



Select Cases and Current Legal Issues

June 14, 2022



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PENSION FORFEITURE AND 8TH AMENDMENT ISSUES

**Michael Sacco, Esquire
Chief Executive Officer
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Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- Angelo LaMonica was the former Town of Winthrop Police Chief
- On April 5, 1995, LaMonica was indicted on several federal charges: (1) extortion under color of official right in violation of 18 U.S.C. § 1951; (2) conspiracy to obstruct enforcement of State gambling laws in violation of 18 U.S.C. § 1511; and (3) filing false income tax returns for the years 1988 through 1993 in violation of 26 U.S.C. § 7206
- In July, 1995 LaMonica pleaded guilty to a superseding information indictment, charging him with only the six (6) counts of filing false tax returns – original indictment was dismissed

Winthrop Retirement Board v. LaMonica, 98
Mass. App. Ct. 360 (2020)

- The information in the superseding indictment stated, “at all times material to this information” LaMonica “was a sworn officer in the Winthrop Police Department,” and further noted that LaMonica was president of the Winthrop Police Association, a benevolent association of present and former Winthrop police officers
- Telco Communications was a telemarketing fundraising company that contracted with the WPA to raise money between 1987 and 1989
- Raymond McGee collected money from the operations of video poker machines in various private clubs in Winthrop

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- McGee worked for Telco, and the 6 counts of filing false tax returns to which LaMonica pleaded guilty charged that he failed to disclose income he received from Telco in 1988 and 1990, and payments of money McGee paid him between 1988 and 1993
- Although LaMonica pleaded guilty, there was no plea colloquy in the case file
- In a pre-sentence probation report, the following facts were recited: “First as Lieutenant, then as Chief of the Winthrop Police Department, LaMonica received illegal payments including an initial payment of \$1,000, then \$100 per week for the next 14 years, from Raymond McGee, to cover-up the video poker machines in the Town of Winthrop.”

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- December 1995 LaMonica applied for superannuation retirement with the Winthrop Retirement Board
- Board reviewed the application at its January 1996 meeting, and had sought advice from its then counsel regarding LaMonica's criminal conviction, and the Board was told based on the conviction, it had no right to withhold his pension
- Board approved and took no further action on the matter
- In 2002 – Board received an inquiry as to why LaMonica was receiving a retirement allowance after being convicted, and sought advice from its current counsel, who opined based on the facts provided – which only included the criminal convictions and not the underlying facts – prior counsel's opinion was correct

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- Fast forward to 2015 – Board receives a phone call from a local TV station asking, “Why is LaMonica receiving his pension when he was convicted of taking kickbacks?”
- Board authorizes counsel to obtain the file from the Federal Court – discover for the first time the underlying facts giving rise to the conviction – Board holds a hearing in 2016 pursuant to Section 15(4) at which LaMonica appears and refuses to testify
- Board counsel – who was acting as Hearing Officer – gives LaMonica the opportunity to testify about McGee and Telco, and his conviction but he declines to do so

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- Board votes to forfeit pension – relies on the statement in the presentence memorandum regarding LaMonica receiving money in his official capacity and his not claiming it as income resulted in his convictions
- LaMonica appeals to District Court – District Court finds that Board could not rely on the information in the presentence memorandum, and vacates the decision
- Board appeals to Superior Court – Superior Court similarly finds that the Board could not rely on the information related to the payoffs because those indictments were dismissed – no other evidence

Winthrop Retirement Board v. LaMonica, 98
Mass. App. Ct. 360 (2020)

- Board appeals to the State Appeals Court – LaMonica argued that in addition to the evidence being correctly excluded, that the Board was barred from revisiting the forfeiture since it reviewed it previously on 2 occasions and declined to take action
- Appeals Court rejected both arguments – on the Board being barred based on prior reviews, Court ruled that since the doctrine of laches – which precludes unjustified, unreasonable and prejudicial delays in raising a claim – does not apply to public entities taking action – Board not barred from revisiting the matter

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- On the merits – Appeals Court found Board had the discretion to rely on the presentence report and the facts set forth therein, noting that the Board may only admit and give probative weight to evidence “only if it bears the requisite ‘indicia of reliability’”
- Appeals Court said this was a good example of the Board exercising its fact-finding ability, and its reliance on the presentence report and superseding information was proper
- As the Board pointed out in its decision – there was no reason to identify LaMonica as a police officer in the superseding information since the crime of filing false tax returns has nothing to do with his being a police officer – unless the funds he received he received in his capacity as a police officer

Winthrop Retirement Board v. LaMonica, 98 Mass. App. Ct. 360 (2020)

- Even though the Federal Court reports were hearsay, the Board was still permitted to consider that evidence in finding a factual link between LaMonica's position and his criminal convictions
- Appeals Court affirmed Board's finding that the criminal convictions and the payments to LaMonica were "inextricably linked," and since the Board explained to LaMonica during the hearing that a reasonable inference could be drawn between his employment and his convictions, and thus his failure to testify allowed the Board to draw an adverse inference that had he testified, it would have been against his own interest
- Thus, Appeals Court found Board decision supported by substantial evidence and vacated the Superior Court's decision

