BUONOMO AND OTHER CASES OF INTEREST

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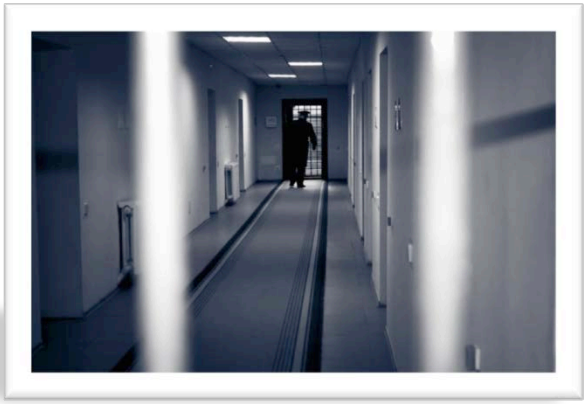
Cases of Note Since February of 2014

NOTABLE CASES (2/2014)	
Brienzo	Randall
Laumann	Bretschneider
Conklin	Savage
Ouellette	Conway
Buonomo	Daley
Howard	Carell
Connolly	Leary
Timmins	Vernava
Cadigan	Madden

Brienzo v. Bristol County Retirement Board

- Case No. CR-11-45 (DALA)
- Decision Date: August 29, 2014
- In a nutshell: DALA upheld denial of ADR because member's incapacity was not considered permanent because he failed to undergo reasonable recommended treatment (surgery) that could have improved his condition. Currently being appealed to CRAB.

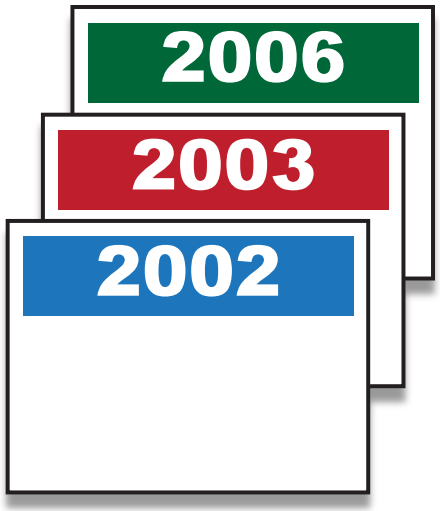
Laumann v. Norfolk County Retirement System



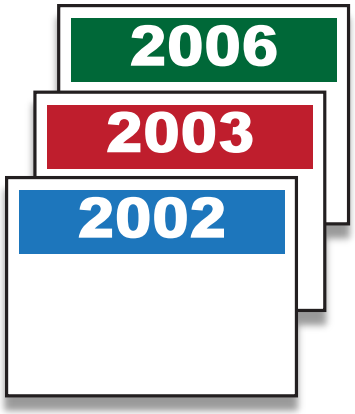
- Case No. CR-10-822 (DALA)
- Decision Date: June 20, 2014
- In a nutshell: The fact that a member was terminated from his position for "moral turpitude" has no impact on the member's eligibility for ADR. Also, refusing to undergo back surgery does not constitute a "failure to follow through with reasonable medical treatment," given its complexity and risk.

Barnstable County v. PERAC ("Conklin")

- From 1996 through 2011, off and on member in service until retired
- G.L. c. 32, § 5(2)(a): "a superannuation allowance must be based on regular compensation earned during either three ***consecutive*** years of creditable service or her last three years of creditable service whether consecutive or not, whichever average is greater." (Emphasis added).
- Board calculated retirement based on three non-consecutive years that were outside her last 3 years of service
- PERAC rejected the calculation because service was not "consecutive"
- Board argued that her interruptions were involuntary and caused by budgetary issues and therefore constituted an exception
- DALA: statute is clear that it must be consecutive, and no exception for budgetary issues

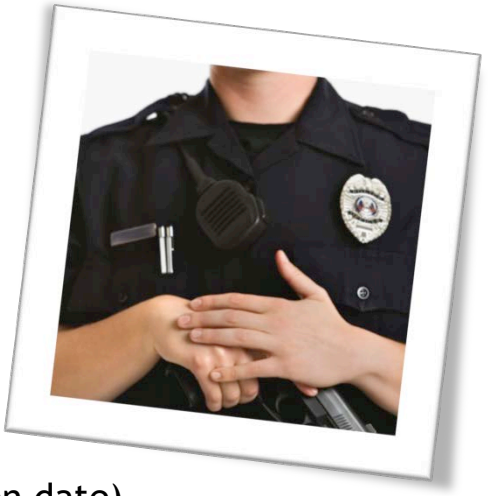


"Conklin" (Continued)



- Case No. CR-11-151 (DALA)
- Decision Date: January 9, 2015
- In a nutshell: The fact that a member had interruptions in service due to budgetary issues had no impact on § 5(2)(a)'s requirement of three *consecutive* years of creditable service occurring outside of the last three years of service.

