Select Cases and Current Legal Issues

June 2, 2025

Moderator

Thomas F. Gibson, Esq.

Panelists and Topics

Timothy J. Smyth, Esq., Executive Officer, Boston Retirement System
Personal Injury v. Hazard Undergone

Michael Sacco, Esq., Law Office of Sacco & Collins, P.C.
Causation – When the Panel Says Yes and the Board Says No

Jaclyn Zawada, Esq., Assistant City Solicitor, City of Newton
Public Records/Open Meeting Law Updates

Felicia M. McGinniss, Esq., Senior Associate General Counsel, PERAC
***Does This Violate Chapter 32? (CBAs, DROs and Settlement Agreements*)**

Panelists and Topics (Continued)

James H. Quirk, Jr., Esq., Law Office of James H. Quirk, Jr.
Recent Cases of Note

Thomas F. Gibson, Esq., Law Office of Thomas F. Gibson
Violent Act Injury – Case Study

Uyen Tran, Esq., Assistant Attorney General, Chair, CRAB
Contributory Retirement Appeal Board Update

HAZARD UNDERGONE

Timothy J. Smyth, Esquire
Executive Officer
Boston Retirement System

"Hazard Undergone" Prong for Accidental Disability

- When applying for an accidental disability the following requirements must be satisfied:
  - any member in service who is unable to perform the essential duties of his job;
  - that such inability is likely to be permanent;
  - *by reason of a personal injury sustained or a* ***hazard undergone*** *as a result of, and while in the performance of, his duties at some definite place and at some definite time*; and,
  - without serious and willful misconduct on his part, G.L. c. 32, §7(1)

"Hazard Undergone" Prong for Accidental Disability cont.

- "The concepts of 'injury sustained' and 'hazard undergone' are distinct." *Witkowski v. Contributory Ret. Appeal Bd.*, 90 Mass. App. Ct. 1122 (2016).

- Generally speaking, a "hazard undergone" is an exposure to a harmful situation over a period of time.

  - Often times, it is an exposure to biotoxins, gasses, fumes, hazardous chemicals, life threatening or traumatic events, etc.

Generally

- An application for accidental disability retirement benefits is premised upon one of two prongs:
  - Personal Injury; or,
  - Hazard Undergone.
  - In practicality, the hazard undergone prong is rarely used.
  - More often than not, members utilize the "personal injury" prong citing an injury on a specific date or time.
  - The "hazard undergone" prong is typically associated with a harmful exposure.

PERAC Definition

- Neither Chapter 32 nor 840 CMR define "hazard undergone"

- However, according to PERAC's Disability Application Glossary of Terms, "hazard undergone" is defined to mean:

  - *"One of the reasons for applying for an accidental disability is because a member is permanently and totally disabled because of a hazard undergone while in the performance of his/her duties. This injury must have occurred while in the performance of a member's duties at a definite place and time without serious and willful misconduct on the member's part. As an example, a hazard undergone could include exposure to chemicals which caused a disease which left the member permanently and totally disabled. "*

Historical Context

- Although this definition is not applicable to the current version of Chapter 32 that we use today, as far back as 1938, "hazard" was defined for members of the State Retirement System to mean "exposure to severe and extraordinary climatic conditions, escaping gases, bursting of gas mains, explosions, infectious diseases and such other circumstances as the board may find could not have been reasonably anticipated by an employee in the discharge of his regular duties." See *Hough v. Contributory Ret. Appeal Bd.*, 309 Mass. 534, 538 (1941).
  - The *Hough* court went on to distinguish the then two prongs by holding, "[a]n accident is an unexpected, untoward event which happens without intention or design, and a hazard is a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm." *Id*. at 539.

PERAC Definition cont.

- In contrast, "personal injury" is defined to mean:
  - "One of the reasons for applying for an accidental disability is because a member is permanently and totally disabled because of a personal injury sustained while in the performance of his/her duties. This injury must have occurred while in the performance of a member's duties at a definite place and time without serious and willful misconduct on the member's part. As an example, a personal injury sustained could include injuries suffered from a fall or psychological injury due to a trauma."
  - www.mass.gov/doc/disability-application-glossary-of-terms/download

Common Questions

- *May an application based upon the hazard undergone prong fall under the aggravation of a pre-existing condition standard?*
  - Yes.
  - "You may find that a previous condition or injury is related to the condition or injury that is the basis of the disability application. If the acceleration of a pre-existing condition or injury is as a result of an accident or hazard undergone, in performance of the applicant's duties, causation would be established. However, if the disability is due to the natural progression of the pre-existing condition or was not aggravated by the alleged injury sustained or hazard undergone, causation would not be established."
    - www.mass.gov/doc/physicians-statement-pertaining-to-a-members-disability-retirement-application/download

