

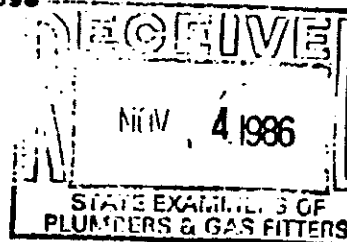


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THE COMMONWEALTH OF MASSACHUSETTS

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November 4, 1986

Irving Risi  
Executive Secretary  
Board of Plumbers & Gas Fitters  
100 Cambridge St.  
Boston, MA 02202

Re: Hughes v. Board of Plumbers and Gas Fitters,  
Suffolk Superior No. 84874

Dear Mr. Risi:

Enclosed for filing please find the decision of the Suffolk Superior Court ruling that the Board's decision was not supported by substantial evidence.

I am also enclosing a copy of my memorandum to the court.

Very truly yours,

Kathleen McDermott  
Assistant Attorney General  
(617) 727-1014

KM/ts  
enclosure

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
C.A. No. 84874

JAMES T. HUGHES SHEET METAL,  
INC. and SHEET METAL WORKERS,  
LOCAL 17,

Plaintiffs

v.

STATE BOARD OF EXAMINERS OF  
PLUMBERS AND GAS FITTERS,

Defendant

DEFENDANT'S MEMORANDUM ON THE MERITS

This action comes before this Court on a petition for judicial review of a decision of the State Board of Plumbers and Gas Fitters (Board) to affirm the decision of the Plumbing and Gas Inspector (Inspector) of Fall River, Massachusetts, ordering the plaintiffs "to cease and desist from installing vent connections and any flue piping work."

Facts and Prior Proceedings

Plaintiff Hughes is a sheet metal company which is working on a public housing project in Fall River. Administrative Record at 1. Plaintiff employs sheet metal workers who are members of the sheet metal union which is also a plaintiff in this case. The work involves fabricating and installing flue

pipes for gas fired boilers which open out to the air. Id. On May 19, 1986, the Plumbing and Gas Inspector for the City of Fall River (Inspector) ordered the plaintiffs "to cease and desist from installing vent connectors and any flue piping work. Id. at 18. As the reason for his decision, the Inspector stated that the sheet metal workers were not licensed to install the flue piping, which could only be done by a licensed plumber or gas fitter. Id. at 8.

On June 4, 1986, a hearing was held on plaintiffs' appeal to the Board. Id. at 1-17. Thereafter, on July 9, 1986, the Board denied plaintiffs' appeal on the ground that

The work involved comes under the jurisdiction of the definition of gas fitting appearing in Section 1 of Chapter 142 G.L. and also comes under the jurisdiction of the provisions of the Massachusetts Fuel Gas Code and shall be installed by licensed plumbers or licensed gasfitters.

Id. at 20.

On August 1, 1986, the plaintiffs filed a complaint pursuant to G.L. c. 30A, § 14, and a request for temporary restraining order. The parties appeared before the Court on August 1, 1986, on the temporary restraining order but the matter was re-scheduled until August 7, 1986, for a determination as to the availability of the transcript of proceedings before the Board and for re-hearing on plaintiff's request for injunctive relief. On August 7, 1986, the parties again appeared and after oral argument, plaintiff's request for

preliminary injunction was allowed. (Morse, J.) The Board stipulated that the transcript would be filed by August 22, 1986.

On August 22, 1986, the Board filed the transcript of proceedings. On August 25, 1986, the Board filed an amended administrative record, having inadvertently failed to include certain documentary materials.

#### Statutory Scheme

General Laws, chapter 142, § 1, defines "gas fitting" as

any work which includes the installation, alteration, and replacement of a piping system beyond the gas meter outlet or regulator through which is conveyed or intended to be conveyed fuel gas of any kind for power, refrigeration, heating or illuminating purposes including the connection therewith and testing of gas fixtures, ranges, refrigerators, stoves, water heaters, house heating boilers, and any other gas using appliances, and the maintenance in good and safe condition of said systems, and the making of necessary repairs and changes.

(Emphasis supplied).

