THE MUNICIPAL LAW QUARTERLY©

Vol. VI, Issue I

FALL

of Massachusetts Municipal Lawyers Association

formerly known as the City Solicitors and Town Counsel Association

This is a publication of MMLA and is not intended as a legal advice, which requires consultation with an attorney.

LETTER FROM THE PRESIDENT

Dear Colleagues:

This is the first opportunity as President of MMLA to address the membership. I want to thank everybody for their support of MMLA, and I especially want to thank Don Rider, City Solicitor of Marlborough and my predecessor as President. Don's leadership, wisdom and strong collegiality made it a pleasure as well as an honor to serve as Vice President under him, and I want to thank him for strengthening a great organization.

On August 4, Mark Cerel and Kathleen Colleary presented a stellar half-day program on A Year in Municipal Government and Finance, applicable to both cities and towns. The speakers were insightful and the materials will be of continuing relevance. In addition to Kathleen and Mark, Phil Lemnios, the Hull Town Manager, Jim Lampke, Don Rider and Barbara Saint André covered topics on the municipal year for both cities and towns, the town finance committee, town meeting process and procedure, and the authorization and approval of construction of a municipal building. Thank you one and all who were involved.

At the start of the program, I was honored to present the President's Award to Deirdre Roney, General Counsel to the State Ethics Commission, and the Robert W. Ritchie Award to Tom Urbelis, long time chair of the Amicus Committee, Past President of MMLA and participant at so many MMLA events.

Deirdre Roney has unstintingly and generously responded to questions posed by many municipal lawyers, mostly hypothetical of course, about potential conflicts of interest. She offers insights concerning all aspects of given situations that we lawyers describe and why our proposed courses of action in light of those situations may be either brilliant or bone-headed. Deirdre has been a friend of the municipal bar for the eight years she has been general counsel at the SEC, and we are profoundly grateful for her service to the law.

Tom Urbelis has been a leader of MMLA for many years. His advice on whether MMLA should file a brief in a given matter is based on meticulous analysis of the facts of the case at hand and the implications of a decision by the Supreme Judicial Court. If a particular decision would have either a beneficial or deleterious effect on municipalities generally, the recommendation would usually be to file. If the decision would be confined to a single incident or one municipality, then the advice would be not to file. Tom's service to MMLA and to municipal law has greatly enriched both, as his friendship and insight enrich all of us who know him.

Continued onto page 2

Inside this Issue

The MMLA Annual Conference and Meeting at the Red Jacket Beach Resort on Cape Cod was absolutely wonderful. Each session dealt with substantive matters reflected in the material that the presenters shared. Thanks go not only to the presenters, but to the Planning Committee: Angela Atchue, Kathleen Colleary, Margaret Hurley, and Matthew Feher. Well done! And, we look forward to seeing all of our members at next year's Conference.

Municipalities and municipal lawyers are facing new challenges. The Supreme Court decision in *Reed v. Gilbert*, 576 U.S. —, 135 S. Ct. 2218 (2015) is impacting sign codes, aggressive pan-handling ordinances and a variety of other municipal regulations which touch on the First Amendment. The "sharing economy" brought about by new technology has all of us grappling with things like Airbnb and other companies, which do not fit into the local regulatory scheme that governs the traditional economy. (The General Court thankfully took ride sharing services out of the municipal bailiwick). Drones, body-cams and dashcams and a host of other issues will present new challenges and new opportunities. Stay tuned!

Finally, I want to encourage everybody to become even more active in MMLA and to solicit new members from among your colleagues. MMLA is the best way to keep current in municipal law, and our members are never shy about giving each other "sanity checks" on questions of substance, practice and procedure. The MMLA List Serve is one of the best teaching tools available, and membership in the Social Law Library for those who qualify is an added bonus.

I look forward to seeing you at our monthly dinner meetings and at the MCLE Municipal Law Conference over the winter. And, remember to contribute articles, case briefs, pictures, etc. to the Quarterly by sending the same to Stacey Bloom and Angela Atchue!

Sincerely,

Henry C. Luthin

LETTER FROM THE EDITOR

This issue of the Municipal Law Quarterly marks our fifth anniversary. It is hard to believe that it was more than five years that a group of MMLA members met over lunch to talk about launching a new and improved Newsletter — as the Quarterly was called then. As we discussed ideas, it was clear that the group of us were committed to putting together a publication to help the MMLA membership expand their knowledge, learn from their colleagues, improve their practice and advance the MMLA.

In the five years since that meeting, the Quarterly has produced 16 issues; profiled 16 municipal law attorneys; and published 90 articles written by 44 different MMLA members. Over the last five years, the Quarterly has evolved from a municipal law newsletter to a journal publication, which reflects the depth and breadth of the articles in each issue. In 2014, we stepped up our game even further by employing the services of a Bond Printing and Marketing, a local, family-owned and operated company to perform the professional design and layout services for each issue.

During these last five years, the MMLA Executive Board has been a constant supporter of our efforts to improve and expand the Quarterly. Without their support the Quarterly would not exist in its current format. I am grateful for their encouragement and their dedication to the MMLA membership. They are not just colleagues, but friends.