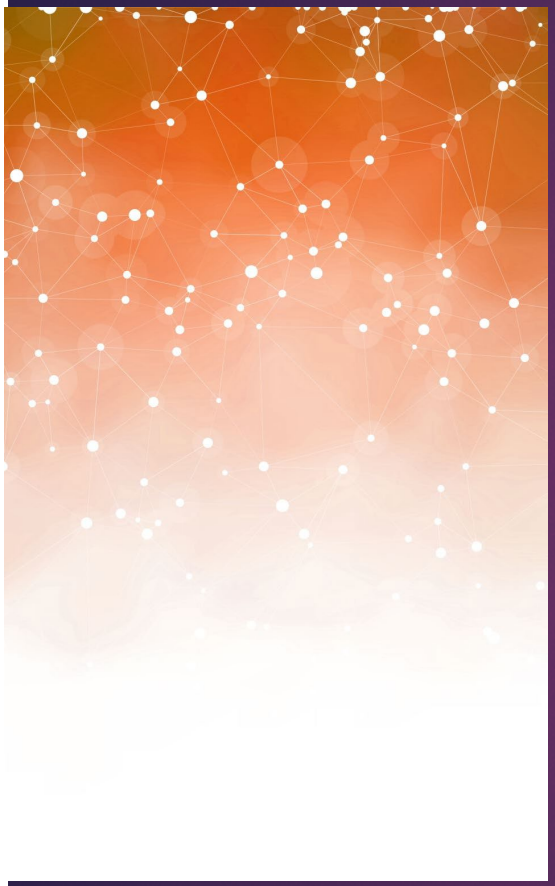
Common Questions

- *Does a member still need to file a notice of injury and satisfy the two-year filing requirements in Section 7 if proceeding under the "hazard undergone" prong?*
  - Absolutely.
    - If a member is exposed to a health hazard, it is essential that a notice of injury be filed with the retirement board within 90 days, in addition to the notice filed with the employer.
    - Even the "discovery rule" could not save a member whose PTSD did not manifest for 10 years after the 9/11 attacks. The Appeals Court noted, "[a]s a matter of law, CRAB did not err by declining to apply the discovery rule, for two reasons. First, the discovery rule is applied to certain actions only in the absence of a governing statute. Second, as the judge observed, the statute sets out two narrow exceptions to the two-year filing requirement." *Witkowski v. CRAB*, 90 Mass. App. Ct. 1122 (2016)

Common Questions cont.

- *What is the burden of proof when a Member asserts the "hazard undergone" prong?*
  - The member must "demonstrate the requisite causal connection between her medical condition and the environment in which she worked. The [member] was required to prove her disablement was by reason of a **hazard undergone** as a result of, and while in the performance of, [her] duties of employment. That is, the [member's] proof had to satisfy CRAB that her disability was the 'natural and proximate result' of the **hazard undergone**. To succeed, therefore, she had to establish that her condition was caused by environmental factors in the work place and not due to some other common etiology. The plaintiff also had to rule out environmental factors other than her school environment or to find some other way of directly linking her school environment to her illness. In the context of this claim (which is for disability based upon a gradual deterioration at work, and not upon some sudden traumatic event), she had to show as part of her case that she was exposed at work to a hazard 'not common and necessary to all or a great many occupations.'" *Narducci v. Contr. Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 128-29 (2007) (internal citations omitted).

Thank You!



Causation – Case Studies When the Panel Says Yes and the Board Says No

MICHAEL SACCO, ESQUIRE
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Causation – Case Studies When the Panel Says Yes and the Board Says No

- To qualify for an accidental disability retirement, a member must prove by the evidence's preponderance that he is permanently unable to perform the position's essential duties. M.G.L. c. 32, § 7(1).
- Incapacity and permanence are quintessential medical questions that the Legislature has vested in the regional medical panel to answer in the first instance, as these questions are beyond the common knowledge and experience of retirement board members. *Malden Retirement Board v. Contributory Retirement Appeal Board*, 1 Mass. App. Ct. 420, 423 (1973).
- As a result, when a medical panel concludes that a member is permanently disabled, it is rare for a non-expert fact-finder to disagree. *Merilee DeSantis v. Massachusetts Teachers' Retirement Board*, CR-21-332 (DALA, November 18, 2022).

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Causation, on the other hand, is solely within the province of the local retirement board. The statute asks the medical panel a narrow question – whether the member's incapacity is "such as might be" the result of the workplace injury(s). M.G.L c. 32, § 6(3)(a). The medical panel's duty is to opine whether causation is medically possible or plausible. *Narducci v. Contributory Retirement Appeal Board,* 68 Mass. App. Ct. 127, 134-135 (2007). A medical panel affirmative causation opinion is only "some evidence" that causation has been established but it is not conclusive of the ultimate fact of causal connection. *Murphy v. Contributory Retirement Appeal Board*, 463 Mass. 333, 335 (2012). It is the province of the local retirement board, after weighing all the medical and non-medical evidence, whether causation has been satisfied by the evidence's preponderance. *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 254-255 (1996).

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Thus – the case law is clear that when a medical panel majority says "yes" to causation, it is only opining as to causation's medical possibility (1%), whereas a retirement board must find by the evidence's preponderance – it is more likely than not, or 51% - that the specific injury, series of injuries or hazard undergone has proximately caused the permanent incapacity.
- This important task and retirement board function and responsibility must be undertaken utilizing a robust review of all the facts and evidence, which is best accomplished through the evidentiary hearing process, that allows retirement boards to examine witnesses and fully evaluate all the evidence before it.

Causation – Case Studies When the Panel Says Yes and the Board Says No

- CASE STUDIES
- *Jill Markos v. Haverhill Retirement Board,* CR-21-0579 (October 4, 2024)
- Facts:
  - Ms. Markos worked as a Paraprofessional – she claimed three (3) injuries: December 9, 2014, she slipped and fell in the parking lot walking from her car to start the school day, striking her head and suffering a concussion; April 28, 2015, walking down a flight of stairs, she tripped and again struck her head; and September 5, 2019, she fell walking up a flight of stairs, striking her head.
  - She filed injury reports for the December 9, 2014, and April 28, 2015, injuries, but not the September 5, 2019, injury

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Ms. Markos had a pre-existing appointment with her primary care doctor on September 5, 2019 – medical records reflect she never mentioned the injury earlier that day, and she later claimed she did not file an injury report out of fear of losing her job – she did not return after this incident
- Ms. Markos treated with various neurologists for a constellation of symptoms – photophobia, tremors, gait unsteadiness, difficulty following instructions, migraine headaches and anxiety – most of which her treating and examining physicians related back to her December 2014 injury
- Ms. Markos applied for an accidental disability retirement – her first application did not cite the September 5, 2019, injury – only the December 2014 and April 2015 injuries – the Physician Statement only cited the December 2014 injury

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Ms. Markos was individually evaluated by regional medical panel – Drs. Fullerton, Fisher and Brady – neurological panel – all affirmatively answered incapacity, permanence and causation – Dr. Fullerton noted all 3 injuries; Dr. Fisher only noted the December 2014 injury; and Dr. Brady noted all 3 injuries
- HRB believed Ms. Markos' problems stemmed from the December 2014 injury, and was going to deny – allowed Ms. Markos to withdraw and refile based on the September 2019 injury, since it occurred within the last 2 years
- Ms. Markos withdraws and files a second application – this time, she cites all 3 injuries
- Board conducts an evidentiary hearing – determines based on the facts that no injury report was filed, there was no corroboration in the medical records the day she was injured, and she did not discuss the injury with most of her treating physicians, that the September 2019 injury did not occur