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- Bisignani was employed by various state and municipalities over a 34-year career, and on January 29, 2012, he retired as the Saugus Town Manager – he then worked post-retirement as the Nahant Town Manager.
- In December 2014, a 12 count indictment was returned against Bisignani – 8 counts pertained to his office or position – 4 counts of purchasing violations under M.G.L. c. 266, § 67A; 2 counts of failure to advertise for public works bidding in violation of M.G.L. c. 149, § 44J; and 2 counts of finance violations by a municipal officer under M.G.L. c. 44, § 62.
- The other 4 counts pertained to Bisignani’s concealing evidence in a criminal proceeding in violation of M.G.L. c. 268, § 13E(b); witness intimidation in violation of M.G.L. c. 268, § 13B; altering public records in violation of M.G.L. c. 66, § 15; and unlawful wiretapping in violation of M.G.L. c. 272, § 99 C.

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- After his conviction, the Saugus Retirement Board held a Section 15(4) pension forfeiture hearing – Bisignani elects not to appear and testify – his counsel appeared but did not argue that crimes were not related to employment – essentially conceded the point – his claim was that the pension forfeiture was an excessive fine in violation of the 8th Amendment: *“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”*
- Board finds that Bisignani’s 8 criminal offenses that directly implicate his position provided that requisite legal link between his position and his convictions, and forfeit his allowance – Bisignani appeals to District Court – District Court and Superior Court find pension forfeiture not excessive

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- Bisignani appeals to the Appeals Court
- Excessive Fine – Grossly disproportional to the gravity of the offense
- Factors to consider:
 - Amount of forfeiture
 - Gravity of the underlying offense(s)
- Amount of forfeiture – District Court found approximately \$1.5 million
- Gravity of offense – look to (1) nature and circumstances of offense; (2) whether related to other legal activities; (3) aggregate maximum sentence that could be imposed; and (4) harm resulting from the offenses

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- Gravity of offense – purpose is to gauge Bisignani’s culpability:
 - Bisignani’s offenses more comparable to Former Speakers of the House Sal DiMasi and Thomas Finneran – higher level employees convicted of serious offenses
 - Bisignani’s 8 convictions not related to other crimes, but he committed 4 additional crimes in an effort to cover up his felonious behavior and obstruct justice
 - Court noted that this was not a single lapse of judgment – Bisignani was convicted of 8 different offenses that he committed over a period of 5 ½ years while employed by 2 different municipalities

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- Gravity of Offense (cont.)
 - Aggregate sentence – look to what the maximum sentence could have been, not what it was – in this case, Bisignani could have been sentenced to 54 years and fined \$102,000
 - Harm – no pecuniary gain to Bisignani or his wife, but harm not limited to pecuniary gain
 - Crimes involved significant breach of the public trust, striking at the core of the ethical responsibilities of his position
 - Created significant harm to the public fisc – crimes deprived Saugus and Nahant benefits of competitive bidding process
 - Bisignani was not only derelict in his duties, but tried to cover them up, further eroding public trust

*Bisignani v. Justices of the Lynn Division Court
Department of the Trial Court, 100 Mass. App. Ct. 618
(2022)*

- Appeals Court concluded that Bisignani's actions undermined the respect for government service, one of the basic purposes of Section 15(4) – “forfeiture is intended to deter misconduct by public employees, protect the public fisc and preserve respect for government service”
- For all these reasons – despite being the highest forfeiture on record – more than double what the SJC found to be excessive in *Bettencourt* – Appeals Court found that the forfeiture was **not** excessive

Pension Forfeiture and 8th Amendment Issues

- A few closing thoughts:
 - Compare and contrast *Bisignani* and *Bettencourt* – clearly, the amount of the forfeiture is not the driving force when looking to whether the fine is excessive
 - *LaMonica* – underscores the importance of the Section 15(4) hearing and obtaining all the available documentary evidence and making factual findings
 - Legislation – SJC commented after *Bettencourt*, as it did again in *Bisignani*, that in 2016 a commission was formed to make recommendations regarding possible changes to Section 15(4) – 6 years now and nothing has happened – not sure there is much of an appetite on Beacon Hill to restore pensions to convicted felons who committed crimes involving their position

RETIREMENT IMPACT OF EMPLOYER-EMPLOYEE SETTLEMENT AGREEMENTS

JAMES O'LEARY

MASSACHUSETTS TEACHERS' RETIREMENT
SYSTEM

MACRS SPRING CONFERENCE 2022

SETTLEMENT AGREEMENTS

- What is a Settlement Agreement and how do they operate?
- Construction and Limits

CONSTRUCTION & LIMITS

- Contract will be broadly construed to keep it effective.
 - “Contract should be construed to give it effect as rational business instrument and in manner which will carry out intention of the parties.”
- Limits
 - Can change a legal outcome of a fact, but not a fact itself.
 - Can't conflict with the law, just as municipalities cannot pass bylaws or ordinances that conflict with state statutes.

CONSTRUCTION & LIMITS

- Exception for CBA's?
 - Adams v. City of Boston 461 Mass. 602 (2012). Where a CBA is contrary to certain enumerated statutes, the terms of the CBA prevail.
 - Strong public policy in the Commonwealth favoring collective bargaining between public employers and employees over certain conditions and terms of employment.
 - Statutes that are not specifically enumerated in conflicts statute, which states that terms of collective bargaining agreements (CBA) prevail over enumerated statutes, prevail over contrary terms in CBAs.
- Chapter 32 is not one of the enumerated statutes. Prevails over contrary terms in CBA's.