General Laws, chapter 142, § 13, provides that the Board may issue regulations relative to gas fitting. The regulations shall be

reasonable, uniform, based on generally accepted standards of engineering practice, and designed to prevent fire, explosion injury and death.

Pursuant to G.L. c. 142, § 15, Code of Massachusetts regulations, 248, sections 4.00 et seq., sets forth the

Massachusetts Fuel Gas Code. See Code and Appendix, attached to this memorandum.<sup>1/</sup> The Massachusetts Code is based on the National Fuel Gas Code and, in addition, contains certain Massachusetts modifications. Pursuant to these regulations, the Fuel Gas Code is defined as

a safety code which applies to the installation of fuel gas piping systems, fuel gas utilization equipment and related accessories as follows:

(4) coverage of piping systems includes design, materials, components, fabrication, assembly, installation, testing, inspection, operation and maintenance.

(5) coverage of gas utilization equipment and related accessories includes installation, combustion and ventilation air, and venting.

248 C.M.R. (Part 1) 5.1.1.1.(a)(4)(5). (Emphasis supplied).

The Code requires that individuals who perform the installation and replacement of gas piping be "experienced in such work, familiar with all precautions required and [have] complied with all the requirements of the authority having jurisdiction." 248 (Part 1) C.M.R. 5.1.4 (emphasis supplied).

The Code further requires that "permits to perform gas fitting shall be issued to licensed gas fitters and licensed

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<sup>1/</sup> To facilitate the Court's review of the Code, the parties have agreed to submit certain sections of the code as an attachment to their memoranda.

plumbers only." 248 C.M.R. 4.00 (Rule 2). In addition, those licensed individuals "shall be responsible for such gas work and/or equipment specified in the permit." 248 C.M.R. 4.00 (Rule 4).

## ARGUMENT

### Issue Presented

Did the Board correctly find that the installation of flue pipe performed by the sheet metal workers came within the definition of "gas-fitting"?

I. THE DECISION OF THE BOARD SHOULD BE AFFIRMED UNDER APPLICABLE STANDARDS OF REVIEW.

A. The Board's Inquiry Into the Facts

To decide whether the installation of flue pipes performed by the sheet metal workers was within the definition of "gas-fitting," it was necessary for the Board to ascertain exactly what work was performed by the sheet metal workers at the Fall River project. To make this determination, a hearing was held at which all interested parties testified, including the plaintiffs, the Inspector and representatives from the different unions. After the hearing, the Board found that the activity of the sheet metal workers was in fact within the definition of "gas-fitting". The findings of the Board are conclusive if supported by substantial evidence. G.L. c. 30A, §§ 14(7)(e) and (1)(6).

B. The Scope of Review of the Board's Decision is Limited to Determination That The Decision is Supported By Substantial Evidence and Free From Errors of Law.

Plaintiffs' appeal is governed by G.L. c. 30A, § 14. Judicial review is therefore confined to the record. G.L. c. 30A, § 14 (5); Costello v. Department of Public Utilities, 391 Mass. 527, 533 (1984); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 568 (1981). The Court must give "due weight to the experience, technical competence, and specialized knowledge of the agency . . . ." G.L. c. 30A, § 14 (7); Costello, 391 Mass. 533; Brookline v. Department of Environmental Quality Engineering, 387 Mass. 372, 389 (1982). If there is substantial evidence in the record to support the agency's decision, then it must be affirmed. G.L. c. 30A, §§ 14(7)(e) and 1(6). School Committee of Brookline v. Bureau of Special Education Appeals, 389 Mass. 705, 714 (1983). The decision may not be reversed merely because the record contains some evidence which contradicts the agency's conclusions. 1001 Plays, Inc. v. Mayor of Boston, 387 Mass. 879, 885 (1983); School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978).

General Laws c. 30A, § 1(6), defines "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion." School Committee of Brookline, 389 Mass. at 716; Langlitz v. Board of Registration of

Chiropractors, 396 Mass. 374, 379 (1985); Craven v. State Ethics Commission, 390 Mass. 191, 201 (1983); Maddocks v. Contributory Retirement Appeal Board, 369 Mass. 488, 495 (1976).