Causation – Case Studies When the Panel Says Yes and the Board Says No

- HRB sends to a medical panel – asks the panel to address only the April 2015 injury when addressing causation, and what role, if any, the December 2014 injury played in Ms. Markos' permanent incapacity, if one exists
- Medical Panel – Panel Majority YYY – One Panel member opines December 2014 injury was the start of the problem, April 2015 and September 2019 aggravated it to permanent incapacity –other Panel member stated that the April 2015 injury aggravated the underlying condition, establishing causation
- Panel minority – No to incapacity – unable to find any deficits on examination, no evidence to support symptoms
- Board denies – no Panel Majority that answered causation based solely on the April 2015 injury

Causation – Case Studies When the Panel Says Yes and the Board Says No

- On appeal – DALA found that Markos, based on her testimony alone, fell on September 2019, despite all the other evidence to the contrary
- DALA also found that the Panel minority opinion was insufficient to sustain the Board's denial
- However – DALA found that the Panel majority opinions were too inconsistent, were not corroborated by the medical evidence, and that the April 2015 and September 2019 falls were not evidence of aggravating her condition, but rather examples of how her condition continued to deteriorate based on the December 2014 fall, which is what almost all the underlying medical opinion evidence had concluded
- DALA upholds HRB decision to deny

Causation – Case Studies When the Panel Says Yes and the Board Says No

- *Teresa Underwood v. Boston Retirement Board*, CR-21-0353 (DALA, July 26, 2024)
- Facts:
  - Underwood elementary school teacher, started in 2000
  - By 2011 – 2 MVAs, resulted in lower back disc herniations and chronic back and cervical pain
  - 2016-2017 school year – teaching 3rd grade – some special needs students in the classroom
  - September 16, 2016 - a special needs student – "Student S" – became disruptive and punched a classmate

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Underwood physically forces Student S out of the classroom – another student runs for help, and when the Principal arrives, Underwood is lying on top of Student S in an unsafe restraint – Student S is screaming, "Get off me"
- Principal instructed Underwood to release Student S, and she did – Student S was crying, coughing and gagging on his mucus
- Underwood proceeded to line her students up to go to lunch, and then she left to have lunch with her husband, and she never returned to school
- The Principal conducted an investigation, which led to Underwood's termination on April 6, 2018, for improperly restraining the student

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Underwood filed for ADR in March 2018 based on the September 16, 2016, incident, claiming the incident aggravated her underlying lumbar and cervical spine conditions
- Between September 16, 2016, incident and her April 6, 2018, termination, Underwood's medical treatment for her lower back and cervical spine was all related to her underlying conditions, and no diagnostic studies demonstrated any fundamental worsening in contrast to her pre-injury state
- Medical Panel examines her – Panel majority YYY, Panel minority YYN
- Panel minority opinion noted multiple inconsistencies between Underwood's statements during the examination and what the medical records revealed, and based on his examination and review of the medical records, he opined that causation was not possible

Causation – Case Studies When the Panel Says Yes and the Board Says No

- BRB denies Application – serious and willful misconduct in Student S incident – Underwood appeals
- DALA agrees with BRB on serious and willful misconduct issue – denies on that basis
- BRB also argued on appeal that the Panel minority opinion was more persuasive, and more consistent with the underlying medical records, as well as Underwood not being a credible witness with respect to both the Student S incident and what she told the Panel members during the examination
- DALA noted that the medical experts' causation opinions are entitled to deference based on training and expertise, but the deference is not "inexorable or limitless"

Causation – Case Studies When the Panel Says Yes and the Board Says No

- In our argument – we pointed out all the flaws and contradictions in both Underwood's statements to the Panel majority, as well as the medical evidence that undercut their opinions, which they either failed to address or simply ignored
- DALA agreed – finding the Panel majority opinions were sufficiently flawed and were not persuasive enough to overcome the Panel minority causation opinion, and thus the BRB's decision was upheld

Causation – Case Studies When the Panel Says Yes and the Board Says No

- *Robin Rogers v. Worcester Retirement Board*, CR-22-164 (DALA, January 26, 2024
- Facts:
  - In 2013, Rogers started working as an instructional assistant in the Worcester Public Schools
  - In 1997, Rogers was involved in a serious MVA, and she suffered from chronic back pain since
  - In 2008, Rogers had her first back surgery, which was a laminectomy and spinal fusion
  - In 2015, Rogers had a second back surgery, another laminectomy, and she returned to work in early January 2016

Causation – Case Studies When the Panel Says Yes and the Board Says No

- In February 2016, a student became violent, and Rogers jumped over a desk to reach the student, whom she restrained for several minutes until help arrived
- Rogers's chronic pain returned, and she was unable to return to work
- In August 2016, Rogers underwent her 3rd spinal surgery, which included another fusion
- In June 2017, Rogers filed for an accidental disability retirement based on the February 2016 incident
- WRB sends to a medical panel – joint panel examination – YYY – but in the narrative, Panel suggests further treatment might allow her to go back to work

Causation – Case Studies When the Panel Says Yes and the Board Says No

- WRB tables while Rogers undergoes further treatment
- After treatment, her treating physician opined the treatment was not successful, and a second medical panel was convened – three individual examinations
- Second Panel – Panel majority YYY, Panel Minority YYN
- Disparity – Panel majority believed the February 2016 incident aggravated Rogers's underlying condition, Panel minority believed it did not
- Other medical opinion evidence from workers' comp claim – similar disparity
- WRB denies – believed that the evidence did not support causation

