Select Cases and Current Legal Issues

MACRS Fall Conference October 2, 2018



Moderator

Thomas F. Gibson, Esq., Law Offices of Thomas F. Gibson

Panel

Kathryn Doty, Esq., SERS Associate Counsel

Derek Moitoso, Esq., PERAC Compliance Counsel

Padraic Lydon Esq., Boston Retirement System General Counsel

Lauren Hatch, Esq., MTRS Associate General Counsel

Thomas F. Gibson, Esq., Law Offices of Thomas F. Gibson



<u>Kathryn Doty, Esq. - Associate Board</u> <u>Counsel- Massachusetts State</u> <u>Retirement Board</u>

Disability Regional Medical Panel Questions*

Accidental Disability:



Is the member mentally or physically incapable of performing the essential duties of his or her job as described in the current job description?



Is the said incapacity likely to be permanent?

Is said incapacity such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed?

Ordinary Disability:



Is the member mentally or physically incapable of performing the essential duties of his or her job as described in the current job description?



Is the said incapacity likely to be permanent?

*Heart Law, Lung Law, and Cancer Law have separate questions and forms

Disability Regional Medical Panel Questions

An affirmative certification by a majority of the medical panel is a condition precedent to an award of benefits. <u>See</u> G.L. c. 32, § 7(1); <u>See also Malden v. Contributory Retirement</u> <u>Appeal Board</u>, 1 Mass. App. Ct. 420, 424-425, 298 N.E. 2d 902 (Mass. App. Ct., 1973).

Typical Negative Panels:

"No" on Question One – the member was found not to be disabled.

YYN or "No" on Question Three – the member was found to be disabled, the disability is permanent, but the disability was NOT found to be related to the member's alleged work-related incident.

NOTE: While not eligible for ADR, this member is eligible for ODR if they have 10 or more years of creditable service

Rare Negative Panel:

YNY – the member was found to be disabled, and the disability is related to their workrelated incident, but the disability is NOT permanent.

COMMONWEALTH OF MASSACHUSSETTS PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION REGIONAL MEDICAL PANEL CERTIFICATE

The member's retirement board will provide you with all information relating to the member's claimed disability and the current job description. This information is critical to your ability to perform a compreheasive medical evaluation and assess the member's ability to perform the essential duties of his/her job. If this information has not been received, please contact the PERAC Medical Panel Unit.

DID THE MEDICAL PANEL REVIEW THE MEMBER'S JOB DESCRIPTION?

YES Z NO

DID THE MEDICAL PANEL RECEIVE AND REVIEW MEDICAL RECORDS IDENTIFIED ON THE TRANSMITTAL OF BACKGROUND INFORMATION TO A REGIONAL MEDICAL PANEL FORM PRIOR TO REVIDENING A MEDICAL OPINION IN THIS CASE?

YES 💋 NO 🗆

PLEASE LIST ANY RECORDS NOT LISTED ON THE TRANSMITTAL OF BACKGROUND INFORMATION TO A REGIONAL MEDICAL PANEL FORM, WHICH THE PANEL REVIEWED.

1. IS THE MEMBER MENTALLY OR PHYSICALLY INCAPABLE OF PERFORMING THE ESSENTIAL DUTIES OF HIS OR HER JOB AS DESCRIBED IN THE CURRENT JOB DESCRIPTION?

YES NO Please continue ONLY if you answered yes to question #1.

2. IS SAID INCAPACITY LIKELY TO BE PERMANENT?

<u>PERMANENCY</u>: A disability is permanent if it will continue for an indefinite period of time which is likely never to call even though recovery at soon remote, anknown thms is posible. If the medical panel is suable to descraise when the applicant will no longer be disabled, they must consider the disability to be permanent. However, if the recovery is reasonably certain a fare a fairly definite time, the disability cannot be classified as permanent. It is imperative that the medical panel make its determination based on the actual examination of the applicant and other available medical text or medical records which have been provided. It is *not* the physican's task to look into employment possibilities that may become available to an applicant at some future point in time. COMMONWEALTH OF MASSACHUSETTS PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION CERTIFICATE FOR ACCIDENTAL DISABILITY

TYPE OF DISABILITY: ACC

PLEASE CONSIDER POINTS A AND B BEFORE RESPONDING TO QUESTION #3. POINTS A AND B SHOULD ALSO BE DISCUSSED IN YOUR NARRATIVE.

A. Whether there is any other event or condition in the member/applicant's medical history, or in any other evidence provided to the panel, other than the personal injury sustained or hazard undergone upon which the disability retirement is claimed, that might have contributed to or resulted in the disability claimed.

B. Whether it is more likely than not that the disability was caused by the condition or event described in (A) rather than the personal injury sustained or hazard undergone which is the basis for the disability claim, and the basis for your conclusion.

3. IS SAID INCAPACITY SUCH AS MIGHT BE THE NATURAL AND PROXIMATE RESULT OF THE PERSONAL INJURY SUSTAINED OR HAZARD UNDERGONE ON ACCOUNT OF WHICH RETREMENT IS CLAIMED?*

YES 🖉 NO 💭

<u>Aggravation of a Pre-Existing Condition Standard</u>: If the acceleration of a preexisting condition or injury is as a result of an accident or hazard undergone, in the 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.

