

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS**

**October 14, 2016**

**Suffolk, ss.**

**Docket No. CR-14-561**

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**PEGGY S. KEMP, Petitioner**

**v.**

**BOSTON RETIREMENT SYSTEM, Respondent**

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**DECISION**

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**Appearance for Petitioner:**

Nicholas Poser, Esq.  
197 Portland St., 5th fl.  
Boston, MA 02114-1716

**Appearance for Respondent:**

Susan M. D'Amato, Esq.  
Boston Retirement Board  
Boston City Hall, Rm. 816  
Boston, MA 02201

**Administrative Magistrate:**

Mark L. Silverstein, Esq.

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*Summary of Decision*

The Boston Retirement Board determined that the petitioner, a Boston public school teacher and chairperson who retired in 1992 and, starting in July 2003, was employed by the Boston Public Schools (BPS) as the salaried headmaster of Fenway High School while she also received teacher pension benefits payments, had “overearnings” of \$40,204.89 in 2005 and 2006 that she was required to repay. It concluded that the Massachusetts Department of Education (DOE, later the Department of Elementary and Secondary Education, DESE) had not issued a “critical shortage waiver” allowing her employment pursuant to M.G.L. c. 32, § 91(e), which would have lifted statutory limitations on her post-retirement earnings. The Board’s decision is reversed, for the following reasons:

(1) M.G.L. c. 32, § 91(e) allows a school district to employ a retired teacher “in any period during which there is a critical shortage of certified teachers available for employment in a school district.” It neither requires that the state education agency approve this “critical shortage” hiring, nor directs that agency to promulgate regulations governing employment pursuant to section 91(e). The statute implicitly leaves it to the school district to determine whether, and during what time period, a critical shortage exists.

(2) Current DESE regulations require that a school district seeking to employ a retired teacher under M.G.L. c. 32, § 91(e) must apply to the state education agency for approval allowing this “critical shortage” hiring with evidence showing that the district has made a good-faith, but unsuccessful, effort to hire non-retirees. *See* 603 C.M.R. § 7.15(13)(b) and (c). The regulations also limit the duration of this waiver to one year, although it can be renewed upon the school district’s reapplication. There is no evidence here, however, that these requirements were effective in 2003, when the petitioner was first employed as Fenway High School’s headmaster, or in subsequent years through 2006, when BPS renewed her employment.

(3) The BPS superintendent’s less formal determination in early 2003, following a search for candidates conducted by the school’s trustees and a consultant, that the petitioner alone met the qualifications for the headmaster position, sufficed under M.G.L. c. 32, § 91(e) to determine that a critical teacher shortage existed and justified her employment as headmaster under the statute. That determination was never rescinded, and, with no statutory limit on its duration, it continued in effect through at least the 2006-07 school year.

(4) It is without consequence that DOE did not issue a waiver allowing the petitioner’s employment as salaried headmaster pursuant to section 91(e) in 2005 or 2006. Because the BPS superintendent’s unrescinded critical shortage determination justified her employment under section 91(e) during those years, there was no limit on her post-retirement earnings in 2005 or 2006, and she had no overearnings that the Board can recoup.

(5) Alternatively, whatever process DOE may have used to decide whether to issue a waiver allowing the petitioner’s employment under section 91(e) based upon a “critical shortage” was likely the computerized process that it used to process school district requests for educator licensure waivers prior to 2012. Because the Massachusetts courts invalidated that process, as applied, in *Nordberg v. Dep’t of Education* (citation below at 31), any critical shortage waiver determination DOE made, or may have made, through that process would not determine whether the petitioner was lawfully employed pursuant to M.G.L. c. 32, § 91(e).

*Background*

a.

