COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

MICHAEL DALEY,
Petitioner-Appellant

v.

PLYMOUTH RETIREMENT BOARD,
Respondent–Appellant.

CR-17-018 and CR-17-169

REISSUED DECISION

This decision is being reissued to correct Footnotes 17 and 25. The remainder of the decision remains unchanged and follows.

Both Petitioner Michael Daley and Respondent Plymouth Retirement Board (PRB) appeal a decision of the Chief Administrative Magistrate of the Division of Administrative Law Appeals (DALA) permitting the Board to recoup excess earnings from Mr. Daley, as calculated on the basis of Mr. Daley's personal earnings (rather than his company's gross receipts) and estimating this figure for the period for which records are not available. In so doing, the magistrate admitted 74 exhibits, held a hearing on October 16, 2018, and made eight findings of fact, which we adopt as our own. The decision is dated August 21, 2020. Mr. Daley and PRB filed timely appeals to us.

After giving careful consideration to all the evidence in the record and the arguments presented by the parties, we incorporate the DALA decision by reference. We affirm the DALA Chief Magistrate's decision for the reasons stated in the Discussion. We do not agree with Mr. Daley's contentions that this matter has already been resolved in court, that G.L. c.32, § 91(b) does not apply to consultants and independent contractors who retired before 2009, and that the estimation of his earnings from 2007-10 constitutes an inappropriate additional sanction. We also do not agree with PRB's contentions that Mr. Daley's excess earnings should be calculated based on his company's gross receipts or based on an alternative formula and that, independent

of our other conclusions, we should sanction Mr. Daley by calculating his excess earnings using FAA's gross receipts from 2007-10 as a punishment for having destroyed his records for this period.

Background

Michael Daley worked in Plymouth municipal government as the Town accountant and later as director of finance from 1988 to 1997.[1] In 1994, he formed Financial Advisory Associates (FAA), working part-time during the final years of his government service and full-time for two decades afterwards, solely servicing government clients during the period of time relevant to this case.[2] In 2011, the Plymouth Retirement Board informed Mr. Daley that it had determined he had over $320,000 (later amended to be over $350,000) in excess earnings from 2007 to 2010, noting (during the DALA proceedings following his appeal of this determination) that, because Mr. Daley had refused to turn over FAA's financial records, and the Plymouth Superior Court had rejected PRB's attempt to subpoena them, PRB had calculated this number based on FAA's gross income, which it had ascertained "based on information it had obtained from the towns that had been provided financial advice by the company."[3]

Mr. Daley appealed the Board's determination to DALA in 2011 but continued to refuse to turn over his financial records from 2007-10 during the pendency of his appeal, causing DALA Chief Magistrate Richard Heidlage to make an adverse inference that Daley had received excess earnings for this period. Chief Magistrate Heidlage also rejected Daley's claim that the excess earnings limitation did not apply to him because he had retired prior to a 2009 amendment of Massachusetts pension law that explicitly added that consultants and independent contractors were subject to this provision. After Daley appealed DALA's decision, CRAB affirmed Chief Magistrate Heidlage's conclusion that Mr. Daley owed PRB excess earnings but rejected PRB's contention that he owed the full $350,927.03. CRAB explained that this number was "likely to be greater than the true amount of Daley's excess post-retirement earnings," but declined to rule on the precise amount of money Mr. Daley owed.[4] Mr. Daley and PERAC appealed CRAB's

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[1] Finding of Fact 1.
[2] FF 3.
[3] 2020 DALA Decision, p.4.
[4] *Daley v. Plymouth Retirement Board and Public Employee Retirement Administration Commission*, CR-11-441 & 13-409.

decision to the Superior Court, but their appeals were dismissed as untimely, and only PRB's appeal requesting that the matter be remanded to CRAB to require it to affirm that "Mr. Daley be sanctioned to the full amount of his excess earnings or that the Board be given a chance to submit the documentation it had proving those over earnings," was heard.[5] The Superior Court, however, refused to allow PRB to collect this 'full' amount, noting that CRAB had not abused its discretion in its decision—a holding that the Appeals Court affirmed in 2018 under a Rule 1:28 Memorandum and Order.[6]

