

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Gloucester Retirement Board,
Petitioner,

No. CR-21-217

Dated: June 10, 2022

v.

Public Employee Retirement
Administration Commission,
Respondent.

ORDER OF DISMISSAL

A provision of a collective bargaining agreement enables City of Gloucester police officers, when they work overtime hours, to forego overtime pay and to instead take paid days off. The dispute in this matter centers on whether the pay relating to such days off counts as “regular compensation” for retirement purposes. G.L. c. 32, §§ 1, 5(2)(a). The Gloucester Retirement Board posed this question to the Public Employee Retirement Administration Commission, which answered yes.¹ The board promptly lodged this appeal.

A critical threshold question is whether the appeal is properly before DALA. The parties agree that it is, but jurisdiction cannot be founded on waiver or consent. *Sullivan v. State Bd. of Ret.*, No. CR-19-435, at 1-2 (CRAB Feb. 8, 2021) (citing *Flynn v. Contributory Ret. Appeal Bd.*, 17 Mass. App. Ct. 668, 370 (1984)). A tribunal must instead assure itself that it possesses the power to adjudicate the matter presented to it. *Id.*

¹ PERAC’s reasoning was essentially that, although the pertinent officers work certain overtime *hours*, they end up with the same amount of *pay* that they would have received for a standard work schedule. PERAC also apparently views the disputed pay amounts as arising from “services performed in the course of employment,” G.L. c. 32, § 1, namely the officers’ not-otherwise-compensated overtime hours.

In cases under the retirement law, an administrative appeal may be brought only from a “decision”² and only by a person or entity “aggrieved” thereby. G.L. c. 32, § 16(4). Persuasive precedents reveal that, under this standard, the PERAC opinion at issue was not appealable.

In *Bretschneider v. PERAC*, No. CR-09-701 (DALA Nov. 13, 2009), PERAC wrote to the Sheriff of Nantucket County that certain monies he collected would not count as regular compensation. The DALA magistrate dismissed the Sheriff’s appeal, explaining:

[A] preliminary advisory opinion . . . is not a “final decision” that is subject to an administrative appeal. . . . Similarly, the Petitioner is not “aggrieved” by PERAC’s advisory opinion. . . . [T]here are no pecuniary effects suffered by the Petitioner as a result of PERAC’s opinion. It is only when the Petitioner seeks to have annuity savings deductions made . . . or when he retires that an action by the board or PERAC will cause him to be “aggrieved”

Id. at 2.

In the instant case, PERAC provided an opinion not to an individual member, but to a retirement board. That situation arose in *Marlborough Ret. Bd. v. PERAC*, No. CR-19-14 (DALA Apr. 9, 2021). The City of Marlborough had adopted an ordinance specifying the salaries of various city employees. The Marlborough Retirement Board was anxious to know whether those salaries would be exempt from the anti-spiking law, G.L. c. 32, § 5(2)(f), under the exception for “salary amount[s] . . . specified by law.” *Id.* PERAC opined that the exception would not apply. Echoing *Bretschneider*, the DALA magistrate wrote:

When any member whose salary is set by the ordinance applies to retire, the Board must decide whether or not the anti-spiking limits apply to that particular member. . . . PERAC could conclude at that time that salaries set by local ordinance are covered by the exception. . . . [N]either the Board nor any of its members suffered any injury from PERAC’s advisory

² Or alternatives irrelevant here.

opinion because no member has applied to retire and claimed the exception applies

Id. at 5-6. The retirement board's appeal was therefore dismissed for lack of jurisdiction.

The foregoing considerations apply here as well. PERAC's opinion to the board does not arise from the contributions or benefits of any particular officer. The opinion's pecuniary effects are inchoate and uncertain. When any affected officer retires, the board will need to determine whether he or she took paid days off in lieu of overtime during the specific years countable in the retirement-allowance computation. G.L. c. 32, § 5(2)(a). PERAC will remain free to change its position at that time. A judicable controversy may or may not arise.

The parties emphasize that, under *Grimes v. Malden Ret. Bd.*, No. CR-15-5 (CRAB Nov. 18, 2016), the board is bound by PERAC's directives. But that doctrine does not enlarge DALA's jurisdiction. Indeed, *Grimes* explained that, when a retirement board disagrees with PERAC, its path to appellate review is to request a ruling stating PERAC's position "as applied to a particular case." *Id.* at 13. That path remains open to the parties.