There are several guidelines to be applied in the court's examination of the record. The function of the court in reviewing the Board's decision is not to conduct a trial de novo, but rather to insure that there was substantial evidence to support the Board's findings, and that the decision is free from errors of law. Attorney General v. Department of Public Utilities, 390 Mass. 208, 228 (1983). The standard does not permit a court to substitute its view of the facts for that of the agency, so long as the agency's decision was reasonable, Attorney General v. Department of Public Utilities, 390 Mass. 228-229, even if the court might justifiably have made a different choice had the matter been before the court in the first instance. Southern Worcester County Vocational School District v. Labor Relations Commission, 377 Mass. 397, 403 (1979). The agency has the responsibility of judging the credibility of witnesses and weighing the evidence presented; the reviewing court must defer to the agency's judgment in this area. School Committee of Brookline, 389 Mass. at 716; Boylston-Washington, Inc. v. Alcoholic Beverages Control Commission, 8 Mass. App. Ct. 396 398 (1976).

Applying this standard of review to the facts below, it is clear that the decision of the Board should be affirmed. There

was substantial evidence supporting the Board's finding that the work in question came under the definition of gas-fitting, which can only be performed by licensed individuals.

The purpose of flue pipes, as all parties at the hearing testified, was to "vent" the exhaust of the gas-fired boilers into the outside air. Id. at 1, 4. Mr. Harold of the Board asserted that the clear problem with inadequate venting was that there was potential for the consumer to be "hurt," should the venting malfunction. Id. at 4. Should the duct work and chimney be "clogged up", serious danger could occur. Id. Although it was not expressly stated at the hearing, the inexorable implication of a "clogged up" flue is that fuel gas particles carried in the exhaust from the gas-fired boilers through the venting system could not properly escape and thus, would "hurt" the consumer. The National Fuel Gas Code's provisions confirm this. Throughout Part 7 of the Code, the process of venting is described as "the discharging of flue gases." (Emphasis supplied). Since the flue pipe system carries such gases, it falls squarely within the plain language of G.L. c. 142, § 1, which defines "gas fitting" as:

a piping system ... through which is conveyed or intended to be conveyed fuel gas of any kind ...

The Board had other grounds for its decision, as well. As was stated above, c. 142, § 1, defines "gas-fitting" as "any work which includes the installation . . . of a piping

system . . . including the connection therewith . . . of . . . house heating boilers . . .". (Emphasis supplied). Throughout the hearing, plaintiff Hughes testified that the kind of work the sheet metal workers employed by his company performed was to "install" the flue piping work. Id. at 3, 7. By their express admission, therefore, the plaintiffs are doing work which comes within the plain language of § 1. In that § 1 describes "gas-fitting" as the "installation of a piping system . . . including the connection therewith," and in that plaintiffs admit they are "installing" a flue-piping system which is "connected" to a gas-fired boiler, the Board was clearly correct in finding that this work came within the definition of "gas-fitting." A statute must be interpreted according to its plain meaning and ordinary usage. Hashimi v. Kalil, 388 Mass. 607 (1983).

Thus, there was substantial evidence to support the Board's finding that the work in question came under the definition of gas-fitting, which can only be done by licensed individuals.

## II. THE DECISION OF THE BOARD IS NOT IN EXCESS OF ITS STATUTORY AUTHORITY.

During oral argument on plaintiffs' request for preliminary injunction, plaintiffs asserted several grounds for their allegation that the Board's decision was excess of its statutory authority.

Their first argument was that the Board's decision was erroneous because the installation in question concerns

"exhaust" pipes which are not included within the specific language of G.L. c. 142, § 1. While it is true that the specific word "exhaust" does not appear in G.L. c. 142, § 1, it is also true that throughout the hearing, numerous terms were used, apparently interchangeably, by professionals in the field, to describe this process. Plaintiff Hughes himself never used the term "exhaust" when he described his work. The term which was, in fact, universally used by those testifying was a variation of "flue piping". For example, plaintiff Hughes referred to the work as "flue work," id. at 7, "venting of the boilers", id. at 1, and "the flue-pipe," Id. at 10. Mr. Walsh of the Sheet Metal Workers Union described the process as "metal vent pipe as a means of exhaust," id. at 3, and "venting," Id. Raymond Tropea of the Board described the process as "the flueing of the gas", id. at 6, and "gas venting." David Medeiros, the Inspector, described it as "flue piping." Id. at 8. Kevin Cotter of the Plumbers' Union described it as "flues," "flue pipes," and "flue piping." Id. at 15.