PRB then sought a new ruling from DALA requiring Mr. Daley to pay the full amount it again claimed he owed in excess earnings (that is, the amount he would owe if these earnings were calculated using FAA's gross receipts), both from the 2007-2010 period for which it had originally sought judgment as well as for the subsequent period during which he had continued to operate the business (2011-17)—an amount totaling over $1.4 million.[7] In 2020, DALA Chief Administrative Magistrate Edward McGrath issued a ruling denying PRB's claims that Mr. Daley's excess earnings should be calculated based on FAA's gross receipts while also rejecting the arguments Mr. Daley resubmitted for why he should owe no money. Chief Magistrate McGrath determined that Mr. Daley's excess earnings should be calculated based on the earnings he reported in Box 5 of his W-2—which represented his reported total income, including Medicare wages and tips—and estimated Mr. Daley's income from 2007-2010 (the period for which Mr. Daley had refused to turn over and destroyed his records) based on the salary he reported having earned in 2011 and 2012. Both PRB and Mr. Daley appealed the Chief Magistrate's 2020 decision, the former arguing again that Mr. Daley should owe the 'full' nearly $1.5 million it calculated based on the rejected 'gross receipts of the whole company' formulation (and also briefly referencing several alternate formulas CRAB could consider using instead of Magistrate McGrath's) and the latter contending again that he owed nothing.

Discussion

1. Standard of Review for DALA Decisions

[5] 2020 DALA Decision, p.8.
[6] Ibid.
[7] 2020 DALA Decision, p.4.

As PRB and Mr. Daley know well, CRAB's primary job is to determine if a DALA Magistrate's determinations were reasonable. As the Appeals Court stated in *Vinal v. CRAB*, CRAB:

> should defer to subsidiary findings entered by a hearings officer according to the following guidelines: First, all subsidiary findings made by a hearings officer should be entitled to some deference; second, when those findings rest on the hearings officer's resolution of credibility questions (i.e., that a fact is true because a witness testified to it and that witness is believable), they should be entitled to substantial deference; and finally, whenever the appeal board rejects subsidiary findings made by a hearings officer, its decision should, consistent with the requirements of G. L. c. 30A, Section 11(8), contain a considered articulation of the reasons underlying that rejection.[8]

Based on these and similar rulings, CRAB has long been reticent to issue new Findings of Fact unless a DALA magistrate has made a clear and pertinent error. In this case, where the magistrate's Findings of Fact are both accurate and a sufficient basis for his decision, we need not, as PRB requests, add 37 Findings of Fact, particularly when such findings are irrelevant to our ultimate conclusions.

2. ***Res Judicata***

Ironically, Mr. Daley contends that the matter currently before CRAB was previously resolved by the Superior Court in 2011 and is thus subject to the principle of *res judicata*—an argument that itself was rejected by CRAB nearly a decade ago. As CRAB noted in its 2014 decision, a claim of *res judicata* requires "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits," and the latter two of these elements were not satisfied by the 2011 Superior Court case.[9] Beginning with the second element of the test, the "cause of action" in *Plymouth Retirement Board v. Michael Daley* (Plymouth County Superior Court, Docket Number 10-0802) stemmed from PRB's attempt "to enforce a *subpoena duces tecum* in a retirement board hearing" that would require Mr. Daley to turn over his financial records from 2007-10 to enable the Board to determine whether it should stop payment on Mr. Daley's pension, whereas the cause of action

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[8] 13 Mass. App. Ct. 85 (1982).

[9] *Kobrin v. Board of Registration in Medicine,* 444 Mass. 837 (2005), citing *DaLuz v. Department of Correction*, 434 Mass. 40, 45 (2001) and *Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 280 (1933).

of the case currently at issue is Mr. Daley's appeal contesting PRB's subsequent determination of the amount of excess earnings he owed.[10] The clear distinction between these causes of action—the former being on a procedural question of the Board's power to subpoena documents that would enable it to make a determination and the latter being a contestation of the determination itself—was even evident in PRB's brief to the Superior Court at the time: "The Board has made no determination as to whether Daley has exceeded the limitations of G.L c.32, § 91(b), but rather merely seeks in its capacity as a fiduciary the production of documents relating to Daley's earnings received by FAA which are derivatively based on FAA's contracts with various public entities so that it may conduct a proper evaluation of whether a violation of section 91(b) has occurred."[11]

