COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

April 28, 2017

Suffolk, ss.

Docket No. CR-15-662

LAURA MARIE CREEDON, Petitioner

v.

LEXINGTON RETIREMENT BOARD, Respondent

DECISION

Appearance for Petitioner:

Laura Marie Creedon, *pro se*
337 St. Paul St., Apt. 6
Brookline, MA 02446

Appearance for Respondent:

Michael Sacco, Esq.
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P.O. Box 479
Southampton, MA 01073-0479

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

A retirement board correctly paid petitioner, the alternate payee of her former husband's accidental disability retirement benefits, a reduced monthly allotment amount pursuant to a 2009 domestic relations order (DRO) issued by the Suffolk Probate and Family Court, and declined to reinstate payment of her higher benefit amount pursuant to a percentage of the marital share of her former husband's monthly retirement benefit, as an earlier DRO had required.

Although the Board issued no formal decision or notice of its action, it was an action nonetheless and, being aggrieved by it, the petitioner had the right to challenge the Board's action by appealing to the Contributory Retirement Appeals Board, pursuant to M.G.L. c. § 16(4)—if only to have it determined whether the 2009 DRO bound the Board to reduce her monthly benefit payment, as the Board asserted it did. However, the relief she sought from the Board is unavailable here as well, and the petitioner must seek it, instead, from the Suffolk Probate and Family Court. In sustaining the Board's action, this decision confirms that the petitioner has exhausted her administrative remedies under M.G.L. c. 32, § 16(4).

Background

Based upon what is, ultimately, her dissatisfaction with a domestic relations order (DRO) issued by the Suffolk Probate and Family Court, petitioner Laura Marie Creedon, the former wife of retired Lexington firefighter Joseph E. Haynes and alternate payee of his accidental disability retirement benefits, appeals what she claimed was an action by respondent Lexington Retirement Board regarding the monthly benefit it pays her: (1) the Board's reduction of her $272.04 monthly pension benefit allotment to a specific amount ordered by the Suffolk Probate and Family Court in a 2009 domestic relations order (the 2009 DRO: Exh. O); and (2) its failure to reinstate the portion of her former husband's monthly accidental disability retirement benefit payment Ms. Creedon received pursuant to the court's previous domestic relations order (the 2008 DRO: Exh. E). Under the 2008 DRO, Ms. Creedon was entitled to 45 percent of her former husband's Lexington Fire

Department pension "accrued during the course of the marriage," a formula that essentially tracked the pension benefit division formula recited by the former spouses's 1995 separation agreement. Per the Board's computation, that formula had generated a $1,123.03 benefit payment to Ms. Creedon each month through August 2009.

Ms. Creedon claims that the 2009 DRO improperly reduced the amount of benefits to which she was entitled under both the 1995 separation agreement and the 2008 DRO. She also claims that the Board failed to notify her that she had the right to appeal its implementation of the 2009 DRO. She contends that the 2009 DRO "must be stricken," and that the Board must reinstate the higher allotment amount it paid her under the 2008 DRO. (*See* Petitioner's response to Board's pre-hearing memorandum (May 2, 2015) at 4).

The Board counters that it did nothing more than implement the payment to Ms. Creedon that the 2009 DRO ordered, and that it did not issue any decision that Ms. Creedon could appeal pursuant to M.G.L. c. 32, § 16(4). It argues further that the 2009 DRO left the Board no discretion to reinstate the monthly benefit amount it had paid to her previously under the 2008 DRO, or to pay Ms. Creedon any allotment amount other than $272.04.[1] As a result, the Board contends, the Division of Administrative Law Appeals (DALA) is without jurisdiction to grant the relief she seeks here, and Ms Creedon must seek it, instead, from the Suffolk Probate and Family Court. (*See* Board prehearing memorandum, Apr. 8, 2016, at 29-31; *see also* Exh. Y: email, Attorney Michael Sacco

[1]/ With her share of her former husband's cost-of-living adjustments to his monthly accidental disability retirement benefit added to the court-ordered allotment ($272.04), Ms. Creedon's current monthly benefit payment is $292.05.

to Laura Creedon, dated Dec. 7, 2015). Ms. Creedon replies to the effect that she is barred from petitioning the court to review any of her claims, or believes this to be the case, because she filed a motion to revise the 2009 DRO with the Suffolk Probate and Family Court, and the court denied the motion. (*See* Creedon cross-examination, June 1, 2016).[2]

The parties submitted prehearing memoranda[3] and exhibits. I held a hearing on June 1, 2016 at the Division of Administrative Law Appeals at 1 Congress Street in Boston, and recorded it digitally. I admitted into evidence the parties' 30 prefiled exhibits.[4] Ms. Creedon testified on her own behalf, and was cross-examined. The Board called no witnesses. I closed the record after Mr. Creedon's testimony ended and the parties argued their respective cases, except for post-hearing memoranda if either party elected to file one. Ms. Creedon filed a "post-hearing statement" on June 3, 2016. The Board did not file a post-hearing memorandum.

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[2]/ As Ms. Creedon described the motion, it may have sought only the revision of the 2009 DRO's attorneys fees provision. (*See* Exh. O at para. 15.) I am unable to determine what the motion sought, or what its disposition was by the Probate and Family Court, because neither the motion nor its denial is in the record. I note no more than the basis for Ms. Creedon's belief, whether correct or not, that she could seek no further redress from the court with respect to her reduced allocation amount under the 2009 DRO, and that her only recourse was by way of an appeal to DALA challenging the Board's payment of that amount to her.

[3]/ *See* Petitioner Laura Marie Creedon's Prehearing Memorandum, Feb. 16, 2016 (Creedon Mem.), and Respondent Lexington Retirement Board's Prehearing Memorandum, Apr. 8, 2016 (Board Mem.) Ms. Creedon also filed a Response to the Board's prehearing memorandum on May 2, 2016 (Creedon Reply Mem.)

[4]/Ms. Creedon filed 29 of these exhibits: Exhs. A-Y, filed with her appeal; Exh. Z (a copy of the Suffolk Probate and Family Court's docket, as of August 4, 2009, in her divorce proceeding), filed with her prehearing memorandum; and three numbered exhibits (1-3) filed with her reply to the Board's prehearing memorandum, which I have re-marked as Exhs. AA, BB and CC. The Board filed a single exhibit with its prehearing memorandum: Exh. [Bd.] 1: a copy of the Board's income verification report for Joseph E. Haynes as of Aug. 31, 2009.

Findings of Fact

1. Petitioner Laura Marie Creedon married Joseph E. Haynes on September 6, 1980. They had three children born, respectively, in 1980, 1982 and 1985. (Exh. B: Separation Agreement dated Mar. 15, 1995, at 1.)

2. Joseph E. Haynes was a firefighter employed by the Town of Lexington. He entered service as a full-time firefighter, and became a member of the Town of Lexington Retirement System, on July 2, 1984. (Exh. A: Joseph E. Haynes's retirement system enrollment form, dated Jul. 2, 1984.)

3. The Lexington Retirement System is one of the Commonwealth's contributory public employee retirement systems governed by M.G.L. c. 32. Respondent Lexington Retirement Board (the Board) administers the Lexington Retirement System.

