. Corp. v. Money Market 1 Institutional Inv. Dealer, 285 F.R.D. 481, 485 (N.D. Cal. 2012). Particularly, Curry distinguished Peterson and found that "As Local One has not identified authority for the recognition of a union-employee communications privilege in this context, the court declines to recognize a privilege in this case." Id. at 7.

There is no published Ninth Circuit authority on the establishment of such a privilege. The Ninth Circuit has expressed its opinion on this privilege in an unpublished case, Kyei v. Oregon Department of Transportation, 497 Fed. Appx. 711, 713 (9th Cir. 2012). The Court noted that neither the Supreme Court nor the Ninth Circuit precedents provide authority for a union member-union representative privilege. Also, the court chose not to continue the evolutionary development of testimonial privileges by recognizing a

new privilege in this case. Curry, at 5. Also, a number of district courts in the Ninth Circuit in grievance proceedings have concluded that no privilege protects union-employee communications.[4]

The union in Curry cites Black v. Potter, No. C 08-01344 SI, 2010 WL 532408, at * 1-2 (N.D. Cal. Feb. 6, 2010) in support of its position, but the court in Curry distinguished the Potter case, involving the protection of confidential employee-union communications where the union representative was acting as the employee's advocate, due to their finding that the EEOC statute furthered the rationale

[4] Dang v. Sutter's Place, Inc., No. C 10-02181 RMW (PSG), 2012 WL2906109, at *3 (N.D. Cal. Jul. 13, 2012), the court concluded that communications between a union and the plaintiff, who had been represented by the union in a related grievance, were not privileged. In another case, the court held that communications between a plaintiff, her attorney friend, and union representatives were not privileged, citing Dang and noting that the plaintiff had cited no authority to support the proposition that there is a privilege for union-employee communications. Fox v. Shinseki, No. CV 11-04820 EDL, 2013 U.S. Dist. LEXIS 82087, at 14, 15 (N.D. Cal. Jun 11, 2013) other district courts in the Ninth Circuit have reached the same conclusion. See Parra v. Bashas' Inc., No. CIV 02-591 PHXRCB, 2003 WL 25781409 at 4, 5 (D. Ariz. Oct. 2, 2003); see also McCoy v. SW Airlines Co. Inc., 211 F.R.D. 381, 387-88 (C.D. Cal. 2002) (expressly refusing to extend the attorney-client privilege to protect communications between pilots and their union representatives made in preparation for grievance hearings as cited in Curry at 5, 6.

of the attorney-client privilege. However, the court distinguished Potter, because the communications did not arise, from an EEOC proceeding, rather Curry involved a grievance procedure that does not contain the same language as that found in the EEOC law. Curry, at 6. The Ninth Circuit has been very careful in the adoption of privileges, and that is particularly true when they have considered the union member-representative communications privilege. Even after the Peterson case, the Ninth Circuit whose jurisdiction includes Alaska, has consistently rejected recognizing such a privilege as has its district courts. Peterson remains an outlier in its recognition of the extension of the union relations privilege to a civil suit filed by an individual employee as Chadwick has brought before this court.

B. The Peterson Case Upon Which Plaintiff Primarily Relies Has Significant Differences From The Public Employee Labor Relations Statute Found In G.L. c. 150E That Renders The Comparison Inapplicable And Of Doubtful Implication.

The court in Peterson concluded that "the privilege exists by implication of Alaska statutes." Id., 280 P.3d at 560. Similar theories that rely on doubtful implication to radically depart from prior

policy have been heard and rejected by the Court, when considering the power vested by statute in school committees. In the case of the School Committee of Newton v. Newton School Custodians Association, 438 Mass. 739 (2003) (concerning an arbitration involving the hiring authority of a principal), the Court reviewed several provisions of the comprehensive statutory scheme contained in G.L. c. 150E, concerning Public Employee Labor Relations, including Sections 6, 7, and 8. The Court ultimately concluded that while the arbitrator had the authority to determine whether the contract had been violated, he did not have the power to effectively require the hiring of a particular individual. This Chapter of the General Laws has been heavily relied upon by Chadwick, through implication, to provide the basis for this Courts recognition of a union-member communication privilege. Chadwick must argue, by way of implication, that c. 150E provides the basis for the recognition of the privilege, because the law provides no explicit provision or reference to any such privilege. Indeed there is no Massachusetts case law concerning the union-representative communications privilege, as acknowledged by Chadwick.