Generally, retired public employees may not be rehired back into salaried state or municipal public service while they continue to receive pension benefit payments, and, even if a retiree receiving those payments returns to state or municipal employment under one of the several statutory exceptions to the general rule, the Massachusetts Retirement Statute, M.G.L. c. 32, limits the retiree's hours and earnings. *See* M.G.L. c. 32, § 91(b). One of those exceptions, in effect since 2000, allows a school district to employ a public school teacher who has retired from the State teachers' retirement system or the Boston retirement system as a salaried teacher "in any period during which there is a critical shortage of certified teachers available for employment in a school district." M.G.L. c. 91(e). After the first two years following the teacher's retirement, moreover, section 91(b)'s post-retirement earnings limitations are lifted for a retired public school teacher rehired under section 91(e)'s "critical shortage" exception. In that circumstance, she may earn a teacher's (or school administrator's) salary and continue to receive teacher pension benefits payments, although these additional earnings cannot boost the earnings upon which those pension benefits are calculated. *Id.*

M.G.L. c. 32, § 91(e) does not state who determines whether there is "a critical shortage of certified teachers available for employment in a school district," on what basis the determination is made, whether a formal determination is necessary at all, or, if the determination is made, whether

its duration is limited or whether it can be extended, whether specifically or by implication. Absent any authority to the contrary, those would be decisions for a school district's employing authority to make, meaning, in Boston, the Superintendent of the Boston Public Schools. Current state education regulations require that a school district apply to the Commissioner of the Massachusetts Department of Elementary and Secondary Education ("DESE," formerly the Department of Education, or "DOE") for approval of a retired teacher's employment based upon a "critical shortage waiver," using an application form prescribed by the Department. To obtain this approval, the school district must demonstrate to DESE's satisfaction that it has made a good-faith effort to hire non-retired certified teachers, following guidelines that the DESE regulations provide. *See* 603 C.M.R. § 7.15(13). These regulations have been in effect since 2010. However, there is no evidence that they were in effect in 2005 or 2006, the years upon which this appeal focuses, and M.G.L. c. 32, § 91(e) imposes no such requirements.

b.

Petitioner Peggy S. Kemp, a former Boston Public Schools (BPS) teacher and chair of the Boston Latin School's social studies department, and a member of the Boston Retirement System, retired in 1992, and then returned to work in 2003 as the salaried headmaster of a BPS pilot school (Fenway High School) while she continued to receive teacher pension benefits payments.<sup>1</sup> She

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<sup>1</sup>/ Ms. Kemp received her teacher pension benefits payments and a headmaster salary through August 2012, when she waived her retirement allowance. (*See* Exh. B4). She expects the 2016-17 school year to be her last year as Fenway's headmaster and, as well, the last year in which she would waive her teacher pension allowance. (Kemp direct testimony, and closing argument.)

appeals, pursuant to M.G.L. c. 32, § 16(4), from the October 15, 2014 decision of respondent Boston Retirement Board requiring that she repay the Board \$40,204.89 of “overearnings” in 2005 and 2006.<sup>2</sup> In reaching this decision, the Board determined, following a hearing, that Ms. Kemp’s salaried employment as Fenway High School’s headmaster during those years was without the benefit of a “critical shortage waiver” determination by the Department of Education, as a result of which Ms. Kemp’s earnings in 2005 and 2006 were subject to, and exceeded, the post-retirement earnings limitations that M.G.L. c. 32, § 91(b) prescribes, and Ms. Kemp was therefore required to return her “overearnings” during those years to the Board.<sup>3</sup> The Board appears to have based this determination upon an assumption that current state education requirements regarding “critical

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<sup>2</sup>/ The appeal was timely filed with the Division of Administrative Law Appeals (DALA) on October 23, 2014, within the 15-day appeal period prescribed by M.G.L. c. 32, § 16(4).

<sup>3</sup>/ The Board relied (as it still does) upon M.G.L. c. 32, § 20(5)(b) (entitled “General Powers and Duties of [Retirement] Boards”) as the source of its authority to recover pension benefits received by a retiree in violation of M.G.L. c. 32, § 91(b), *citing Flanagan v. Contributory Retirement App. Bd.*, 51 Mass. App. Ct. 862, 750 N.E.2d 489 (2001).