*PLEASE NOTE: When constructing your response to the question of causality (#3) in accidental disability narrative reports, your opinion must be stated in terms of medical possibility and not in terms of medical certainty.

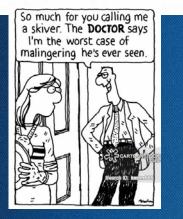
CONCLUSIONS:

The DIAGNOSIS includes the following:

1. Status post C7 corpectomy and fusion, and artificial disc placement

We did review the member's job description. We did receive and review the medical records identified in the transmittal of documents.

The disability is claimed weakness and numbress after a cervical operation for disc protrusion at C6-7 which affects his arm and he denies any feeling below the elbow on the right side. That being the case, he claims he has a virtually useless right arm, however, examination does not support his claim. This examination, particularly the sensory aspects, suggests symptom magnification rather than a structural lesion. For that reason, a statement of disability and permanency cannot be made.



It is the recommendation of the panel that an eight week rehabilitation program may allow the symptom magnification to fade, permitting a better and more accurate examination.

At this time, the member would be physically incapable of performing the essential duties of his job as described in the current job description. However, the issue of permanency is not yet determined. He may very well has partial weakness, pain and numbness of the right arm which would permanently limit his ability to return to work but this cannot be accurately determined because of the symptom magnification. In any event, said incapacity is such as might be the natural and proximate result of the injury sustained on account of which retirement is claimed.

We hope this material is helpful in your review.

Arthur P. Safian, Mr.D. Board Certifled Neurologist Medical Panel Chair

Mast

Nabil Basta, M.D. Board Certified Orthopedic Surgeon

Hwa Hsin Hsich, M.D. Board Certified Orthopedic Surgeon Encs: Regional Medical Panel Certificate

Legal Standard for Evaluating a Medical Panel

The Petitioner does not have an opportunity to have a retrial of the medical facts of the case, where the Panel applied proper procedures and correct principles of law. See Kelley v. Contributory Retirement Appeal Board, 341 Mass. 611, 617 (1961).

A medical panel's certificate responses can be overcome only upon proof that the panel:

(1) lacked pertinent facts or

(2) employed an erroneous standard.

See Retirement Board of Revere v. Contributory Retirement Appeal Board, 36 Mass. App.Ct.

99, 106 (1994). See also Queenan v. Contributory Retirement Appeal Board, 2001 Mass.

Super. LEXIS 91, at *12 (Mass. Super. Ct. 2001).

Pertinent Facts

Transmittal of Background Information to a Regional Medical Panel Transmittal of Background Information to a Regional Updated Systember: 201	Medical Panel 2
Hetirament Start Board of Retirement Montber's Last Name First Board Phone Start Phone First Complete listing of 3d medical panel Complete listing of 3d medical panel First Add phone worker-ward Complete listing of 3d medical panel Complete listing of 3d medical panel Complete listing of 3d medical panel Complete listing of 3d medical panel	ML Social Security #
STATE BOARD OF RETRIMENT	
Namber's Last Name Pirst Mine Marken Arrender Board	
Social Security # Member's Employer 02/22/2016 MEDICAL RECords 02/32/2018-01/13/2014	
Exemination Date Time Exemination Location	02/19/2013
Tec Date: /	
Member of Regional Medical Panel	TO MEMBERS APPLICATION
We have been informal that, pursuant to GL_c_22, § 6, you have been appointed as a member of the regional models pand which will examine the above named member for (Please Check One or both):	
Accidental Diability Revinement Ordinary Disability Revinement	
The following materials have been enclosed to assist you in your evaluation:	
The statement of the member's physician in connection with application for distibility retirement.	6- 6-
Statament of the member's anglypedegramment had, with resolved capies of sll reports or investigations concerning the manher's alleget instance or huzinde, and is copy of the miniber's correct official (she descend during notes)	
The member's statement of reason for accidental disability (lifed only in the case of accidental disability).	
The member's sciences of dicles.	
The member's covernment of background, qualifications, and recents physical soci/bloss.	
Medical records as obstand by the recircitment board (see page 2 for complete listing). Name of Board Chairman or Board Administrator Signature of	f Board Chairman or Board Administrator
Specific Instructions from the retirement board. Sorreg Address Ze Phone B	

Massachusetts State Retirement Board | http://www.mass.gov/treasury/retirement/state-board-of-retire/ This slide is for educational purposes only and does not constitute legal advice or guidance.