The union in Newton contended that the provisions of G.L. c. 150E, § 8, control the arbitrability issue in the case and provided a substantive right to collective bargaining over matters of job appointments. Id., 438 Mass. at 750. The Court rejected the union's contention and found that the plain language of section 8, merely permits but does not require the parties to make job appointments subject to contractual binding arbitration. Furthermore, the Court noted that G.L. c. 150E, § 7, which enumerates statutory provisions that must be overridden when in conflict with contrary terms of a collective bargaining agreement makes no mention of the hiring statute in this case. G.L. c. 71, § 59B. Most pertinently the Newton Court, cited School Committee of Danvers v. Tyman, 372 Mass. 106, 113 (1977) ("Whenever the Legislature has limited the powers of school committees, it has done so in express terms, and it is expected that a radical departure from prior policy would be clearly indicated, and not left to doubtful implication.") Chadwick has relied exclusively on c. 150E to establish, by implication, any authority that purports to validate a radical departure from prior policy such as the recognition by

this Court of a union-member privilege. In general, no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce a writing, or prevent another from doing the same. Mass. G. Evid. § 501 (2012). Testimonial privileges are exceptions to the general duty imposed on all people to testify. Commonwealth v. Corsetti, 387 Mass. 1, 5 (1982). Thus, the recognition of privileges contravenes the "fundamental maxim that the public … has a right to every man's evidence." [463 Mass. 167] U.S. v. Bryan, 339 U.S. 323, 331 (1950), quoting J. Wigmore, Evidence § 2192, at 70 (3d ed. 1961). The recognition of the union-member privilege by this Court would be "exceptional," and, a "radical departure" from the general rule and prior policy, which does not recognize such a privilege.

Also, the recognition of the union-member privilege is based upon doubtful implication. Chadwick has admitted that the references drawn from G.L. c. 150E were by implication. The Newton decision supra, involved a careful review of the same Chapter of the General Laws relied upon, by Chadwick and found that a radical departure from prior policy should not be left to doubtful implication. The decision in

Peterson, which forms the basis of Plaintiff's argument in support of finding a union-member privilege was reached by implication, and has not been followed in courts within the Ninth Circuit, which casts doubt upon its precedential value. However, the Alaska statute provided guidance that is absent from the comparable Massachusetts statute.

The Peterson decision relied primarily on Alaska's Public Employment Relations Act (PERA) which bears some similarities to the corresponding Massachusetts statute; however, it includes a Declaration of Policy that is not found in G.L. c. 150E. The Peterson Court essentially adopted the position of the AFL-CIO when they argued:

> … that a statutory-based union relations privilege protecting grievance-related communications between employees and their union representatives should be recognized to "harmonize PERA's strong public policy in favor of contractual resolution of labor disputes with the civil discovery rules' presumption in favor of disclosure." … we agree with AFL-CIO and find the privilege implied in our statutes. PERA states that "the enactment of positive legislation establishing guidelines for public employment relations is the best way … to provide a rational method for dealing with disputes and work stoppages." …

Peterson, 280 P.3d at 564, 565 (emphasis added). In Peterson the interpretation of the PERA statute was

aided by a Declaration of Policy[5] as contained in the Alaska Public Employment Relations Act, from which the Court took the above underlined quote. No such

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[5] AS 23.40.070 Declaration of Policy.