Ouellette v. Haverhill Retirement Board



- 1981 – Member started as a police officer
- 12/31/03 – Filed for superannuation
- 8/14/05 – Applied for § 7 ADR related to incidents occurring in November 2003
  - ADR approved effective 2/14/05 (6 months prior to application date)
- Board imposed 75% cap on disability allowance
- Ouellette argued eligible for exception in § 7(2)(a)(ii), because she was **continually a member in service** since 1/1/88
- Board/PERAC disagreed: upon superannuation (12/31/03), she ceased to be a member in service
  - Upon the effective date of her disability allowance (2/14/05), she had not continuously been a member in service since 1/1/88
  - She argued that the date of incident should be used (November 2003)
- Appeals Ct.: statute ambiguous, but CRAB's interpretation reasonable

Ouellette (Continued)

- Case No. 13-P-291 (86 Mass.App.Ct. 396 (2014))
- Decision Date: September 30, 2014

- In a nutshell: A retired member who subsequently applies for accidental disability is not exempt from the 75% cap on her disability allowance, because her retirement meant that she had not continuously been a member in service since January 1, 1988.

Retirement Board of Somerville v. Buonomo

- Case No. SJC-111413 (467 Mass. 662 (2014))
- Decision Date: April 2, 2014
- In a nutshell: Mr. Buonomo was a Somerville retiree who became the elected register of probate for Middlesex County after his retirement. He was not a member of the Middlesex Retirement System. In 2009 he pled guilty to 34 charges stemming from the theft of monies from cash vending machines attached to photocopy machines in the Registry of Deeds office. SJC held that he violated the laws applicable to his office or position and that he forfeited his pension under c. 32, § 15(4).

Howard v. Haverhill Retirement Board

- 1967 – Officer Howard joined the Haverhill Police Dept.
- 1994 – Appointed prosecuting officer at local courthouse
- 2002 – New Chief of Police hired
- 2004 – Chief reassigned several police officers, including Officer Howard
  - Officer Howard was transferred to patrolman
  - He was 62-years old at the time
- Mr. Howard felt humiliated and believed the reassignment was punishment for his previously filing a grievance
- He developed depression and emotional issues and could not work
- 2005 – Filed for superannuation retirement
- 2006 – Filed application for ADR, for depression resulting from the transfer
  - Medical panel unanimously found him permanently incapable of performing his duties as a result of the transfer
- 2007 – HRB voted to grant him the benefits

Howard (Continued)

- PERAC remanded back to the HRB
  - Howard argued: the transfer caused his depression
  - ADR statute should be read in harmony with worker's compensation statute: mental or emotional disabilities arising out of a *bona fide* (done in good faith) transfer are excluded from the definition of "personal injury"
- Howard appealed to DALA, then CRAB, then the Superior Court, who remanded it back to DALA
- Most recent DALA decision: The transfer was *bona fide*
  - Chief wanted a superior officer as court liaison
  - Chief has collectively bargained for right to transfer officers
  - Other officers were transferred at same time
  - Chief had greatest need for patrolmen

Howard (Continued)

- Case No. CR-07-1052 (DALA)
- Decision Date: October 24, 2014
- In a nutshell: Police officer who developed mental/emotional issues following a transfer was not entitled to accidental disability benefits, because the issues arose out of a *bona fide* personnel action and, therefore, were exempt from the definition of "personal injury." On appeal to CRAB.

Connolly v. State Board of Retirement

- Case No. CR-11-18 (CRAB)
- Decision Date: December 19, 2014
- In a nutshell: CRAB decision reversed a decision of DALA and found that member was not entitled to accidental disability for a claimed neck injury allegedly caused by the cradling of a telephone for the bulk of her workday, because using a telephone is "common and necessary to all or a great many occupations."