Transmittal Form

Pertinent Facts

What the Panel Received and Reviewed

MEDICAL RECORDS:

The records submitted were reviewed in detail prior to the PERAC evaluation and these included the following:

- Job description titled "Clerk III" for
- Forms needed for the disability application including the treating physician's statement of M.D. (undated)
- Reports of injury detailing the February 19, 2013, indicating her last working day was January 29, 2016, i.e. she worked for three years following the injury
- Reports of cervical spine MRI studies duted March 25, 2013 and December 10, 2014 which indicated multilevel cervical spondylosis mostly at C5-6 on the left associated with foraminal stenosis and spinal stenosis.
- Report of the EMG/NCV study dated June 17, 2014
- Reports of plain x-rays of the lumbar spine dated December 13, 2013, along with thoracic spine and cervical spine dated March 5, 2013

- Report of Mathematical May 22, 2014, along with an addendum of June 10, 2014. He was of the opinion that she indeed had cervical spondylosis and it was preexisting and aggravated by the nature of her work.
- Report of Management, M.D. neurosurgeon, dated April 14, 2015 who did not find her to be a surgical candidate and considered treated with a pain management specialist

Jo an

Job description / Regular and Major Duties

Medical Records (including any IMEs)

Surveillance (if notable)

Other factors to consider are: Length of Panel Exam (time) Physical Examination of Member Member History (including Member narrative to Panel) Length of Panel discussion (pages)

Legal Standard

Accidental Disability:

Is the member mentally or physically incapable of performing the essential duties of his or her job as described in the current job description?



Is the said incapacity likely to be permanent?



Is said incapacity such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed?



Presumptions: Heart Law, Lung Law, Cancer

Any such employee must have successfully passed a physical examination on or after the date of hire, which failed to reveal any evidence of such condition

A retirement board is required to the condition was caused by the job, unless the contrary can be shown by competent evidence.



See Damiano v. Contributory Retirement Appeal Board, 72 Mass. App. Ct. 259 (2008) (noting that that language of G.L. c. 32, §7 is more restrictive that that under G.L. c. 152).

Total and permanent incapacity v. total incapacity v. partial incapacity

Legal Standard



Aggravation of a Pre-Existing Condition Standard:

If the acceleration of a pre-existing condition or injury is a result of an accident or hazard undergone, in the performance of the applicant's duties, causation would be established. However, if the disability is due to the natural progression of the preexisting condition, or was not aggravated by the alleged injury sustained or hazard undergone, causation would not be established.



Not mandatory to answer, as only applicable IF disability was the result of the aggravation of a pre-existing condition.

Legal Standard

DISCUSSION:

The DIAONOSIS includes the following:

 Curvical spondylosis at multiple levels, with bilaters) foreminal stenosis and central canal narrowing at C5, 6

Based on the records available, today's clinical evaluation and review of the job description, it is the Panel's opinion that there is no causal relationship between her job duties and the present cervical spoadylosis. This is based on review of the job description of duties which is inconsistent with cervical spondylosis at multiple levels and foraminal stonosis, which is the cause of her current symptoms and need for treatment. It is the Panel's opinion that she cannot work as a receptionist with the current findings, but again these findings are not related to her job. These findings are permanent.

In summary, based on today's evaluation and review of the available medical records, the member is physically interpable of performing the essential daties of his job as described in the current job description. Sold incapecity is likely to be permanent in datare. The incapecity is not such as might be the natural and proximate result of the personal injury sustained on account of which redirement is claimed.

3

Sincerely yours,

Nabil Basia, M.D. Board Centified Orthopedic Surgeon Medical Panel Chair

Richard Toran, M.D. Board Certified Neurologian

Clarifications and New Panels

Clarifications Additional Medical / Employment Records? Pre-injury or Missing Post-Panel Medical Records

The Appellant does not have an opportunity to have a retrial of the medical facts of the case, where

the

Panel applied proper procedures and correct principles of law. <u>See</u> Kelley v. Contributory Retirement Appeal Board, 341 Mass. 611, 617

(1961).

<u>Goodgion v. Contributory Retirement Appeal Board</u>, Suffolk Superior Court Civil Docket # SUCV2008-01622 (May 1, 2009)(finding appropriate the view that "had evidence of plaintiff's disability existed prior to the Medical Panel's consideration of the matter, it would

have

appeared in the many evaluations and examinations which had previously occurred.")

Factual or Non-Fatal Legal Standard Errors (Ex., wrong date of injury; unclear legal conclusion) Break Non-Majority Panel Tie (Ex., N, YNY, YYY)

New Panels



Wrong Panel Specialty (i.e. Psych v. Ortho; ADR v. H<u>eart Law)</u>



Panelist conducted Member IME



Panel unable to answer questions about Member's alleged disability



Clarification requests have failed

Questions/ Open Discussion



The Status of Gomes and Its Ramifications on Retirement Boards



Derek M. Moitoso, Esq., Compliance Counsel | PERAC October 2, 2018

MACRS 2018 FALL CONFERENCE LEGAL PANEL

MacAloney v. Worcester Regional Ret. Bd. & PERAC

- MacAloney, call firefighter, Westminster.
- Sought creditable service as a call firefighter.
- Worcester Regional Ret. Bd. ("WRRS") denied request because member was not a civil service employee.



CRAB in *MacAloney*

- CRAB rejected WRRS civil service argument.
- CRAB adopted PERAC's position that a call firefighter should receive creditable service under G.L. c. 32, §4(2)(b), but added that the member must pay for such service, a departure from PERAC's long held position.



Gomes v. Plymouth Ret. Bd. & PERAC

- Gomes, Police Officer, Plymouth.
- Sought to buy creditable service for police reserve time under G.L. c. 32, §4(2)(b).
- PERAC directed the Plymouth Retirement Board ("PRB") to allow the buy back, PRB said no and appealed to DALA.