The overearnings amount the Board seeks to recoup from Ms. Kemp consists of the teacher retirement allowance it paid her in 2005 (\$19,922.40) and in 2006 (\$20,282.40). In limiting its recoupment amount to the retirement benefits it paid Ms. Kemp during those years, the Board relies upon *Daley v. Plymouth Retirement Bd.*, Docket Nos. CR-11-441 and CR-13-449, Decision at 22 (Mass. Contributory Retirement App. Bd., Aug. 7, 2014) (in an appeal by a retired town finance director challenging a retirement board’s decision that he had excessive post-retirement earnings from financial consulting services he performed for Massachusetts municipalities, CRAB affirmed a summary decision in the board’s favor granted by DALA’s Chief Magistrate, following the retiree’s refusal to produce records of his post-retirement earnings upon the retirement board’s request and after the Chief Magistrate ordered their production, on the grounds that (1) there should be drawn against the retiree an adverse inference that his earnings were subject to M.G.L. c. 32, § 91’s limits on post-retirement earnings; (2) during the time in question, his excess earnings were greater than the amount of the total retirement benefits paid to him; and (3) as a result, the board could recoup the excess earnings up to the amount of the retirement benefits he was paid during that time.)

shortage waivers” applied in 2005 and 2006—as assumption shared, apparently, by BPS and by Ms. Kemp as well.

On appeal, Ms. Kemp asserts that she inquired of BPS about the status of her critical shortage waivers beginning in 2003, but found it difficult to obtain information about them or verify that BPS had requested that the Department of Education approve them. (*See, e.g.*, Kemp prehearing memorandum, Dec. 4, 2015, at 1-2, para. 3.) Ms. Kemp was first advised by BPS on November 27, 2012, in an email from its human resources director at the time, that her “waiver history” at BPS showed the following:

“waiver approved” for 2003-04,  
“not approved” for 2004-05,  
“waiver not applied” for 2005-06,  
“not approved” for 2006-07,  
“approved” for 2007-08 and 2008-09,  
“waiver not applied” for 2009-10; and  
“waiver application pending” for 2010-11 and 2011-12.

(*See* Exh. K1 and Finding 32 below.) The email did not state where the BPS human resources director found this “waiver history,” or from whom she received it. In an attempt to amplify this “waiver history,” Ms. Kemp filed a public records request with BPS during the March 2014 Board hearing, but this generated no further documentation beyond the human resources director’s November 2012 email. Based, apparently, on that email and the absence of further information regarding Ms. Kemp’s critical shortage waivers, the parties stipulated before the BPS hearing officer, and the hearing officer found, that DOE had not granted critical shortage waivers allowing Ms. Kemp’s employment as Fenway High School’s salaried headmaster in 2005 or 2006, although it had

done so for her employment in 2003, 2004, 2007, 2008, 2011 and 2012.<sup>4</sup>

The parties have not abandoned their assumption regarding the DOE critical shortage waivers. Ms. Kemp asserts, instead, that the six-year contract statute of limitations, estoppel, and laches bar the Board's belated recoupment of her 2005-06 overearnings, as she did without success during the Board's hearing.<sup>5</sup> She claims, as well, that the Board cannot recoup the overearnings amount that the hearing officer computed by offsetting it against future pension payments Ms. Kemp is owed without first obtaining a court judgment allowing this.<sup>6</sup> The Board counters that it has a

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<sup>4/</sup> See (Exh. K5: *In re Excess Earnings of Peggy S. Kemp*, Recommended Decision of Boston Retirement System Hearing Officer (Jul. 9, 2014) at 6, para. 18 (finding that “[n]o waiver was ever granted by the DESE for Ms. Kemp for the 2005, or 2006, calendar years” based solely upon the parties’ stipulation), and at 7, para. 19 (finding that waivers were granted by DESE for Ms. Kemp for the other years of her employment as Fenway high School’s headmaster, also based solely upon the parties’ stipulation). The “waiver history” that the BPS human resources director reconstructed in 2012 shows fewer approvals than the parties stipulated and the Board hearing officer found—in 2003-04, 2007-08 and 2008-09. See Exh. K1 (discussed further below).

