24-P-1114 Appeals Court

ROBERT DRISCOLL vs. CITY OF MELROSE.

No. 24-P-1114.

Middlesex. May 13, 2025. – November 21, 2025.

Present: Blake, C.J., Ditkoff, & Brennan, JJ.

National Guard. Fire Fighter. Public Employment, Military leave. Municipal Corporations, Fire department, Officers and employees. Practice, Civil, Summary judgment. Statute, Construction.

Civil action commenced in the Superior Court Department on March 10, 2022.

The case was heard by James Budreau, J., on motions for summary judgment.

Patrick N. Bryant for the plaintiff.
Stephen C. Pfaff for the defendant.
Andrea Joy Campbell, Attorney General, David C. Kravitz, State Solicitor, & Gerard J. Cedrone, Deputy State Solicitor, for the Attorney General, amicus curiae, submitted a brief.

DITKOFF, J. The plaintiff, Robert Driscoll (firefighter), appeals from the entry of summary judgment in favor of the defendant, the city of Melrose (city). General Laws c. 33,

§ 59 (a), requires participating government entities to pay the full salary of an employee performing certain military service for "40 days in any federal fiscal year," and states that a day "shall mean any 24-hour period regardless of calendar day." Applying the plain meaning of these words, we conclude that the firefighter is entitled to pay for up to forty twenty-four hour shifts missed during his military service in each Federal fiscal year, and not (as the city claims) up to twenty such shifts in a consecutive period of forty days. Accordingly, we reverse.

1. Background. The operative facts are undisputed. The city employed the firefighter from 2002 until his retirement in October 2022. Pursuant to the collective bargaining agreement (CBA) between the city and the firefighters' union, the firefighter worked a twenty-four hour shift "followed by one (a) day off, then one (a) twenty-four hour shift followed by five (5) days off."[1] Each twenty-four hour shift began at 7 A.M. and concluded the following calendar day at the same time. Pursuant to the CBA, the twenty-four hour shift consisted of two separate shifts: a ten-hour day shift followed by a fourteen-hour night shift. For purposes of vacation or sick leave, the ten-hour and fourteen-hour shifts were considered separate days, amounting to

[1] The city's firefighters are represented by the Melrose Firefighters Union, Local 1617, International Association of Fire Fighters, AFL-CIO.

two total days for one twenty-four hour shift. Accordingly, a firefighter who missed a twenty-four hour shift because of a vacation or illness would expend two days of vacation time or sick time.

During the entire time that the firefighter worked for the city, he served as an officer in the United States Air Force, reaching the rank of colonel in the Air National Guard. This role required the firefighter to take occasional leave for military service, both for training and after being called up for active duty. Relevant here, between October 2019 and March 2020, the firefighter missed six twenty-four hour shifts for military training. On April 10, 2020, he went on active military leave and missed thirty-two twenty-four hour shifts between that date and August 14, 2020. In August and September 2020, the firefighter missed another four twenty-four hour shifts for military training.

The next Federal fiscal year began on October 1, 2020. See 31 U.S.C. § 1102. In October 2020, the firefighter missed one twenty-four shift and one fourteen-hour night shift for military training. On November 28, 2020, the firefighter was again deployed for active military service, which lasted until September 5, 2021. During that time, he missed seventy twenty-four hour shifts.

After some back and forth, the city paid the firefighter in full for twenty twenty-four hour shifts in each Federal fiscal year. The plaintiff filed a lawsuit in Superior Court asking that the court issue a declaratory judgment declaring that he was entitled to be paid in full for forty twenty-four hour shifts in each Federal fiscal year. Relying on an opinion of our court construing a prior version of G. L. c. 33, § 59 (a), Glass v. Lynn, 49 Mass. App. Ct. 352, 353-355 (2000), the city defended by arguing that it was required to pay in full only for military service within "the first 40 consecutive calendar days of an annual tour of duty" and that a twenty-four hour shift counts as two days of military leave.[2]

The parties stipulated to the relevant facts and filed cross-motions for summary judgment. A Superior Court judge entered judgment for the city, finding that the "Plaintiff is entitled to be compensated only for the time he would have worked during a consecutive 40 day period." This appeal followed.

2. Standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the

[2] As stated, the city actually paid the firefighter in full for twenty twenty-four hour shifts in each Federal fiscal year, regardless of whether that service occurred within a consecutive forty-day period. Of course, G. L. c. 33, § 59 (a), provides a floor, not a ceiling. The city was free to pay the firefighter more than its interpretation of G. L. c. 33, § 59 (a), required.

moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "We review a grant of summary judgment de novo . . . ." Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 272 (2020), quoting DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799 (2013).