4. On July 2, 1984, Mr. Haynes designated Ms. Creedon as the sole beneficiary of his retirement benefits, which were to be paid to her when he died. (Exh. A.)

1995 Separation Agreement and Divorce

5. Ms. Creedon and Mr. Haynes entered into a separation agreement on March 15, 1995. (Exh. B.) The separation agreement included several attached "exhibits," each of which recited the terms of the parties' agreement regarding matters such as child custody and visitation, child and spousal support, medical expenses, and the division of the marital estate, including bank accounts, personal property, marital debt and pensions. (Exh. B: attached "Exhibits" A-J, numbered as pages

8-22 of the separation agreement.) The separation agreement stated that it included all of these exhibits. (Exh. B at 5, para. 9.)

6. The 1995 separation agreement provided, among other things, that Mr. Haynes agreed "to designate the wife (Ms. Creedon) as beneficiary of his Lexington Fire Dept. Pension." (Exh. B: *Separation Agmt. Exh. J*, entitled "Waiver of Alimony," at 22 (handwritten addition to text, initialed by Mr. Haynes and Ms. Creedon).

7. The separation agreement also provided that Ms. Creedon was to receive 45 percent of her husband's Lexington Fire Department pension "accrued during the course of the marriage," and that Mr. Haynes "agree(d) to execute whatever documents are necessary to effectuate a QDRO (qualified domestic relations order) of the pension (sic)." (Exh. B: *Separation Agmt., Exh. E (*entitled "Division of the Marital Estate," at 12) Part III: "Pensions.")

8. On March 22, 1995, while Ms. Creedon and Mr. Haynes were separated but still married, Mr. Haynes signed a change of beneficiary form, pursuant to M.G.L. c. 32, § 11, that removed Ms. Creedon as his sole retirement beneficiary, and named each of his three children as one-third beneficiaries of his retirement benefits due upon his death. (Exh. C.)

9. Ms. Creedon brought a divorce action against Mr. Haynes in the Suffolk Probate and Family Court, which granted a judgment granting them a divorce on August 2, 1995. (*See* Exh. O: *Creedon v. Haynes*, Docket No. 90 D 1062 D1, Domestic Relations Order (Suffolk Cty. Probate and Family Ct., Aug. 8, 2009), at 1, referencing Judgment of Divorce.)[5]

[5]/ The 1995 Judgment of Divorce is not in the record.

10. Mr. Haynes remarried at some point prior to July 2005. Ms. Creedon has not remarried since divorcing Mr. Haynes.

Former Husband's 2005 Accidental Disability Retirement

11. On July 1, 2005, Mr. Haynes retired from the Lexington Fire Department based upon accidental disability, pursuant to M.G.L. c. 32, § 7. He elected to receive his retirement allowance under "Option C," *see* M.G.L. c. 32, § 12(2)(c), and named his new wife, Marie, as his Option C beneficiary.[6] On July 6, 2005, Mr. Haynes signed a change of beneficiary form designating his new wife, Marie, as the sole beneficiary of his retirement benefits due upon his death. (Exh. D (retirement option form page designating Option C beneficiary, dated June 6, 2005; *see also* Exh. K (Lexington Retirement System estimated retirement allowance, dated Aug. 2, 1995.)

The 2008 DRO

12. On April 30, 2008, the Suffolk Probate and Family Court issued a Domestic Relations Order (Exh. E: "the 2008 DRO") regarding the allocation to Ms. Creedon of a portion of Mr. Haynes's retirement benefits. Paragraph 2 of the 2008 DRO stated that:

The Plan Administrator is advised that the Alternate Payee and Participant have

[6]/ Option C is one of the retirement benefit payment options available to Massachusetts public employees upon retiring. Upon the death of a retiree who elected this option, the retiree's designated beneficiary will be paid an allowance for the remainder of his or her life equal to two-thirds of the retirement benefit the retiree was being paid at the time of his or her death. Eligible Option C beneficiaries include a spouse, unmarried ex-spouse, and child. *See:* http://www.mass.gov/treasury/retirement/for-current-emps/plan-for-retire/payment-options/

> agreed on allocating the retirement benefits of the Participant under the Retirement Plan, which is currently being paid to him, as of the date of this Order.[7]

13. The 2008 DRO implemented a formula for determining Ms. Creedon's benefit as alternate payee that included a 45 percent share of Mr. Haynes's pension, as the 1995 separation agreement did; however, in contrast with the separation agreement, the 2008 DRO did not base the 45 percent share upon an amount "accrued during the course of the marriage" (*see* Finding 7), which ended by court decree on August 2, 1995. (*See* Finding 9.) Instead, the 2008 DRO provided that Ms. Creedon's benefit, as alternate payee, was to be 45 percent of the "marital portion" of Mr. Haynes's retirement benefit, commencing at the time of his actual retirement, and the marital portion would be "the benefit that the Participant would have received if he had terminated employment and retired on *July 1, 2005*." (Exh. E: 2008 DRO at 2, para. 5 (emphasis added).) If Mr. Haynes retired with accidental disability benefits pursuant to M.G.L. c. 32, 7, Ms. Creedon's benefit as alternate payee would also be 45 percent of the marital portion of his retirement benefit, but the marital portion would mean:

> a sum equal to the benefit the Participant would have received if he had retired with accidental disability benefits on *Aug. 2, 1995*, multiplied by a fraction, the numerator of which is the Participant's number of years and months of credited service through 7/1/05 and the denominator of which shall be the Participant's total number of years and months of credited service through the date of his disability retirement."

(Exh. E: 2008 DRO at 2, para. 6 (emphasis added).)[8] The 2008 DRO also provided that if Ms.

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[7]/ The 2008 DRO defined "Plan Administrator" as the Lexington Retirement Board, "Alternate Payee" as Ms. Creedon, and "Participant" as Mr. Haynes. (Exh. E at 1, para. 1.)

[8]/ Because Mr. Haynes had already retired (in July 2005) based upon accidental disability (*see* Finding 11 above), it is not clear why the 2008 DRO stated two different ways of determining Ms. Creedon's benefit as alternate payee based upon differing definitions of the "marital portion" of her

Creedon was remarried at the time of Mr. Haynes's retirement, Mr. Haynes was to elect Option B and name her as the beneficiary for 45 percent of "any refund of annuity that may be payable at [his] death." (*Id.*; 2008 DRO at 3, top para. (second part of para. 7, beginning on previous page).)[9]

14. The 2008 DRO also provided that Mr. Haynes:

> [s]hall elect to receive his retirement benefit under Option C of the Retirement Plan, and to name the Alternate Payee (Mrs. Creedon) as the survivor beneficiary, provided that the Alternate Payee is living and not remarried at the time of Participant's retirement."

(*Id.*; 2008 DRO at 2, para. 7.) The Suffolk Probate and Family Court retained jurisdiction to establish or maintain the 2008 DRO's status as a domestic relations order sanctioned by the Supreme Judicial Court, and/or to modify it as appropriate. (*Id*. at 6, para. 18.)

Ms. Creedon's Monthly Benefit Per the 2008 DRO

15. After receiving the 2008 DRO in May 2008, the Lexington Retirement Board calculated Ms. Creedon's 45 percent allocation of the marital portion of Mr. Haynes's accidental disability retirement allowance, as the DRO directed, and determined this amount to be $1,123.03 per month. (Exh. N: Affidavit of Marguerite Oliva, Retirement Board Administrator, sworn-to Mar. 7, 2012, filed with the Suffolk Probate and Family Court in *Creedon v. Haynes*, at 1, para. 2.)