> The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect, and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by ensuring effective and orderly operations of government. These policies are to be effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining; (2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment; (3) maintaining merit-system principles among public employees. (Emphasis added.)

Declaration or Preamble is found in Chapter 150E. When the Massachusetts Legislature deems it important to provide guidance as to the intent of a law it does so as part of the legislation. For example, the Commonwealth's Goals in crafting the 1993 Education Reform Act is clearly stated in G.L. c. 69, § 1, and gives guidance to a Court as to the legislative intent of the Act. See Zagaeski v. School Committee of Lexington, 469 Mass. 104, 112, 113 (2014). No such guidance is provided by Massachusetts regarding the Public Employee Labor Relations Act (G.L. c. 150E). This Court does not have a Declaration of Policy or Commonwealth's Goals to provide persuasive guidance to them that proved so pivotal in the Peterson case, and distinguishes that case from Chadwick and further renders the Plaintiff's reliance on its comparison of the Massachusetts (G.L. c. 150E) and the Alaska PERA statutes inapplicable. The material difference in the state statutes renders the Peterson finding to be flawed and inapplicable to an analysis by implication of G.L. c. 150E. Furthermore, the failure of courts to adopt the holding in Peterson strengthens the contention that reliance of Chadwick on this case is an example of doubtful implication as referenced in

Newton and should be rejected by the Court in this case. It is important to note that Peterson, a wrongful termination case arising from the Alaska PERA statute is the principal case cited by the Plaintiff that creates a union-member testimonial privilege in the context of a civil lawsuit. Otherwise, the cases cited by the Plaintiff concern the extension of the union-member privilege to collective bargaining or matters directly related thereto.

C. Plaintiff Has Failed To Show Real As Opposed To Speculative Harm That Has Accrued From The Absence Of A Privilege.

Dean Wigmore, an expert in the field of evidence, has constructed a framework for recognizing new common law privileges, which includes four conditions in order to render communications as privileged:

(1) The communications must originate in confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one, which, in the opinion of the community, ought to be sedulously fostered.

(4) The injury that would inure to the relation by disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[6]

The burden is on the plaintiff to establish that the injury to the relation is greater than the benefit gained for the correct disposal of the litigation. The plaintiff presents no arguments that relate to real harm as opposed to speculation as to the potential for harm. The parties to Massachusetts Collective Bargaining Agreements have functioned effectively without a union-member privilege and its alleged chilling effect on union-member communications since at least 1973, the year collective bargaining rights were extended to public sector employees, otherwise litigation on this matter would have long since been before the court. The plaintiff concedes that this is a case of first impression. The Court has previously stated "that the defendants' assertions (which are

[6] 8 J. Wigmore, Evidence § 2285 (McNaughton rev. 1961).

unsupported by any empirical evidence) are speculative in light of the long history of the Commonwealth and the lack of any showing of real harm that has accrued from the absence of the privilege." Babets v. Secretary of Executive Office of Human Services, 403 Mass. 230, 236 (1988). The Court in Babets declined to create a governmental privilege. We respectfully request that the Court decline to create a union-member privilege.

CONCLUSION

For the above-mentioned reasons it is the position of *amici curiae*, MASC and MMLA, that the judgment of the Superior Court and the Single Justice of the Massachusetts Appeals Court should be upheld.

Respectfully submitted,

Massachusetts Association of School Committees

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Dated: April 11, 2016

ADDENDUM

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KeyCite Yellow Flag - Negative Treatment
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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 69. Powers and Duties of the Department of Elementary and Secondary Education (Refs & Annos)

M.G.L.A. 69 § 1

§ 1. Intent of title

Effective: July 1, 2003
Currentness

It is hereby declared to be a paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children including a limited English proficient student as defined in section 1 of chapter 71A, and also, including a school age child with a disability as defined in section 1 of chapter 71B the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy. It is therefore the intent of this title to ensure: (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement.