The Quarterly comes together because of the efforts of our dedicated editorial board: Angela Atchue, Tim Harrington, Carol McGravey, Peter Mello and Jordan Shapiro. Without the work of Angela, Tim, Carol, Peter and Jordan, the Quarterly would have folded long ago. These dedicated MMLA members take time away from their busy municipal law practices to contribute articles to each edition of the Quarterly. I am grateful for their dedication and support. I would also like to pay special recognition and heartfelt thanks to managing editor Angela Atchue. It is not an exaggeration to say that the

Continued onto page 3

Quarterly would not exist without Angela's efforts. Angela has been a jack-of-all trade's for the Quarterly---proofing each issue, helping coordinate submissions, handling correspondence, working with our design firm and actually laying out the first 8 issues of the Quarterly herself. Angela has been a sounding board and cheerleader for the Quarterly and has been a good friend to me. I am forever indebted to her for all she has done and continues to do for the Quarterly and the MMLA.

The Quarterly is a testament to the membership of the MMLA. Without the support of the membership and the contributions to the Quarterly by our members, the Quarterly could not continue to publish. In our first issue, I wrote that I hoped the Quarterly would continue to provide MMLA members with the latest in municipal law news and continue to be informative. I believe we have delivered on that promise. Thank you for all of your contributions to the Quarterly. If you would like to contribute to a future edition, please contact either Angela or myself. For everyone at the Quarterly, I extend my heartfelt thanks and we look forward to the next five years.

Stacey G. Bloom, Esq.

Editor-in-Chief and MMLA Past President

MUNICIPAL SPOTLIGHT ON: Tom Urbelis, Esq.

Urbelis & Fieldsteel, LLP

1. **In what city/town were you born?**
   Amsterdam, New York
2. **Where did you attend college and law school?**
   Union College;
   University of Rochester (MBA);
   Boston College Law School
3. **What municipalities do you represent?**
   I am Town Counsel for Andover and North Andover. I also, represent other municipalities as Special Counsel in litigation and land use.
4. **What is your favorite city in the world outside of Massachusetts, and what could be learned from that city?**
   Rome, Italy with its rich history and ruins from 2,000 years ago providing a lesson in what can happen when a government goes from being a republic to being an empire.
5. **What is one of your proudest moments as a lawyer?**
   Working on Amicus Curiae Briefs for the Association over the years to help the advancement of Municipal Law.
6. **What is the most useful advice you could give regarding the practice of law?**
   Communicate with the clients as much as possible because municipal law can often be very confusing.
7. **What trip have you taken recently which you enjoyed?**
   I like to learn all I can about World War II. It was inspiring when I recently traveled down the Rhine River and saw landmarks that marked so much bravery by American troops.
8. **If you were not a lawyer, what would you do for work?**
   High school history teacher and basketball coach.
9. **When you are driving to court to argue an important motion, what might you be playing on the radio?**
   If the Red Sox are not playing, then Bob Seger, the Rolling Stones or folk music.
10. **What are your favorite books?**
    Historical nonfiction, most recently "20 Years in the Middle East" by Richard Engle.

PUBLIC RECORDS PROCEDURE CHECKLIST FOR RECORDS ACCESS OFFICER(S) OF MUNICIPALITIES

By: Kevin Batt, Esq. Anderson & Kreiger, LLP

An Act to Improve Public Records Chapter 121, Acts of 2016

Chapter 121, Acts of 2016 (the "Public Records Act") was enacted by the Massachusetts Legislature and signed into law by Governor Baker on June 3, 2016. Most of its provisions become effective on January, 2017. The Public Records Act inserts a new section 6A into G. L. c. 66 (the Public Records Law) that requires for the first time that each municipality designate one or more Records Access Officers (RAOs) to assist records requestors, to coordinate responses to requests and to prepare guidelines for access to public records held by the municipality. The municipal clerk, his or her designees and any other persons appointed by the Chief Executive of the municipality, serve as RAOs for the municipality. This checklist is intended to provide a starting point for municipal RAOs to comply with the minimum statutory procedures required by the Public Records Act, but does not address procedures for appeal by requestors to the Supervisor or to Court. The statute prevails over any inconsistencies in this checklist due to paraphrasing of requirements. This checklist may be supplemented or superseded by regulations to be promulgated by the Supervisor of Public Records, a draft of which has been released.

1. Receipt of Request for Public Records

a. Verify request received by hand, by mail or by email.[1, 2]

b. Review request to determine if records "reasonably described."[3] RAO may request clarification from requestor.

c. Determine and record due date for production of records or response (10 business days following the date of receipt).[4, 5, 6]

2. Initial Processing of Request prior to 10th Business Day

a. Do records requested exist within the possession, custody or control of the municipality or municipal agency for which RAO is responsible?[7]

b. If RAO is responsible for a department or agency within the municipality, should requestor be referred to RAO of another department, or to the municipal clerk?

c. Send copy of request, and/or contact municipal employees and board members who may have custody of requested records.

d. If records exist, how many business days will likely be required to search, compile and reproduce records? The municipal RAO has the right to an additional 15 business days after the initial 10 business days,[8] if the magnitude or difficulty of the request, or multiple requests from the same requestor, unduly burdens the other responsibilities of the municipality and therefore the municipality is unable to produce the records within 10 business days of the request. Therefore, consider the following:

i. Based on nature of request, assess magnitude (volume) of requested records.

ii. Based on nature of request, assess difficulty of compliance with request.