Causation – Case Studies When the Panel Says Yes and the Board Says No

- On appeal – DALA finds no dispute that incapacity and permanence have been established
- On causation – DALA agreed with the WRB that the underlying medical evidence, even that evidence that was supportive, noted that the clinical nature of chronic back pain post surgery is to decline, and that the evidence supported the theory that Rogers had chronic back pain for 20 years and two (2) surgeries prior to the February 2016 injury
- DALA also found, as we argued, she was only back to work for a couple of weeks following her 2015 surgery, and thus she had never fully recovered from that procedure, which was unrelated to her employment
- DALA affirmed WRB's denial

Causation – Case Studies When the Panel Says Yes and the Board Says No

- Take-a-ways:
  - "We're Not Doctors" – As these cases illustrate, causation is both a medical and legal question, and as fact-finders, Board members must weigh all the evidence, including medical evidence, and determine whether the statutory standard has been satisfied
  - Medical Panel on Causation – "Such as might be" is about as low a standard as you get get – unless it is impossible that a particular injury or hazard could have caused the permanent incapacity, Panel must answer "yes" to causation – 1% vs. 51%
  - "Major but not necessarily predominant" – this is the workers' compensation causation standard, which is a lesser standard than the "natural and proximate" and "preponderance standard that must be applied in retirement cases

Causation – Case Studies When the Panel Says Yes and the Board Says No

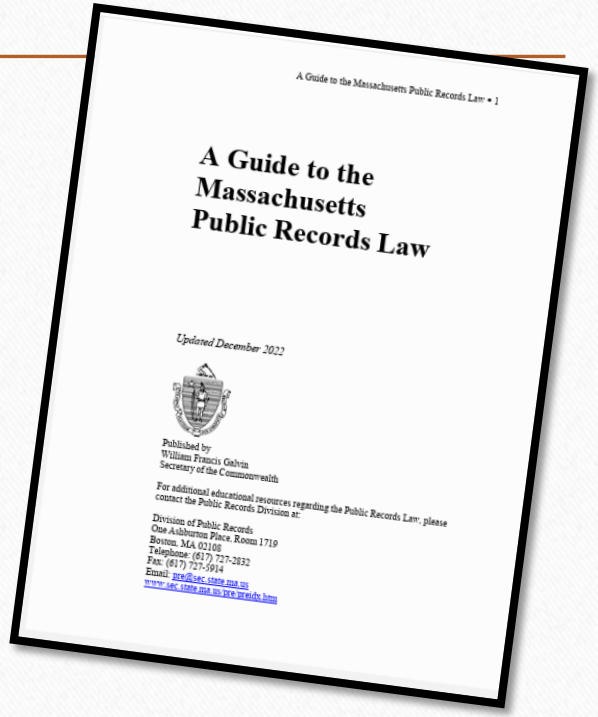
- Evidentiary Hearings, Evidentiary Hearings, Evidentiary Hearings
- PERAC Likely Would Have Approved All These Cases
- When the Panel says "yes" the Board can say "no" and if done properly, and the decision is fact-based, you have a very good chance of prevailing on appeal
- The hearing at DALA is de novo – meaning, while it reviews the retirement board's decision to determine if it was correct, it renders its own decision based on its own interpretation of the facts and law

Public Records Law
&
Open Meeting Law

June 2, 2025

Public Records Law

Massachusetts General Laws
Chapter 66, Section 10 &
Chapter 4, Section 7(26)



A Guide to the Massachusetts Public Records Law • 1

A Guide to the Massachusetts Public Records Law

Updated December 2022

Published by
William Francis Galvin
Secretary of the Commonwealth

For additional educational resources regarding the Public Records Law, please contact the Public Records Division at:

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www.sec.state.ma.us/pre/prewidx.htm

A public record is any document or other record in any form sent or received by [the retirement system] unless an exemption applies.

- Email
- Photos
- Reports
- Agendas
- Audio recording
- Video recording
- Minutes
- Text messages
- Data




Governmental records are presumed to be public, and members of the public have a "right to access records and information held by" public entities. Attorney Gen. v. District Attorney for the Plymouth Dist., 484 Mass. 260, 262-264 (2020).

The public records law promotes broad public access to governmental records. Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 382-383 (2002).

Exemptions from the definition of "public record" under G. L. c. 4, § 7, Twenty-sixth, "are strictly construed." Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 614 (1993).

The records holder claiming an exemption has the burden of proving by a preponderance of the evidence that the record or portion of the record may be withheld in accordance with state or federal law. G. L. c. 66, § 10A (d) (1) (iv).

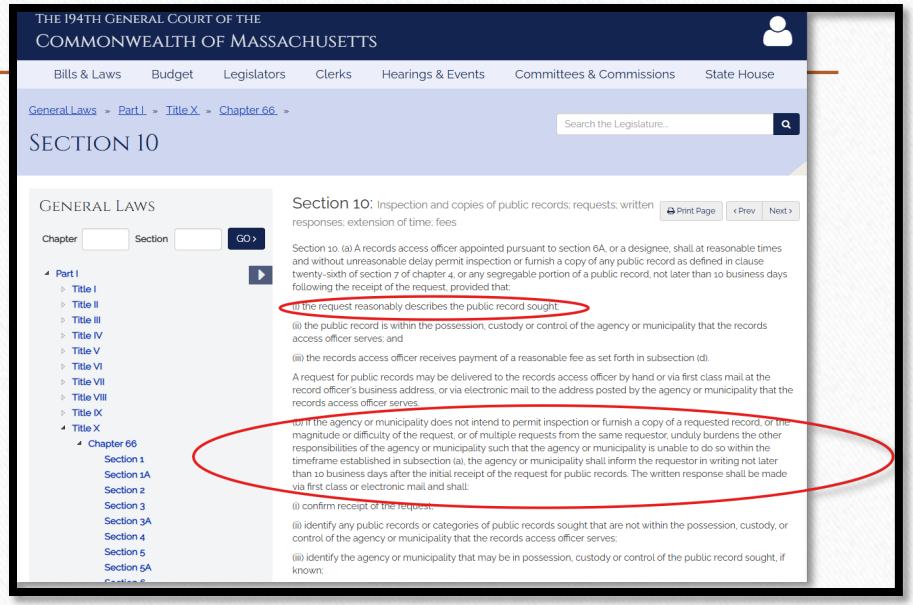
Bradley v. Records Access Officer, Department of State Police, 100 Mass. App. Ct. 46, 49 (2021)

Some Exemptions

- Exemption (a) Statutory exemption
- Exemption (c) Privacy; Personnel and medical information
- Exemption (o) Home address, home phone, personal email of public employee
- Exemption (t) Statements filed under G.L. c.32 §20C

Practical Tips

- G.L. c.66 §10(a)(i)
- G.L. c.66 §10(b)



A public records request must reasonably describe the record sought.