3. General laws c. 33, § 59 (a). a. Overview. General Laws c. 33, § 59, sets forth a statutory scheme that provides certain public employees compensation for their civilian employment while on leave for active duty or reserve military service. In broad strokes, § 59 (a) provides full pay for a limited number of days for service in the reserve or State military. Section 59 (d) provides differential pay (that is, the difference between the employee's regular salary and the employee's military salary) for an unlimited period of time. Section 59 (b) and (c) provides similar compensation for state military service under particular statutes. As the Attorney General informs us, the evident purpose of this statute is "to encourage state employees to serve in the militia or reserves." See Opinion of the Attorney General, Rep. A.G., Pub. Doc. No. 12, at 125 (1977). Such service benefits the State and local government both by increasing the number of soldiers protecting the country and the Commonwealth and by providing the government

with the myriad advantages of military training for its employees.

The statute applies to all State employees.[3] G. L. c. 33, § 59 (a)-(d). It also applies to the employees of any county or municipality that has voted to adopt it. G. L. c. 33, § 59 (e). The parties agree that the city has adopted the statute.

"Our primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it.'" Commonwealth v. Sabin, 104 Mass. App. Ct. 303, 305 (2024), quoting Commonwealth v. Sousa, 88 Mass. App. Ct. 47, 49 (2015). "The language of the statute is the starting point for all questions of statutory interpretation." Sabin, supra, quoting Bank of N.Y. Mellon v. Morin, 96 Mass. App. Ct. 503, 507 (2019). "Statutory language should be given effect consistent with its plain meaning. Where . . . that language is clear and unambiguous, it is conclusive as to the intent of the Legislature." Bank of N.Y. Mellon, supra, quoting Patriot Resorts Corp. v. Register of Deeds for the County of Berkshire, N. Dist., 71 Mass. App. Ct. 114, 117 (2008).

This case involves the firefighter's rights under G. L. c. 33, § 59 (a), which provides the following:

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[3] Because of this case's impact on the Commonwealth, we requested the views of the State Solicitor. We gratefully acknowledge the amicus brief filed by the State Solicitor on behalf of the Attorney General.

> "An employee of the commonwealth in the service of the armed forces of the commonwealth or a reserve component of the armed forces of the United States shall be entitled to receive pay without loss of ordinary remuneration as a public employee during service in the uniformed services, annual training under section 60 or drills and parades under section 61, not exceeding 40 days in any federal fiscal year, and shall not lose any seniority or any accrued vacation leave, sick leave, personal leave, compensation time or earned overtime. . . . For the purposes of this subsection, 'day' shall mean any 24-hour period regardless of calendar day."

The parties bring two disputes about the interpretation of this subsection. The city argues that the full salary provided by § 59 (a) applies only for service within the first forty consecutive days in any Federal fiscal year; the firefighter and the Attorney General argue that it applies to any forty days within a Federal fiscal year. The city also argues that each twenty-four hour shift counts as two days of service; the firefighter and the Attorney General argue that any twenty-four hour period counts as only one day of service.[4] We agree with the firefighter and the Attorney General on both issues.

b. Meaning of "not exceeding forty days." The plain and ordinary meaning of G. L. c. 33, § 59 (a), is that a public employee must be compensated for forty days of military leave per Federal fiscal year, whether or not they are consecutive. The operative clause, "during service in the uniformed services,

[4] The Attorney General informs us that the Commonwealth's practice is consistent with hers and the firefighter's interpretation of the statute.

annual training under section 60 or drills and parades under section 61, not exceeding 40 days in any federal fiscal year," does not impose any requirement that those forty days be consecutive, rather than merely in a single Federal fiscal year. The Legislature's decision to omit such a requirement was purposeful as two of the statute's other subsections, § 59 (b) and § 59 (d), expressly refer to service lasting "30 consecutive days." See Donis v. American Waste Servs., LLC, 485 Mass. 267, 266 (2020), quoting Commonwealth v. Johnson, 482 Mass. 830, 835 (2019) ("[T]he omission of particular language from a statute is deemed deliberate where the Legislature included [the] omitted language in related or similar statutes"). See also Commonwealth v. Dossantos, 472 Mass. 74, 80-81 (2015) ("the Legislature clearly knew how to reference a probable cause standard, and chose not to do so in defining the judge's role in connection with the initial placement of an abuse allegation statement in the" domestic violence record keeping system). The city's interpretation requires us to add the word "consecutive" to the statute, which is well beyond our authority. See Cristo v. Worcester County Sheriff's Office, 98 Mass. App. Ct. 372, 379 (2020) ("It is not, however, within our authority to rewrite a statute").