16. The Board paid this amount to Ms. Creedon monthly beginning on June 30, 2008.

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former husband's marital amount, one reflecting an accidental disability retirement and one that did not.

[9]/ Because Ms. Creedon had not remarried when Mr. Haynes retired in 2005 (*see* Finding 10), it is not clear why the 2008 DRO included this remarriage provision.

(Exh. M: Letter, Marguerite Oliva, Retirement Administrator, Lexington Retirement Bd. to Joseph Haynes, dated Apr. 23, 2009.)

The 2009 DRO

17. On August 4, 2009, the Suffolk County Probate and Family Court issued a domestic relations order ("the 2009 DRO") that changed Ms. Creedon's assigned allocation of Mr. Haynes's gross monthly retirement benefits to a fixed sum—$272.04 per month—from the percentage that the 2008 DRO had assigned to her (45 percent of the marital portion of Mr. Haynes's accidental disability retirement benefits; *see* Finding 13 above). (*See* Exh. O: 2009 DRO at 2-3, para. 5.)

18. Paragraph 2 of the 2009 DRO stated that it was:

> the intention of the parties and the order of this Court that this Order shall replace any other Domestic Relations Order relating to the Retirement Plan, on which benefits are currently being paid to the Alternate Payee. This is an assignment of rights pursuant to M.G.L. c. 32, § 19.

(*Id*.; 2009 DRO at 2, para. 2.)

19. Although the 2009 DRO did not state specifically that this reduced Ms. Creedon's assigned allocation, it did so; the fixed sum amount she was to be paid monthly pursuant to the 2009 DRO ($272.04) was 24 percent of what the Board had been paying her pursuant to the 2008 DRO ($1,123.03). (*See* Finding 15 above.)

20. The 2009 DRO did not state why the Probate and Family Court reduced Ms. Creedon's assigned allocation of Mr. Haynes's gross monthly retirement benefits. Paragraph 2 of the 2009 DRO stated that:

> The Plan Administrator is advised that the Alternate Payee and Participant have agreed on allocating the retirement benefits of the Participant under the Retirement Plan, which is currently being paid to him, as of the date of this Order.

(*Id*. at 2, para. 2.) However, the 2009 DRO did not state at paragraph 2, or elsewhere, that Ms. Creedon had agreed specifically to the reduction of her monthly allocation amount to $272.04 or to any other amount. Paragraph 3 of the 2009 DRO also provided that Ms. Creedon's right to receive her monthly benefit "shall not be altered by her remarriage." (*Id*. at 2, para. 3, last sentence; compare the remarriage provision of 2008 DRO para. 7, discussed at Finding 13 above.) However, the 2009 DRO did not state at paragraph 3, or elsewhere, that the remarriage provision was in consideration for Ms. Creedon receiving a monthly allocation amount of $272.04.[10]

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[10]/ I note, at this point, that the record lacks evidence sufficient for me to find the basis for the $272.04 monthly allocation amount.

The record includes an affidavit that the Probate and Family Court may, or may not, have considered in ordering that Ms. Creedon be paid a $272.04 monthly allocation amount by the Lexington Retirement Board. (Exh. P.) The affidavit was sworn-to April 30, 2009 by Edward P. Berger, who identified himself as a mathematician and expert in pension valuations, and stated that Mr. Haynes requested in June 2008 that he "consider his pension and how to divide it with his ex-wife, Laura Creedon." (Exh. P at 1, paras. 1-2.) In doing so, he considered the following factors: the "estimated retirement allowance form" Mr. Haynes obtained from the Lexington Retirement Board;" Mr. Haynes's Group 4 classification for retirement purposes; his three-year average salary before retiring ($38,501.46, according to Mr. Berger); the number of years he worked before his divorce in 1995 (11.0833); assumptions that Mr. Haynes's employment ended on the date of his divorce (August 2, 1995) and that he later received a superannuation retirement (actually, he received an accidental disability retirement); the provision of the 1995 separation agreement that Ms. Creedon was to receive "45 percent of Mr. Haynes's pension for the period of the marriage;" and a factor of 1.70 percent "from the statutory table for Group 4 age 47." Based upon this information, Mr. Berger calculated Ms. Creedon's portion of Mr. Haynes's monthly pension benefit to be $272.04. (*Id*. at 2, paras. 11-12.)

This happens to be the amount that the Suffolk Probate and Family Court ordered be paid monthly to Ms. Creedon, and it may be that in doing so, the court relied upon the Berger affidavit. On this point, however, the affidavit is unreliable. Although the *Creedon v. Haynes* caption and docket number appear on its first page, there is no notation on the copy of the Berger affidavit in the record showing that the court marked it in evidence, and the 2009 DRO does not refer to it. Mr. Berger did not

21. The 2009 DRO also provided that Ms. Creedon was to receive a cost-of-living adjustment equal to "a pro-rata share of any cost-of-living increases or of any other benefit enhancements which may be granted on benefits which are in a pay status." If Ms. Creedon predeceased Mr. Haynes, all benefits payable to her as alternate payee under Mr. Haynes's retirement plan would revert to him. (Exh. O: 2009 DRO at 2-3, paras. 5-7.) As it had done with respect to the 2008 DRO, the court retained jurisdiction to establish or maintain the 2009 DRO's status as a domestic relations order sanctioned by the Supreme Judicial Court, and/or to modify it as appropriate. (*Id*. at 6, para. 18.)

22. After receiving the 2009 DRO in early August 2009, the Lexington Retirement Board noted the court's reduction of Ms. Creedon's portion of Mr. Haynes's monthly retirement benefits

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testify in this appeal, and neither party requested that I subpoena him. Both parties found fault with the computation his affidavit presented. Ms. Creedon criticized Mr. Berger's methodology and conclusions for (among other things) being based upon Mr. Haynes having been 55 years old when he retired rather than 47, not using three consecutive years of creditable service during which Mr. Haynes's compensation was the highest, and using a incorrect gross monthly pension benefit of $604.52 when information from PERAC and the Comptroller's Office showed that it was much higher in 2005 ($3,516.09). (Appeal: Statement at 3.) The Board suggested, during my colloquy with the parties at the hearing before Ms. Creedon was cross-examined, that the estimated retirement allowance form Mr. Berger used in computing Ms. Creedon's monthly allotment amount was a 2007 form the Board revised or replaced in 2008, and may have generated an error in computing the amount of her monthly benefit. Although DALA is without jurisdiction to correct the 2009 DRO, it is within its jurisdiction to determine what the facts are, including what the 2009 DRO ordered (including the $272.04 monthly allotment amount it ordered paid to Ms. Creedon) and why it did so, if the 2009 DRO makes that clear, which it does not. Based upon the circumstances presented here, I am unable to find that the court based the reduced monthly allotment amount it assigned to Ms. Creedon in the 2009 DRO upon Mr. Berger's calculation.

