

MIRICK, O'CONNELL, DEMALLIE & LOUGEE
ATTORNEYS AT LAW
1700 MECHANICS BANK TOWER
WORCESTER, MASSACHUSETTS 01608-1477
508-799-0541
FAX: 508-752-7305

February 28, 1994

Russell B. Higley, Esquire
City Solicitor
City of Cambridge
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

RE: The Cambridge Board Election Commissioners

Dear Mr. Higley:

I am pleased to offer the following advice in response to the City's request to address the authority of the Board of Election Commissioners with respect to Chapter 239 of the Acts of 1921 and how that authority changed, if at all, upon the adoption of the Plan E Charter by the City of Cambridge. Particularly, the Board of Election Commissioners sought our advice, asking: "What is the authority of the Cambridge Election Commission as to hire, terminate, direct election commission staff in our office specifically as this pertains to the Special Act of 1921 which created the Board of Election Commission and the duties and responsibilities of the City Manager as described in the Plan E Charter, entitled, Powers, Rights and Duties of the City Manager. . . ."

In short, I advise that the Plan E Charter supersedes the Special Act of 1921, thereby transposing the rights and powers to appoint and remove Election Commission staff from the Board of Election Commissioners to the City Manager. In support of this decision, the following facts and analyses were considered.

I. FACTS

In 1921, the Legislature established the Board of Election Commissioners in the City of Cambridge through Chapter 239 of the Acts of 1921. This Special Act empowered the mayor to appoint successors to the Board of Election Commissioners upon expiration of their terms and to prescribe their salaries. Among other provisions, the Special Act included language, at Section 7, which

MIRICK, O'CONNELL, DEMALLIE & LOUGEE
Russell B. Higley, Esquire
February 28, 1994
Page 2

stated that the Board may appoint assistant commissioners and clerical assistants as it deemed necessary. The Board of Election Commissioners, therefore, had, at that time, the rights and powers to hire and terminate the Election Commission staff.

Chapter 239 of the Acts of 1921 was amended twice. Both amendments, however, regulated only the appointment of members to the Board of Election Commissioners. Chapter 43 of the Acts of 1939 regulated such appointment to provide that a vote of the whole membership was necessary to select a candidate for submission to the mayor. Subsequently, however, Chapter 432 of the Acts of 1939 further amended and regulated the method of appointment of Board members by eliminating the "whole membership" requirement with respect to the vote and replaced it instead with a requirement that a majority of voting members present at a duly called meeting would be necessary to select a candidate for submission to the mayor. Thereafter, the Special Act was not altered.

In the early 1940's, the City of Cambridge adopted, as its Charter, the Plan E form of government set forth in Massachusetts General Laws Chapter 43, Sections 93 through 100, 102 through 114, and 116. Plan E operates to centralize control of a city's administration, having as its center, the City Manager. Pursuant to the Charter, the City Manager acts as the Chief Executive and Chief Administrative Officer, responsible for the administration of all departments, commissions, boards, and offices of the City. Under the Plan, the City Manager is empowered to make all appointments and removals in the departments, commissions, boards and offices of the City for which he is responsible.

Since the adoption of the City Charter in 1942, I understand that the Board of Election Commissioners has submitted all of its employment matters to the Personnel Office, which is under the City Manager. By involving the Personnel Office for all of its hiring, firing, promoting, and demoting needs, the Board of Election Commissioners has allowed the City Manager to oversee all of its employment activity. In fact, both the Personnel Director and the City Manager sign all of the Board of Election Commissioners' employment documentation.

In recent months, the Board of Election Commissioners has disagreed with the City Manager's refusal to remove one of its employees. From this situation, the Board began to question the authority of the City Manager in relation to the power and authority, if any, that it derived from the Special Act of 1921.

MIRICK, O'CONNELL, DEMALLIE & LOUGEE
Russell B. Higley, Esquire
February 28, 1994
Page 3

I understand that no ordinances or executive orders have been enacted or executed by the City regarding the Election Commission.

II. ANALYSIS

The purpose behind the adoption of a Plan E Charter is the desire to centralize the administration of the City. In this way, the City is set up similarly to a corporation which is run under a single executive officer. Under the Plan E form of government, the City Manager is the sole appointing authority and, as such, can more easily maintain centralization of the administration. It is worth noting also that, under Massachusetts General Laws Chapter 150E, the City Manager is the sole bargaining agent, centralizing the collective bargaining process in a single officer. Interpretations, therefore, which allow the City Manager to have central personnel control, are not inconsistent with the intent of the Legislature.

Moreover, the Plan E Charter makes the City Manager responsible for departments, commissions, boards and offices of the City. Chapter 43, Section 103. Since the Board of Election Commissioners is a department or commission within the City of Cambridge, the City Manager is responsible for it. The City Manager is further entrusted with the duty and responsibility to supervise the administration of affairs of the City. Chapter 43, Section 104. According to the Charter, those duties include the power to make all appointments and removals in those departments, commissions, boards and offices for which the City Manager is responsible, unless it is otherwise provided in the Charter. Based on such language, the City Manager appears to have gained the authority to appoint the Board of Election Commissioners' staff upon the adoption of the Charter. A review of the facts also indicates that from the time of the adoption of the Charter, the Board of Election Commissioners acknowledged the authority of the City Manager to appoint the Board's staff, since all employment matters were channeled through the City's Personnel Office.