CRAB in Gomes

- CRAB adopted PERAC's position that Gomes had to pay for the creditable service under G.L. c. 32, §4(2)(b).
- CRAB rejected PRB's position that the service could be granted for "free", as the member was originally compensated for such service.



Grimes v. Malden Ret. Bd. & PERAC

- George Grimes, Police Officer, Malden.
- Sought creditable service while on a reserve list.
- Malden Retirement Board "MRB" voted to take payment from member, but refused to grant creditable service.



CRAB in Grimes

- DALA adopted PERAC's positon that Grimes was entitled to creditable service based on a \$5,000 annual salary under G.L. c. 32, §4(2)(b).
- CRAB found that where no salary was paid to Grimes, the creditable service would be "free" to the member.
- CRAB also determined that all PERAC memoranda are binding on all retirement boards based on a statutory grant of power.



Superior Court in Gomes

- Superior Court determined that the creditable service under G.L. c. 32, §4(2)(b) is "free" or without cost to the member.
- Superior Court found that there is no "make-up" payment provision in G.L. c. 32, §4(2)(b).



 G.L. c. 32, §4(2)(c) deals with make-up payments and reserve police/fire are not mentioned in that section of the statute.

CRAB: PRB No Standing to Appeal

- CRAB argued PRB has no pecuniary interest that can be harmed, as it can only gain contributions from Gomes.
- Superior Court stated CRAB's view too narrow, as it limits access to justice.



G.L. c. 32, §16(4)

- Any "person" when aggrieved by any action taken or decision of the retirement board or PERAC ... may appeal to CRAB.
- Can a "person" be a retirement board?





"Person"

 A person pursuant to G.L. c. 4, § 7 cl. 23 is defined as follows: "Person" or "whoever" shall include corporations, societies, associations and partnerships.



Woods Hole, Martha's Vineyard & Nantucket Steamship Authority v. Town of Falmouth

- When the Legislature enacts a statute ... that applies only to "persons," it does not intend the statute to apply to the Commonwealth or any of its governmental entities, including government authorities.
- As has been many times observed, this definition does not encompass governmental agencies, municipalities, or municipal corporations.



Court of Appeals In Gomes

- CRAB is likely arguing that the Superior Court erred in interpreting G.L. c. 32 and failed to defer to CRAB's interpretation as CRAB is entitled to deference.
- CRAB is also likely pursuing the "standing" argument.



The Public Records Law

BOSTON TEA PART

Explanation of the old and the new

Padraic P. Lydon, Esq. General Counsel Boston Retirement System



The current Massachusetts public records law has been in place since 1973, but was recently amended effective January 1, 2017

Massachusetts has its own public records law, not to be confused with the often cited Federal Freedom of Information Act or "FOIA"

We often receive requests that actually cite to FOIA, but nonetheless treat them as a Massachusetts public records request

The Freedom of Information Act is a Federal statute that applies to Federal records only

On the other hand, the Massachusetts Public Records Law applies to records created by or in the custody of a state or local agency, board or other government entity



According to the Secretary's A Guide to the Massachusetts Public Records Law, "every record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part."

The statute defines "public records" to "mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee . . ." GL c. 4, §7(26)

Electronic records are treated the same as paper records for disclosure purposes (such as, email, texts, IMs and so forth)

Do not commingle your email or electronic devices such as laptops and phones or you will potentially open them up to review for public records.



Specific statutory exemptions may be found at GL c. 4, § 7(26).

There are non-statutory exemptions as well called common law exemptions, such as attorney-client privilege and work product privilege. These exemptions permit the board to withhold a record from the public.

A records access officer (RAO) must prove with specificity why it should be allowed to withhold any public record. If an RAO claims an exemption and withholds a record, the RAO has the burden of showing how the exemption applies to the record and why it should be withheld.



Changes in the law require government custodians to designate a records access officer.

Custodians may also have secondary records access officers.

Some city departments have two public records contacts, one for press and one for constituents and others. This remains permissible under the new law.

Massachusetts law requires that, "Each agency and municipality shall post in a conspicuous location at its offices <u>and</u> on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer. The designation of 1 or more records access officers shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any employee responsible for making public records available shall provide the records in accordance with this chapter." GL c. 66, §6A(c)



Why does it matter?

- Different time limits
- Different fees
- Different implementation dates
- Different electronic posting requirements
- Different venue for court proceedings
- Different reporting requirements



- Confusion stemmed from the fact that amended statute distinguishes between municipalities and agencies, but does not define the terms.
- Secretary of State's regulations do define those terms. An agency, for example, is defined as:

Cities and towns, local housing, redevelopment or similar authorities. A consortium, consolidation or combination of entities within a single political subdivision of the commonwealth or among multiple political subdivisions of the commonwealth shall be deemed a municipality.

• But the definition of municipality is troubling:

Any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth that is identified in M.G.L. c. 66, §6A and c. 4, §7, clause Twenty-sixth and makes or receives 'public records'', as defined in 950 CMR 32.02...

WHAT?