The absence of such finding is without legal consequence here. As I discuss below, jurisdiction in this matter extends no further than finding what the 2009 DRO did (and did not) provide, and what it directed the Board to do, including payment of a specific ($272.04) monthly allotment amount to Ms. Creedon.

to $272.04, and began paying Ms. Creedon this amount "along with annual pro rata cost of living adjustment increases," beginning on August 31, 2009. (Exh. N: Affidavit of Marguerite Oliva, Lexington Retirement Bd. Administrator, sworn-to Mar. 7, 2012 (filed with the Suffolk Probate and Family Court), at 2, para. 3.)

23. On January 21, 2010, Ms. Creedon sent a letter to the Lexington Retirement Board in which she objected to the Board's reduction of her portion of Mr. Haynes's monthly retirement benefits to $272.04, and asserted that this amount had not been calculated in accordance with M.G.L. c. 32, § 7. (*See* Exh. U: Letter, Michael Sacco, Esq., on behalf of Lexington Retirement Bd., to Laura M. Creedon, dated Feb. 18, 2010.)[11] In his February 18, 2010 reply to Ms. Creedon, Board counsel stated that the Suffolk Probate and Family Court had ordered payment of this amount in the 2009 DRO, and that, as a result, the Board could not change the monthly payment to her "in the absence of a court order to do so, or an agreement executed by both parties [to the court proceeding]." (*Id*.)

24. Ms. Creedon did not respond to Board counsel's February 18, 2010 letter at the time, and nor did she file, at the time, an appeal challenging the Board's implementation of the court-ordered reduced monthly payment of $272.04 to her, or its failure or refusal to change that amount upon her objection to it.

25. On January 16, 2015, the Suffolk Probate and Family Court issued a Supplemental Domestic Relations Order directing that Mr. Haynes elect to receive his retirement benefit under

[11]/ Counsel's reply letter summarized Ms. Creedon's January 2010 letter to the Retirement Board, but her letter is not itself in the record.

"Option C" of his retirement plan, and that he name Ms. Creedon as survivor beneficiary. However, the 2015 Supplemental DRO did not change the amount of Ms. Creedon's monthly allocation payment that the 2009 DRO had ordered ($272.04). (Exh. H.)

26. On July 15, 2015, Mr. Haynes signed a choice of retirement option form designating Ms. Creedon as his Option C retirement beneficiary. (Exh. I.) The Board confirmed, subsequently, that Ms. Creedon was Mr. Haynes's Option C beneficiary effective July 13, 2015. (Exh. J: Letter, Michael Sacco, Esq., on behalf of Lexington Retirement Bd., to Joseph E. Haynes and Laura M. Creedon, dated Sept. 11, 2015.)

27. As of September, 2015, the Lexington Retirement Board was paying Ms. Creedon $292.05 per month, which comprised, per the 2009 DRO, her $272.04 allocation amount from Mr. Haynes's gross monthly retirement benefit payment, and an additional $20.01, her then-current pro-rata share of Mr. Haynes's retirement benefit cost-of-living adjustments. (*See* Exh. J; *see also* Exh. W: Lexington Retirement Bd. income verification report for Joseph E. Haynes as of 07/31/2015 showing a "garnishment amount" deduction of $292.05.)

28. By letter to Board counsel dated November 25, 2015, Ms. Creedon stated that:

> Your letter dated February 18, 2010 failed to notify me of my right to appeal the Board's decision, Kindly mail me the appeal information I should have received then.

(Exh. X.)

29. On December 7, 2015, Board counsel replied that there had been no "decision" by the Board, which had done no more than comply with the Probate Court's 2009 DRO, and that it was "unclear how [Ms. Creedon] was aggrieved by the Board's decision to comply with a court order."

Counsel also stated that if Ms. Creedon had "any issues with the Probate Court's order," she should "direct [her] communications to the Probate Court judge that has been assigned [her] case." (Exh. Y.)

30. On December 11, 2015, Ms. Creedon filed, with the Public Employee Retirement Administration Commission (PERAC), an appeal challenging the Lexington Retirement Board's "decision of denial" regarding her objection to the $272.04 monthly allocation amount the Board was paying her and, as well, her objections to the 2009 DRO and the Board's failure to pay her 45 percent of the marital portion of Mr. Haynes's pension benefit in accordance with the 2008 DRO and the 1995 separation agreement. Assuming, correctly, that Ms. Creedon had intended to file her appeal with the Contributory Retirement Appeal Board, PERAC immediately transferred her appeal to the Division of Administrative Law Appeals, pursuant to M.G.L. c. 32, § 16(4).

Discussion

The issue to be decided here at the outset is whether or not DALA has jurisdiction to adjudicate Ms. Creedon's claims—whether there was an action or decision by the Lexington Retirement Board that Ms. Creedon had the right to appeal pursuant to M.G.L. c. 32, § 16(4), and, if so, whether her appeal was timely. If the answer to both of these questions is "yes," the next issue to be decided relates to the merits of Ms. Creedon's appeal—whether the Board was bound by the specific dollar amount of her monthly allocation that the Suffolk County Probate and Family Court ordered in its 2009 DRO (in which case, Ms. Creedon cannot obtain the relief she seeks here, and must seek relief from the court), or whether the Board retained discretion, in administering Mr.

Haynes's pension plan pursuant to Chapter 32, to determine the amount of Ms. Creedon's allocation and cost-of-living adjustment share—for example, pursuant to the 2008 DRO, as it had been doing, or based upon its own judgment, in which case, DALA could order the Board to recalculate Ms. Creedon's monthly payment).

1. Jurisdiction

a. Appealability Pursuant to M.G.L. c. 32,§ 16(4)

M.G.L. c. 43, § 16(4), entitled "Right of Appeal to Contributory Retirement Appeal Board," provides, with exceptions not applicable here, that:

> On matters other than those subject to review by the district court as provided for in subdivision (3), or other than those which would have been subject to review had the requirement for the minimum period of creditable service been fulfilled, any person when aggrieved by *any action taken or decision of the retirement board or the public employee retirement administration commission rendered, or by the failure of a retirement board or the public employee retirement administration commission to act*, may appeal to the contributory retirement appeal board by filing therewith a claim in writing within fifteen days of notification of such action or decision of the retirement board or the commission, or may so appeal within fifteen days after the expiration of the time specified in sections one to twenty-eight, inclusive, within which a board or the commission must act upon a written request thereto, or within fifteen days after the expiration of one month following the date of filing a written request with the board or the commission if no time for action thereon is specified, in case the board or the commission failed to act thereon within the time specified or within one month, as the case may be. The contributory retirement appeal board, after giving due notice, shall, not less than ten nor more than sixty days after filing of any such claim of appeal, assign such appeal to the division of administrative law appeals for a hearing . . . .

(Emphasis added.)

In determining whether there was, in this case, any action, decision or inaction on the

Lexington Retirement Board's part that Ms. Creedon could appeal under M.G.L. c. 32, §16(4), I begin by identifying what Ms. Creedon stated she was appealing, the grounds for her appeal, and the relief she was asking DALA to grant.

i. Claims Asserted and Relief Sought

The appeal includes most of Ms. Creedon's hearing exhibits and her very detailed "statement," which comprises, in its essence, a particularization of her claims and the errors she asserts as a basis for relief.

