CLIENT ALERT: SJC Finds “Evergreen” Clauses in Public Sector Contracts Unenforceable

The Supreme Judicial Court (“SJC”), the highest court of Massachusetts, recently issued an important decision that immediately applies to all municipal and state labor contracts in Massachusetts, as well as significantly changes the bargaining landscape in the public sector. In the *Boston Housing Authority* decision, the SJC found that public sector collective bargaining agreements subject to Chapter 150E may only be a maximum of three (3) years in length and that any contractual provision extending a contract beyond three years, often called an “evergreen” or “rollover” clause, is illegal and unenforceable even in existing contracts.

In 2006, to help address an anticipated budget deficit, the Boston Housing Authority (“BHA”) eliminated the positions of 16 heating system engineers, called “firemen,” which were represented by Local 3 of National Conference of Firemen and Oilers. BHA employees represented by Local 3 had been working under an expired 2001-2004 collective bargaining agreement that contained an evergreen clause providing, during any period of negotiations, “the provisions of this Agreement shall remain in full force and effect until such time as a new agreement has been signed.”

Local 3 grieved the elimination of the firemen positions, claiming that the minimum staffing provision of the expired contract prohibited the layoff. An arbitrator agreed with Local 3 and ordered that the BHA reinstate the 16 firemen with full back pay and benefits. The BHA sought to overturn the arbitration award in Superior Court but the court upheld the arbitration award, finding that the expired contract, including its minimum manning provision, was still in effect in 2006 as a result of the evergreen clause. The BHA appealed.

On October 22, 2010, in its *Boston Housing Authority* decision, the SJC overturned the arbitrator and Superior Court, finding that G.L. c. 150E, §7(a), which states that a collective bargaining agreement shall not exceed three years, prohibited a contractual evergreen clause from extending that agreement beyond the maximum three-year statutory limit. With an unenforceable evergreen clause, the minimum manning and grievance and arbitration provisions of the Local 3 contract had no effect after its expiration in 2004. Therefore, the BHA was not subject to any contractual restrictions in its decision to eliminate the firemen positions in 2006 and, moreover, the decision was not arbitrable.

It is clear that one of the considerations the SJC took into account is the “legitimate concern about the seemingly leisurely status and pace of public sector bargaining” that evergreen clauses encourage. The SJC expressly recognized the important public interest in requiring employers and unions to seriously address contract issues at least every three years and freeing public employers from expired contractual terms so that current operational concerns may be addressed.

This is the most important Chapter 150E decision in many years and effectively overturns decades of Labor Relations Commission/Division of Labor Relations precedent upholding evergreen/rollover provisions. Contracts will actually expire at the end of three years and unions will lose the ability to bring any grievances on new matters to arbitration after the expiration of a contract. Although certain terms and conditions of employment, such as wages and benefits, may continue after the expiration of a contract, the Court specifically held that any contractual grievance and arbitration provision will be ineffective upon expiration. Employers should provide written notification to a union if it intends to not to process any grievances that are filed following the expiration of an agreement.

The effect of this decision should pressure unions to actively negotiate a successor agreement with the employer before the expiration of an existing collective bargaining agreement. It should help curb the current practice of successor negotiations that often continue for years after the expiration of a contract and, upon agreement, then having retroactive effect. On the other hand, it may also

encourage unions to file more prohibited practice charges at the Division of Labor Relations in response to managerial decisions, especially if a contractual grievance and arbitration provision is no longer effective.

The *Boston Housing Authority* decision also has an immediate effect on current and impending contract negotiations. For example, unions will likely propose a "bridge" agreement to ensure that the terms of an expired contract continues until a successor is negotiated. Employers should obviously obtain concessions from a union before entering into any such extension. The decision also supports the right of an employer to implement its bargaining proposal upon impasse, provided the union has not yet filed for mediation under applicable state law. Public employers should consult with their labor counsel about the effect of this decision on current contracts and negotiations.

As expected, public sector unions are greatly displeased with the *Boston Housing Authority* decision and efforts are already underway to lobby the Legislature to amend Chapter 150E to expressly allow for evergreen and rollover clauses. For the time being, at least, all public employers should give serious consideration to the effect of this decision to its existing collective bargaining agreements and any successor negotiations.

If you would like to discuss this decision and its possible impact, please contact your MBJ attorney or James Pender at 617-788-5060 or jpender@morganbrown.com.

James Pender is an attorney with Morgan, Brown & Joy, LLP and may be reached at (617) 523-6666 or at jpender@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was published on November 10, 2010.