1. G. L. c. 66, §10(a), as amended by St. 2016, c. 121. Subsequent citations will be made to G. L. c. 66 only, which will be assumed to include the amendments to that chapter made by St. 2016, c. 121.
2. While the Public Records Act provides that requests "may be delivered to the records access officer by hand or first class mail . . . , or via electronic mail," the draft regulations issued by the Supervisor of Records continue to allow in-person verbal requests. Under current law and the draft regulations, verbal requests would not trigger the right by a requestor to appeal to the Supervisor.
3. G. L. c. 66, §10(a)(i).
4. G. L. c. 66, §10(a).
5. Under most statutory regimes, computation of time should begin the business day following the date received. The Supervisor's draft regulations adhere to this common standard.
6. Under the Supervisor's draft regulations, "business day" is defined to exclude Saturdays, Sundays, legal holidays and other days that the municipal office is unexpectedly closed.
7. G. L. c. 66, §10(a)(ii).
8. State agency RAOs are limited to an additional 5 business days, or 15 total, following the initial request.

Continued onto page 6

iii. Determine whether records likely to be found in multiple locations, or held by multiple persons.

iv. Has requestor made multiple recent requests, such that request could be considered harassment?

v. Are email records requested? Make preliminary determination of search methodology or search terms for responsive email records and resulting volume or difficulty in producing them.

vi. Based on nature of request, will any requested records likely be withheld as exempt or attorney-client privileged?

vii. Will substantial redaction of records be necessary to protect exempt or privileged material?

viii. Will other immediate responsibilities and priorities limit the availability or time of staff or other persons, such as volunteer board members, who are needed to fulfill request, and therefore impair ability to respond to records request within 10 business days?

ix. Determine if fee should be assessed requestor (see Section 7 on fees).

x. If fee is to be assessed, estimate amount of fee, and provide as soon as possible to requestor.

e. If available as electronic records, records should be provided to requestor in the requested electronic format or in a standard, machine searchable electronic format, unless records are held only as paper records, or requestor is unable to receive or access electronic records.[9]

i. Are records held in electronic media, or only as paper hard copies?

ii. Has requestor specified that electronic records should be provided in any particular electronic format?

iii. Has requestor indicated inability to receive or access records if provided in electronic format?

f. If more than 10 business days are likely to be needed to comply with request, or if records will likely be withheld or redacted, draft response letter to requestor.

3. Production of Records

a. If no additional time beyond 10 business days will be needed nor records withheld or redacted, communicate to requestor no later than the 10th business day following receipt of the request that records are ready for inspection, retrieval or delivery.

b. When records are available on public website, provide access information to requestor for such records.[10]

c. Collect fee, if any, prior to providing records to requestor.[11]

d. Make records available for inspection, for pickup or delivery by mail, email or facsimile, as the requestor requests, in electronic format unless exceptions to production in electronic format apply.[12]

e. Document date records provided, number of hours of all municipal employees and board members to fulfill request, and fees, if any, charged.[13]

4. Additional Time for Production and Withholding Records

a. When additional time is needed to produce the records, or records are to be withheld (or redacted), send letter by mail, email or facsimile no later than 10th business day after receipt of request. Letter should include the following:[14]

i. Confirm receipt of request;

ii. Identify records or categories of records not within municipality's possession, custody or control;

iii. Identify any other agency, if known, that may hold records requested;

Continued onto page 6

9. G. L. c. 66, §6A(d).
10. G. L. c. 6A(d).
11. G. L. c. 66, §10(a)(iii).
12. G. L. c. 66, §6A(d).
13. Although only RAOs of state agencies are required to document this information, G. L. c. 6A(e), municipal RAOs are encouraged to do so in the event requesters appeal determinations to the Supervisor, or other inquiries are made concerning the management of records requests..
14. G. L. c. 66, §10(b)

iv. Identify records, categories or portions of records intended to be withheld and reasons and specified exemptions for non-disclosure; if subsequent detailed review of records reveals additional records, categories or portions of records to be withheld or redacted in accordance with state and federal law, supplement this response to identify such records and reasons for non-disclosure;

v. Identify records, categories and portions of records to be produced, and describe in detail why magnitude or difficulty of request unduly burdens other responsibilities of municipality and therefore requires additional time to produce the records;

vi. Identify a reasonable timeframe to produce records sought, not to exceed 25 business days from the initial receipt of request,[15] or a later date agreed to by requestor;

vii. Suggest a reasonable modification of the scope of the request if records could then be produced more efficiently and affordably;

viii. Provide an itemized, good faith estimate of fees, if any, to be charged;

ix. Include statement of requestor's appeal rights to Supervisor of Records and to Superior Court.

b. RAO should consider seeking assistance of counsel to review this letter.

5. Appeal by RAO to Supervisor of Records for More Time[16]

a. If more than 25 business days will be needed to comply with the request, the RAO should make such a determination no later than the 20th business day after receipt of the request (or within 10 business days of a determination by the Supervisor of Records that a withheld record must be produced).

b. The RAO should draft and submit a written petition to the Supervisor of Records no later than the 20th business day after the receipt of the request.

c. The RAO should consider whether to seek assistance of counsel to draft petition.

d. The RAO's petition for additional time should include any of the following information that supports the need for additional time:

i. The time estimated to search for, collect, examine and redact records;

ii. The scope of redaction required to prevent unlawful disclosure;

iii. The capacity and normal hours of business of the municipality to fulfill the request without the extension of time;

iv. Efforts already undertaken to fulfill the current and previous requests;

v. Whether the current and any previous requests are frivolous or intended to harass or intimidate the municipality;

vi. The public interest, or absence of public interest, in producing the documents more quickly.

e. The RAO shall provide a copy of the written petition to the requestor.

f. The Supervisor of Records is to decide such appeal within 5 business days.

g. Records should be produced within time ordered by Supervisor.