Given the numerous terms which are used to describe this process, the fact that the word "exhaust" is not mentioned within the definition of "gas-fitting" is far from a critical omission by the legislature. Rather, it underscores the need for exactly the kind of all-encompassing terminology the legislature did employ.

The express intent of the legislature in defining "gas-fitting" as "any work which includes the installation, alteration and replacement of a piping system . . . through which is conveyed fuel gas of any kind . . . including the connection therewith . . . of . . . any . . . gas using appliances . . ." was to cover all parts of the process, however named. In this highly technical area, it is the members of the Board who have particular expertise, not the Court. It is the Board, not the Court, which could appreciate the functional equivalence and/or distinctions to be discerned with respect to words like "flueing", "venting," "exhaust", etc. In conducting the hearing, the Board took these distinctions into account when it determined the nature of the actual work performed. Using its expertise, the Board determined that this was the type of work which came under the definition of "gas-fitting" and which required a license. This Court must defer to the Board's judgment in its particular area of expertise. School Committee of Brookline, 389 Mass. at 716. Judicial deference to the Board's choice between two conflicting views acknowledges the Board's expertise. Brookline v. Department of Environmental Quality Engineering, 387 Mass. at 388. Additionally, deference to the agency recognizes that administrative decision making occurs increasingly in specialized and technical areas. The Court has neither the resources nor the knowledge and skills to oversee the administrative decision-making process and cannot be as

knowledgeable about the various areas as are administrative agencies.

Therefore, plaintiffs may not seek to limit the expansive coverage of G.L. c. 142, § 1, nor negate the Board's expertise in this area, by simply asserting that because the term "exhaust" is not mentioned, this part of the conveyance of fuel gas is not covered.

In support of their allegation that the lack of express language concerning "exhaust" or venting systems means that these systems are outside the definition of "gas-fitting," plaintiffs cited the case of Simon v. Board of Electricians, 395 Mass. 238 (1985). See plaintiffs' memorandum in support of preliminary injunction. Simon held that G.L. c. 141, § 1, which required that only licensed individuals could install "appliances for carrying or using electricity for light, heat or power purposes," did not permit the Board of Electricians' Examiners to enact a regulation requiring that only licensed individuals install fire and burglar alarm systems. Simon can be distinguished from the instant case in three very important ways.

First, the Court came to its conclusion based on a review of the legislative history, which indicated that the purpose of the statutory language was to limit, rather than expand the statute's coverage. Here, there is no legislative history to cast doubt on the all-encompassing nature of the definition of "gas-fitting."

Second, the Supreme Judicial Court found that the Electricians' Board was itself unsure of the breadth of the statute's application. The Court noted that the Electricians' Board had previously requested an Attorney General's Opinion regarding the extent of its statutory authority and had filed certain clarifying legislation. None of those circumstances apply to this statute and this Board. The definition of "gas-fitter" was added in 1977 and no changes or court challenges have been made since that date. No opinion has been sought from the Attorney General as to the scope of that definition; nor has there been any doubt as to whether the Board properly adopted the Fuel Gas Code, which has been in use since 1977 without objection or challenge.

In fact, the Court should be aware that it is the sheet metal workers, rather than the Board, who are unsure of their jurisdiction. Mr. Walsh of the Sheet Metal Workers Union testified that

[i]n November, I filed legislation to have the sheet metal worker licensed in Massachusetts. . . . they are in the process of setting up registration for the sheet metal worker, not just because of this particular problem but because of a lot of various trade work that we do within the industry in the heating, ventilation, air pressurization of the stairwells and high-rise buildings in the hotels within the City of Boston, basically because of what's happened in the city as far as fire ... Administrative Record at 5.