Credits
Amended by St.1993, c. 71, § 27; St.2000, c. 159, § 134; St.2002, c. 218, § 1A.

Notes of Decisions (5)

M.G.L.A. 69 § 1, MA ST 69 § 1
Current through Chapter 71 of the 2016 2nd Annual Session

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Add. 1

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 59B

§ 59B. Principals; appointment; compensation; duties; appointment of other personnel

Effective: [See Text Amendments] to August 31, 2016
Currentness

The superintendent of a school district shall appoint principals for each public school within the district at levels of compensation determined in accordance with policies established by the school committee. Principals employed under this section shall be the educational administrators and managers of their schools and shall supervise the operation and management of their schools and school property, subject to the supervision and direction of the superintendent. Principals employed under this section shall be responsible, consistent with district personnel policies and budgetary restrictions and subject to the approval of the superintendent, for hiring all teachers, athletic coaches, instructional or administrative aides, and other personnel assigned to the school, and for terminating all such personnel, subject to review and prior approval by the superintendent and subject to the provisions of this chapter. The principal of any school which requires an examination for student admission shall be solely and exclusively responsible for hiring all teachers, instructional or administrative aides and other personnel, and for terminating all such personnel without the requirement of review or prior approval by the superintendent before said hiring or termination. This section shall not prevent one person from serving as the principal of two or more elementary schools or the use of teaching principals in such schools.

It shall be the responsibility of the principal in consultation with professional staff of the building to promote participatory decision making among all professional staff for the purpose of developing educational policy.

The school superintendent of a city or town or regional school district including vocational-technical schools, may also appoint administrators and other personnel not assigned to particular schools, at levels of compensation determined in accordance with policies established by the school committee.

Credits
Added by St.1973, c. 421. Amended by St.1993, c. 71, § 53; St.1994, c. 60, § 95; St.1996, c. 134, § 2.

Notes of Decisions (35)

M.G.L.A. 71 § 59B, MA ST 71 § 59B
Current through Chapter 71 of the 2016 2nd Annual Session

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Add. 2

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150E. Labor Relations: Public Employees (Refs & Annos)

M.G.L.A. 150E § 6

§ 6. Negotiations; meetings

Currentness

The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within the scope of negotiation.

Credits

Added by St.1973, c. 1078, § 2. Amended by St.1986, c. 412; St.1989, c. 470.

Notes of Decisions (93)

M.G.L.A. 150E § 6, MA ST 150E § 6
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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150E. Labor Relations: Public Employees (Refs & Annos)

M.G.L.A. 150E § 7

§ 7. Collective bargaining agreements; term; appropriation requests; provisions; legal conflicts, priority of agreement; review of agreement by retirement board

Effective: November 4, 2014
Currentness

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years; provided, however, that the employer and the exclusive representative through negotiation may agree to include a provision in a collective bargaining agreement stating that the agreement's terms shall remain in full force and effect beyond the 3 years until a successor agreement is voluntarily negotiated by the parties. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the commission and with the house and senate committees on ways and means forthwith by the employer.

(b) The employer, other than the board of higher education or the board of trustees of the University of Massachusetts, the chief justice for administration and management, a county sheriff, the PCA quality home care workforce council, the alcoholic beverage control commission, or the state lottery commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

(c) The provisions of this paragraph shall apply to the board of higher education, the board of trustees of the University of Massachusetts, the chief justice for administration and management, a county sheriff, the PCA quality home care workforce council, the department of early education and care with regard to bargaining with family child care providers, the alcoholic beverage control commission, Massachusetts Department of Transportation and the state lottery commission.