6. Fees[17]

a. Costs that may be included in fees for records production:

i. Cost of storage device

ii. $.05/page of materials printed in black and white (both single and double sided pages).

iii. Hourly rate of lowest paid employee with necessary skill to compile, segregate, redact and reproduce records not to exceed $25/hour unless approved upon petition to Supervisor of Records.

iv. Employee time may include outside vendor time.

Continued onto page 7

15. Fifteen business days for state agencies.
16. G. L. c. 66, §10(c).
17. G. L. c. 66, §10(d).

b. Costs that may not be included in fee for records production

i. Municipalities with populations over 20,000 may not charge for first two hours of staff time.

ii. Staff time for segregation and redaction unless required by law or approved by Supervisor of Records.

c. Petition to Supervisor for fee adjustments.

i. Hourly rates in excess of $25/hour.

ii. Time spent for segregation and redaction when not required by law.

iii. Grounds for Supervisor to grant adjustment:

1. For requests commercial in nature, or

2. Fee represents actual good faith cost of compliance, request could not have been prudently completed without redaction or increase in hourly rate, fee is reasonable and not designed to limit access to public records.

3. Supervisor shall also consider public interest in limiting fees charged and financial ability of requestor to pay additional fees.

d. Waiver of fees by RAO

i. if disclosure of records is in public interest.

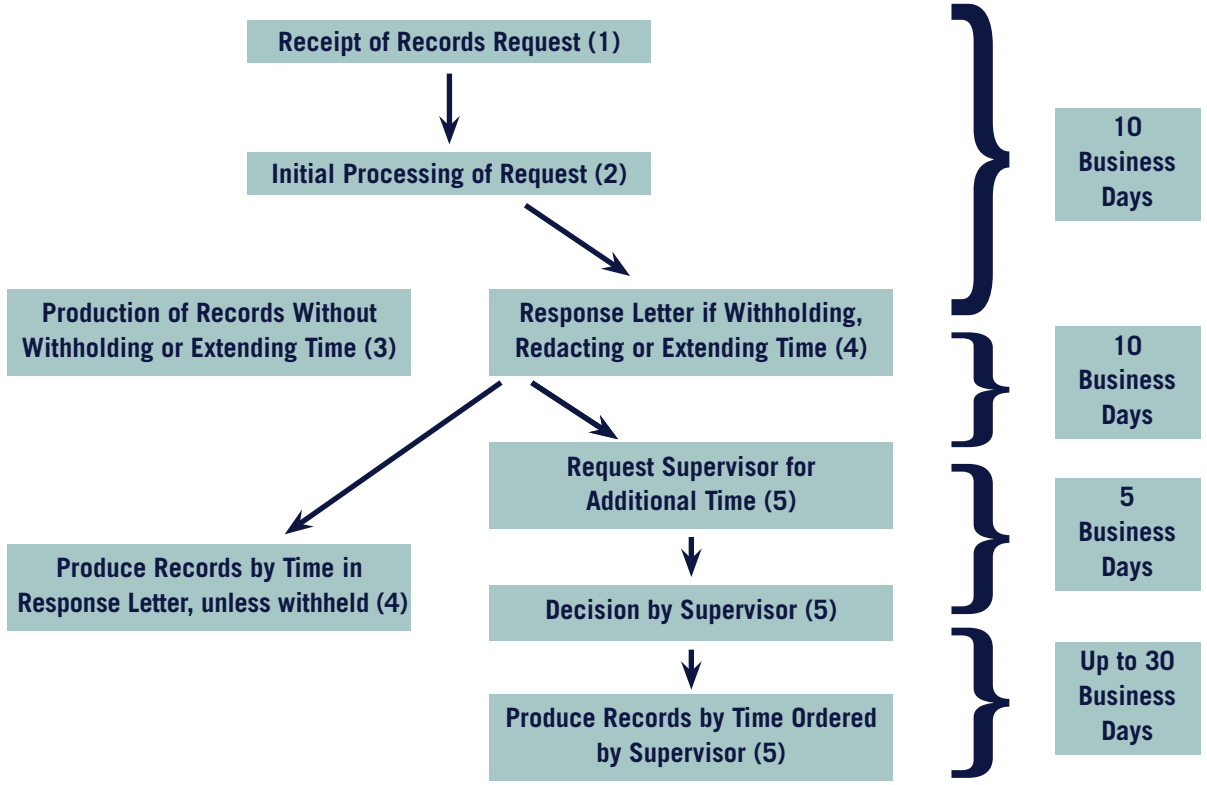
ii. if records request not primarily in commercial interest of requestor.

iii. upon showing of financial hardship of requestor to pay full fee.

e. Denial of records to requestor who has failed to pay for previously produced records; RAO provides written denial and itemized balance of fees still owed.