The statement presents an underlying history regarding the separation agreement and divorce, Mr. Haynes's change of beneficiaries and retirement, and the 2008 and 2009 DROs, with references to her exhibits. It goes further, however, asserting a series of errors during this history by the Lexington Retirement Board beginning on March 22, 1995, when it accepted Mr. Haynes's request to remove Ms. Creedon as his sole retirement beneficiary (*see* Finding 8), allegedly without notifying Ms. Creedon or obtaining her consent. It continued, according to Ms. Creedon's statement, through the Board's reduction of Ms. Creedon's monthly allocation payment following the 2009 DRO and its failure to comply with the 2008 DRO assigning her 45 percent of the marital share of her former husband's pension and, as well, the Board's failure to notify her of her right to appeal its "decision of denial" (meaning its counsel's response to her January 21, 2010 letter) objecting to the reduced allocation amount payment she received from the Board following the 2009 DRO (*see* Findings 22-23). Ms. Creedon's statement also asserts that the 2009 DRO unlawfully overrode the assignment to her of 45 percent of the marital share of Mr. Haynes's pension, to which she and Mr. Haynes had

agreed in the 1995 separation agreement and that the 2008 DRO had implemented, substituting, for this percentage amount that the Board was to calculate, a "fraudulent" or "erroneous" dollar amount"—meaning the $272.04 monthly payment that the 2009 DRO directed the Board to pay Ms. Creedon as her portion of Mr. Haynes's monthly pension benefit payments as alternate payee. This, Ms. Creedon asserts, interfered with her rights under the 1995 separation agreement, interfered with the Board's authority to implement Mr. Haynes's retirement plan under M.G.L. c. 32, and was "improper in form and exceed[ed] the Board's authority." (Appeal: "Statement" at 3-4 and at 6.)[12]

From Ms. Creedon's statement and the many errors it alleges, I discern two overall claims against the Board relating to the components of her monthly benefit payment—the allocation of her former husband's monthly gross pension benefit, and her share of the cost-of-living adjustments to that benefit:

(1) In view of the 2009 DRO's errors, including its interference with the Board's statutory authority to administer pension plans, the Board was not bound by the 2009 DRO and the $272.04 fixed dollar amount it substituted for the 45 percent share of the marital portion of her former husband's pension she was to have received under the 1995 separation agreement and the 2008 DRO implementing that percentage share, and the Board should have continued to calculate Ms. Creedon's

[12]/ Ms. Creedon also claims that the 2009 DRO "removed survivor benefits, added attorney fees and implemented a fraudulent dollar amount to represent [her] calculated benefit." (Appeal at 3, first unnumbered para.) She claims, as well, that the 2009 DRO directed a computation of her monthly benefits amount that did not reflect the three consecutive years of her husband's creditable service when his rate of compensation was the highest, applied the wrong age at the time of her former husband's retirement (age 55 rather than age 47), and assumed a significantly lower gross monthly pension amount ($604.52) than Mr. Haynes actually received ($3,569.16). (Appeal at 2-4.)

monthly payment pursuant to the 2008 DRO. In failing to do so, the Board has underpaid Ms. Creedon as alternate payee under Mr. Haynes's pension plan since August 2009 (*see* appeal: "Statement" at 3-4 and 6); and

(2) In failing to implement the 2008 DRO and the 45 percent share on which Ms. Creedon's monthly benefit payment was based, the Board has also failed to include the correct cost of living adjustment in her monthly benefit payments. According to Ms. Creedon's Statement, Mr. Haynes's cost of living adjustments have been $30.00 per month since at least 2009, 45 percent of which is $13.50, higher than the pro rata cost of living adjustment the Board has paid her ($9.31 per month in 2010, and $2.14 per month since 2011.) (*See* Appeal: "Statement" at 4-5).

The appeal asserts no specific claim for relief, but it is sufficiently clear from Ms. Creedon's "Statement" that she seeks a decision from DALA directing the Board to recalculate her monthly benefit payment based upon the 2008 DRO and the 1995 separation agreement.

ii. Aggrievement by the Board's Action or Decision, or Inaction

The Board denies issuing an appealable decision, asserting, instead, that it merely implemented the $272.04 monthly allocation payment to Ms. Creedon that the 2009 DRO directed, as a result of which DALA is presented here with no claim it can adjudicate and no relief it can grant. Ms. Creedon counters that the Board took action regarding her monthly allocation from her former husband's gross pension benefit that she has the right to appeal to DALA.

In terms of appealability under M.G.L. c. 32, §16(4), what matters is not how Board action or decisionmaking is characterized, or whether it was memorialized in a formal document entitled

"decision" or 'notice of action," but whether it falls within the scope of what the statute makes appealable to the Contributory Retirement Appeals Board (CRAB). Sitting as CRAB's designee, DALA has jurisdiction to determine whether Ms. Creedon was "aggrieved by *any action taken or decision* of the retirement board . . . or by the failure of a retirement board . . . to act . . . ." *See* M.G.L. c. 32, § 16(4), second unnumbered para. (emphasis added). That aggrievement is the basis of jurisdiction to adjudicate an appeal challenging a retirement board's action or decision. Whether the Board acted properly, or whether (as it asserts here) it could act no differently in view of the Suffolk Probate and Family Court's order, has nothing to do with aggrievement and relates, instead, to whether, despite aggrievement, there is a remedy available in this forum under M.G.L. c. 32, § 16(4).

The statutory language describing what may be appealed to CRAB pursuant to M.G.L. c. 32, § 16(4) is very broad— "any action taken or decision of the retirement board," or the board's failure to act. The opening clause of M.G.L. c. 32, §16(4) recites specific exceptions to what may be appealed—"matters other than those subject to review by the district court as provided for in subdivision (3), or other than those which would have been subject to review had the requirement for the minimum period of creditable service been fulfilled . . . ." Section 16(4) recites no other exception to the phrase "any action taken or decision of the retirement board." The phrase encompasses, therefore, what the Lexington Retirement Board did after it received the Suffolk Probate and Family Court's 2009 DRO, even though the Board did not issue a formal decision or notice of action, and even though it believes itself to have done nothing more than implement a court order leaving it no discretion to recalculate Ms. Creedon's $272.04 allocation amount.

Still, as a jurisdictional matter, Ms. Creedon must be aggrieved by what the Board did for DALA to adjudicate her appeal under M.G.L. c. 32, §16(4). That requirement is readily met here.

Neither section 16(4) nor Chapter 32's definitional section, M.G.L. c. 32, §1, defines "aggrieved" or states what one must show to be an aggrieved person. Absent a different statutory definition, I apply the longstanding Massachusetts rule that "to be a person aggrieved [by a Probate Court decree] 'it must appear that he has some pecuniary interest, some personal right, or some public or official duty resting upon him, affected by the decree.'" *First Christian Church v. Brownell*, 332 Mass. 143, 147,123 N.E.2d 603, 607 (1955), *quoting Monroe v. Cooper*, 235 Mass. 33, 34, 126 N.E. 286, 287 (1920).