Even had Mr. Daley's 2011 Superior Court case satisfied this element of the *res judicata* test, he has not proven that this case received "a final judgment on the merits" of the issue now at hand. Judge Muse's decision was one and a half lines long, jotted in the margins of the first page of Mr. Daley's Motion to Dismiss, and written partially in legal shorthand, referring only to "the reasons articulated in Δ's [Defendant's] Memorandum" as the basis of his decision.[12] Such a ruling, as CRAB noted, does not specify whether the judge based his decision specifically on Mr. Daley's argument that the excess earnings limitation should not apply to him because he retired before 2009 that is currently at issue or rather on the numerous other grounds he invoked (e.g. that he was "entitle[d] to rely on the advisory opinion by PERAC…that the PRB had failed to join PERAC as a necessary party, and… that the subpoena was overbroad in that it was not limited to earnings from services to public entities").[13] Furthermore, Judge Muse's follow-up

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[10] See *Plymouth Ret. Bd. v. Daley, Complaint, Civ Action* No. 10-0802, Superior Court (June 16, 2010), p.1. Note in contrast, Chief Magistrate Heidlage's holding that "These matters [the DALA appeal] concern the Petitioner's appeal of the Respondent retirement board's determination, as set forth in a letter dated July 25, 2011 (Exhibit 1), that the Petitioner had excess earnings pursuant to G.L. c. 32, s. 91 in the amount of $323,784.53 for years 2007 - 2010." 2013 DALA decision, *Daley v. Plymouth Retirement Board and PERAC* (CR-11-441 and 13-409).

[11] "Memorandum of Law In Support of Plaintiff Plymouth Retirement Board's Opposition to Defendant Michael Daley's Motion to Dismiss," p.2.

[12] "Answer and Motion to Dismiss of Defendant Michael Daley," p.1.

[13] 2014 CRAB Decision. See also "Reply Memorandum to Plaintiff Plymouth Retirement Board's Opposition to Defendant Michael Daley's Motion to Dismiss" and "Answer and Motion to Dismiss of Defendant Michael Daley." Importantly, numerous major courts, including the SJC, have held that a 'general verdict' does not have a *collateral estoppel* or *res judicata* effect on future litigation regarding a particular issue or piece of evidence that was not necessary or

order denying Mr. Daley's Motion for Fees and Costs explicitly stated that "there is an *open question* as to whether it [Mr. Daley's claim against PRB] ever shall, ripen to a 6F claim" (emphasis added)—that is, a claim that a party has advanced arguments that are "wholly insubstantial, frivolous and not advanced in good faith."[14] This statement would not make any sense unless Judge Muse anticipated the possibility of further litigation on issues relevant to Mr. Daley's case that would determine whether PRB had advanced "wholly insubstantial" and "frivolous" contentions in bad faith. Thus, Judge Muse's decision does not appear to (have been intended to) preclude further litigation as to the amount of excess earnings Mr. Daley owed.

Major courts have repeatedly held that such an ambiguous ruling militates against a finding of *res judicata* and have generally been averse to imposing *res judicata* in cases where it was not obvious that an issue had received final judgment. In *In re: Subpoena Duces Tecum Issued to Commodity Futures Trading Commission*, for example, the D.C. Circuit held that a Magistrate Judge's decision on the privilege of documents that E&J Gallo Winery attempted to subpoena from the CFTC for its lawsuit against WD Energy Services Inc. was too vague to be entitled to preclusive effect. The Circuit panel noted that the Magistrate's order was "ambigu[ous]...about whether the question of privilege was actually and necessarily determined" given that the order noted, "Moreover, the pending D.C. court action militates against overriding [WD Energy's assertion] of the settlement privilege"—a statement that could mean either "that it was prudent to recognize that a settlement privilege covered the withheld WD Energy documents in order to prevent Gallo from obtaining them from the Commission in the D.C. district court proceeding" or "that he was electing to defer a decision pending the outcome of the D.C. district court proceeding as WD Energy had requested."[15] The Court determined that "the equivocal nature of the 'militates' sentence would suggest that the California proceedings did not necessarily determine the settlement privilege issue," emphasizing the relevance of the Supreme

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inherent to the decision. See, e.g. *Commonwealth v. Albert B. Benson and another*, 389 Mass. 473 (1983) and *Commonwealth v. William Lopez*, 10 Mass. App. Ct. 351 (1980). Many other major courts, such as the Connecticut Supreme Court and the 5th and 11th circuits have also held this. See, e.g. *Dowling, Sr. v. Finley Associates, Inc.,* 248 Conn. 364 (Conn. 1999), *United States v. Irvin,* 787 F.2d 1506 (11th Cir. 1986), *United States v. Gonzalez,* 548 F.2d 1185 (5th Cir. 1977). The lack of specificity in Judge Muse's order as to which arguments of Mr. Daley's he found persuasive thus prevents us from ruling for Mr. Daley's *res judicata* claim.