It is quite clear that due to the complex, and potentially life-threatening work that is involved with venting, sheet metal workers have come to believe that they should be licensed

and have indeed, petitioned the legislature to set up such a procedure as a means of ensuring safety. Yet, simultaneously, or until this proposed legislation is passed, plaintiffs would have this Court overlook the same potential dangers with respect to the particular installation in Fall River. It is quite clear that, like the Electricians' Board in Simon, the sheet metal workers themselves are not entirely sure of their authority to do these particular jobs, and therefore, they have no basis for their claim of expanded jurisdiction.

Third, issues of public safety distinguish Simon from the instant case. Simon held that the specific legislative policy behind the licensing statute in question was to protect citizens from the danger posed by the transmission of electric current. 395 Mass. at 247. Since the electricity used in burglar alarm systems was of such low voltage, the Supreme Judicial Court found that the likelihood of accident or injury seemed remote, and therefore, held that unlicensed individuals could install such alarm systems without contravening the legislative policy behind the statute. Id.

Here, there is no question that the legislative policy behind the expansive definition of "gas-fitting" is to protect citizens from the significant danger of asphyxiation posed by fuel gas. By utilizing the broad language, "any work which includes the installation, alteration and replacement of a piping system through which is conveyed fuel gas of any kind . . . including the connection therewith . . . of . . . any . . . gas using applicances . . .", the legislature

was ensuring that only licensed individuals would be responsible for the entire fuel gas piping process. In this process, the proper installation of the end-point, whether one calls it exhaust, flueing or venting, is indisputably as important to safety as any other, earlier part of the system. Unlike the low voltage fire and burglar alarm systems in Simon, any malfunctioning in the proper transmission of gas through flue pipes and out safely to the outside air, could cause serious injury and even death by asphyxiation.

The second ground for plaintiffs' allegation that the Board's decision was in excess of its statutory authority was that the legislature could have included venting and exhaust as terms within the definition of gas fitting but deliberately chose not to. Accordingly, plaintiffs argued, venting work was not within the definition of "gas-fitting." Their evidence for this proposition is found in the fact that the word "venting" is included in the definition of "plumbing" contained in G.L. c. 142, § 1.<sup>3/</sup>

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<sup>3/</sup> General Laws, chapter 142, § 1, defines "plumbing" as

the work and practice, materials and fixtures used in the installation, removal, maintenance, extension, and alteration of a plumbing system; of all piping, fixtures, fixed appliances, and appurtenances in connection with any of the following: sanitary drainage, storm drainage facilities, special wastes, the venting system and the public or private watersupply systems, within or adjacent to any building, structure, or conveyance; to their connection with any point of public disposal or other acceptable terminal within the property line.

(Emphasis supplied).

Yet, while it is true that the word "venting" does not appear in the statutory language, it appears on almost every page of the Fuel Gas Code. In addition, Part 7 of the Code devotes 21 pages exclusively to proper venting procedures. 248 C.M.R. 5.00 (Part 7). Furthermore, Appendices D, G, H, I, J, K all concern venting and contain numerous highly detailed tables relative to venting, including, for example, checking for leakage, sizing of venting system, the installation and testing of flue pipes and vent devices.

Thus, the decision of the Board that the work in question came under the definition of "gas-fitting" was not a decision in excess of its statutory authority. While administrative or executive interpretations cannot bind the courts, weight should be given to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement. H.N. Gorin and Leeder Management Co. v. Rent Control Board of Cambridge, 18 Mass. App. 272, review denied 392 Mass. 1104 (1984). Certainly, the comprehensive discussion of the "venting" process and its requirements in the Fuel Gas Code, supports the Board's conclusion that the process in question came within the definition of "gas-fitting."

### III. THERE CAN BE NO ESTOPPEL AGAINST THE GOVERNMENT

Plaintiffs also asserted, in oral argument on preliminary injunction, that part of the job had already been inspected and approved by the municipal Inspector, and that therefore, the

state Board's Order was inconsistent with the Inspector's previous interpretation of the statute, "changing the rules of the game mid-project and midstream." See plaintiffs' memorandum in support of preliminary injunction at 3.