Under the principles of statutory construction, it is often true that special acts supersede general acts, even if the general act is enacted at a later date; however, where two special acts are at issue, the act enacted later in time is given full force and effect, and the earlier act is deemed repealed. North Shore Vocational Regional School District v. Salem, 393 Mass. 354, 359 (1984) (with an earlier special statute and later general one, the earlier statute will be construed as remaining in effect as an exception to general statute); Clancy v. Wallace, 288 Mass. 557, 564 (1934) ("if and so far as the special statute . . . is inconsistent with the provisions of the general law, it is

MIRICK, O'CONNELL, DEMALLIE & LOUGEE
Russell B. Higley, Esquire
February 28, 1994
Page 4

operative notwithstanding the general law"). The Supreme Judicial Court of Massachusetts has held that a city charter is equivalent to a special act, as opposed to a general act. Welch v. Contributory Retirement Appeal Board, 343 Mass. 502, 507 (1962) ("City charters are essentially . . . special enactments"); Clements v. Treasurer of Cambridge, 324 Mass. 73, 75 (1949) (city charter defined as special act). By adopting the Plan E Charter then, the City, in effect, adopted a special act. The Charter, therefore, superseded the prior Special Act establishing and regulating the affairs of the Election Commission where there was a conflict between the Charter and the Special Act.

Moreover, Section 11 of Chapter 43, which provides for the adoption of the standard city charters, states, in pertinent part, that, "if a majority of the total number of votes cast at a regular city election . . . shall be in favor of its [a plan's] adoption, this chapter, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of its charter and of the general and special laws relating thereto and inconsistent herewith" (Emphasis added.) Moreover, Section 104 of the Charter, which is made a part of the Plan E Charter states, in pertinent part, that "the City Manager shall possess, have, and exercise all powers, rights and duties that the mayor and all boards and commissions had prior to the adoption of the plan." Previous to the Charter's adoption, the mayor had the power to appoint the Election Commissioners, while the Commissioners had the authority to appoint staff and assistants. Once accepted by voters, the Charter transferred those powers and authority to the City Manager.

Even though the Act of 1921 at Chapter 239 was not expressly repealed, its provisions are inconsistent with a newer special act, the charter, which revokes "all that has gone before concerning the same subject matter." King v. Mayor of Quincy, 270 Mass. 185, 187 (1930) ("present charter revoked all that has gone before concerning the same subject matter" quoting Cunningham v. Mayor of Cambridge, 222 Mass. 574, 577 (1916)); Cunningham, supra, 222 Mass. at 577 ("All that has gone before concerning the same subject matter is revoked"). Moreover, the Plan E Charter is written in such a way that implies its intent to cover completely all those topics related to or associated with city management mentioned within the sections of the law comprising Plan E. Cunningham, supra, 222 Mass. at 577 (it must be assumed that the new Charter is intended to be exclusive in its field). As such, a Charter of that nature is intended to supersede the local and special acts that are inconsistent with it. Homer v. Fall River, 326 Mass. 673, 676 (1951) (recognizing the principle that "the enactment of a statute which seems to have been intended to cover the whole of a subject to which it relates, impliedly repeals all

MIRICK, O'CONNELL, DEMALLIE & LOUGEE
Russell B. Higley, Esquire
February 28, 1994
Page 5

existing statutes touching the subject and supersedes the common law"); McDonald v. Superior Court, 299 Mass. 321, 324 (1938) (a statute of a comprehensive nature displays on its face an intent to supersede local and special laws and to repeal inconsistent special statutes).

I note that Chapter 51 of the Massachusetts General Laws governs elections and specifically establishes, at Section 16A, election commissions in all cities and towns accepting that part of the statute. Section 16A allegedly gives the Election Commission the right to appoint assistant commissioners and staff. The City of Cambridge, however, is expressly exempted from this statute.

If the City Manager decides, however, that it is preferential for the Election Commission to have the authority to appoint and remove its staff, he may delegate his power to do so. According to Chapter 43, Section 105, the City Manager may authorize the head of a department, commission or board, or the holder of an office, to appoint and remove subordinates in such department, commission, board or office. That decision is, however, exclusively the City Manager's and not the Election Commissioners'.

III. CONCLUSION

For all of the reasons stated above, I wish to advise that the City Manager of the City of Cambridge has the sole authority to appoint and remove the staff of the Board of Election Commissioners. Please note that this advice is issued to you specifically in connection with the question asked in relation to the Board of Election Commissioners.

Sincerely yours,

D. M. Moschos

D. M. Moschos

DMM/tmd
12478/12001
127opin.lt

cc: Robert W. Healy, City Manager



EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300
FAX. 349-4307

March 7, 1994

To The Honorable, The City Council:

Please find attached for your information an opinion received from Attorney D. M. Moschos, relative to the Cambridge Board of Election Commissioners.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Healy", is written over a horizontal line. The signature is fluid and cursive.

Robert W. Healy
City Manager

RWH/mev
attachment

Consent Agenda #4

8-90

Transmitting communicaiton from R.W. Healy
relative to an opinion received from Atty.

D.M. Moschos re: the Cambridge Board of Election
Commissioners.

In City Council March 7, 1994

Placed on file.