f. Forfeiture of fees: If Court awards attorneys fees to requestor who successfully obtains judicial relief in litigation, fees for production of records also forfeited.[18]

FLOW CHART OF PROCEDURES UNDER PUBLIC RECORDS LAW



18. G. L. c. 66, §10A(d)(3).

2016 LEGISLATIVE WRAP-UP

By: Matthew G. Feher, Esq., Burns & Levinson, LLP and MMLA Legislative Committee Chair

July 31, 2016 marked the final day of formal sessions for the 2015-2016 biannual legislative session, a session that focused heavily on policy changes affecting all 351 cities and towns. Early this summer, the Governor signed legislation overhauling the state's public records law and, most recently, a comprehensive package of reforms to a host of municipal finance and administration policies. With the Legislature must convene every 48 hours under the Constitution, it only takes one opposing vote to table a measure. As such, MMLA does not expect any continued movement on any legislation of significance of broad applicability until next year when the 2017-2018 legislative session commences. In the interim, the MMLA Legislative Committee will develop the Association's legislative package for submission in January and will continue to work closely with MMA and other municipal groups in formulating policy priorities.

In the flurry of activity that takes place in the weaning days of formal sessions, the Legislature enacted and the Governor signed several pieces of important legislation including the following:

The Municipal Modernization Act (Chapter 218 of the Acts of 2016) was signed into law on August 9 and makes several changes to municipal statutes regarding borrowing, financial management and governance, local tax administration, tax exemptions and benefits, retiree health insurance, municipal revenues and special funds, procurement (public works construction, public building construction and goods and services), double poles, and regionalization. MMLA was directly involved in developing this critically important legislation in partnership with the Administration, particularly the Massachusetts Department of Revenue's Division of Local Services (DLS). A complete summary prepared by DLS is available on the MMLA website.

An Economic Development Package (Chapter 219 of the Acts of 2016) was signed August 9 and provides $1 billion in new investments in infrastructure, workforce training and economic stimulus programs. Among other things, the new law reauthorizes the popular MassWorks infrastructure program ($500 million authorization); provides long-term funding for brownfields redevelopment; incentivizes creation of denser affordable workforce housing under the Chapter 40R Smart Growth Zoning Program; reauthorizes the 40R Trust Funds providing incentives to municipal program participants; incentivizing use of housing-related tax increment financing resources.

Municipal Small Bridge Program (Chapter 220 of the Acts of 2016) signed August 10 provides for a 5 year, $50 million non-federal aid state funding program to provide reimbursements to cities and towns of up to $500,000 per year to assist in the repair and preservation of certain municipally owned bridges that are not eligible for federal aid. These funds can cover up to 100% of total design and construction costs associated with nearly 1,300 such bridges across the Commonwealth. Additional information regard the program is available at www.massdot.state.ma.us.

Pay Equity legislation (Chapter 177 of the Acts of 2016) signed August 1 and effective July 1, 2018 will prevent municipal employers from requiring job applicants to provide salary history prior to receiving a formal offer and will prevent pay discrimination for comparable work based on gender. The Attorney General's office is tasked to promulgate regulations governing the new law.

As previously reported, the Governor signed into law sweeping changes to the 40-year old **Public Records Law** in early June (Chapter 121 of the Acts of 2016) effective January 1, 2017. The legislation overhauls the law in many areas, notably regarding the production of electronic records, compliance timing and procedures, records production fees, Supervisor and court appeals and remedies. On September 13, the Secretary of State's office published draft regulations that will be subject to a public hearing beginning 11am on October 6 held at their offices at 1 Ashburton Place, 17th Floor Conference Room in Boston. The draft regulations hedge closely to the new law and provides additional clarity to several of the law's provisions. MMLA is currently reviewing the regulations and expects to submit testimony during the public comment period in conjunction with MMA. Please visit the MMLA website for further information. A copy of the regulations can be found at **www.sec.state.ma.us/pre/prepdf/950-CMR-32-00-2017-Edition.pdf** .

I encourage our membership to consider volunteering time to serve on the MMLA Legislative Committee. The Committee provides a unique opportunity to serve on the front lines in developing municipal statutory and regulatory policies that impact our practices and clientele. Our Association has established itself firmly this past year as a thought leader and resource to Beacon Hill leaders. If interested, please contact me directly at **mfeher@burnslev.com** or 617-345-3307.

SUPERVISORS BEWARE: THE MYTH OF AT-WILL EMPLOYMENT

By: Tom Donohue, Esq.
Brody, Hardoon, Perkins & Kesten, LLP

The Town has a probationary at-will employee named Lazy Leo. Six months into his employment, Town Manager Tina decides that Lazy Leo has lived up to his name and terminates him. She is aware of the law and believes that she has the authority to terminate his employment for any reason. Accordingly, she simply tells him "it is not working out." Lazy Leo visits Shady Sam, the lawyer, and they decide to sue. Can he win?

Like most people, juries do not like it when employees are fired, especially if there is no misconduct by the employee. While it is true that an employer can terminate an at-will employee for any reason, even a probationary employee cannot be terminated for an "illegal" reason. So, Leo and Sam file a complaint at the MCAD alleging that Lazy Leo was let go because of his age (41), religion and disability - he claims that he has a fatigue disorder that causes him to appear lazy. These allegations force Tina to change course and outline the real reasons she terminated Leo.