WHY A SETTLEMENT AGREEMENT?

- Avoid/End Litigation
 - Expensive
 - Time Consuming
 - Uncertain
 - Turn every type of legal dispute into a contract to end it
- Exchange
- Private (depending...)

CHAPTER 32 ISSUES

- Authority to recognize
- Sources of guidance
- Creditable Service/Regular Compensation
(back pay vs. damages)
- “Future Pay”
- Public Record or Confidential

WHY RECOGNIZE SETTLEMENTS?

- Save time and expense. Courts will just take the same actions.
- Ballotte v. City of Worcester, 51 Mass. App. Ct. 728 (2001)
 - Teacher who should have had bumping rights was laid off from her position.
 - Sued the city, seeking reinstatement and damages. Prevailed.
 - Remanded to Superior Court for remedy.
 - Ms. Ballotte retired in the meantime.

WHY RECOGNIZE SETTLEMENTS?

- In 2003, the Superior Court ordered un-do the retirement and place Ms. Ballotte not just into the position she would have been in had she not been subject to the wrongful discharge, but into the position she would have been in had the laws been correctly applied to her from the beginning of the time period pertinent to the suit:
 1. Un-retire Ms. Ballotte from the Worcester Retirement System (“WRS”).
 2. Ms. Ballotte to repay WRS all of the retirement benefits she had received since the date of her retirement.
 3. Transfer Ms. Ballotte’s retirement account from WRS to the MTRS, with recognition by the MTRS of Ms. Ballotte’s work in the vocational school as creditable service (it had not been so recognized by WRS).
 4. Ms. Ballotte to pay the MTRS all contributions for the time period covering her erroneous discharge, and she could get R+.

PERAC GUIDANCE: MEMO #28/2001

- In cases where a member of a retirement system has been improperly terminated, or where the employer improperly refused to restore the member to service, a back pay award may be made.
- Usually, these orders provide that the member is reinstated without loss of benefits.
- The following are steps to be taken by the Retirement Board in evaluating these cases:
 1. Determine the exact period that the back pay award covers. This is important for granting creditable service and for evaluating whether, and to what extent, the member mitigated the damages owed.

PERAC GUIDANCE: MEMO #28/2001

2. Determine the amount of regular compensation that the member would have received had he or she not been improperly terminated or had been restored to service when he or she should have been. The parties must demonstrate to the Board how the amount was arrived at and supply documentation. For example, written documentation of the amount of regular compensation that a person holding an identical position received.

3. Determine the amount of earnings that the member had during the period of the back pay award. If the member had no earnings, or was not fully employed, the order should reflect the amount that the member would have earned had he or she made reasonable and diligent efforts to be employed up to his or her working capacity. The actual or calculated earnings are used to reduce the amount of the back pay that the member will be paid. The back pay award is likely to be a taxable event, so the member may wish to seek advice from a tax professional.

PERAC GUIDANCE: MEMO #28/2001

4. If the member received a retirement allowance of any sort during the period of the back pay award, it must be repaid to the retirement system by the member. The member may direct the employer to pay the amount due to the retirement system, but this does not affect the status of the payment as being regular compensation.

5. Retirement contributions would be paid to the retirement system on the full amount of regular compensation the member would have received at the appropriate contribution rate.

BENEFITS OF A BOARD POLICY ON SETTLEMENTS AND COURT JUDGMENTS

- Saves time and preserves legitimacy.
- Recognizes the force and effect of court orders to the maximum extent possible, does the same with settlement agreements.
 - Governs determinations of back pay/damages as regular compensation and creditable service for periods covered by settlement agreements and court orders.
 - Provides notice that system need not recognize settlement agreement to get member to threshold service requirements for termination retirement allowance. Tarlow v. CRAB, 32 Mass.L.Rptr. 487 (Suffolk Superior Ct. 2015)(Back pay granted by Settlement Agreement could result in additional service credit, but not counted toward 20 years for termination retirement threshold because not actually worked).

BACK PAY & SERVICE CREDIT

- Back pay award, in effect, recognizes that the member should have continued to be “regularly employed” and so the member receives pay and benefits as if he or she had been so employed.
- Thus, the amount of creditable service awarded should be equal to the amount of time represented by the awarded back pay (with a little flexibility).
- In other words, where the purpose of the award is to make the employee whole, the system awards creditable service upon the payment of retirement contributions, because the member is being treated as if he or she was regularly employed and earning membership during the respective period of time.

BACK PAY IDENTIFIED

- The settlement specifically states “\$XX represents back pay.” Amounts specifically designated as something else (e.g., future pay, medical expenses, “pain and suffering”) are not back pay.
- If the settlement agreement does not characterize the award, discretion to assume whether it is all supposed to be back pay.

BACK PAY & REALITY

- Back pay should not be a random number. The parties should be able to offer something that shows that the amount of back pay bears some relation to the amount the member would have received for the time.
- While it is true that back pay cannot be some random number, do not focus too much on the math lining up perfectly so that the back pay figure represents an exact payment of lost wages.
 - Back pay is usually a result of negotiations between the employer and the member. That is why, when a figure isn't clear on its face, it is important to call the employer and ask what the number is intended to represent.
 - Reasonable. If not, may want to consult counsel.