Without question, Ms. Creedon had a pecuniary interest in the allocation amount she received from her former spouse's gross monthly retirement benefit. That interest arose originally on July 2, 1984, when Mr. Haynes designated her as the sole beneficiary of his retirement benefits. (*See* Finding 4.) It continued when Ms. Creedon and Mr. Haynes entered into a separation agreement on March 15, 1995, which included their specific agreement that Ms. Creedon would remain designated as the beneficiary of Mr. Haynes's Lexington Fire Department pension, as consideration for her waiver of alimony, and that she would receive, as pension beneficiary, 45 percent of her husband's Lexington Fire Department pension "accrued during the course of the marriage," which division was to be confirmed by a qualified domestic relations order. (*See* Findings 5-7.) Her interest may have continued in spite of Mr. Haynes' change of beneficiaries in 1995 and his designation of his new wife as his Option C beneficiary upon retiring in 2005 (Finding 11); if not, her interest was revived by either the 1995 Judgment of Divorce and Domestic Relations Order (*see* Finding 9) and/or the

2008 DRO implementing the 45 percent allocation to Ms. Creedon of the marital portion of Mr. Haynes's accidental disability retirement allowance. (*See* Finding 12.) Despite Ms. Creedon's objections to the 2009 DRO overall, that order recognized her continuing interest, as alternate payee, in Mr. Haynes's retirement benefit.

Having this pecuniary interest, Ms. Creedon was affected, financially, by the resulting reduction of the monthly payment she received from the Board. As of August 31, 2009, the allocation portion of Mr. Haynes's monthly pension benefit that she received from the Board was reduced from $1,123.03 (per the Board's computation, using the 45 percent formula the 2008 DRO directed the Board to use) to $272.04, the specific monthly amount ordered by the 2009 DRO. This left Ms. Creedon with roughly 24 percent of the allocation she had received from the Board per the 2008 DRO.

Ms. Creedon was aggrieved sufficiently, therefore, to appeal, pursuant to M.G.L. c. 32, § 16(4), the Board's implementation (beginning August 31, 2009) of the $272.04 monthly allocation amount that the 2009 DRO directed, and its payment of that amount after Ms. Creedon objected to it on January 21, 2010.

iii. Timeliness of Ms. Creedon's Appeal

I have determined that there was a Board action or decision with respect to her monthly allocation by which Ms. Creedon was aggrieved and that she could appeal, as a result, pursuant to M.G.L. c. 32, § 16(4). I determine, next, whether her appeal was timely—another element needed to establish DALA's jurisdiction to decide Ms. Creedon's claims and request for relief.

M.G.L. c. 32, § 16(4) prescribes a short limitations period of 15 days within which a retirement board's action or decision, or inaction, must be appealed to CRAB. The start of the 15-day appeal period varies depending upon what is appealed. Per section 16(4), the appeal must be commenced "within 15 days of notification of such action or decision;" or, if M.G.L. c. 32, §§ 1-28 specifies a time within which the Board must act, within 15 days after that time expires; or it must be commenced within 15 days "after the expiration of one month following the date of filing a written request with the board or the commission if no time for action thereon is specified." If an appeal challenges action by a retirement board, rather than inaction, the 15-day appeal period applies only if the board has actually acted or issued a decision, and the appeal period begins to run only when notice of the board's action or decision is received by the person aggrieved by it and, if the aggrieved person is represented by counsel, by counsel as well. *See Kalu v. Boston Retirement Bd.*, 90 Mass. App. Ct. 501, 504-06, 61 N.E.3d 455, 460-61 (2016).

Kalu noted that section 16(4) "does not define 'notification' (or any variant of the term) and is ambiguous with respect to who must be notified in the case of a represented applicant." *Id.*; 90 Mass. App. Ct. at 505, 61 N.E.3d at 461. Rather than defining notification, the Appeals Court simply noted what the plain language of M.G.L. c. 32, §16(4) requires, which is that notice be given that the retirement board took action or issued a decision. *Id.* Its focus in *Kalu* was, instead, upon to whom notice of the board's action or decision had to be sent when (as in that case) the accidental disability retirement applicant was represented by counsel. Having found that section 16(4) was ambiguous on this point, the court turned to both the underlying statutory intent and interpretive regulations promulgated by the Public Employees Retirement Administration Commission (PERAC)

governing disability retirement proceedings before local retirement boards, 840 C.M.R. § 10.00. *Id.*; 90 Mass. App. Ct. at 505, 61 N.E.3d at 461. Having found the PERAC regulations to be consistent with the purposes of M.G.L. c. 32, § 16(4) regarding disability retirement appeals, the court found "reasonable" the Contributory Retirement Appeals Board's determination in *Kalu* "that the [15 day] appeal period began to run when counsel [for the disability retirement applicant] received notice" that the board had issued a decision denying the application, and that the applicant had appealed the board's decision within 15 days after his counsel received that notice. *Id.*; 90 Mass. App. Ct. at 506-07, 61 N.E.3d at 461, 462-63.

No issue presents here as to which persons the Lexington Retirement Board needed to notify when it decided or acted upon Ms. Creedon's January 21, 2010 objection to the amount of her retirement benefit allocation check. The PERAC regulations are helpful, nonetheless, in resolving that notice of a local retirement board's action or decision (assuming that either of these things occurred) must also include appeal rights information, a matter that the Appeals Court was not asked to decide in *Kalu* and that the plain language of M.G.L. c. 32, § 16(4) does not resolve.

The PERAC regulations require that when an application for disability retirement is denied, "the board shall notify PERAC and notice of the decision and right to appeal shall be sent to all parties within three business days of the decision," and, in addition, "[a] copy of M.G.L. c. 32, §§ 16(3) and (4) shall be included with the notice of decision and, upon request, the retirement board shall assist the applicant or retired member, as the case may be, in filing of the appeal." 840 C.M.R. § 10.13(1)(c).

The regulations do not state whether information regarding the right to appeal must be sent

to a person who requested action or a decision regarding anything other than the denial of a disability retirement application. However, they do not expressly confine their purpose or scope to disability retirement application decisions alone. Instead, it appears to be the underlying intent of the PERAC regulations to promote a uniform practice in disability retirement-related proceedings before local retirement boards generally, and to assist in preserving the right to obtain benefits "authorized by the laws governing ordinary and accidental disability retirement, while protecting the retirement system and the public against claims and payments for disability retirement not authorized by law." *See* 840 C.M.R. § 10.02 (entitled "Purpose of Standard Rules: Retirement Board Policy"). It is consistent with these purposes and, thus, with PERAC's construction of M.G.L. c. 32, § 16(4), to read the notice requirements of the PERAC regulations as applying more broadly than to disability retirement applications alone—for example, to a board decision or action regarding a change in the amount of benefits or benefit allocations it pays under a disability retirement plan that it approved previously. If there actually was such action or decision, therefore, the board must provide notice of that decision or action to a potentially-aggrieved person, and that notice must include a statement of an aggrieved person's appeal rights. If the board gives this notice, receipt of the notice by an aggrieved person (and counsel, if any) triggers that person's fifteen-day period to appeal the board's action or decision to DALA.

If Board counsel's February 18, 2010 reply to Ms. Creedon's January 21, 2010 objection is deemed to be the Board's action or decision on the objection, Ms. Creedon's time to appeal it to DALA would have expired 15 days after she received the reply (on or about March 5, 2010, in other words), *if* (and only if) the reply included a statement of her appeal rights under M.G.L. c. 32, §

16(4). If board counsel's reply was not action or a decision by the Board on Ms. Creedon's objection, her time to appeal to DALA based upon inaction by the Board would have commenced running on the thirtieth day following her January 21, 2010 objection, and would have expired 15 days later, on March 8, 2010, since M.G.L. c. 32, §§ 1-28 specifies no time within which a retirement board must act on an objection such as Ms. Creedon sent to the Board on January 21, 2010.