G.L. c.66 §10(a)(i)

Friedman v. DALA and "A Rule of Reason"

103 Mass. App. Ct. 806 (2024)

- Bruce Friedman made 13 public records requests to the BSEA in eight (8) months.
- The Appeals Court addresses five (5) of the requests.
- Three (3) of his requests were properly dismissed because they failed to reasonably describe the records sought.
- Two (2) of his requests were in compliance with public records law.

The reasonable description requirement of FOIA is met when the request "would be sufficient [to enable] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."

Truitt v. Department of State, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990).

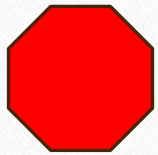
- Request 1 DID reasonably describe the records sought.
- All e-mail messages between Bureau of Special Education Appeals staff and specified e-mail domain belonging to a law firm that frequently appeared before bureau that were sent or received during three-year period
- The Appeals Court noted: the documents responsive to request one can be identified with reasonable effort - it is the production that is extremely time intensive.
    - Consider the "identification" process before starting the production process.

- Request 2 DID NOT reasonably describe the records sought
- Text messages exchanged between BSEA staff and anyone who worked at a law firm that frequently appeared before bureau over a more than five-year period
- Response would require BSEA to "determine, without aid from the request, each person who worked (or had worked) at the law firm, then somehow identify their personal cell phone numbers, and then conduct a search of each bureau staff member's personal (and, if applicable, work-issued) cell phone to determine whether they exchanged text messages."

Tip:
Ask "Do I have enough information?"

- What is being sought?
- Is research needed?
- What assumptions am I making?

"While **as a practical matter it may be the better course for an agency to state upfront that a request fails to meet the reasonable description requirement**, the agency also may attempt to work with the requestor to determine whether the requestor can refine the request." Friedman, 103 Mass. App. Ct. at 819.



Tip: Review the §10(b) "checklist"

Develop template responses using G.L. c.66 §10(b) as a nine-point checklist

- Identify records or portions you intend to withhold (iv)
- Identify records or portions you intend to produce (v)
- Extend the response deadline (vi)
- **Generate a cost estimate** (viii)

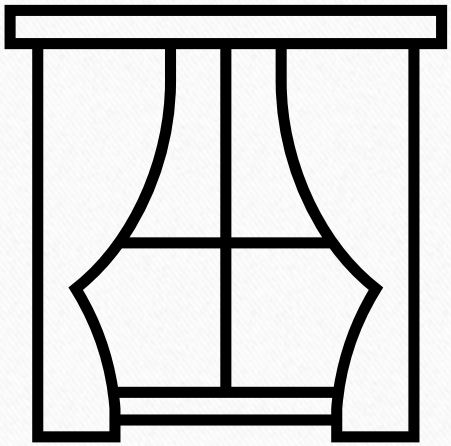
Open Meeting Law
Massachusetts General Laws Chapter 30A §§18-25

OML exists to ensure transparency in the deliberations of a public body by requiring:

- Public notice

- Public access

- Open deliberations



Under OML, all meetings of a public body must be open to the public.

What is a public body?

A public body is a multi-member board, commission, committee, or sub-committee established to serve a public purpose

What is a meeting?

A meeting is a deliberation of the public body concerning any matter within that body's jurisdiction.

Some exceptions to the definition of "meeting"

- Trainings, conferences, seminars (provided there is no deliberation)
- Open participation in another public body's meeting (provided there is no deliberation)
- On-site visit of project or program (provided there is no deliberation)

Deliberation

An oral or written communication through any medium, between or among a quorum of a public body on any business within the jurisdiction of the public body.

- ✓ Serial conversations
  - ✓ Text messages, emails, "playing a game of telephone"

- × Agendas
- × Scheduling information
- × Procedural information
- × Documents to be discussed IF they do not contain member opinions

Agendas

- 48 hours advance notice (excluding weekends, holidays)
- Date, time, place of meeting
- List of topics: must be sufficiently specific
- Public body may consider a topic that was not listed in the meeting notice if it was not reasonably anticipated
- Better practice is to postpone deliberations/actions if possible until properly noticed

Executive Session

- Convene in open session
- State the purpose of the executive session
- State whether the public body will reconvene in open session at the end
- Take a roll call vote of the body to enter executive session.

- Purpose 1: To discuss the reputation, character, physical condition or mental health of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual.
- Purpose 3: To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares
- Purpose 7: To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements

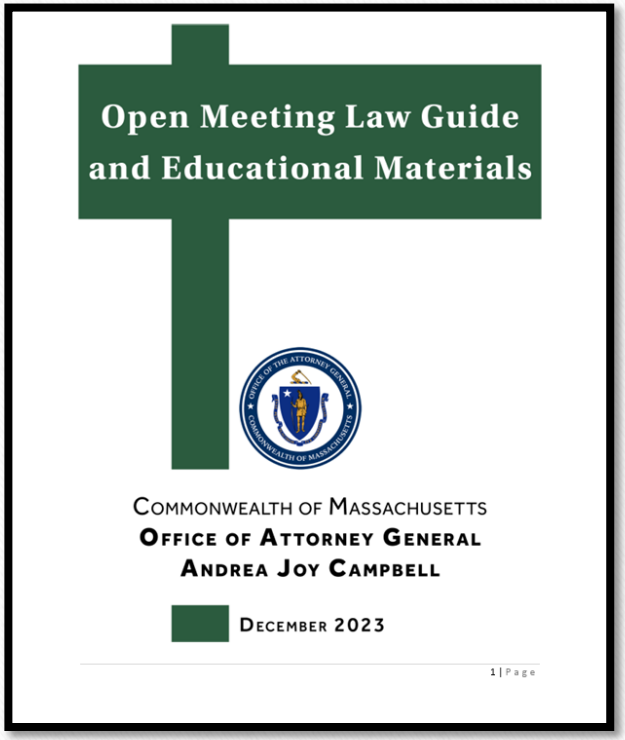
- OML 2015-120: Board cited Purpose 3. AGO found this was improper and ordered Board to publicly release the minutes of the executive session without redaction.