CREDITABLE SERVICE CALCULATION

- If the settlement says it is back pay, how do you figure out how much creditable service the member should receive from the settlement?
- Does the settlement specifically state a period of time that the back pay is intended to cover?
- Contributions:
 - Since the whole point of the settlement agreement is to make the member whole, as if the termination never happened, their retirement benefits need to reflect that time. To do that, however, the retirement system also needs to be made whole.
 - Board should receive payment to echo what should have been received in retirement contributions for the agreed upon timeframe. If the amount received as contributions in conjunction with the settlement is not correct, then you should bill the member for the outstanding amount prior to awarding full creditable service.

“FUTURE” PAY VS. REINSTATEMENT

- “Future pay” is the amount that a member is paid, usually in the form of administrative, vacation, or sick pay, after reaching a settlement with the employer ending the employment.
 - e.g., Settlement is reached in October 2021 and the member is allowed to take various kinds of leave until June 2022.
- Rare. Settlement agreement specifies an amount of money as payment for time after the date of the settlement agreement. Can have both creditable service and regular compensation implications.

“FUTURE” PAY VS. REINSTATEMENT

- May be acceptable and can be regular compensation if the leave is of a type that is available to other employees, such as contractually available sick leave.
- However, if the paid leave is created purely as a result of the settlement agreement, the pay will not be regular compensation. There are several reasons for this:
 - As a form of payment not available to all employees, but made available only in connection with the settlement, it is neither ordinary, repeated or recurrent.
 - Unlike back pay, payment of future pay is really just payment for damages other than lost wages. The whole idea of back pay is that the firing has been undone. Future pay with no return to work, and with a leave that is specially created for or by the agreement, is really just severance.
 - This policy does not prevent the parties from waiting until the end of a given period and categorizing the entire payment as back pay. Future pay, unlike back pay, is open-ended. It thus has a much greater potential for abuse.

“FUTURE” PAY VS. REINSTATEMENT

- Burke v. MTRS, CR-15-428 (4/1/2016)
 - Payments received by a teacher in her last three years of employment were paid as a career incentive and did not become part of her base salary. These payments are therefore not "regular compensation."
 - Sick pay was not regular compensation because Ms. Burke was not actually sick.
 - CRAB acknowledged that it is common to let an employee take *brief* periods of vacation before the end of employment, and that is okay as regular compensation.
- Reinstatement
 - But does it really make sense to reinstate someone for a day just to legitimize the settlement? ODR?

SETTLEMENT VS. COURT ORDERS

- Court Orders will be treated similarly to settlement agreements insofar as we will try to give effect to the intent of the Order, and we will respect an Order reinstating a member.
- Court Orders are an adjudication of the rights of a member and have the force and effect of law (unlike a settlement agreement).
- Member may “unretire” if the Order requires it.

“CONFIDENTIAL” VS. PUBLIC RECORDS

- Sheriff of Bristol County v. Labor Relations Com'n, 62 Mass.App.Ct. 665 (2004). Commission did not improperly use balancing test determining union was entitled to information pertaining to investigation of corrections officer necessary to determine whether his rights were violated, regardless of whether information was public record or was exempt from disclosure under investigatory exemption; Commission weighed public policy considerations and balanced union's need for information against sheriff's considerations.
- Boston Globe v. Department of Criminal Justice Information Services 484 Mass. 279 (2020). Under the privacy exemption to disclosure under the Public Records Law, the prospective invasion of individual privacy is to be weighed against the public interest in disclosure. Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest.

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Responding to Requests for Member Information



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MACRS LEGAL PANEL
June 14, 2022

Introduction

- Every government record is presumed to be public unless a specific exemption applies.
- Electronic records are treated the same as paper records for disclosure purposes, which includes:
 - Email communications
 - Text messages

What is a Public Record?

- "Public records" are broadly defined to include all documentary materials or data, regardless of physical form or characteristics, created or received by any officer or employee of any town of the Commonwealth to serve a public purpose, unless falling within a statutory exemption. G. L. c. 4, s. 7(26).
- The use of personal email addresses by government officials, employees, and/or board and commission members while conducting any day-to-day business of a government entity renders the emails public records.

Presumption

- It is presumed a particular record is public. The burden is on the Board to prove one of the statutory exemptions apply.
- Given the statutory presumption in favor of disclosure, application of the exemptions are narrowly construed.
- If a document or portion of a document is not a public record, it is the Board's duty to safeguard that information.

Requests

- A person may request copies of, or access to, public records:
 - In person, during regular business hours
 - In writing via:
 - Letter
 - Fax
 - Email
 - By Telephone
 - This is optional - Board is not required to accept.

Response to Requests

- The Board must permit inspection or provide a copy of requested public records within a default time period of **10 business days**.
 - If the initial response is not provided within 10 business days, the Board **cannot** assess a fee.
 - The initial response can be that the Board needs more time to comply with the records request – must state timeframe needed.
- Records should be provided electronically if available in an electronic format.