Based upon her objection to the absence of appeal language from Board counsel's February 18, 2010 reply to her objection, it is sufficiently clear that Ms. Creedon appealed what she believed to have been the Board's decision or action upon her objection to the amount of her reduced monthly benefit allocation payment, rather than the Board's inaction. If her belief was correct, and Board counsel's February 18, 2010 reply had recited notice of its action and decision and a statement of her appeal rights, Ms. Creedon's 15-day time to appeal to DALA would have commenced running when she received the reply. There was no such notice, however, because the Board viewed its implementation of Ms. Creedon's $272.04 allocation, per the 2009 DRO, as having being neither an action nor a decision, as counsel's February 18, 2010 letter stated in so many words.

Although the 15-day appeal period clearly applies here, it is difficult to identify when the appeal period began to run or, more accurately, whether it began to run when Ms. Creedon received Board counsel's February 18, 2010 reply, or at a later time—specifically, each time the retirement board issued a monthly benefit allotment check to Ms. Creedon in the amount ordered by the Suffolk Probate and Family Court. The difficulty arises in part because section 16(4) is silent on this point, but also because the board insisted that it took no action on Ms. Creedon's January 21, 2010 objection to the payment amount the board calculated pursuant to the 2009 DRO, and did not advise

her that she had any particular time to challenge this action or inaction on its part. Indeed, the board's position here was that it did nothing Ms. Creedon could appeal under M.G.L. c. 32, § 16(4). This left it to Ms. Creedon to guess whether the board had taken any action on her objection, or whether there was an inaction she could appeal under the statute and, if so, when her relatively short time to appeal began to run.

One possible response might be that her time to appeal began to run when she knew, or should have known, that the Board would not act upon her objection to the reduced allotment amount she was paid following the 2009 DRO, for example because she received no decision or notice of action, and she continued to receive monthly checks in an amount she regarded as improper. That would not comport with the statute's plain language, however. Section 16(4) does not state that the 15-day appeal period begins to run from the earliest date on which one has actual knowledge that the board has acted or failed to act, or words to that effect. *Compare* Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1113(2), which recites such a provision,[13] and *Riley v. Metropolitan Life Insurance Co.*, 744 F.3d 241 (1st Cir. 2014) (summary decision affirming that the plaintiff beneficiary's ERISA action against insurer based upon alleged

[13]/ 29 U.S.C. § 1113 requires that an ERISA action for breach of a fiduciary's responsibility, duty or obligation must be brought:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

continuing underpayment of monthly benefits under his employer's long-term disability insurance plan was barred by the six-year contract statute of limitations; in a decision of first impression for the First Circuit, the court held that the plaintiff knew or should have known that the payments he received were underpaid when the first benefits check was issued to him, and it therefore rejected his arguments that (1) the pension plan was analogous to an installment payment plan, so as to alter the accrual date of his underpayment claim, and (2) the right of the plan administrator to recover overpayments without regard to time must be construed as creating, for a person receiving benefits, a reciprocal to recover for underpayment regardless of when the underpayment was first made or could have been discovered).

The legislature's omission, from M.G.L. c. 32, § 16(4), of claim accrual language such as ERISA recites is legally significant here, as is the fact that the Board did not notify Ms. Creedon of any obligation to appeal within 15 days after learning that the Board may have acted on her objection. The February 18, 2010 reply to her objection regarding the amount of her monthly allocation payment included no notice of her appeal rights, and that was because the Board did not perceive its reply to be a decision or action that Ms. Creedon had the right to appeal under section 16(4). The Board's perception turns out to have been incorrect; however, even though its reply was indeed an action or decision upon Ms. Creedon's January 21, 2010 objection, the reply still included no notice that would have started the 15-day appeal clock.

When, then, did the appeal clock begin running? The only other potentially appealable action that the Board took regarding her January 2010 objection was its issuance to Ms. Creedon, each month, of a retirement benefit allotment payment in the lower amount that Ms. Creedon had earlier

protested. Each of the allotment benefit checks Ms. Creedon received following her January 2010 objection can be viewed as having reiterated the position stated in Board counsel's February 18, 2010 reply and, thus, as having started anew a 15-day period in which she could appeal the Board's decision or action. This continued until one of two things happened: either the Board issued to Ms. Creedon a notice of its action or decision that included a statement of her appeal rights, which did not happen, or she filed an appeal, which she did on December 11, 2015.

This approach is reasonable because M.G.L. c. 32, § 16(4) recites no claim accrual rule such as ERISA recites; in addition, there is no statutory or regulatory provision, or decision, that precludes this approach. I follow it here. Neither party asserts that Ms. Creedon filed her appeal more than 15 days after she received her previous benefit allotment check. The appeal was, therefore, timely.[14]

[14]/ In view of the outcome here, it is unnecessary for me to determine whether the absence of a statement of Ms. Creedon's right to appeal from Board counsel's February 18, 2010 letter tolled Ms. Creedon's time to appeal the Board's decision, action or inaction under M.G.L. c. 32, § 16(4), or whether the appeal should be dismissed, despite apparent timeliness, for laches given the lapse of time between the Board's February 18, 2010 reply and the December 11, 2015 appeal. There is no factual record showing prejudice to the Board sufficient to demonstrate that Ms. Creedon delayed appealing unreasonably, but even if there were, the absence of notice to her of her appeal rights, and the omission from section 16(4) of language regarding claim accrual based upon actual or constructive knowledge of retirement board action, suggests that laches would be difficult to prove. All of that aside, I emphasize that despite the timeliness of her appeal, Ms. Creedon can obtain no relief here as to the amount of her current monthly benefit allocation payment. What she has done, however, is exhausted her search for a remedy under M.G.L. c. 32, § 16(4). This decision confirms this exhaustion, and underscores that if there is any remedy for her, Ms. Creedon must seek it in the Suffolk Probate and Family Court. In view of this outcome, other issues and concerns are academic, including any perception that this decision expands the universe of actions or decisions that section 16(4) makes appealable, which it does not do, and which is not its intent.

b. Scope of Jurisdiction Pursuant to M.G.L. c. 32,§ 16(4)

Because the Board's action or decision was appealable pursuant to M.G.L. c. 32, § 16(4), Ms. Creedon was sufficiently aggrieved to appeal it under that statute, and her appeal was not jurisdictionally defective on account of lateness, I determine next what may be decided here relative to her claims and request for relief (*see* above at 18-19.)

DALA has jurisdiction to determine whether a retirement board correctly calculated the retirement benefit due to a retired public employee's former wife under a qualified domestic relations order (QDRO) issued by the Probate and Family Court. *See Holland v. Boston Retirement Bd.,* Docket No. CR-13-13, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016)(retirement board properly used a Group 2 age factor in calculating benefit due to retiree's former wife under QDRO, because although the retiree had become a member of public employee retirement Group 4 by the time he retired due to a statutory change, the court order provided that the former wife's benefit was to be calculated as if he had terminated employment at the time of the divorce, and he had been classified in Group 2 at that time). DALA can determine here, therefore, whether the Lexington Retirement Board erred in implementing the amount of Ms. Creedon's allocation that the Suffolk County Probate and Family Court's 2009 DRO directed. It can also determine whether there is any relief that can be granted here, or whether Ms. Creedon must pursue the relief she seeks in the Suffolk Probate and Family Court, which retains jurisdiction to modify its domestic relations orders or issue new ones as appropriate.