This cautionary tale shows the danger to supervisors who do not give reasons for the termination of an at-will employee. In Massachusetts, the law says that an employer can terminate the employment of an at-will employee at any time for any reason — or even for no reason at all. However, this is never actually true. In the real world of litigation, a jury will punish an employer who appears to be unfair and callus by ending an employee's job for no particular reason. Accordingly, a supervisor must provide a solid reason for all discharges, even for at-will terminations.

Critically, the reasons given for a termination must be all of the real reasons and cannot change after the employee is gone. If the employer comes up with new reasons after litigation starts, juries will assume that the real reason for the termination must be unlawful. The employer will be punished in court for not being honest with the jury and fair to the employee.

Another danger of at-will employment is that employees with contracts intending to create at-will employment are often not treated as such under Massachusetts law. Both Massachusetts state and federal courts have determined that employees are generally not considered "at-will" if their employment contracts specify a definite period of time. Even when contracts allow supervisors to terminate employment "at their discretion" a specified time period can give rise to a protected property interest in employment, and thus the "at-will" employee may have a right to notice and a hearing prior to termination.

The fact is whenever an employer is considering terminating an employee, she should not act as if she has the power to do so at her whim, or for any reason or no reason at all. Supervisors must make decisions to terminate as if they will have to prove "just cause."

Remember, all people are in a "protected class" under discrimination laws. Gender, National Origin, Sexual Orientation, and Race are all protected classes under law. All people – even a terminated Caucasian, heterosexual, Anglo Saxon male – can claim discrimination. The supervisor will then be forced to outline valid reasons for the termination.

Bottom line, if employers are fair, act reasonably, make decisions for solid reasons, and give the reasons, the municipality will prevail.

MUNICIPAL CASE LAW UPDATE

Heffernan v. City of Patterson, New Jersey, et al. United States Supreme Court, Docket No. 14-1280, April 26, 2016

By: Carol Hajjar McGravey, Esq.
Urbelis & Fieldsteel, LLP

In an interesting take on First Amendment rights of public employees, the United States Supreme Court, on April 26, 2016 decided that a municipality could not escape liability when it disciplined an employee based upon the employer's mistaken belief that the employee had engaged in speech protected by the First Amendment.

Continued onto page 9

The Plaintiff in the case, Jeffrey Heffernan, was a police officer with the Patterson, New Jersey police force. Both the Chief of Police and Heffernan's supervisor were appointed by the incumbent mayor, who was being opposed for re-election by a friend of Heffernan's. Although Heffernan was not involved in the campaign, his problems leading to this litigation began when as a favor to his bedridden mother, he picked up a yard sign for the mayor's opponent to replace a sign that had allegedly been stolen. Heffernan picked up a sign at the distribution location for the campaign and was seen by other members of the police force talking to campaign workers. The next day, Heffernan was demoted, allegedly for "overt involvement" in the mayoral campaign.

In fact, Heffernan's supervisors were mistaken in their belief that he was "overtly involved" in the campaign. Heffernan filed a suit in federal court, claiming that he was demoted because of his suspected involvement in a political campaign, which conduct would have been protected by the First Amendment. When the facts became known, the City argued that it could not have violated Heffernan's constitutional rights because he was not, in fact, engaged in the campaign, and therefore not exercising any protected rights.

Both the District Court and the Court of Appeals for the Third Circuit agreed with the City, with the Third Circuit writing that "a free speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." 777 F.3d. 147, 153 (2015).

The Supreme Court granted certiorari and reversed the lower courts. In its opinion the Court noted that neither the text of §1983 nor case law precedent addressed the situation where the employer's action was based upon a mistake and where the employee was not in fact engaged in activity that was constitutionally protected. Justice Breyer saw the issue in the case as a question of what precisely is the constitutionally protected act? As Justice Breyer framed the question: "Is it a right that primarily focuses upon (the employee's) actual activity or a right that primarily focuses upon (the supervisor's) motive, insofar as that motive turns on what the supervisor believes that activity to be?"

According to the Court, the statute does not directly answer the question whether the protected right primarily focuses on the employee's actual activity or on the employer's motive. Neither did the Court find a precise answer in case law. In Connick v. Myers, 461 U.S. 138, 143 (1983), which involved an employee circulating a document that criticized how the office was run, and similarly, in Garcetti v. Ceballos, 547 U.S. 410, 418 (2006), where an employee circulated a petition criticizing his employer's practices, the Court held that it must first determine whether the employee's conduct amounted to protected speech, and if the speech was not on a matter of public concern, that the reasons for the discharge need not be scrutinized. Neither of those cases involved a mistake on the part of the employer concerning the characterization of the employee's speech.

The Supreme Court cited Waters v. Churchill, 511 U.S. 661 (1994) as most closely on point. In that case, an employer had disciplined an employee based upon the mistaken belief that the employee's speech was of a personal nature and not of public concern, when it was, in fact, otherwise. In Waters, the Court held that it was the employer's motive that mattered and that, as long as the employer (1) had reasonably believed that the employee's conversation had involved personal matters, not matters of public concern and (2) had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. Id. at 679-680.