Response to Requests

- If the Board denies access to records:
 - Cite exemption.
 - Clearly state why the exemption applies to the records.
 - Inform requestor of right to appeal to Supervisor of Records.

G.L. c. 4, s. 7(26) – Exemptions Overview

- The law provides for 22 different categories of exemptions, including:
 - Retirement Board member’s Statement of Financial Interests (SFI)
 - Personnel and medical files or information
 - The home address and telephone number of a public employee
- Burden is on the Board to claim an exemption:
 - Must state why the exemption applies to the portions withheld.
 - Applicable only to exempt portion of record.

G.L. c. 4, s. 7(26) – Exemption (a)

- A statute or other law specifically or by implication permits or requires non-disclosure.
 - Criminal Offender Record Information
 - Executive session records for public bodies subject to the Open Meeting Law
 - Domestic Relations Orders (“DROs”)
 - Superior Court Standing Order 3-08: Impoundment of Qualified Domestic Relations Orders, Domestic Relations Orders, and Orders Commonly Known as *Mangiacotti* Orders

G.L. c. 4, s. 7(26) – Exemption (b)

- Records related to personnel rules and practices.
- Release of records would interfere with necessary governmental function.
 - Law enforcement personnel policies

G.L. c. 4, s. 7(26) – Exemption (c)

- Personnel records (does not apply to certain law enforcement records)
 - Retirement Applications – certain parts
 - PERAC/Retirement Board Forms – certain parts
 - Disciplinary information
 - Financial Information
- Medical records

G.L. c. 4, s. 7(26) – Exemption (c), cont'd

- Records containing intimate personal details
 - Family disputes, reputation, government assistance
- Veterans' Records
- DROs

G.L. c. 4, s. 7(26) – Exemptions (d) and (e)

- Policy positions being developed
 - May only withhold records until decision is made.
 - Exemption does not apply to factual information.
- Personal notes that are not maintained in government files
 - Exemption is waived once records are shared.

G.L. c. 4, s. 7(26) – Exemption (h)

- Bids and proposals
 - May be withheld until the time for bidding expires.
- Evaluations of bids and proposals
 - May be withheld until final decision.

G.L. c. 4, s. 7(26) – Exemption (i)

- Appraisals of real property acquired or to be acquired until:
 - Final agreement.
 - Litigation has concluded.
 - Time for litigation has expired.

G.L. c. 4, s. 7(26) – Exemption (n)

- Applies to records related to:
 - Security measures
 - Emergency preparedness
 - Cyber Security
- Disclosure must be deemed to jeopardize public safety or cyber security.

G.L. c. 4, s. 7(26) – Exemptions (o) and (p)

- Permits withholding of records disclosing home address, personal email, and home telephone number of government employees or family members.
- PERAC's longstanding position has been that this also applies to retired members.

G.L. c. 4, s. 7(26) – Exemption (t)

- Statement of financial interest forms submitted by members of public retirement boards.

Final Thoughts

- The Public Records Law begins on the premise that all records are public records.
- HOWEVER, the Board's duty is to safeguard the information of their members.
 - Board should use due diligence in reviewing requests and determining if any exemptions apply.
- When in doubt, contact the Division of Public Records for assistance.

Resources

- Public Records Division
 - sec.state.ma.us/pre
 - Email: pre@sec.state.ma.us
 - Phone: (617) 727-2832 – ask for the Attorney of the Day
- *A Guide to the Massachusetts Public Records Law*
 - sec.state.ma.us/pre/prepdf/guide.pdf

REVIEW OF REGIONAL MEDICAL PANELS

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What statutes control the Regional Medical Panel (“RMP”)?

- ▶ “No member shall be retired for a disability under the provisions of this section or section seven unless he has been examined first by a regional medical panel and unless the physicians on such panel, after such examination, shall review the pertinent facts in the case, and such other written and oral evidence as the applicant and the employer may present to be reviewed in making a determination of the member's medical condition. No physician having previously examined the member, except as part of a prior disability medical panel, shall serve on the regional medical panel examining the member. At the conclusion of such examination, but in not more than sixty days, the panel shall certify to the board in writing whether such physicians on said panel find that such member is **mentally or physically incapacitated for further duty and that such incapacity is likely to be permanent, and in any case involving a retirement under section seven, the panel physicians shall state further whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed under said section seven.**” G.L. c. 32, §6(3)(a).

What statutes control the Regional Medical Panel?

Cont.

- ▶ “No such retirement shall be allowed unless the board, after a review of the evidence it deems appropriate, and after review by the commission pursuant to the provisions of section twenty-one, and including in any event on examination by the regional medical panel provided for in subdivision (3) of section six and including **a certification of such incapacity by a majority of the physicians on such medical panel, shall find that such member is unable to perform the essential duties of his job and that such inability is likely to be permanent**, and that he should be so retired.” G.L. c. 32, §6(1).
- ▶ “No such retirement shall be allowed unless the board, after a review of the evidence it deems appropriate, and after a review by the commission, pursuant to the provisions of section twenty-one, and including in any event on examination by the regional medical panel provided for in subdivision (3) of section six and including a certification of such incapacity by a majority of the physicians on such medical panel, shall find that such member is unable to perform the essential duties of his job and that such inability is likely to be permanent, and that he should be so retired.” G.L. c. 32, §7(1).
- ▶ Matters pertaining to the RMP may also be located at 840 CMR 10.08, 10.10.