- PERAC and the Law Offices of Thomas Gibson filed requests for advisory opinions from the Secretary of State
- A written advisory opinion, SPR Bulletin 01-17 was issued in response
- The issue was framed as:

The updated Public Records law took effect January 1, 2017. The updated law distinguishes between agencies and municipalities and imposes different responsibilities based on this distinction. As a result, it is now necessary for public entities to be considered either an agency or municipality for purposes of the Public Records Law.

- After considering several factors the Secretary of State opined that "In light of the above factors and the definition of "municipality" in the Public Records Law and Regulations, please be advised that local, regional, and county retirement boards are to be viewed as municipal units for purposes of the updated Public Records Law."
- SPR Bulletin 01-17 is on the Secretary of State's website



By way of example, the Boston Police Department website contains instructions for those seeking public records:

Members of the public seeking records from the Boston Police Department can submit their requests in writing to:

Director of Public Information One Schroeder Plaza Boston, MA 02120 Attn: Martha DeMaio

Or via email to: PublicRecordRequest@pd.boston.gov (preferred)

If you are a member of the Media please direct your records request in writing to:

Director of Media Relations One Schroeder Plaza Boston, MA 02120

Or via email to: MediaRelations@pd.boston.gov (preferred)

For questions regarding Public Records requests or to check the status of your request please contact the Director of Public Information during regular business hours Monday to Friday at 617-343-6660.

http://bpdnews.com/public-records-request/ (Accessed August 31, 2018) The RAO shall provide public records "by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form." GL c. 66, §6A(d)

The RAO shall "provide the public record in the requestor's preferred format or, in the absence of a preferred format, in a searchable, machine readable format." GL c. 66, §6A(d)

The RAO "shall not be required to create a new public record in order to comply with a request." GL c. 66, §6A(d)



This page will evolve over time to include additional records access contacts for City departments

PUBLIC RECORDS

As Director of Public Records, Shawn Williams is the Records Access Officer for the City of Boston.

PUBLIC RECORDS RESOURCES COST OF PUBLIC RECORDS REQUESTS

Under Massachusetts law, every person has a right to access public government records. Not all records are public, and you may need to pay a fee to get them.

Contact Shawn Williams if you have any questions, or if you need help getting records from the City of Boston.

boston.gov/departments/public-records (Accessed August 31, 2018)

CONTACT	
D	617-635-4037
\square	SHAWN.WILLIAMS@BOSTON.GOV
0	1 CITY HALL SQUARE ROOM 615 BOSTON, MA 02201 UNITED STATES
0	OFFICE HOURS Monday through Friday, 9 a.m 5 p.m.



PUBLIC RECORDS RESOURCES



boston.gov/departments/public-records (Accessed August 31, 2018)



COST OF PUBLIC RECORDS REQUESTS

PAPER COPIES OF RECORDS

City of Boston departments assume you would like electronic copies of records if we have them. The cost of black and white paper copies of documents is \$.05 per page.

RESEARCH COST

There is no cost for the first two hours of time we need to find records. After two hours, the fee is usually no more than \$25.00 per hour. When we review a request, we will provide you an estimate of how much the research will cost.

boston.gov/departments/public-records (Accessed August 31, 2018)



The new law does not require municipal retirement boards to track all public records requests

- However, State agencies must track requests and send annual reports to the Secretary of State
- The Secretary of State sends an annual report to the Legislature
- Municipal retirement boards are not required, but are encouraged to track requests
- The suggested tracking would include (these are requirements for state agencies):

(i) the nature of the request and the date on which the request was received;

(ii) the date on which a response is provided to the requestor;

(iii) the date on which a public record is provided to the requestor;

(iv) the number of hours required to fulfill the request;

(v) fees charged to the person making the request, if any;

- (vi) petitions submitted under clause (iv) of subsection (d) of section 10;
- (vii) requests appealed under section 10A;
- (viii) the time required to comply with supervisor of records orders under said section 10A; and
- (ix) the final adjudication of any court proceedings under subsection (d) of said section 10A.



Time is calculated now based on <u>business</u> days; this would exclude holidays and weekends:

- A request is considered received the first business day after receipt
- You must respond within 10 business days
- You may take up to 25 business days if you provide a detailed explanation
- Additional time may be granted based upon
 - Mutual agreement with requester
 - Grant of extension from Supervisor of Records

Records custodians must explain and its response may be appealed to Supervisor of Records



Summary of changes:

- Boards must waive the first two hours of search time; state must waive first four hours
- Boards may not charge more than \$25.00 per hour for search time unless a waiver has been granted by the Supervisor of Public Records; state has no waiver option
- Boards may charge no more than \$.05 for paper copies of records
- Special fees for police and fire have been repealed

Some things have not changed:

- Government custodians may not charge for electronic copies of records
- State law and regulation generally overrule local ordinances for fees



Under the new law you may no longer charge for time to review or segregate records unless:

- Redaction or withholding is required by law
 - For example, student records, medical records, domestic violence records, other records deemed not public by statute
- Permission granted <u>in advance</u> by Supervisor of Records, by stating:
 - Exemptions applicable, stated with specificity
 - Hours needed to redact
 - Must show why the number of hours is needed
 - Must show person doing work is lowest paid person capable