[14] "Defendant Michael Daley's Motion for Attorney's Fees and Costs Pursuant to Ch. 231 Sec. 6F," p.1. See also G.L. c.231, § 6F.

[15] 439 F.3d 740 (D.C. Cir. 2006).

Court's long-standing observation that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," and distinguishing the case at issue—which involved "the commencement of a new, albeit ancillary, proceeding in a different court"—from cases in which the Court had determined that *res judicata* was appropriate.[16] We find the D.C. Circuit's observations persuasive and relevant to Mr. Daley's case. Judge Muse's ruling was sufficiently unclear as to the precise rationale for his decision and insufficiently "extensive[]" to warrant the imposition of a serious foreclosing measure like *res judicata*, particularly given that, unlike the Magistrate Judge, Judge Muse appeared to actively suggest that litigation on Mr. Daley's case could continue.[17] Further, we agree with the D.C. Circuit that a proceeding like Mr. Daley's that is "ancillar[il]y" relevant to issues previously litigated can nonetheless be considered "new" and not receive *res judicata*.[18]

3. Application of Section 91(b) to Independent Contractors and Consultants Who Retired Pre-July 1, 2009

Further, Mr. Daley attempts to persuade CRAB to overrule our previous holding that independent contractors and consultants who retired before 2009 were subject to Chapter 32's

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[16] Ibid.

[17] 351 Mass. 363 (1966). See also *AB & C. Motor Transp. Co. v. Dept. of Pub. Utilities* 327 Mass. 550 (1951), holding that the possibility of decreased business for certain carriers gave these carriers standing to challenge the Director of the Commercial Motor Vehicle Division's decision to allow the transfer of certain commercial vehicle licenses, as well as *Boston Police Assn. v. Menino* (No. SUCV2006-02939), where the Superior Court held that the Boston Police Association was 'aggrieved' by the City's decision to transfer officers to the Boston Police Department, given that the Association's officers "*will be harmed* by having to work alongside individuals who did not obtain their jobs through the statutory competitive scheme designed to advance basic merit principles, and who may not have adequate credentials and abilities for the position of BPD officer. In addition, the individual plaintiffs *will have to compete* with such individuals for promotions, overtime, and detail opportunities" [emphasis added].

[18] Note also the Sixth and Seventh Circuit's decisions that *res judicata* did not apply in a case where the FTC issued *subpoenas duces tecum* as part of investigating taxi companies over an issue similar to one that was decided by the Supreme Court in the 1940s. The Circuits reasoned that it was unclear that the issues then under investigation were the same as those that had been resolved before the Supreme Court, and thus that the burden for imposing *res judicata* had not been met. See *F.T.C. v. Markin* 532 F.2d 541 (6th Cir. 1976) and *F. T. C. v. Feldman* 532 F.2d 1092 (7th Cir. 1976). Thus, while we believe the issues in the instant case are clearly distinct from those in the 2011 Plymouth Superior Court case, even a potential connection between the two would be insufficient for us to rule for Mr. Daley on this question.

excess earnings limitation even though the Massachusetts Legislature amended Chapter 32 to reference these groups explicitly in 2009. We decline to so hold. As Chief Magistrate Heidlage and CRAB held previously, the statutory phrases "no person…shall…be paid for any service rendered to the commonwealth" (in M.G.L Ch. 32 s.91(a)'s general prohibition against continued public service by pensioners) and "any person…may…be employed in the service of the commonwealth" (in s.91(b)'s detailing of the exception to this general prohibition and of the excess earnings limitation) appear to refer to any "person" who "render[s]" "services" for "the commonwealth," whether that person is an employee, a consultant, or an independent contractor.

There are three primary reasons to believe the term 'service' applies to independent contractors and consultants just as it does employees. First is the plain language of sections 91(a) and (b). As Chief Magistrate Heidlage's 2013 decision noted, the term "service" manifestly connotes the performance of work for a particular entity's benefit rather than a specific employer-employee relationship. This interpretation is supported by dictionaries such as Webster's New Universal Unabridged Dictionary (defining the term as "work done or duty performed for another or others," Cambridge Advanced Learner's Dictionary (defining the term as "work that someone does"), and Collins English Dictionary (stating, "If an organization or company provides a particular service, they can do a particular job or a type of work for you,").[19] Moreover, the Legislature could easily have written section 91(b) to refer to those "employed *by*" the commonwealth—the phrase appears over 350 times in the Massachusetts General Laws—but instead chose to use the phrase "employed in the service of," indicating that it sought