Following the reasoning in Waters, the Court concluded that the reason given by the City of Paterson in demoting Heffernan was what matters, because the City had, in fact, "acted upon a constitutionally harmful policy," and that Heffernan had, in fact, been harmed by that policy, notwithstanding that the underlying facts ultimately revealed that Heffernan's conduct was not constitutionally protected.

NEW LAW MEANS LESS CONTROL FOR MUNICIPALITIES

By: Olympia A. Bowker, Esq., Of Counsel at McGregor & Legere, P.C

On August 10, 2016 Governor Baker signed HB 4569 into law. It is titled, "An Act Relative to Job Creation and Workforce Development," and appears as Chapter 219 of the Acts of 2016. Despite declining to approve two sections of the Bill, Governor Baker approved Section 48, which will have confusing implications for environmental regulation in municipalities, and likely lead to a slew of doubt, disputes, and even lawsuits.

The so-called Massachusetts Development Act ("MDA") is touted as "an important step" in the implementation of Massachusetts' economic development plan. According to the bill itself, the new law's overall purpose is to finance "improvements" to the Commonwealth's economic infrastructure and promote economic opportunity, and is "necessary for the immediate preservation of the public convenience."

The public convenience, however, comes at a price—namely, the ability of municipalities to enforce heightened environmental regulations within their jurisdiction.

While Governor Baker declined to approve Sections 36 and 131 of the MDA, (sections that would have imposed new Community Benefit Districts, and created a regional transit authority, respectively) Section 48 slipped into the new legislation unharmed. This provision will undermine local environmental regulations. You will find it as G.L. c. 40R §5(f)(7).

The essence of Section 48 is that several types of development projects "shall not be subject to any municipal environmental or health ordinances, bylaws or regulations that exceed applicable requirements of state law or regulation."

More specifically, Section 48 excuses smart growth and starter home zoning districts from the potential limitations caused by building permits, or local moratoriums on issuing such permits. In addition to this wholesale reference, proposed starter home zoning districts are to be exempt from any municipal environmental or health ordinance, bylaw, or regulation that exceeds state requirements. While there are exceptions to this last provision, they are limited by both site and project type.

Section 48 of the MDA will take effect on January 1, 2017.

This poorly conceived and executed section usurps municipal regulatory authority to set parameters and measures for environmental health within their own jurisdictions. As a result, the new provision will create turmoil concerning its application to land and resources which are subject to stricter environmental regulations than required by state. The result? There will be lots for lawyers to do.

The full text of Chapter 219 of the Acts of 2016 can be found at **https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter219**

BOURBEAU & ASSOCIATES, P.C.

Mark S. Bourbeau, Esq.

Our practice covers the entire legal arena, with a special emphasis on consultation, representation before administrative bodies, and litigation in all state and federal courts concerning eminent domain, land use/acquisition, environmental, development and other real property related matters. B&A has a wide range of experience in all types of eminent domain cases, having represented plaintiffs and defendants across the Commonwealth in hundreds of different types of cases, including those involving the Big Dig.

266 Beacon Street
Boston, MA 02116
Telephone: (617) 367-9695
Facsimile: (617) 367-9651
Website: www.bourbeaulaw.com

BRODY, HARDOON, PERKINS & KESTEN, LLP

We concentrate in: civil rights, employment discrimination claims and have represented over 100 Massachusetts cities and towns in litigation during the past 15 years. Available for consultation on a case by case basis.

699 Boylston Street
Boston, MA 02116
Telephone: (617) 880-7100
Facsimile: (617) 880-7171
Email: ljoyce@bhpklaw.com
Website: www.bhpklaw.com

DEUTSCH, WILLIAMS, BROOKS, DeRENSIS & HOLLAND, P.C.

Paul R. DeRensis, Esq.

Providing comprehensive legal services to, municipalities and government entities, town counsel, on land use, environmental, litigation, labor, eminent domain, zoning, contracts, and public sector law.

One Design Center Place, Suite 600
Boston, MA 02110
Telephone: (617) 951-2300
Facsimile: (617) 951-2323
Email:pderensis@aol.com
Website: www.dwboston.com

EPSTEIN & AUGUST, LLP

Bill August, Esq. and Peter Epstein, Esq.

Representing cities and towns in cable television franchising and related regulatory matters, including: cable franchise renewals and franchising, negotiations strategy and counsel, franchise compliance, grants of location and right-of-way management, telecommu-nications planning, non-profit incorporation, governance and over-sight. The firm's principals have represented more than 100 cities and towns in cable television and related regulatory matters.

101 Arch Street, 9th Floor
Boston, MA 02110
Telephone: (617) 951-9909
Facsimile: (617) 951-2717
Email: billaugustUSA@aol.com peter@epsteinandaugust.com

KP | LAW

LaurenF.Goldberg,Esq.

A comprehensive statewide municipal law firm with the expertise and resources to efficiently and effectively assist you as Special Counsel in all areas of municipal law. Specializing in land use, affordable housing, real estate, labor and employment, environment, education, cable TV, and procurement. Trial experience in all courts and administrative agencies, extensive database of briefs and opinions, special counsel to over 100 municipalities.

101Arch Street
Boston, MA 02110
Tel: (617) 654-1701 / Fax: 617-654-1735
Email: **lgoldberg@k-plaw.com**
Website: www.k-plaw.com

LAW OFFICES OF LAMPKE & LAMPKE

James B. Lampke, Esq.