"Unique Right of Access" is pursuant to the provisions of 950 CMR 32.06(1)(g), if a requester or requester's representative (such as an attorney), has "a unique right of access by statutory, regulatory, judicial or other applicable means", a request for records will not be considered a G.L. c.66, §10 public records request

Requesters with a unique right of access should be treated this way:

- Respond within ten business days
- Explain to requester she is seeking non public records
- Explain to requester why she has a unique right of access
 - Student Records
 - Domestic violence records
 - Other specifically exempted record
- In response do not inform requester of right to appeal, as this is not a response to a public records request



As the presumption is that all records are public, a records custodian has a burden to:

- Cite an applicable exemption to the Public Records Law
- Explain how the exemption applies to the withheld or redacted portion
- Withhold or redact only the portion to which the exemption applies

The Supreme Judicial Court found the privilege applies to government records

Requirements to cite attorney-client privilege:

- Explain that the exempt portion contains confidential information
- That information was shared between an attorney and client for legal advice
- The client has not waived the privilege

There is no "exemption" to cite as this privilege is based solely on case law

The statute and regulations state a response must include:

a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.

G. L. c. 66, § 10A(a); 950 CMR 32.06(3)(d)

See Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007)

How long do I need to keep my records?

• Retention of records is determined by the Supervisor of Records



Quick Guide



http://www.sec.state.ma.us/arc/arcpdf/Municipal_Retention_Schedule_20161109.pdf (Accessed August 31, 2018)



The Division of Public Records provides an "attorney of the day" to assist any person seeking information regarding the Public Records Law.

The hours of operation for the Division are Monday-Friday from 8:45 a.m. to 5:00 p.m.

The telephone number for the Division is (617) 727-2832, and the email address is pre@sec.state.ma.us.



The statutes and regulations discussed in this presentation include:

- G. L. c. 66 Duties of custodians, authority of Supervisor of Records
- G. L. c. 4, § 7(26) Exemptions to the Public Records Law
- 950 C.M.R. 32.00 Public Records Access Regulations

The Secretary of the Commonwealth publishes a guide with case citations and other statutes:

<u>A Guide to the Massachusetts Public Records Law</u>



There are numerous cases interpreting the Public Records Law. Here are citations of a few:

Attorney-client privilege - common law exemption: Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007)

Personnel records - first clause of exemption (c): Wakefield Teachers Ass'n v. School Committee of Wakefield, 431 Mass. 792 (2000)

Police internal affairs records - first clause of exemption (c): Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1 (2003)

Settlement agreements - students with special needs: Champa v. Weston Public Schools, 473 Mass. 86 (2015)

Public safety and terrorism - exemption (n):

People for the Ethical Treatment of Animals, Inc. v. Department of Agricultural Resources, 477 Mass. 280 (2017)

Questions and Answers

Forfeitures: The "Post-Bettencourt Era"

Massachusetts Teachers' Retirement System

Lauren Hatch, Esq., Associate General Counsel MACRS – Fall 2018



M.G.L. c. 32 §15(4)

- "Forfeiture of Pension upon Misconduct"
 - "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position be entitled to receive a retirement allowance [...]"
 - "Nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member."
 - "The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions"

Bettencourt v. PERAC, 474 Mass. 60 (2016) Background

Peabody PD Lieutenant acting as Watch
 Commander

 Created 21 fake accounts on Commonwealth HRD website to view Civil Service Exam scores of other police officers

 Convicted of 21 counts violating G.L. C. 266 §120F, Unauthorized access to a computer system

As part of sentencing, member fined \$500 per count, for a total of \$10,500, and lost his job.

Bettencourt v. PERAC, 474 Mass. 60 (2016)

- Appeals Court determined in 2012 that the crimes were related to Bettencourt's position.
- Sole issue on remand, and ultimately at the SJC, was whether the forfeiture of his pension constituted an excessive fine under the 8th Amendment.



8th Amendment, Ratified in 1791

- "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
 - First time SCOTUS used 8th Amendment to halt a forfeiture was in 1998, U.S. v. Bajakajian, 524 U.S. 321

Bettencourt v. PERAC, 474 Mass. 60 (2016)

- Pension forfeiture is a fine for purposes of the 8th Amendment
 - Amount of pension forfeited: \$659,000, plus unknown amount for health insurance
 - Was found to be an excessive fine in this case.

Pension forfeiture constitutes punishment

 Only happens following conviction and it "cannot be imposed on an employee who is not convicted of committing such an offense."

- STEP 1: "The amount of forfeiture is the first issue to consider."
- STEP 2: Consider "the gravity of the underlying offenses that triggered the forfeiture."
 - Four Factors laid out by SJC:
 - Nature and circumstances of his offenses
 - Whether they were related to any other illegal activities
 - Aggregate maximum sentence that could have been imposed
 - Harm resulting from them.