What is the purpose of a RMP?

- ▶ Generally speaking, to answer medical questions beyond the “common knowledge and expertise” of retirement boards.
- ▶ “The requirement of a medical panel evaluation and certificate in disability proceedings, however, reflects the legislative understanding that in each case there exist fundamental medical questions at the core of the disability issue that must be answered by medical experts. The medical answers to such questions are beyond the common knowledge and experience” of local retirement boards and CRAB, without which [answers those agencies] could not find the ultimate fact[s] of permanence and causation.” *Ret. Bd. of Revere v. Contributory Ret. Appeal Bd.*, 36 Mass. App. Ct. 99, 111 (1994)

What should occur prior to convening a RMP with PERAC?

- ▶ Make sure all pertinent records are assembled.
 - In fact, members are required to provide “authorizations on such other form as may be required by a person, institution or other agency having custody of the member's records, for release of medical or insurance records relating to the member as follows:
 1. records of the member's personal physicians and of the physician submitting the certificate described in 840 CMR 10.06(1)(b);
 2. records of all physicians or medical institutions examining or treating the member for the condition or personal injury upon which the application is based;

What should occur prior to convening a RMP with PERAC?

- ▶ Authorizations (cont.)

3. records of all physical examinations performed within the five year period prior to the application or, if none are available for that period, the most recent;

4. the member's workers' compensation records or, if applicable, any records in connection with application for or receipt of benefits pursuant to G.L. c, 41, § 111F;

5. **the member's medical records for the last five years;**

6. the accident or claim reports for the last five years of any insurer in connection with the personal injury sustained or the hazard undergone upon which the application is based.” 840 CMR 10.06(1)(g).

What should occur prior to convening a RMP with PERAC? *Cont.*

- ▶ Confirm that the member's injury occurred prior to his last day of work. *See Vest v. Contr. Ret. Appeal Bd.*, 41 Mass. App. Ct. 191, 194 (1996) (“an employee who has left government service without an established disability may not, after termination of government service, claim accidental disability retirement status on the basis of a subsequently matured disability”).
- An exception would be the cancer presumption, but only where cancer is first discovered within five years of the “last date on which such person actively so served shall be eligible to apply for benefits.” *See* G.L. c. 32, §94B.

What should occur prior to convening a RMP with PERAC? *Cont.*

- ▶ Consider conducting an evidentiary hearing
 - “10.09: Investigation of Facts; Denial of Certain Applications; Appeal
- (1) The retirement board shall obtain any pertinent information known to exist without regard to the five year time periods stated in 840 CMR 10.06(1)(g) 3., 5. and 6., including any record listed in 840 CMR 10.06(1)(g) relating to an application for ordinary or accidental disability retirement and shall conduct such investigation as may be necessary to determine the facts.
- (2) **At any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.**
- (3) If the retirement board decides to deny an application under 840 CMR10.09, notice of the decision, basis for the board’s decision, and right to appeal shall be sent to all parties as provided by 840 CMR 10.13(3).” 840 CMR 10.09.

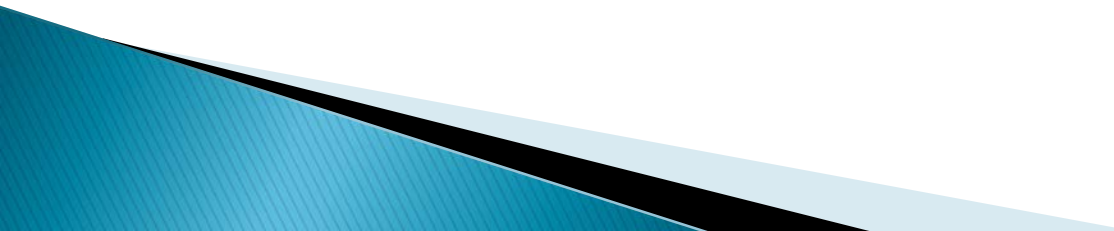
What is the make-up of a Regional Medical Panel?

- ▶ “G.L. c. 32, § 6(3)(a) allows that physicians selected for the panel ‘so far as practicable, be skilled in the particular branch of medicine or surgery involved in the case.’” *Queenan v. Contr. Ret. Appeal Bd.*, No. 952109, 2001 WL 292410, at *4 (Mass. Super. 02.21.2001), *aff’d sub nom. Queenan v. Contr. Ret. Appeal Bd.*, 56 Mass. App. Ct. 1114 (2002)

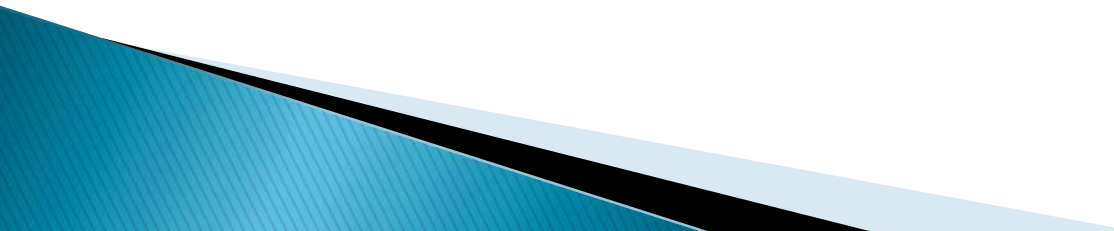
Who may attend a Regional Medical Panel examination?