[19] See Chief Magistrate Heidlage's 2013 decision for the Webster's definition. See also *collinsdictionary.com* and dictionary.cambridge.com (definition C1). Additionally, see Black's Law Dictionary, which defines the term 'service' as it occurs "[i]n contracts" as "The being employed to serve another; duty or labor to be rendered by one person to another." Importantly, Black's Law Dictionary does not define the term 'service' as requiring that one be an 'employee' but rather states that the term includes 'being employed to serve another'—a phrase that includes the type of contingent, contractual relationship Mr. Daley had with his municipal government clients. This interpretation of the word "service" is further bolstered by the Black's Law Dictionary's follow-up clarification that the word means "duty or labor to be rendered by one person to another"—a phrase that connotes the performance of work for another rather than a particular status of 'employee,' and undoubtedly describes Mr. Daley's work.

to apply the provision to the larger group of individuals who performed work for the commonwealth, whether or not they were formally 'employed *by*' the Commonwealth.[20]

Second, this interpretation of the term 'service' is consistent with the provision's and section's general purpose. The structure of sections 91 (a) and (b)—a general prohibition followed by an exception with specific conditions—as well as the long history of similar restrictions in Massachusetts law (the first law barring individuals from collecting a pension from the same entity they were working for occurred in 1913), indicate that the Legislature intended to substantially restrict individuals' ability to receive compensation from the government while receiving a pension. Specifically, these sections were enacted to ensure, in the words of the Supreme Judicial Court, "that an employee of a governmental unit in Massachusetts generally may not retire, receive a pension, accept employment elsewhere in the government, and, by combining her pension and her new compensation, make more money than if she had not retired."[21] As Chief Magistrate Heidlage and CRAB previously noted, if individuals were able to incorporate themselves or work as independent contractors for the commonwealth, the purpose of these restrictions could be entirely frustrated—a result that principles of statutory construction compel that we endeavor to avoid.[22]

Third, reading the pre-2009 version of section 91(b) as not applying to independent consultants would create serious interpretative difficulties with regard to section 91(a), preventing us from reading the statutory section 91 as a "harmonious whole."[23] As noted above, Section 91(a) provides a general prohibition against pensioners "be[ing] paid for any service rendered to the commonwealth"—a ban that appears clearly to forbid payment to independent contractors and consultants, who, by definition, would be providing "service…to the commonwealth." This is evidenced not only by the paragraph's plain language (as noted above,

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20 https://malegislature.gov/Laws/Search?SearchTerms=%22employed%20by%22&Page=13&Refinements%5Blawslawtype%5D=47656e6572616c204c6177

21 For the 1913 law, see *Flanagan v. CRAB,* 51 Mass. App. Ct. 862 (2001). For the quotation, see *Bristol County Retirement Board v. CRAB,* 65 Mass. App. Ct. 443 (2006).

22 See, e.g. *Sterilite Corp. v. Continental Cas*. Co., 397 Mass. 837, 839 (1986); *Boston Retirement Bd. v. Contributory Retirement Appeal Bd*., 441 Mass. 78, 83 (2004), stating that courts should "interpret a statute to give effect to the Legislature's purpose."

23 See, e.g. *Faircloth v. Dilillo*, 466 Mass. 120, 128 (2013). "[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose."

one does not have to be an employee of an entity to "render[]" a "service" to it) and by the Legislature's general intent to meaningfully restrict post-retirement work, but also by the fact that section 91(a) contains over two dozen explicit exemptions for various types of work not subject to its prohibition, but does not include one for the category of independent contractors and consultants. We cannot read into Section 91(a) an additional, major exemption for independent contractors and consultants, both because the Legislature's inclusion of other exemptions and exclusion of this one suggests the exclusion was intentional and because such a reading would render moot the explicit exemption the provision gives for a sub-group of independent contractors and consultants—"contractual service, or service as a nonemployee, rendered to the general court"—indicating to us that the Legislature intended its general prohibition to apply to the rest of independent contractors and consultants.[24]

If section 91(a) thus applies to forbid work for the commonwealth by pensioners who are contractors, the only two conclusions possible are that: (1) the pre-2009 version of section 91(b) does not apply to independent contractors and consultants, in which case such persons would never be able to receive any payment for any work for the commonwealth while receiving a pension, or (2) Section 91(b) does apply to independent contractors, and therefore they are subject to the excess earnings limitation. Given that the former possibility has not been raised by either party (and is generally unpersuasive to us given the lack of evidence that the Legislature sought to uniquely discriminate against independent contractors and consultants), we need thus default to the latter. To read Section 91 as a consistent whole, we thus must interpret the excess earnings limitation to apply to independent contractors and consultants and read the phrases "service rendered to the commonwealth" in section 91(a) and "employed in the service of the commonwealth" in section 91(b) as effectively synonymous.