Timmins v. Somerville Retirement Board

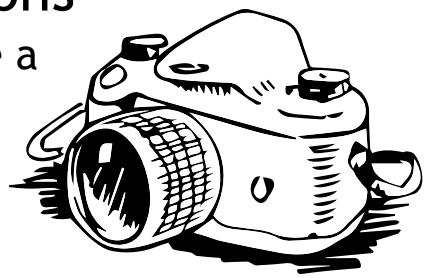
- Case No. CR-13-533 (CRAB)
- Decision Date: December 19, 2014
- In a nutshell: It was not improper for a DALA magistrate to permit additional testimony at a second DALA hearing, because the hearing should be held *de novo* (afresh). On appeal to the Superior Court.

Cambridge Retirement Board v. Cadigan

- 1981 – Joined Boston Retirement System
- 1996 – Left Boston Retirement System, and withdrew all of her deductions
- 2002 – MA Legislature passed Chapter 46 of the Acts of 2002
  - Complied with federal tax law: salary over a specific amount cannot be used in retirement calculation
  - Contained grandfather clause: not applicable to "members who were members in service on or before December 31, 1995"
- 2010 – Joined Cambridge Retirement System; re-deposited funds
- Highly compensated and tripped the federal compensation limit
- She argued that the grandfather clause applied; Board disagreed

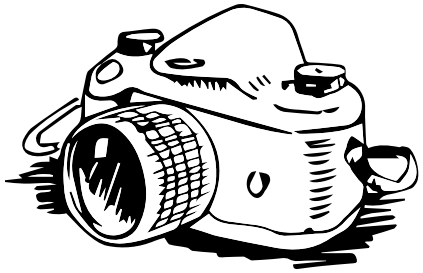
Cadigan (Continued)

- Three possible reasons she is subject to the IRS limit:
  - (1) Membership was discontinuous
    - Irrelevant: grandfather clause does not say that service must be "continuous"
    - Law only states that must be a member in service prior to 12/31/95; she was a member in service prior to that date
  - (2) Service was in multiple retirement systems
    - Although there were 105 separate retirement systems, they are all governed by Chapter 32 and benefits are calculated the same way
  - (3) Withdrawal and repayment of deductions
    - When she withdrew her deductions, she ceased to be a member
    - Irrelevant: grandfathered status remains because she was a member in service prior to 12/31/95
    - "Snapshot" approach



Cadigan (Continued)

- Case No. CR-12-574 (DALA)
- Decision Date: April 4, 2014



- In a nutshell: Member qualified for an exception to a federal tax limit because she was a member of a system prior to 1/1/96, even though she left that system, withdrew her money, and then re-deposited it in another system in 2010. On appeal to CRAB.

Randall v. Haddad

- Haddad was member of State Retirement System
- Also was director of charitable corporation
- Secretly sold church property (to her sister)
- Plaintiff diocese filed lawsuit
- Court ordered proceeds to be held in escrow

- Despite order, she later withdrew $100,000 from the proceeds and cut a check for $40,000 that she deposited into her State retirement account for the “buy back” of creditable years of service
- Plaintiffs sought an attachment

Randall (Continued)

- Both State Board and A.G. moved to dismiss it
  - Argued that retirement accounts are exempt from attachment per M.G.L. c. 32, § 19
  - "The rights of a member to an annuity, pension or retirement allowance…shall not be attached or taken upon execution or other process."
  - Superior Court and Appeals Court agreed

- SJC: Bar against attachment only applies to a member's "rights" to the funds, and she had no "rights" to the $40,000, so it could be attached
  - Emphasized the narrow scope of this holding and the indisputable facts concerning the theft

Randall (Continued)

- Case No. SJC-11402 (468 Mass. 347 (2014))
- Decision Date: June 12, 2014
- In a nutshell: M.G.L. c. 32, § 19 protects a member's rights to her retirement account from attachment but, when a member has no "right" to the money in that retirement account, attachment may be permitted.

Bretschneider v. PERAC

- Case No. CR-10-721 (DALA)
- Decision Date: February 20, 2015
- In a nutshell: Civil process service fees paid to the Sheriff of Nantucket are not "regular compensation" because they were not paid to him by his employer.

Boston Police Dept. v. Boston Retirement Board (Savage)

- Case No. CR-11-397 (DALA)
- Decision Date: January 9, 2015
- In a nutshell: Police officer injured while working a paid detail was not eligible for accidental disability because § 7 contains no provision allowing for it, whereas § 111F specifies coverage when someone is "assigned to special duty by his superior officer." Currently on appeal to CRAB.