- ▶ The member;
- ▶ The member's attorney;
- ▶ The member's physician;
- ▶ The employer; and,
- ▶ The employer's physician.
 - It should be noted that the above physicians "may be present and may answer questions from the panel during the decision making process of the panel; provided, however, that neither physician shall have a vote in the final determination of such panel" G.L. c. 32, §6(3)(c).
 - In reality, this is a rare occurrence.

What are the three statutory questions?

- ▶ The medical panel that is convened must answer the three certificate questions:
 1. Is the applicant unable to perform the essential duties of his job?
 2. Is such incapacity likely to be permanent? and,
 3. Is the disability such as might be the natural and proximate result of the accident or hazard upon which the retirement application is based?
- 

What documents should be provided to a Regional Medical Panel?

- ▶ Through PROSPER, the Board should supply the following documents, which PERAC will provide to the RMP:
 1. Treating Physician's Statement;
 2. Employer's Statement;
 3. Copies of any injury reports filed with the retirement board or the member's employer;
 4. All of the member's medical records in the Board's possession pertaining to the purported disabling injury;
 5. A copy of the member's job description, including his/her essential duties; and,
 6. Member's Application for Disability.
- 

What should a Board do when it receives a Regional Medical Panel report?

- ▶ Review the composition of the RMP and confirm it is the appropriate specialty.
- ▶ Confirm that the certificate and report refer to the same person.
- ▶ Confirm that the certificate is completely executed and the RMP physician reviewed the member's job description and records provided by the Board (many times in the report, the physician will list the documents he reviewed).
- ▶ Confirm that the RMP used the correct standards.
- ▶ Confirm that the RMP had all of the pertinent documents.
- ▶ Determine whether or not a clarification is warranted pursuant to 840 CMR 10.11(2).
- ▶ The retirement board must notify the parties of the panel's findings, and provide the member with a copy of all certificates and documents completed by the medical panel physicians within 30 days of receipt. 840 CMR 10.11(1).

What is the Board's role in determining causation?

- ▶ “[The retirement] board is entitled to know whether, in the opinion of the panel, there is a medical *possibility* that the causal relation exists; absent such information, the [retirement] board lacks medical information that, with nonmedical facts presented to the board, provides the basis for the decision of the [retirement] board on the question of causation” *Fairbairn v. Contributory Ret. Appeal Bd.*, 54 Mass. App. Ct. 353, 359 (2002) citing *Noone v. Contributory Retirement Appeal Bd.*, 34 Mass. App. Ct. at 762.
- ▶ “The Supreme Judicial Court has held that where the regional medical panel has made a positive finding of causation, such a finding, although not binding on the retirement board, is *some* evidence to be considered in the board's determination.” *McKenna v. Contr. Ret. Appeal Bd.*, No. 925313C, 1993 WL 818764, at *4 (Mass. Super. 10.29.1993)
- > Therefore, even if the RMP makes a positive finding as to causation, the Board may still deny if it does not determine causation to exist given the totality of the medical and non-medical evidence.

May a Board approve an application where the Regional Medical Panel failed to certify causation?

- ▶ Yes, on presumption cases.
- ▶ “Although in accidental disability applications it is generally a condition precedent that the medical panel answer “yes” to all three questions, where the Heart Law presumption is applicable, the medical panel need not answer the standard causation question. *See Mathewson v. Contr. Ret. Appeal Bd.*, 335 Mass. 610, 615-16 (holding that, where Heart Law presumption applied, retirement board erred by regarding the medical panel's negative response to the certificate's causation question as conclusive).” *Sinclair v. State Bd. of Ret.*, CR-10-302 (DALA dec. 07.12.2013).
 - *See Milton Ret. Bd. v. PERA*, CR-96-729 (DALA dec. 05.16.1997) (where RMP unanimously answered in the negative on causation, PERA remand to the Retirement Board was reversed and the member was awarded ADR due to the heart law presumption where “substantial competent contrary evidence sufficient to rebut the use of the Heart Law presumption was not shown”).

May a Board approve an application where the Regional Medical Panel failed to certify causation?

Cont.

- ▶ “The determination of the ultimate facts of causal connection in accidental disability retirement cases is with the local retirement board. *Wakefield Contributory Ret. Bd. v. CRAB*, 352 Mass. 499, 503 (1967). The local board then must use the panel’s opinion, together with any nonmedical evidence presented to it, to determine the ultimate question of causation. *Kelley v. CRAB*, 341 Mass. 611, 613-14 (1961).” *Mass. Public Employee Retirement Systems*, EPAI MA-CLE 8-1 (MCLE 2021).
- ▶ Part (3) of the medical certificate serves a purpose similar to that discussed with regard to parts (1) and (2), *i.e.*, it provides an effective vehicle for determining the preliminary medical question which would normally be beyond the competence of the local board. The local board’s fact-finding responsibility is not usurped, because part (3) of the medical certificate as defined in s. 6(3)(a) supplies necessary medical fact without which the local board (or the Appeal Board) could not find the ultimate fact of causal connection. The certification by the medical panel that this incident might have been the cause of the permanent disability is not decisive of the ultimate fact of causal connection. It is in the nature of evidence before the local retirement board. *Id. at 424*