<u>Massachusetts Teachers'</u> <u>Retirement System</u> <u>V.</u> <u>Joseph Giordano</u>

Superior Court Civil Action No. 2017-96-G (2018)

Procedural Background

- 2004, Giordano retired from MTRS and began receiving a pension
- 2009, he pled guilty in USDC to (1) count, violation 18 U.S.C. § 1001, knowingly and willfully making a materially false statement in a matter within the jurisdiction of the executive branch of the U.S. Government.
- 2016, MTRS decision that Giordano had forfeited his pension by committing a criminal offense involving violation of the laws applicable to his office
- 2016, Giordano appealed to USDC
- USDC ruled that the loss of retirement benefits is excessive fine
- MTRS appealed under M.G.L. c. 249 § 4.
- July 9, 2018, argument heard on motion for judgment on pleadings.
- August 9, 2018, decision rendered, findings of district court affirmed.
 62

Facts, pt. 1

- From 1992 2004, Giordano was the coordinator of community education at Whittier Regional Vocational Technical High School "Whittier"
- As part of his duties, he assisted with professional development of teachers, often using federal grant money.
- Some of those teachers were pursuing Master's degrees and took courses at Fitchburg State College.
- Giordano arranged for Whittier to reimburse teachers for those courses.
- FSC requested Giordano help facilitate administrative responsibilities associated with attendance of all teachers taking courses and offered to pay him for services.
- Giordano accepted the offer and established an entity called MDG to perform these duties.
 63

Facts, pt. 2

- MDG, under its arrangement with FSC, billed each teacher a specific sum based on cost of attendance.
- Most of sum was paid to FSC, but some kept as administrative fee.
 - Giordano never informed Whittier that he was MDG.
 - "Realized this would be a conflict of interest."
 - Giordano, as a Whittier official, was funneling money, including federal grant money, through MDG, which was a profit-making enterprise for him.
 - Giordano retired in 2004 and began receiving benefits.
 - Soon after, Haverhill School Committee initiated an audit.
- Giordano entered a guilty plea in 2009.

Facts, pt. 3

- False statement he admitted to: MDG was charging Whittier for courses taken by its teachers at FSC, and keeping a portion of Whittier's money (which included federal grant funds) as MDG's administrative fee, without revealing that MDG was Giordano's entity, and therefore he was profiting from Whittier's fees to FSC.
- 2010, sentenced to 3 years probation, \$10,000 fine, and restitution of \$15,049
 - Amount of administration fees MDG had charged Whittier
- Giordano paid the fine and restitution and completed his probation.



Standard of Review

- Important to consider that standard of review is very limited.
 - In certiorari review, a court "may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public."

 Court adopts and applies test laid out by SJC, using it as a guide to determine whether or not it is an excessive fine.

<u>STEP 1</u>: "The amount of forfeiture is the first issue to consider."

- Giordano faced a forfeiture of \$1,313,444.40
- Not a disputed issue.

 <u>STEP 2</u>: Consider "the gravity of the underlying offenses that triggered the forfeiture."

- Four Factors laid out by SJC:
 - Nature and circumstances of his offenses
 - Whether they were related to any other illegal activities
 - Aggregate maximum sentence that could have been imposed
 - Harm resulting from them.

- Court found factor 3 to be most at issue in this case; aggregate maximum sentence.
- MTRS argument was that the court improperly focused on the sentence *actually imposed* rather than the aggregate maximum.
- Here, aggregate maximum penalty was 5 years in Federal prison and \$30,000 fine
- Court admitted that aggregate maximum sentence here was higher than the "relatively low" penalties imposed in <u>Bettencourt</u>, but found that even if the court focused on that exposure, it likely would not have reached a different result.



Takeaways

- <u>Bettencourt</u> lays out very distinct method of analysis for forfeiture cases
- Good news, it gives many opportunities to attack one or more "factors"
- Likely will need clearer guidance from courts regarding "harm resulting" and where to draw the line with the "aggregate maximum sentence"



Thank you!



Thomas F. Gibson, Esq.



- Defined legally: "Sexual harassment" means sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:
- Submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; OR,

- Such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.
- Direct or implied requests for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits, or continued employment constitutes sexual harassment.

- Broadly defined clear examples of conduct which may constitute sexual harassment include, but are not limited to:
- Sexual advances, epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comments about an individual's body or clothing, comments about an individual's sexual activity, deficiencies, or prowess.

- Displaying sexually suggestive objects, pictures, cartoons;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Dissemination of sexually-explicit voice mail, email, downloaded material or websites.

- Although obvious to some, others can be clueless or insensitive, intentionally or otherwise.
- The "I didn't mean any harm" or "he/she knew I was only joking" defense is no defense.
- What constitutes sexual harassment today is markedly different than even a year ago.

- All boards should consider Sexual Harassment Training (which can include age, gender, race, disability and religious sensitivity training).
- At a minimum, boards should adopt a Sexual Harassment Policy. (See sample.)
- Failure to do so could be considered a breach of fiduciary duty to protect the system's assets in the event of a claim for monetary damages.

- MACRS Fiduciary Insurance Policy precludes coverage of claims involving sexual harassment.
- Potential personal liability of individual board members and could result in removal of board member by PERAC, termination of staff and unwanted media attention.
- Takeaway: Think before you speak or act, and if you have to think about it, don't say it or do it.