Certified as a Local Government Fellow under auspices of IMLA.

Over 30 years concentrating in municipal and public sector law.

Available to assist you or serve as Special Counsel when the need arises due to conflict situations, work load demands or other reasons. Also available as Independent Hearing Officer (c. 31, etc.), Internal Investigations - Harassment, Discrimination, Claims Against Employees, etc. adds credibility to process & removes appearance of politics. Provides Dispute Resolution, Mediation and Arbitration Services. Rates & services flexible for most situations.

115 North Street ,Hingham, MA 02043
Telephone: (781) 749-9922 / Hull Residential: (781) 925-1587
Cell Phone: (617) 285-4561
Facsimile: (781) 749-9923
Email: jlampke@massmunilaw.org

MMLA thanks our advertisers for their support. If you would like to advertise in the Quarterly, please contact Jim Lampke.

LOUISON, COSTELLO, CONDON & PFAFF, LLP

ATTORNEYS AT LAW

Douglas Louison, Esq. and Patrick Costello, Esq.

Special counsel available to assist City Solicitors and Town Counsel in the defense of civil rights, discrimination and general liability claims; eminent domain, public construction, local taxation and tax title Land Court practice.

101 Summer Street, Fourth Floor

Boston, MA 02110

Telephone: (617) 439-0305

Facsimile: (617) 439-0325

Website: www.merricklc.com

McGREGOR & ASSOCIATES, P.C.

OVER 30 YEARS OF ENVIRONMENTAL LAW

Gregor I. McGregor, Esq., Michael O'Neill, Esq.

Nathaniel Stevens, Esq., and Luke H. Legere, Esq.

Legal services for government, business, non-profit, and landowners in all aspects of environmental law, real estate, and related litigation, plus land use planning and strategic advice for complex transactions and controversies.

15 Court Square, Suite 50

Boston, MA 02108

Telephone: (617) 338-6464

Facsimile: (617) 338-0737

MURPHY, HESSE, TOOMEY & LEHANE, LLP

Providing comprehensive legal services to municipalities and school systems throughout the Commonwealth. Town counsel, education law, labor and employment, employee benefits, public sector law and health care law.

300 Crown Colony Drive, Suite 410

P.O. Box 9126

Quincy, MA 02169-9126

Tel: (617) 479-5000 / Fax: (617) 479-6469

Website: www.mhtl.com

MURPHY, LAMERE & MURPHY, P.C.

A comprehensive, full service law firm. Providing legal counsel in all areas of municipal, education, labor & employment law.

Ten Forbes Road West

P.O. Box 9003

Braintree, MA 02184

Tel: (781) 848-1850/ Fax: (781) 849-0749

Email: mmcnulty@mlmlawfirm.com

Website: mlmlawfirm.com

PETRINI & ASSOCIATES, P.C.

Petrini & Associates, P.C. offers special counsel services in all phases of public construction, including representation of cities and towns in construction litigation and advisement of municipalities in bidding, contract negotiation, project delivery and close-out. The firm also offers special counsel services to communities with Chapter 40B projects, including providing advice to boards conducting comprehensive permit reviews at the local level and bringing appeals before the Housing Appeals Committee.

372 Union Avenue

Framingham, MA 01702

Tel: (508) 665-4310/ Fax: 508-665-4313

Email: info@petrinilaw.com

Website:www.petrinilaw.com

PIERCE, DAVIS & PERRITANO, LLP

COUNSELORS AT LAW

John J. Davis, Esq.

The PD&P Municipal Liability and Civil Rights Practices Group specializes in the defense of municipalities, schools, municipal boards and departments and public officials in the courts of Massachusetts and Rhode Island, in the federal courts, and before state and federal administrative agencies.

90 Canal Street

Boston, MA 02114

Telephone: (617) 350-0950

Facsimile: (617) 350-7760

Email: jdavis@piercedavis.com

Website: www.piercedavis.com

ROBINSON DONOVAN, P.C.

A Comprehensive, Full Service Law Firm Providing Effective Legal Counsel In All Areas of law, including:

Municipal
Corporate & Business Counseling
Commercial Real Estate
Estate Planning & Administration
Family
Litigation
Employment & Litigation

1500 Main Street, Suite 1600
P.O. Box 15609
Springfield, MA 01115
Telephone: (413) 732-2301
Facsimile: (413) 785-4658
Email: npelletier@robinsondonovan.com
Website: www.robinson-donovan.com

MMLA thanks our advertisers for their support. If you would like to advertise in the Quarterly, please contact Jim Lampke.

MMLA General Contact Information and Quarterly Advertising

If you would like to contact MMLA or advertise in the Quarterly, please call or email Jim with your question or advertising information.

James B. Lampke, Esq.
MMLA Executive Director
115 North Street
Hingham, MA 02043

Telephone: (781)-749-9922
Facsimile: (781)-749-9923
Email: jlampke@massmunilaw.org

MMLA Quarterly Editorial Board

Quarterly Information and Contributing an Article

For information about the Quarterly, or to contribute an article, please contact

Stacey G. Bloom, Esq. at Staceygene@gmail.com or

Angela D. Atchue, Esq. at Angela.Atchue@Boston.gov

MMLA thanks our advertisers for their support. If you would like to advertise in the Quarterly, please contact Jim Lampke.