May a Board approve an application where the Regional Medical Panel failed to certify causation? *Cont.*

- ▶ “The purpose of the third question on the regional medical panel certificate is to inform CRAB whether there is a medical possibility that the events relied upon could cause the disability.” *Narducci v. Contr. Ret. Appeal Bd.*, 68 Mass. App. Ct. 127 (2007)
- ▶ Information and opinions contained in the narrative statements of the doctors who comprise the regional medical panel, including clarifications, may, except for unqualified opinions as to actual causation, be considered by a retirement board and CRAB on the question of causality.” *Narducci v. Contr. Ret. Appeal Bd.*, 68 Mass. App. Ct. 127, 135 (2007)

How may a negative RMP be overcome on appeal?

- ▶ RMP's negative certificate response can be overcome on appeal only upon proof that the panel:
 1. lacked pertinent facts;
 2. employed an erroneous standard;
 3. plainly wrong; and/or
 4. failed to conform to the physical examination requirement.
- ▶ "Should a retirement board deny an application despite an affirmative panel, a member on appeal may attempt to demonstrate that the [retirement] board erred and that he should be granted accidental disability retirement." *Simmons, Petitioner v. Brockton Retirement Board & P.E.R.A.C.*, CR-15-551 (DALA dec. 10.04.2019)
- ▶ "On the other hand, if the panel answered "no" to any of the three questions, the retirement board must deny the application. On appeal, an applicant may overcome a panel's "no" response only by proving that the panel either lacked pertinent facts, employed an erroneous standard, or was plainly wrong. If the member proves that the panel erred, the matter will be remanded for the appointment of a new panel." *Id.*

How may a negative RMP be overcome on appeal?

Cont.

- According to the Mass. Appeals Court, “[i]t is clear that affirmative answers to parts (1) and (2) are not conclusive and binding on the local board. However, a negative response to either part precludes the allowance of the application unless an erroneous standard was applied by the medical panel.” *Malden Ret. Bd. v. Contr. Ret. Appeal Bd.*, 1 Mass. App. Ct. 420, 423 (1973).
- The *Malden* court went on to state, “[n]othing in G.L. c. 32, §16(4), permits the [Contributory Retirement] Appeal Board to substitute its opinion for that of the majority of the medical panel responding in the negative to any of the three parts of the medical certificate, unless the panel has employed an erroneous medical standard.” *Id.* at 424
- The *Kelley* court held that, “the statute does not intend . . . that the applicant be foreclosed by a plainly wrong medical certificate, or by a certificate made without conforming to the required procedure of physical examination and review of all the pertinent facts.” *Kelley v. CRAB*, 341 Mass. 611, 617 (1961)
 - For example, court concluded that a RMP physician did not comply with §6(3)(a) by failing to review the member’s job description, which amounted to being erroneous as a matter of law. *See Coit v. Contr. Ret. Appeal Bd.*, 5 Mass. L. Rptr. 714 (1996).

Select Cases of Note

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Cases of Note

Section 100 and Cancer Presumption

Marybeth Smith v. Gloucester Retirement Board and PERAC, CR-19-493 (DALA, April 22, 2022)*

- Surviving spouse must prove member's death from cancer was caused by specific injury or exposure in order to receive killed in the line of duty benefits.
- Spouse had been previously awarded § 9 accidental death benefits.
- Cancer presumption not applicable to § 100 claims.

*Objections filed with CRAB

Cases of Note

ADR Application Requirements:

Vernon Porter v. Barnstable County Retirement Board, CR-14-248 (CRAB, March 25, 2022)

- Long procedural history of ADR application based upon emotional and cardiac events.
- Unless exemption applies, § 7 requires that ADR application which relies upon an injury or hazard undergone more than 2 years prior to the filing of such application be supported by a notice of injury filed with the board within 90 days after its occurrence.
- Emotional disabilities caused by bona fide personnel actions are not personal injuries.

Cases of Note

Section 14A Third Party Recovery

Michael Basile v. Springfield Retirement Board, CR-17-109 (CRAB, May 3, 2019)

- Disabled firefighter receiving ADR based in part on negligence of 3rd party gas company.
- Board's offset of \$50,000 of the firefighter's \$166,299 settlement with 3rd party upheld pursuant to § 14A.
- Retirement boards have a fiduciary duty to treat members fairly, but must also protect all members of the system by collecting a fair and reasonable amount from third party settlements, while not impeding third party claims.

Cases of Note

Appealable Decisions – Regular Compensation

Jeffrey Dudley v. Leominster Board of Retirement, CR-16-39 (DALA, October 5, 2019)

- Board's notice of action must include appeal rights in order to create an appealable decision – otherwise, DALA and CRAB lack jurisdiction. Appeal was dismissed.
- DALA would have found that officer-in-charge differential and lieutenant stipend were not regular compensation because payment was contingent upon temporary staffing levels (i.e, conditional and temporary, not guaranteed, regular or recurrent).

The Legal Panel
Thanks You for Your
Time and Attention