Every such employer shall submit to the governor, within thirty days after the date on which a collective bargaining agreement is executed by the parties, a request for an appropriation necessary to fund such incremental cost items contained therein as are required to be funded in the then current fiscal year, provided, however, that if such agreement first has effect in a subsequent fiscal year, such request shall be submitted pursuant to the provisions of this paragraph. Every such employer shall append to such request an estimate of the monies necessary to fund such incremental cost items contained therein as are required to be funded in each fiscal year, during the term of the agreement, subsequent to the fiscal year for which such request is made and shall submit to the general court within the aforesaid thirty days, a copy of such request and such appended estimate; provided, further, that every such employer shall append to such request copies of each said collective bargaining agreement, together with documentation and analyses of all changes to be made in the schedules of permanent and temporary positions required

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by said agreement. Whenever the governor shall have failed, within forty-five days from the date on which such request shall have been received by him, to recommend to the general court that the general court appropriate the monies so requested, the request shall be referred back to the parties for further bargaining.

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a ½) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(b ½) section seventeen *I* of chapter one hundred and eighty;

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight *I*, inclusive, and sections one hundred and eleven to one hundred and eleven *I*, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g ½) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section twenty-eight A of chapter seven;

(k) sections forty-five to fifty, inclusive, of chapter thirty;

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(*l*) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;

(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;

(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;

(*o*) section fifty-three C of chapter two hundred and sixty-two;

(p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;

(p ½) the third paragraph of section 58 of chapter 31;

(q) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

(e) If the commonwealth has agreed under a collective bargaining agreement with an employee organization to exercise statutory rights of the commonwealth regarding the removal of employees in a certain manner with respect to the members of that employee organization, then the commonwealth shall exercise such rights of removal in accordance with the terms of the collective bargaining agreement.

An employer entering into a collective bargaining agreement with an employee organization shall provide a copy of the agreement to the retirement board to which the employees covered by the agreement are members. All retirement systems shall maintain files of all active collective bargaining agreements which cover the systems members. The retirement board shall review collective bargaining agreements for compliance with chapter 32.

Notwithstanding any general or special law to the contrary, employee and employee exchange of tours shall be governed by this chapter.

Credits

Added by St.1973, c. 1078, § 2. Amended by St.1974, c. 589, § 1; St.1976, c. 480, § 21; St.1977, c. 278, § 4; St.1977, c. 937, § 3; St.1978, c. 478, § 77; St.1979, c. 342, § 13B; St.1980, c. 329, §§ 125, 126; St.1980, c. 354, § 17A; St.1983, c. 248; St.1986, c. 222; St.1987, c. 40; St.1991, c. 142, §§ 26, 27; St.1992, c. 379, §§ 31, 32; St.1996, c. 12, §§ 7, 8; St.1997, c. 66, § 23; St.1998, c. 9; St.1998, c. 194, §§ 186, 187; St.2003, c. 140, § 36, eff. July 1, 2003; St.2007, c. 42, § 8, eff. May 16, 2007; St.2009, c. 25, § 100, eff. July 1, 2009; St.2010, c. 359, § 24, eff. Oct. 15, 2010; St.2011, c. 176, § 54, eff. Feb. 16, 2012; St.2011, c. 198, § 1, eff. Nov. 22, 2011; St.2012, c. 189, § 3, eff. Oct. 30, 2012; St.2012, c. 236, eff. Nov. 4, 2012; St.2013, c. 38, § 110, eff. July 1, 2013; St.2014, c. 250, eff. Nov. 4, 2014.

Notes of Decisions (118)

M.G.L.A. 150E § 7, MA ST 150E § 7
Current through Chapter 71 of the 2016 2nd Annual Session

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M.G.L.A. 150E § 8

§ 8. Grievance procedure; arbitration

Currentness

The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supercede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one.

Credits

Added by St.1973, c. 1078, § 2. Amended by St.1978, c. 393, § 39; St.1988, c. 186, § 1; St.1989, c. 341, § 80.

Notes of Decisions (62)

M.G.L.A. 150E § 8, MA ST 150E § 8
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CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Stephen J. Finnegan

STEPHEN J. FINNEGAN