Conway v. PERAC

- Firefighter
- Owned 50% of roofing and construction company with his wife's cousin
- 3/11/00 – Injured his knee
- 3/20/00 – Transferred his 50% ownership to wife
- 2001 – Awarded ADR
- M.G.L. c. 32, § 91A: when added to retirement allowance, member allowed to earn no more than the amount of regular compensation that would have been payable if member had continued working, plus $5,000
- PERAC believed him to be in excess

Conway v. PERAC (Continued)

Conway's reported earnings	His wife's reported earnings
2004 - $3,200	2004 - $311,103
2005 - $6,600	2005 - $240,738
2006 - $15,600	2006 - $203,203
2007 - $15,600	2007 - $244,670

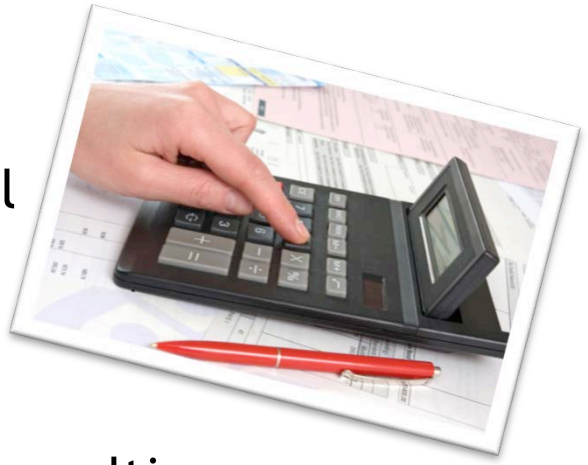
Conway v. PERAC (Continued)

- 2007 – Business dissolved contentiously and litigiously
- 2010 – Business partner contacted PERAC's Fraud Unit
  - Claimed Mrs. Conway did no work and the transfer of ownership was done to avoid § 91A's earning limitation
- PERAC determined excess earnings for years 2004 – 2007 of **$948,680.01**
  - Board held a hearing and rejected PERAC's findings
- DALA Magistrate determined:
  - Mr. Conway had a significant role that substantially contributed to the company's profits
    - Wages he was paid did not reflect his contributions
  - Mrs. Conway's role was limited to minimal administrative errands
    - Her work did not substantially contribute to the company's profits
  - Looked at the "fair value" of labor rather than just the wages paid
  - Greatly relied on Mr. Conway's testimony during business dissolution proceeding, where he described his extensive role in the business
  - Found that Mr. Conway owes $154,237.44 in pension benefits

Conway v. PERAC (Continued)

- Case No. CR-11-195 (DALA)
- Decision Date: February 20, 2015
- In a nutshell: Income from a spouse's ownership in a business may be attributed to a retiree for purposes of calculating excess earnings under § 91A where the retiree's labor, management, or supervision contributed to that income. Currently on appeal to CRAB.

Daley v. Plymouth Retirement Board



- Finance Director for Plymouth
- 1994 – formed company that provided financial consulting services to various towns
- 1997 – left Finance Director job in Plymouth
- 2006 – retired from Plymouth, but continued consulting work while also collecting retirement
- G.L. c. 32, § 91 provides hour and earning limitations on retirees rendering services to a public entity
- PRB argued that Daley had excess earnings of more than $350,000 for 2007 – 2010

Daley (Continued)

- Daley argued that the restriction did not apply to him as an independent contractor who had retired prior to passage of Chapter 21 of the Acts of 2009
  - Act amended § 91(b) to specifically include "independent contractors"
- Because § 91 did not include "independent contractors" prior to 2009, Daley argued that § 91's limitations did not apply to him
- CRAB disagreed: longstanding history of applying to independent contractors
- PRB wanted Daley to pay it $350,000 in excess earnings
- CRAB: PRB was only entitled to $40,000 Daley received in retirement benefits for the disputed period

Daley (Continued)

- Case Nos. CR-11-441, CR-13-409 (CRAB)
- Decision Date: August 7, 2014
- In a nutshell: Retired member who worked as an independent contractor who frequently performed services for municipalities was subject to § 91's earnings limitation even though he retired prior to passage of Chapter 21 of the Acts of 2009. The penalty for the over-earnings was deemed to be the money he received in retirement benefits. Currently on appeal to Superior Court on that issue.

Boston Retirement Bd. v. Carell

- Case No.: Civil No. 13-02476 (Superior Court)
- Decision Date: February 7, 2014
- In a nutshell: The Legislature's repeal of the remarriage penalty in 2000 allows for a spouse whose benefits were terminated due to remarriage to apply for reinstatement of those benefits going forward.