The above reasoning has been consistently persuasive to DALA, CRAB, and the Appeals Court, which have repeatedly upheld this interpretation of section 91 for over three decades.[25]

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[24] G.L. c.32, § 91(a).

[25] See, e.g., *Flanagan v. State Retirement Bd*, CR-93-406 (CRAB Sept. 12, 1995), in which CRAB held that a consultant to a correctional alcohol center was subject to section 91, *Sarno v. Mass. Teachers' Retirement System*, CR-07-253 (DALA Oct. 29, 2010), in which section 91 was held to apply to a retired school superintendent employed as independent contractor to work as school principal; *Pike v. Melrose Retirement Bd*., CR-07-116 (DALA Apr. 14, 2008), in which the statute was held to apply to a retired police employed by a private vendor to work police details; and *Barranco v. Contributory Ret. Appeal Bd.*, 104 Mass. App. Ct. 660 (2024), in which

For example, in *Monteiro v. New Bedford Retirement Board and PERAC*, CRAB held that s.91(b) applied to a retired police officer who worked as an independent contractor while receiving a pension.[26] The Appeals Court applied the same principle of law in *Pellegrino v. Springfield Parking Authority*. There, the Court held that a pensioner who worked as the chief executive of the Springfield Parking Authority (SPA) had violated the excess earnings limitation despite the fact that SPA was generally not "subject to the supervision and regulation of any department, commission, board, authority, bureau or agency of the commonwealth."[27] The court reasoned that her work for this entity provided an "essential government function" and that she "was clearly rendering a service to the city."[28] Here as there, we note that the terms 'rendered' and 'service' import the question of the entity one's work benefitted rather than the entity that controlled one's labor, thus requiring us to conclude that, because Mr. Daley's work entirely and exclusively benefitted Massachusetts municipal governments during the period in question, he, like other independent contractors and consultants, is subject to the excess earnings limitation.

Mr. Daley's response to this line of logic and precedent relies on the fact that the Legislature added the phrase "including as a consultant or independent contractor" into section 91(b) in 2009, which he argues would have been purposeless had the provision previously applied to these groups. There are, however, as CRAB and DALA previously noted, other persuasive explanations for the addition of this phrase, including that the Legislature sought to make crystal clear an idea it had previously sought to convey, but which had been repeatedly disputed by litigants, and/or to make clear that independent contractors and consultants were not entirely barred from work for public entities while receiving a pension (an interpretation that, as noted above, could theoretically have been raised prior to these groups' addition to section

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the Appeals Court held that the statute applied to public pensioner working for a private entity that rendered service to an education collaborative, which constituted service to the State or locality.

[26] *Monteiro v. New Bedford Retirement System and Public Employee Retirement Administration Comm'n,* CR-06-1033 (CRAB June 12, 2009).

[27] *Pellegrino v. Springfield Parking Authority*, 69 Mass. App. Ct. 94 (2007).

[28] Ibid. Indeed, section 91(b) appears to apply more clearly to Mr. Daley than to Ms. Pellegrino given that the former rendered services directly to government agencies (and thus explicitly to the Commonwealth) while the latter was deemed to be performing a generally public function. The Appeals Court's decision that Ms. Pellegrino was subject to section 91(b) thus further persuades us that it should apply to Mr. Daley.

91(b)).[29] In any event, given that, as was also discussed above, Mr. Daley's interpretation would render entirely moot a different part of section 91 (the exemption for non-employees rendering services to the general court in section 91(a)), we default to the interpretation of the provision that is more generally supported by plain language and precedent—which, as discussed above, holds him subject to the excess earnings limitation.