There is substantial evidence to find the Board was correct in not finding for the plaintiffs on this ground. As the Inspector testified, "this job was held up. The plumber was fully aware that he would have to take out a permit to do the flue piping work." Id. at 9. Although the Inspector did concede that "[i]nitially ... some of the work was accepted," id., he made clear that it was not because the work had passed inspection, but because his then-supervisor was out on disability and unavailable to disapprove it. Id. He concluded by stating that, in any event,

Mr. Hughes was aware well in advance that he was not to continue installing the flue piping on the gas appliances. Well in advance of this hearing, prior to my even going to the job or asking him to stop work.

Id.

As a factual matter, then, plaintiffs have no basis for their assertion that the Board's Order was inconsistent with the Inspector's previous interpretation of the statute.

Moreover, as a matter of law, the Board cannot be estopped from requiring that this work be done by licensed individuals, as the law requires, whatever the prior action taken by Fall River. The Supreme Court has affirmed the rule that estoppel

is not available against the government. Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984) (oral advice given by an intermediary agent of the Medicare Administration to a third party, advice which later proved to be in error, did not estop the Medicare Administration from disavowing reimbursement funds expended on the basis of the misinformation by the third party); Accord Franklin v. Board of Assessors, 391 Mass. 1018 (1984); Phipps Products Corp. v. MBTA, 387 Mass. 687 (1982); Outdoor Advertising Board v. Sun Oil Co., 8 Mass. App. 872 (1979) (no estoppel even where written statement made).

However, this Court need not even decide the question of whether the Board is estopped, because plaintiff has not met the threshold requirement for finding estoppel, in that there has been no detrimental reliance. Id. at 59. Here, the work that was previously done had never been approved, and therefore there could be no detrimental reliance by the plaintiffs on statements made by an Inspector.

#### IV. PLAINTIFFS HAVE FAILED TO SERVE FALL RIVER

The Board must bring a procedural ground for dismissal to the Court's attention. Plaintiffs complaint is brought pursuant to G.L. c. 30A, § 14. Yet G.L. c. 30A, § 14(2), requires that "[s]ervice shall be made upon the agency and each party to the agency proceeding in accordance with the Massachusetts Rules of Civil Procedure." Plaintiffs have never

named the City of Fall River which was certainly a party to the Board proceeding, having been the original entity issuing the cease and desist order. Failure to name the City of Fall River is grounds for dismissal.

Conclusion

For all of the above reasons, the decision of the Board should be affirmed.

Respectfully submitted,

FRANCIS X. BELLOTTI  
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Date: September 2, 1986

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 84874

JAMES T. HUGHES SHEET METAL, INC.  
and SHEET METAL WORKERS, LOCAL 17

vs.

STATE BOARD OF EXAMINERS OF  
PLUMBERS AND GAS FITTERS

MEMORANDUM and ORDER


This case is before the Court for review pursuant to G.L. Ch. 30A, § 15. The plaintiff Hughes seeks to set aside a decision of the State Board of Examiners of Plumbers and Gas Fitters. Hughes also seeks declaration relief pursuant to Chapter 30, § 14. The focus of the controversy is whether gas fitters or plumbers should be allowed to install sheet metal flues and vents to exhaust gas from buildings in a housing project under construction in Fall River.

There is no dispute that the sheet metal ducts are designed and intended to exhaust the burned gases that are part of the heating system for the housing project. The piping is intended to convey the fuel gas from the furnace, or similar heater, which provides warmth in the premises.

Simply stated the vents are not fuel pipes that carry "live" fuel gas, and the vents in this project carry the products of combustion. The decision of the Board is plainly wrong and

it is not supported by substantial evidence.

It is ordered that the decision be set aside and that judgment enter declaring that the plaintiff sheet metal workers are the proper persons to install the subject sheet metal vents, and that this is not the work of plumbers or gas fitters.

  
\_\_\_\_\_  
Thomas R. Morse, Jr.  
Justice of the Superior Court

Dated: October 31, 1986