- See Memorandum # 8/2015.

Hull Retirement Board v. Leary

- Police officer in Hull
- 2001 – Injured in the line of duty; granted benefits under M.G.L. c. 41, § 111F
  - § 111F benefits are "regular compensation"
- 4/15/03 – § 111F benefits discontinued
- 7/1/03 – applied for ADR under c. 32, § 7
  - § 7 allowance becomes effective on the last day received regular compensation
- 1/30/04 – HRB approved § 7 application, effective 4/15/03 (last day received regular compensation)

Leary (Continued)

- Leary wanted § 111F benefits extended to the date his § 7 disability was granted, 1/30/04
  - Town Board of Selectmen voted to approve
  - Contingent on HRB changing his retirement date to 1/30/04
- HRB and PERAC refused to change the date
- Leary appealed to CRAB
- While appeal pending, Leary filed lawsuit against the Town to enforce their approval
  - 3/20/08 – Settlement Agreement dismissed lawsuit, Town agreed to pay Leary $44,000 for § 111F payments during disputed period
  - However, money was deposited in escrow account, pending the HRB's recalculation of his retirement benefits
  - Clause: if benefit is recalculated, he needs to return § 7 accidental benefits received during the disputed period

Leary (Continued)

ESSENTIAL ARGUMENTS	
LEARY	**HRB**
• The Town granted and paid me § 111F benefits for the period 4/15/03 – 1/30/04, so the HRB needs to change my effective retirement date to 1/30/04, the last day I received regular compensation	• Pursuant to the Settlement Agreement, the § 111F funds are in escrow, pending a change in your retirement date to 1/30/04 • Leary has not received those funds and, therefore, the last day he received regular compensation remains 4/15/03

Leary (Continued)

- DALA, CRAB, Superior Court, Appeals Court:
  - $44,000 deposited in escrow was § 111F compensation for the disputed period of 4/15/03 – 1/30/04
  - Leary "received" those § 111F funds as soon as they were placed in escrow
  - Last day he received regular compensation was 1/30/04
  - Because he last received regular compensation on 1/30/04, his retirement date must be changed
  - Leary must pay back the § 7 ADR benefit received from 4/15/03 – 1/30/04
- Issue in this case hinged on terms and conditions contained within the Settlement Agreement; neither HRB nor PERAC were parties to that Agreement

Leary (Continued)

- Case No. 13-P-1825 (86 Mass.App.Ct. 906 (2014))
- Decision Date: September 16, 2014

- In a nutshell: When a town enters into a valid and enforceable settlement agreement with a retired member to provide supplemental § 111F benefits, the retirement board may be compelled to change the member's retirement date and recalculate the member's retirement benefit.

Vernava v. Swampscott Retirement Board

- Case No. CR-12-640 (CRAB)
- Decision Date: December 19, 2014
- In a nutshell: Sick and/or vacation pay used by a member each week to supplement his worker's compensation benefits (and maintain his health insurance) does not constitute "regular compensation." Currently before CRAB on motion for reconsideration.

PERAC v. Madden

- 1977 – Firefighter (Group 4)
- 1992 – Appointed Chief
- 2000 – Elected Mayor (Group 1)
  - Civil Service Law (M.G.L. c. 31, § 37): person in civil service position who is elected mayor may take leave of absence without pay for term
  - Person shall be reinstated at the end of term

- Incumbent Fire Chief agreed to a brief demotion to Deputy Chief starting 1/2/08
- Madden would return to Chief on 1/2/08 and take an immediate leave of absence then file for retirement

Madden (Continued)

- 1/4/08 – Applied for superannuation as Group 4
  - He performed no duties as Chief upon reinstatement
  - Board calculated retirement under Group 4
  - PERAC instructed Board to calculate under Group 1
- DALA: Group 1 proper, because he performed no duties as Fire Chief
- CRAB: Group 4 proper, because reinstatement sufficient; no service requirement
- Superior Court and Appeals Court: Group 1 proper, because c. 31, § 37 requires actual performance of duties upon reinstatement

Madden (Continued)

- Case No. 13-P-1587 (Appeals Court)
- Decision Date: August 7, 2014
- In a nutshell: A Group 4 member, who took a leave of absence pursuant to the Civil Service law (M.G.L. c. 31, § 37) to become mayor (a Group 1 position), must actually last perform the duties of a Group 4 member at the time of retirement in order to retire as a Group 4 member. Due to recent pension reform, this is no longer necessary as service in different groups is pro-rated.