4. Chief Magistrate McGrath's Methods of Calculating and Estimating Mr. Daley's Excess Earnings

The above holdings mean that Mr. Daley owes PRB some amount of excess earnings, but the question remains, how much? At the outset, we note that the Appeals Court affirmation of CRAB's ruling that Mr. Daley's excess earnings should not be calculated using FAA's gross receipts is binding on the parties in this case. Specifically, the Appeals Court emphasized that CRAB properly walked the line between penalizing noncompliance and punishing excessively, holding that its decision "appropriately balanced the parties' positions to reach a fair outcome." By contrast, the Appeals Court ruled, PRB's requested sanction "clearly exceed[ed] the bounds of reasonableness," given that taking FAA's gross earnings for Daley's personal earnings ignored the numerous "ubiquitous business expenses including, but not limited to, employee wages, taxes, benefits, insurance, location costs, and maintenance costs" the company undoubtedly incurred.[30] Contrary to PRB's assertion that this holding was "gratuitous and baseless…dicta," the Appeals Court's holding was at the core of the controversy it was asked to resolve: whether CRAB's determination that Daley owed some excess earnings, but less than the full $350,000 PRB demanded, amounted to an error of law.[31] In order to determine whether to affirm CRAB's decision, the Appeals Court necessarily had to determine the reasonableness of PRB's contrasting vision of Mr. Daley's excess earnings. Further, as the Appeals Court noted in its decision, PRB raised the argument that CRAB erred by refusing to calculate Daley's excess

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[29] Note that in *Monteiro v. New Bedford Retirement Board* (CR-06-1033), the DALA Magistrate held that consultants and independent contractors were not subject to section 91—a ruling CRAB later overturned. Cases like this one may have spurred the legislature to attempt to clarify its intent to avoid future problems while not applying any changes retroactively to avoid disturbing existing retirees' pensions.

[30] Appeals Court decision, *Plymouth Retirement Board v. Contributory Retirement Appeal Board* (17-P-23), p.5.

[31] Ibid p.6. and PRB appeal brief, p.9.

earnings using FAA's gross receipts in its appeal—"The board argues that CRAB erred because CRAB rejected evidence of Daley's excess income submitted by the board which would have increased the amount of recovery to $350,927.03"—making the Appeals Court's rejection of this method of calculation entirely within the scope of the appeal.[32]

Even were the Appeals Court's holding dicta, the reasoning contained in it is entirely persuasive to us and we adopt it as our own. As CRAB affirmed in *Pomeroy v. Plymouth Retirement Board*, the language of section 91 refers only to the earnings received by "persons" who are retirees, rather than by the corporations they own or the entities for which they work. The money FAA received from Plymouth undoubtedly went to pay numerous costs and expenses other than the salary or retirement benefits of Mr. Daley—for example, the salaries of the four employees whom CRAB noted in its 2014 decision FAA had on payroll.[33] There is no evidence in the record that any of these people were former government employees receiving retirement funds and thus no evidence that the money they were paid because of work for the municipality was received by persons subject to the excess earnings restriction. The interpretation of section 91 PRB asks us to adopt would thus contravene both the language of the statute, which forbids excess earnings by a person who is a government retiree, and basic logic, requiring retirement boards to count towards a retiree's excess earnings funds that the individual did not receive.

The two "alternative" methods of calculating Mr. Daley's excess earnings that PRB suggests in its appeal memo are similarly unreasonable.[34] Both the former method—which would include in Mr. Daley's excess earnings calculation every deductible expense in FAA's records—and the latter—which would include in the calculation the bonuses and voluntary contributions to 401(k) and safe harbor plans that FAA made for the benefit of its other employees—would count towards Daley's excess earnings money that he did not, in fact, receive. As PRB admits, the former method would include in the calculation money FAA was obligated to give its employees, obviously disqualifying this method—not only under this line of reasoning but also under the Appeals Court's holding that Mr. Daley did not earn his "employee[s]' wages."[35]

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[32] Appeals Court decision, p.4.
[33] 2014 CRAB decision.
[34] PRB appeal brief, p.14.
[35] PRB appeal brief, p.12 and Appeals Court decision, p.5.

The latter method would similarly require CRAB to conflate FAA with Mr. Daley himself. Mr. Daley decided—acting in his capacity as President of FAA—to distribute a portion of FAA's profits to its employees. Whether or not he (again, in his role as FAA President) could have transferred this money to his own personal accounts instead is irrelevant, given that he did not do so, and the money thus was not received by him—the retiree whose excess earnings are at issue. An interpretation of the term "earnings" in section 91(b) that included any money a majority shareholder could conceivably have taken for himself would necessarily count towards excess earnings funds spent on repairing office furniture or purchasing insurance a business was not legally required to have. Such an interpretation, as the Appeals Court indicated when it ruled that expenses such as "maintenance costs" and "insurance" did not count towards Mr. Daley's earnings, appears to us deeply unreasonable and implausible.[36] For all intents and purposes relevant to section 91, the corporation FAA earned money and distributed it to a number of sources, including Mr. Daley, and only the money Mr. Daley himself received comprises "earnings…receiv[ed]" by a "person whose employment, in the service of the commonwealth, county, city, town, district or authority, has been terminated" and who is receiving a "pension or retirement allowance" from such entity, and can therefore count towards his excess earnings limit within the plain language and purpose of G.L. c.32, § 91(b).[37] We thus affirm Chief Magistrate McGrath's decision to use Box 5 of Mr. Daley's W-2 form to calculate his excess earnings.