The Legal Panel Thanks You For Your Time And Attention



Blackacre Retirement Board

- 1. The Blackacre Retirement Board supports an employee's right to work in an environment free from sexual harassment. All employees and board members have the right to be treated with respect and dignity. Accordingly, reference to "employees" in this policy shall also include board members.
- 2. It is the Blackacre Retirement Board's policy that no employee may harass another, nor should a board member harass an employee or fellow board member. In addition to sexual harassment, harassment is also illegal when harassment is based on age, color, disability, gender, gender identity/ expression, national origin, race, religion, ancestry, sexual orientation, veteran or marital status, physical appearance, or any other basis applicable under federal or state law.
- 3. This policy applies to all terms, conditions, and privileges of employment, including but not limited to recruitment, hiring, performance reviews, training, development, promotion, transfer, compensation, benefits, educational assistance, layoff and recall, social and recreational programs, associate facilities, termination, and/or retirement.
- 4. Sexual harassment is behavior directed towards employees on the basis of gender, and can include sexual advances, requests for sexual favors, or verbal and physical conduct of a sexual nature when: (A) submission to such conduct is made either explicitly or implicitly a term or condition of employment; (B) submission to or rejection of such conduct is used as the basis for making employment decisions; or (C) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- 5. While it is not possible to list all additional circumstances that may constitute sexual harassment, the following are examples of conduct which may constitute harassment depending on the circumstances: sexual advances, whether involving physical touching or not; requests for sexual favors in exchange for actual or promised job benefits, such as favorable reviews, salary increases, promotions, increased benefits or continued employment; use of sexual epithets; written or oral references to sexual conduct; gossip regarding one's sex life, comments on an individual's body or clothing, comments about an individual's sexual activity, deficiencies, or prowess; displaying or distributing sexually suggestive objects, pictures (including inappropriate computer screensavers and emails) or cartoons; dissemination of sexually explicit voicemail, email, graphics, downloaded material or websites; leering, whistling, brushing against the body, sexual

gestures, suggestive or insulting comments; inquiries into one's sexual experiences; discussion of one's sexual activities; and, assault or coerced sexual acts.

- 6. It is possible that any employee may, in the normal course of work, be assigned to look at information, published on the internet or elsewhere. If any employee is asked to look at any such information which the employee finds personally offensive, it is that employee's duty to promptly consult the manager, the Executive Director or the Board Chairman. Best efforts shall be made to reassign the work.
- 7. If an employee has any questions about what constitutes harassing behavior the employee should ask the supervisor, the Executive Director or the Board.
- 8. Harassment of board employees by non-employees is also be a violation of this policy. Any employee who experiences harassment by a non-employee, or who observes harassment of an employee by a non-employee, shall report such harassment to the supervisor, the Executive Director or the Board. Harassment of members of the retirement system by employees or board members is also strictly prohibited.
- 9. If any employee believes that he or she has been subjected to sexual harassment, the employee is strongly encouraged to inform the Board.
- 10. Any reported incident will be promptly and thoroughly investigated. While each investigation will proceed as the particular circumstances warrant, an investigation will involve an interview with the employee making the complaint and interviews with persons identified as witnesses or having knowledge of the incident or conduct. All persons will be instructed to treat the investigation as confidential and not to discuss the allegations with other persons, particularly those not involved in the incident or investigation, but complete confidentiality cannot be guaranteed. Any form of retaliation directed towards an individual who makes a complaint or who participates or cooperates in an investigation is unlawful and will not be tolerated.
- 11. If, as a result of the investigation, it is determined that any individual engaged in conduct that either constitutes harassment or otherwise violates Board policies, appropriate remedial or disciplinary action will be taken. Such actions could include eliminating contact between the employees involved in the incident, mandated training and/or counseling, suspension, demotion or immediate termination. The Board will also meet with the employee to ensure that any improper conduct has stopped, and that there has been no discrimination or retaliatory action against the employee or witnesses.

12. An environment free of sexual harassment is not only the law, it is fundamental to the culture of the Blackacre Retirement Board. While the Board hopes that any employee who believes that he or she has been sexually harassed will immediately bring the matter to the attention of the supervisor, Executive Director and the Board, employees also have the right to contact the state and/or federal employment discrimination agencies which enforce the law against sexual harassment and discrimination:

Massachusetts Commission Against Discrimination

One Ashburton Place, Sixth Floor, Room 601 Boston, MA 02108 (617) 994-6000

Equal Employment Opportunity Commission, Area Office John F. Kennedy Federal Building, Government Center - Fourth Floor, Room 475 Boston, MA 02203 (617) 565-3200

To be automatically connected to the nearest EEOC Field Offices in other locations, employees should call 1-800-669-4000. Each of the agencies has a short time period for filing a claim (EEOC - 180 days (the 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis); MCAD 300 days).

EMPLOYEES MUST NOT ASSUME THAT THE BLACKACRE RETIREMENT BOARD IS AWARE OF AN EMPLOYEE'S SITUATION.

EMPLOYEES SHOULD REPORT ALL INCIDENTS OF HARASSMENT TO THEIR SUPERVISOR, EXECUTIVE DIRECTOR, OR THE BOARD.

ADOPTED BY VOTE OF THE BLACKACRE RETIREMENT BOARD, NOVEMBER 1, 2018