Minutes

- Date, time and place of the meeting;
- Members present or absent;
- Decisions made and actions taken, including record of all votes;
- Summary of discussions on each subject;
- List of all documents and exhibits used at the meeting; and
- Names of those who participated remotely

× Not a transcript

Resources



Certificate of receipt

- https://www.mass.gov/doc/certificate-of-receipt-of-open-meeting-law-materials-102120/download

MACRS
LEGAL PANEL

Does This Violate Chapter 32?
(Agreements, Contracts, DROs)

Felicia McGinniss, Senior Associate General Counsel | PERAC
MACRS LEGAL PANEL
June 2, 2025

Introduction

- Chapter 32 is the Plan document that controls our public pension system.
- All agreements and contracts must be made in conformity with Chapter 32.
- If any parts of an agreement violate Chapter 32, they cannot legally be enforced.
- Topics covered today:
  - Collective Bargaining Agreements
  - Domestic Relation Orders
  - Settlement Agreements

MACRS
LEGAL PANEL

Collective Bargaining Agreements (“CBAs”)

Role of CBAs

- CBAs are created usually between unions and employers to ensure contractually guaranteed benefits for employees.
- Many CBAs will include notations after a stipend that “this payment is considered regular compensation and pensionable for retirement purposes.”
- However, CBAs **cannot** dictate what is considered regular compensation.
- The determination of what is regular compensation lies with the retirement boards and PERAC.

MACRS LEGAL PANEL

CBAs – Always Right?

Examples Where They Usually Get it Wrong:	Examples Where They Usually Get it Right:
▪ Clothing Allowances ▪ Overtime Pay ▪ Drug Testing ▪ Holiday Premiums ▪ No Services Provided ▪ Payment Isn't Guaranteed	▪ Training/Certification ▪ Shift Differentials ▪ On-Call ▪ Additional Services Beyond Job Duties

CBAs – Summary

- Just because a CBA indicates a payment is regular compensation should not influence your review.
- The determination of whether a payment is regular compensation is a fact specific inquiry.
- **Remember:** Payments must be received for services performed by the employee on behalf of the employer.
- Payments must also be pre-determined, non-discretionary, guaranteed, and available to all similarly situated employees.

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Domestic Relations Orders (“DROs”)

What is a DRO?

- A DRO is a judicial order that splits a retirement benefit by recognizing the joint marital ownership in the benefit by the plan participate and their former spouse.
- DRO's must be provided to retirement boards so that a copy can be maintained on file in the event of retirement.
- At the time of a member's retirement, retirement boards should ask and confirm whether there is a DRO in place.

What DROs Can Do

- Usually, DROs will assign a percentage or amount of a retiree's retirement allowance to the ex-spouse.
  - This can become effective immediately, because the member is retiring, or in the future at the time of the member's actual retirement.
- The ex-spouse is then paid directly from the retirement board as the "alternate payee."
- Can also require that a member designate the ex-spouse as an Option C beneficiary at the time of retirement.**

What DROs Cannot Do

- Usually, the issues with DROs arise when the divorce occurs after the member has already retired.
- DROs cannot change a retiree's option selection as G.L. c. 32, s. 12(1) requires that the election be made prior to retirement.**
- DROs cannot change a nominated beneficiary after retirement.**

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Settlement Agreements

What are Settlement Agreements?

- Settlement agreements are usually entered into over some type of employment dispute, i.e., discrimination or unlawful firing.
- The settlement agreement will seek to make the member whole, which can occur in several ways:
  - Reinstatement
  - Back Pay Award
  - Front Pay Award
  - Lump-sum Payment for Damages/Fees

General Issues

- Issues usually arise when the member has already retired and then receives the settlement agreement.
- However, regardless of whether the member is retired or not, a settlement agreement cannot count “front pay” or “damages” as regular compensation.
- Additionally, back pay must be awarded, the period it covers should be identified, and contributions must be remitted to the retirement board on that pay for it to count as creditable service.
- See ***Montiero v. PERAC***, CR-19-0453 (DALA Oct. 7, 2022).

What Happens if a Member Already Retired?

- If a member has already retired and is awarded back pay, deductions must be paid to receive creditable service.
- If the retiree wants their retirement allowance recalculated to include the additional service, they must refund their received retirement allowance in full.
  - An individual cannot be both a member-in-service receiving regular compensation and accruing creditable service while simultaneously being a retiree receiving a retirement allowance.
  - *See* ***Leary v. Hull Ret. Bd. & PERAC***, CR-08-551 (DALA Sept. 16, 2011)

Settlement Agreements – Summary

- PERAC Memorandum #28 of 2001.
  - Addresses specific guidelines for the inclusion of back pay for retirement purposes for settlement agreements.
- **Key Point**: Chapter 32 cannot be used as a vehicle to resolve employment disputes. Agreements must be in conformity with Chapter 32, even if the settlement agreement was court-ordered, or they cannot be enforced.
  - *See* ***Tarlow v. Teachers' Ret. Sys.***, CR-10-793 (CRAB, Nov. 26, 2013)

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Conclusion

- Main question to always ask when reviewing any type of contract or agreement: Does it Violate Chapter 32?
- If it does, it cannot be legally enforced, as Chapter 32 “reigns supreme.”
- If you have any questions, I can be reached at:
  - (617) 591-8909
  - felicia.m.mcginniss@mass.gov

Any Questions?