The short of the matter is that PERAC's advisory opinions to the boards are not appealable. They are theoretical and non-final. Their pecuniary effects, if any, remain to be assessed in specific cases. Only a determination of concrete entitlements or liabilities generates an "aggrieved" party in the pertinent statutory sense. *Marlborough, supra*, at 7; *Bretschneider, supra*, at 2. The remaining decisions that the parties cite are consistent with this framework. *See, e.g., Haverhill Ret. Sys. v. Contributory Ret. Appeal Bd.*, 82 Mass. App. Ct. 129 (2012) (appeal from PERAC's ruling that one board owed reimbursement to another in connection with a specific member's retirement allowance); *Stoneham Ret. Bd. v. PERAC*, CR-12-548 (CRAB May 20, 2019) (appeal from PERAC's refusal to approve a specific rule proposed by a board);

Winchester Ret. Bd. v. PERAC, No. CR-19-267 (DALA Dec. 11, 2020) (appeal from PERAC’s audit findings involving payments to specific members).

PERAC possesses the authority to issue advisory opinions. *Boston Ret. Bd. v. Contributory Ret. Appeal Bd.*, 441 Mass. 78, 83-84 (2004). The Legislature did not grant similar authority to CRAB and DALA. This tribunal’s jurisdiction in retirement cases extends no further than the bounds of G.L. c. 32, § 16(4). *Sullivan, supra*, at 1-2. When jurisdiction is absent, “the only function remaining . . . is that of announcing the fact and dismissing the cause.” *Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, 480 Mass. 224, 230 (2018) (quoting *Vermont Agency of Nat. Res. v. Ex rel. Stevens*, 529 U.S. 765, 778-79 (2000)). Serious efficiency-oriented concerns may persuade a tribunal to outline a view of the merits where the jurisdictional inquiry is close, the dispute turns on questions of fact, and the tribunal has heard evidence on those questions. No such considerations are present here.³

For the foregoing reasons, it is hereby ORDERED that this appeal is DISMISSED. A standard notice of appellate rights is appended to this order. A copy of the order will be delivered directly to CRAB.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

³ The parties agree on the facts and pose a fundamentally legal question. Accordingly, in the event of an appeal to CRAB, if CRAB determines that it possesses jurisdiction, it will be equipped to proceed directly to a decision on the merits.

Notice of Appellate Rights

G.L. c. 32, § 16(4) provides that decisions of the Division of Administrative Law Appeals such as the instant decision:

shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties unless within *fifteen days* after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board, or (2) the contributory retirement appeal board orders, in writing, that said board shall review such decision

(Emphasis added.) A party objecting to this decision shall mail specific objections to Uyen M. Tran, Assistant Attorney General, Chair, Contributory Retirement Appeal Board, Office of Attorney General, One Ashburton Place, 18th floor, Boston, MA 02108. Copies must be sent to the Division of Administrative Law Appeals, 14 Summer Street, Malden, MA 02148, and to the other party or parties involved in the case.

Proceedings before CRAB are governed by standing orders, copies of which may be found at <https://www.mass.gov/how-to/file-a-public-employment-retirement-appeal>. Pursuant to CRAB Standing Order 2008-1, ¶ 4(a)(2), the notice of appeal must include (a) the date of the DALA decision, (b) a copy of the DALA decision, and (c) a statement of the part or parts of the DALA decision to which objection is made.

The notice of appeal must be postmarked or delivered in hand to CRAB no later than fifteen days following the date of the DALA decision. Electronic submissions do not satisfy this filing requirement.

Pursuant to CRAB Standing Order 2008-1, ¶ 4(a)(3), within forty days following the date of the DALA decision, the appellant must supplement the notice of objection by filing with the chair of CRAB three copies, and serving on each other party one copy, of:

- (a) All exhibits admitted into evidence before DALA, numbered as they were numbered on admission;
- (b) A memorandum of no more than twenty pages containing a clear and precise statement of the relief sought and the findings of fact, if any, and legal conclusions to which objection is made, together with a clear and precise statement of the particular facts, with exact references to the record, and authorities specifically supporting each objection; and
- (c) If CRAB's passing on an objection may require a review of oral proceedings before DALA, the transcript of the relevant portion of those proceedings.

Do not send any such supplementary materials or exhibits to DALA. Failure to follow CRAB's procedures could lead to sanctions, including dismissal of the appeal.