The statute's expansive coverage further supports the omission of a consecutiveness requirement. See Plymouth

Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 604 (2019) (statute must be "read as a coherent whole"); Retirement Bd. of Stoneham v. Contributory Retirement Appeal Bd., 476 Mass. 130, 135 (2016) ("Courts must look to the statutory scheme as a whole"). As noted, the statute applies to public employees engaged in either active duty or reserve service. G. L. c. 33, § 59 (a). The statute specifically includes National Guard members under reserve service through its references to "annual training under section 60 or drills and parades under section 61." G. L. c. 33, § 59 (a). As the "drills and parades" under G. L. c. § 61 requires National Guard members to "assemble for training at least 48 times in each year" for training, it is apparent that the statute presupposes that a public employee in the National Guard would apply this recurring training obligation to the statute's forty-day limit throughout a calendar year. G. L. c. 33, § 61 (a). Conversely, if a consecutiveness requirement were imposed, a National Guard member would exhaust the total forty-day allotment through just twelve weekend days, creating inequitable results between reserve and active duty servicemembers.

To counter the plain meaning of the statute, the city relies on Glass v. Lynn, 49 Mass. App. Ct. 352, 353 (2000), which interpreted a prior version of G. L. c. 33, § 59, which provided full pay for an employee "during his annual tour of

duty of not exceeding seventeen days as a member of a reserve component of the armed forces of the United States . . . ." G. L. c. 33, § 59, as amended by St. 1956, c. 378. We had little trouble determining that "the term 'annual tour of duty of not exceeding seventeen days' must be construed as describing a single period of seventeen consecutive calendar days . . . ." Glass, supra at 357.

The city invokes the principle "that, when a statute after having been construed by the courts is re-enacted without material change, the Legislature are presumed to have adopted the judicial construction put upon it." Commonwealth v. Rivera, 445 Mass. 119, 128 (2005), quoting Nichols v. Vaughan, 217 Mass. 548, 551 (1914). Accord Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 383 (2019); Chapoteau v. Bella Sante, Inc., 103 Mass. App. Ct. 254, 260 n.16 (2023). In doing so, however, the city overlooks the keystone of this principle: that the statute "is re-enacted without material change." Rivera, supra. This doctrine has no application, in logic or law, when the statute has been materially amended.

Here, the Legislature rewrote G. L. c. 33, § 59, in 2014, eliminating completely the language we construed in Glass. St. 2014, c. 307, § 42. Under those circumstances, we can engage in no presumption that the Legislature approved of our opinion in Glass, except to the extent that it may have agreed

with our exhortation that, to the "extent there may be hardship resulting from the express limitations imposed by § 59 on those whose annual tours of military duty exceed the traditional two-week training period, amelioration must be left to the Legislature." Glass, 49 Mass. App. Ct. at 355. Accordingly, we apply the plain meaning of the statutory text, which requires payment for forty days of service within a Federal fiscal year, regardless of whether those forty days are consecutive.

c. Meaning of "day." Regarding whether a twenty-four hour shift counts as one day of service, the statute is explicit: "'day' shall mean any 24-hour period regardless of calendar day." G. L. c. 33, § 59 (a). Indeed, this definition appears to address directly our statement in Glass that "the word 'day' when not qualified means a calendar day." Glass, 49 Mass. App. Ct. at 355, quoting Booker v. Chief Eng'r of the Fire Dep't of Woburn, 324 Mass. 264, 266 (1949). Accordingly, a twenty-four hour shift counts as only one day of leave under § 59 (a).

To counter this, the city provides an e-mail message from an Air Force captain that indicates that the intent of the "day" definition was to "prevent the double shift issue (working both mil[itary] and civ[ilian] positions in the same 24 hour period)." According to the stipulated facts, this interpretation was "indicated" by a particular colonel described as "one of MA National Guard's Senior Attorneys who assisted in

drafting the language in section G.L. c. 33, s. 59(a) for the Legislature." How the definition of "day" prevents an employee from performing civilian work within twenty-four hours of military service is unexplained.[5]

Even those susceptible to the siren call of statements of individual legislators explaining their personal understanding of laws would require no beeswax in their ears to resist this argument. A hearsay statement of what was "indicated" by a person who assisted in drafting statutory language is entitled to no weight. Instead, "[c]lear and unambiguous statutory language is 'conclusive as to legislative intent.'" S&H Indep. Premium Brands E., LLC v. Alcoholic Beverages Control Comm'n, 494 Mass. 464, 467 (2024), quoting HSBC Bank USA, N.A. v. Morris, 490 Mass. 322, 332 (2022). "We need not turn to legislative history because where the statutory language is clear and unambiguous, 'it must be interpreted as written.'" Doe No. 99 v. Cheffi, 105 Mass. App. Ct. 704, 710 (2025), quoting Boss v. Leverett, 484 Mass. 553, 557 (2020). Here, the statutory language is clear, unambiguous, and explicit.

Judgment reversed.

[5] We are highly skeptical that those service members undergoing training on weekends are being routinely excused for the Monday following the weekend.