Finally, PRB argues that, even if CRAB holds that a company's gross earnings are not an appropriate metric for determining a retiree's excess earnings (which we do), we should still require Mr. Daley to pay the $500,000 that it contends constitute FAA's gross earnings from 2007-10 as an additional sanction for his having destroyed the business records for this period.[38] Such a sanction would be inappropriate. Mr. Daley failed to comply with Chief Magistrate Heidlage's order requiring him to produce his financial records from 2007-10 and was appropriately penalized via the drawing of an adverse inference that these records demonstrated he owed excess earnings. The subsequent destruction of these records did not cause (sufficient) additional harm to PRB or any court or adjudicatory body to warrant such a massive (not to

[36] Appeals Court decision, p.5.
[37] G.L. c.32, §91.
[38] See PRB appeal brief, p.13.

mention, per our earlier holding, inapposite) punishment.[39] Further, as Mr. Daley noted in his appeal brief, the destruction of these records was never independently prohibited by Magistrate Heidlage's 2013 Order and was, as is proven by the transcript from Mr. Daley's first DALA hearing (which was composed long before the destruction occurred), a part of FAA's normal business practices of shredding documents older than six years.[40]

Further, we also do not agree with Mr. Daley's contention that Chief Magistrate McGrath's estimation of Mr. Daley's excess earnings from 2007-2010 based on his reported salary and bonus from 2011 and 2012 constituted an inappropriate additional sanction. Given Chief Magistrate Heidlage's adverse inference, Mr. Daley, undoubtedly, had excess earnings during this period, and Chief Magistrate McGrath devised a reasonable method for estimating them. Such a method does not constitute an "improper….second sanction" by Chief Magistrate McGrath, as Mr. Daley contends, given that the Chief Magistrate was merely attempting to determine the amount of money Mr. Daley owed. Ruling such a determination improper would incentivize defendants to actively withhold evidence, given that DALA magistrates would be barred from making reasonable inferences in the absence of conclusive proof, and we decline to do so. We thus affirm Chief Magistrate McGrath's method of estimation as reasonable and appropriate.

While we agree with the method of calculating Mr. Daley's excess earnings, we cannot determine the amount of excess earnings accrued for the years in question based on the evidence in the record. Here, since Mr. Daley forfeited his pension for years 2007 – 2010, the DALA decision did not consider those calculations. However, for years 2011 - 2016, the record does not clearly reflect whether Mr. Daley's pension was paid to him or withheld. Thus, we cannot verify that the magistrate's calculations of Mr. Daley's excess earnings for 2011 – 2016 are accurate. Consequently, when PRB calculates Mr. Daley's excess earnings in accordance with the method above, this must be determined in order to accurately calculate his excess earnings for those years.

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[39] Note the Appeals Court's previous emphasis in upholding CRAB's 2014 decision that "CRAB…need not apply the harshest sanction even when a party acts in bad faith" and its quotation a First Circuit decision holding that judges should "take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." Appeals court brief, p.4. Here, even further, there is no evidence that Mr. Daley acted in bad faith when he destroyed his 2007-10 business records.

[40] Daley appeal brief, p.5

Conclusion

For the above reasons, we affirm the DALA decision that Mr. Daley owes PRB excess earnings and that these earnings should be calculated using Box 5 of his W-2 form and estimated based on his 2011 and 2012 earnings for the period during which his business records are unavailable (2007-10). Further, PRB must consider whether Mr. Daley's pension was paid or withheld before computing his excess earnings for 2011 - 2016. ***Affirm***.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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Date: May 28, 2025

[41] Given that the Public Employee Retirement Administration Commission (PERAC) was a party in the appeal of *Daley v. Plymouth Retirement Bd. and PERAC*, CR-11-441 and CR-13-409, involving the period of 2007-2010, Patrick M. Charles' participation is limited to *Daley v. Plymouth Retirement Bd.*, CR-17-169, only.