Recent Cases of Note

James H. Quirk, Jr. Esq.

Section 94 – Heart Presumption

- ***Shailor v. Bristol County Retirement Board, CR-21-034*** (DALA, August 16, 2024 – On Appeal to CRAB)

Police Officer for 20 years invoked the heart presumption in his ADR application, based upon disabling hypertension.

The medical panel certified as to Shailor's permanent disability from police duties, and to the presumption that the hypertension was suffered in the line of duty.

Pre-employment physicals found him fit for work with no evidence of heart disease or hypertension, but did reveal an existing congenital "bicuspid aortic valve."

Section 94 – Heart Presumption

- ***Shailor v. Bristol County Retirement Board, CR-21-034*** (DALA, August 16, 2024 – On Appeal to CRAB) (cont.)

The Board denied the application and Shailor appealed to DALA, which reversed the Board's decision.

DALA found that the abnormality of Shailor's aortic valve did not disqualify the invocation of the presumption, because "a preemployment physical exam makes the heart law unavailable only if it disclosed some evidence of the same condition that ultimately disabled the member."

DALA found that Shailor's congenital valve defect was "unconnected to his now-disabling hypertension."

Section 94 – Heart Presumption

- ***Shailor v. Bristol County Retirement Board, CR-21-034*** (DALA, August 16, 2024 – On Appeal to CRAB) (cont.)

DALA's decision, which was consistent with its prior decision in *Cabral v. Fall River Retirement Board v. PERAC*, CR-15-673 and CR-17-211 (DALA, June 5, 2020) has been appealed to CRAB, (where *Cabral* is pending, now for 5 years).

PERAC, nevertheless, has maintained its position that if a pre-employment physical exam reveals any evidence of hypertension *or* heart disease, the presumption cannot be invoked, and that a congenital valve defect is such evidence of heart disease, if not hypertension.

Anti-Spiking – Systemic Wage Adjustment

- ***Celona v. MTRS and PERAC, CR-23-0395*** (DALA, October 25, 2024 – On Appeal to CRAB)

Appeal filed prior to enactment of Chapter 141 of the Acts of 2024, *An Act Relative to Salary Range Transparency*, which created anti-spiking exceptions to G.L. c. 32, Section 5(2)(f), including for salary adjustments pursuant to "an employer's systemic wage adjustment."

Every employee of the charter school received larger than usual, but varying, pay raises in 2022 and 2023, to make up for the lack of salary increases during the pandemic.

In 2023, MTRS correctly found that Ms. Celona's raises tripped the anti-spiking law and reduced her pension.

Anti-Spiking – Systemic Wage Adjustment

- ***Celona v. MTRS and PERAC, CR-23-0395*** (DALA, October 25, 2024 – On Appeal to CRAB) (cont.)

Chapter 141 of the Acts of 2024, was enacted on July 31, 2024, but was made effective retroactively to July 1, 2018.

MTRS declined to adjust Ms. Celona's allowance, asserting that a "systemic wage adjustment" must mean the same percentage increase to all employees, and be set according to a formula.

Ms. Celona appealed, and DALA invited PERAC to be a party to the proceedings, and to weigh in on PERAC Memo #21/2024, which PERAC issued on August 14, 2024.

Anti-Spiking – Systemic Wage Adjustment

- ***Celona v. MTRS and PERAC, CR-23-0395*** (DALA, October 25, 2024 – On Appeal to CRAB) (cont.)

PERAC opined that because the employer had given raises to all of its employees in response to a specific event (the pandemic), that this was a "systemic wage adjustment," notwithstanding a wide variance in the raises.

DALA agreed with PERAC, and it rejected the MTRS assertion that a raise must be "an additional [percentage] across the board, or something [else] that could be expressed formulaically…"

DALA's decision is not final as MTRS has requested review.

Violent Act Injury

A Case Study

Thomas F. Gibson, Esq.

Chapter 149 of the Acts of 2024 – *"An Act Relative to Disability Pensions and Critical Incident Stress Management for Violent Crimes"*

- Provided enhanced ADR benefits for certain disabilities resulting from a "Violent Act Injury"; and,
- Provided that first responders involved in an incident involving exposure to actual or threatened death, serious injury, sexual violence, or any other critical incident, be provided notice of programs where they can receive stress management debriefing.

What is a "Violent Act Injury"?

Defined in G.L. c. 32, § 1 as:

- A catastrophic, life-threatening or life-altering and permanent bodily injury -
- sustained as a direct and proximate result of a violent attack upon a person -
- by means of a dangerous weapon, which is designed for the purpose of causing serious injury or death, including, but not limited to, a firearm, knife, automobile or explosive device.

Who is covered by a "Violent Act Injury"?

- Limited to police officers (excluding State Police), firefighters, EMTs, and public and municipal licensed health care workers.
- No retroactivity for those who retired before October 29, 2024, the effective date of enactment.
- Applies to physical (bodily) injuries; does not apply to mental or emotional injuries, such as PTSD.

What is the enhanced ADR benefit provided by a "Violent Act Injury"?

- Allowance equal to 100% of the regular rate of compensation, including pensionable stipends, as if the member had continued in service at the grade held at retirement, plus a return of total accumulated deductions.
- The benefit is adjusted annually, in the same manner as a Section 100 benefit, and is payable to the member until death or mandatory retirement age, if applicable.

What is the enhanced ADR benefit provided by a "Violent Act Injury"? (cont.)

- At mandatory retirement age (65 for police and fire) the ADR benefit is reduced to 80% of the regular rate of compensation paid for the previous 12 months, subject to COLAs.
- Upon death of retiree, the spouse receives 75% of benefit for life – Section 9 and Option C not applicable; if member dies prior to mandatory retirement age, the spouse's benefit remains at 75%, subject to COLAs, plus dependency benefits.

What is the enhanced ADR benefit provided by a "Violent Act Injury"? (cont.)