That determination entails making the necessary findings of fact and sorting out what the

DROs in question directed. If the Suffolk Probate and Family Court is Ms. Creedon's sole forum of recourse, DALA may also determine that Ms. Creedon has exhausted the pursuit of any remedy she might have had under M.G.L. c. 32, § 16(4). That determination may prove helpful to the parties and the Suffolk Probate and Family Court if Ms. Creedon pursues a remedy there.[15]

Finally, DALA also has jurisdiction, under M.G.L. c. 32, § 16(4), to determine whether the Board was bound by a DRO issued by the Suffolk Probate and Family Court in *Creedon v. Haynes* and, if it was, which of the two DROs in question controlled Ms. Creedon's allocation as of August 2009, and whether the Board's action or decision here was consistent with whichever DRO applied.

2. Determination of Substantive Issues

The Lexington Retirement Board was bound to provide Ms. Creedon with a portion of her former husband's pension benefits as the Suffolk Probate and Family Court ordered, based upon two

[15]/ Ms. Creedon's post-hearing statement suggests that this clarification may be helpful. She states that after having thought about what was said during the hearing, it was her understanding that the Board had implemented the 2009 DRO as it was written, without approving how or why the court concluded that her monthly allocation amount from Mr. Haynes's retirement benefits payment should be reduced to $272.04. (Petitioner's post-hearing statement, Jun. 3, 2016, at 1.) Ms. Creedon's memorandum goes on to assert that her former husband may have persuaded the court to reduce her monthly allocation amount with less-than-candid testimony—a matter I do not, and cannot, consider here—and that, as a result, she may have "harbored anger at the Board" for what the court did in the 2009 DRO and why it did so. (*Id*. at 2). Nonetheless, Ms. Creedon did not withdraw her appeal after the hearing, despite this realization. Based upon the parties' arguments at the close of the hearing, and my discussion with them, Ms. Creedon did not appear convinced that she could withdraw this appeal without having her claims disposed of on their merits and prejudicing her chance of obtaining relief from the Suffolk Probate and Family Court, even if the disposition was that no relief was available here. Stated another way, Ms. Creedon preferred that the decision issued here clarify her exhaustion of whatever remedies she had under M.G.L. c. 32, §16(4), if any, with respect to the Board's action implementing the 2009 DRO. I do so below.

principles: first, public pension benefits interests may be assigned to former spouses under a qualified domestic relations order issued by the Probate and Family Court, *see Contributory Retirement Bd. of Arlington v. Mangiacotti,* 406 Mass. 184, 186, 547 N.E.2d 21, 22 (1989); and second, a "decree of a probate court cannot be attacked in any collateral proceeding." *Farquar v. New England Trust Co.,* 261 Mass 209, 212, 158 N.E. 836, 838 (1927). Based upon the same principles, DALA, too, is bound by a domestic relations order issued by the Probate and Family Court, and cannot reform or rewrite it. *See Holland v. Boston Retirement Bd.,* Docket No. CR-13-13, Decision at 9 (Mass. Div. of Admin. Law App., Apr. 1, 2016).

The question here is which of the two DROs in question, the 2008 DRO or the 2009 DRO, bound the Board in paying Ms. Creedon her monthly allocation of her former husband's pension benefit after the 2009 DRO was issued. In resolving this issue, I emphasize that DALA is without jurisdiction to vacate or modify the 2009 DRO, and, therefore, cannot pick and choose from between the 2008 and 2009 DROs as a matter of preference for how Mr. Haynes's pension benefits should be allocated.

The issue is resolved by the 2009 DRO, which provides that it "shall replace any other Domestic Relations Order relating to the retirement plan, on which benefits are currently being paid to [Ms. Creedon]." (*See* Exh. O at 2, para. 2.) By its own terms, the 2009 DRO superseded the 2008 DRO in all respects, including with respect to Ms. Creedon's allocation of Mr. Haynes's monthly gross retirement benefit and the portion of any retirement cost-of living adjustments he received.

The 2009 DRO bound the Board, therefore, and the Board correctly paid to Ms. Creedon the $272.04 allocation that the 2009 DRO ordered beginning August 31, 2009. The Board is without

authority to change that amount. DALA, too, must enforce the 2009 DRO as it is written. It is without jurisdiction to reform or rewrite the 2009 DRO by directing the Board to substitute the 45 percent allocation directed by the earlier 2008 DRO, which the 2009 DRO superseded.

The 2009 DRO did not fix the pro rata amount of the cost-of-living retirement benefit adjustments that Ms. Creedon receives in addition to her monthly $272.04 allocation. That amount fluctuates with Mr. Haynes's cost-of-living adjustments (it has remained stable since 2010, thus far), and it remains for the Board to calculate under the 2009 DRO as those fluctuations occur. However, the 2009 DRO unquestionably superseded the 2008 DRO and fixed the amount of Ms. Creedon's monthly allocation at $272.04. As a result, the Board cannot substitute payment of the 45 percent allocation that the 2008 DRO ordered for the cost-of-living adjustment computation that the 2009 DRO requires, and DALA cannot order that it do so, as Ms. Creedon advocates. Doing so would be little more than reforming, or ignoring, the 2009 DRO, which neither DALA nor the Board may do.

Conclusion and Disposition

For the reasons stated above, I conclude that after receiving the 2009 Domestic Relations Order issued by the Suffolk Probate and Family Court in *Creedon v. Haynes*, the Lexington Retirement Board correctly paid Ms. Creedon, as alternate payee of her former husband's accidental disability retirement benefits, a monthly allotment amount of $272.04 as the 2009 DRO directed, and has continued to do so correctly since then because the court has not ordered that Ms. Creedon be paid a different allocation amount.

Moreover, because the 2009 DRO stated that it "replaced" any prior DRO under which Ms. Creedon had been paid a portion of Mr. Haynes's retirement benefits, the Board also correctly declined to reinstate the higher monthly benefit amount it had paid her under the 2008 DRO or in accordance with the 1995 separation agreement. Absent an order by the Suffolk Probate and Family Court directing payment of a different amount to her, the Board cannot pay Ms. Creedon a different allocation amount, and DALA cannot order it to do so.

I confirm that Ms. Creedon has exhausted, in this forum, any remedies she may have had, pursuant to M.G.L. c. 32, §16(4), with respect to the allocation amount and the cost-of living adjustment that comprise her monthly payment from her former husband's retirement pension benefits. Ms. Creedon's only recourse with respect to the allocation amount and cost-of-living adjustment computation ordered by the 2009 DRO is to petition the Suffolk Probate and Family Court to modify it, for example by amending the 2009 DRO or issuing a new DRO superseding it. In saying this, I note the provision of the 2009 DRO in which the Court retained jurisdiction to amend the order (Exh. O: 2009 DRO at 4, para. 12).

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: April 28 , 2017