- Provides post-retirement indemnification of medical expenses related to injuries.
- No post-retirement earnings restrictions if employed in the private sector.
- MA public sector earnings allowed up to 50% of allowance - no hours restrictions. Prohibited from employment in Group 3 and 4 positions.
- See PERAC Memo #28/2024 for further details.

Case Study – Sergeant Jonathan Harker

- Profile: Age 47, police officer for the Town of Renfield for over 20 years; happily married to Mina, a nurse, father of 4, union officer, socially active, no significant medical issues.
- Injury: On April 8, 2022, dispatched with another officer to take into custody a teenage male, 6'2" in height and weighing 210 lbs., who had fled a medical facility after being admitted as a suicidal person.

Case Study – Sergeant Jonathan Harker

- The subject violently resisted being taken into custody, gained control of the other officer's steel duty baton, and struck Sgt. Harker in the head several times before being restrained.
- Sgt. Harker was taken by EMS from the scene to the hospital due to vision issues, and the same day was discharged with a diagnosis of concussion.
- He returned that day to the Renfield Police Department but struggled to complete an injury report; he was brought home by Mina.

Case Study – Sergeant Jonathan Harker

- Sgt. Harker was unable to return to work and was placed on IOD leave under G.L. c. 41, § 111F.
- Significant symptoms ensued, resulting in extensive medical treatment for headaches, cognitive deterioration and visual defects.
- Almost two years later, in March of 2024, Sgt. Harker filed an application for accidental disability retirement, supported by the Physician's Statement of Dr. Van Helsing, the member's treating neurologist.

Case Study – Sergeant Jonathan Harker

- Dr. Van Helsing certified as to the member's permanent incapacity resulting from post-concussion syndrome due to the head injury sustained on April 8, 2022, citing Sgt. Harker's dizziness, slow cognitive processing speed, headaches, and the failure of medication and therapies to improve the member's condition.

- In separate examinations, the medical panel unanimously agreed, finding that "the nature of this head strike injury likely caused brain damage."

Case Study – Sergeant Jonathan Harker

- The Board conducted an extensive review of Sgt. Harker's ADR application and the medical panel reports on November 20, 2024 – after the effective date of the Violent Act Injury Law, and after issuance of PERAC Memo #28/2024.
- At the Board's request, Renfield Police Chief John Seward presented for inspection the Monadnock brand collapsible steel baton issued to Renfield Police Officers as standard law enforcement equipment – the intent and design of which is to subdue individuals by force.

Case Study – Sergeant Jonathan Harker

Case Study – Sergeant Jonathan Harker

- Sgt. Harker and Mina appeared before the Board, as did Chief Seward, citing the many substantial ways Sgt. Harker's life has been impacted by his injury, and providing examples of the changes to his personality and the family's interactions.
- The Board requested Mina to file an attested statement detailing how these changes have affected her husband's daily activities, and continued its review of the application.

Case Study – Sergeant Jonathan Harker

- After receipt and review, the Board granted Sgt. Harker's application under the Violent Act Injury Law, making detailed findings in support.
- The Board concluded that Sgt. Harker indeed sustained a catastrophic, life-threatening or life-altering and permanent bodily injury, as a direct and proximate result of a violent attack by means of a dangerous weapon, a police baton, which is designed for the purpose of causing serious injury or death, and forwarded its findings to PERAC.

Case Study – Sergeant Jonathan Harker

- Although approving Sgt. Harker's ADR under Section 7, PERAC remanded the Board's approval under the Violent Act Injury Law.
- PERAC recommended that the Board obtain clarification from the medical panel on whether Sgt. Harker suffered a catastrophic, life-threatening or life-altering injury, specifically identifying how his injury was "catastrophic", and providing examples of his significant limitations and inability to complete the activities of daily living.

Case Study – Sergeant Jonathan Harker

- The Board requested a supplemental medical report from Dr. Van Helsing, and an additional statement from Mina further detailing the injury's catastrophic impact on Sgt. Harker's life.
- Dr. Van Helsing opined that his patient suffered from "emotional lability, reduced memory, impaired executive function," and had "sustained a serious permanent brain injury," ending his profession and impairing his ability to provide for and to interact with his family.

Case Study – Sergeant Jonathan Harker

- The Board requested the medical panel to review the supplemental documents and to address the issues cited in PERAC's remand.
- The medical panel unanimously agreed that Sgt. Harker's injury was catastrophic and life-altering, citing, among others, the "extreme" and "profound functional deficits in daily life," and his cognitive impairments, including "severe difficulty with concentration, significant memory deficits, and an inability to process information when faced with multiple stimuli."

Case Study – Sergeant Jonathan Harker

- The Board provided PERAC with its supplemental findings affirming its grant of accidental disability benefits to Sgt. Harker under the Violent Act Injury Law.
- After further review, PERAC approved the Board's action.
- The Board is now in the process of calculating the benefits due Sgt. Harker, which must also be reviewed and approved by PERAC.

Case Study Takeaways – Violent Act Injury

- The initial application of new laws is rife with uncertainty, especially when terms are undefined.
- Whether an ADR claim comes within the Violent Act Injury Law is fact specific – obtain as much documentation regarding the injury as required as findings of fact must be submitted to PERAC.
- The opinion of physicians familiar with the member's treatment and medical/social history should be solicited, as well as statements from family members and others.

Case Study Takeaways – Violent Act Injury

- An issue likely to arise in future cases is whether the legal requirement of whether a member's injury is catastrophic, life-threatening or life-altering is for the Board or for the medical panel to determine – most likely a combination of both.
- Other issues to be clarified include further defining a "dangerous weapon, which is designed for the purpose of causing serious injury or death" – would the law apply if Sgt. Harker was struck by a golf club, or a tire iron, instead of a steel police baton? Does intent to injure matter?

Case Study Takeaways – Violent Act Injury

- Until PERAC completes the update of ADR forms to address the Violent Act Injury Law, retirement boards should utilize PERAC's guidance in Memorandum #28/2024.

The Legal Panel Thanks You for Your Time and Attention