<sup>5/</sup> Ms. Kemp asserts that:

(1) The recoupment of her 2005-06 overearnings is time-barred by the six-year limitation period applicable to contract actions, because the Board's statutory authority to collect post-retirement earnings is limited to a contract action, *citing* M.G.L. c. 32, § 91(c);

(2) The Board is estopped from collecting her 2005-06 overearnings because BPS failed to obtain critical shortage waivers for those years, which breached a duty to do so that was implicit in her employment contract, and because BPS did not inform her of this failure in time for her to have sought the waivers on her own; and

(3) The Board's recoupment of her 2005-06 overearnings is barred by the equitable doctrine of laches because it unreasonably delayed instituting a timely action to recoup Ms. Kemp's overearnings from her work as Fenway's headmistress during those years, to her detriment, and also because there would have been no “overearnings” to compute if BPS had sought and obtained critical shortage waivers on her behalf for either of those years, or if BPS had advised Ms. Kemp of this failure in time for her to have applied for the waivers herself.

<sup>6/</sup> Ms. Kemp asserts that a court judgment allowing this offsetting is required because:

continuing obligation to correct pension benefit payment errors and recoup overearnings in violation of M.G.L. c. 32, § 91(b).

Ms. Kemp and the Board each filed proposed hearing exhibits and a prehearing memorandum.<sup>7</sup> I held a hearing on March 23, 2016 at the Division of Administrative Law Appeals in Boston. The hearing was digitally recorded. I admitted the parties' 14 prefiled exhibits (Ms. Kemp's Exhs. K1–K7, and the Boston Retirement Board's Exhs. B1–B7) into evidence, without objection.<sup>8</sup> Ms. Kemp testified on her own behalf. The Board called no witnesses. Both parties presented closing arguments, and the record closed at their conclusion with the exception of post-hearing memoranda<sup>9</sup> and three proposed additional exhibits that Ms. Kemp and the Board filed after the hearing.

None of these additional exhibits generated an objection. Ms. Kemp proposed two of them: (1) the text of a June 28, 2008 *Boston Globe* article regarding retired Massachusetts educators,

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(1) A retirement board has an affirmative duty to pay retirement allowances to a retiree monthly, *see* M.G.L. c. 32, § 13(1)(b); and

(2) Retirement allowances are deferred compensation, and therefore offsetting overearnings against them without an authorizing judgment would violate both the prohibition against attachment and execution of a pension allowance recited by M.G.L. c. 32, § 19, and the directive of the Massachusetts Wage Act that wages or salary be paid to an employee within seven days of the end of a pay period, *citing* M.G.L. c. 149, § 148.

<sup>7</sup>/ *See* Prehearing memorandum of Peggy Kemp, Dec. 4, 2015 (“Kemp prehearing mem.”); Respondent’s pre-hearing memorandum, Jan. 6, 2016 (“Board prehearing mem.”).

<sup>8</sup>/ Both parties numbered their exhibits. To distinguish them overall, I have added a letter prefix showing who filed them (K for Ms. Kemp’s exhibits, and B for the Boston Retirement Board’s exhibits).

<sup>9</sup>/ *See* Supplemental Argument of Peggy S. Kemp, dated March 25, 2016 (“Kemp post-hearing mem.”) and Respondent’s Post-Hearing Memorandum dated April 5, 2016 (“Board post-hearing mem.”).



including Ms. Kemp, who were receiving salaries in school district staff positions while they were receiving full pensions, and (2) several emails, dated between September 2013 and December 2013, between Ms. Kemp's counsel and the Boston Retirement Board's General Counsel. Both are admitted into evidence, *de bene*, as Exhibits K8 and K9 respectively.<sup>10</sup> The Board's single additional exhibit is a recent version of a Massachusetts Department of Elementary and Secondary Education "critical waiver" request form. I admit this *de bene*, as Exhibit B8, for the limited purpose of showing what information a school district must submit, under *current* DESE regulations, in seeking approval to employ a retired educator based upon a critical shortage of certified teachers, and the

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<sup>10</sup>/ Exh. K8, the 2008 *Boston Globe* article, describes the circumstances under which more than 100 retired educators earned full school district salaries and collected full pensions as "special arrangements" that were "routinely approved" by the Department of Elementary and Secondary Education in the form of "critical shortage waivers" each year without requiring "fresh proof" that the school districts requesting them could not find a non-retiree to fill the position in question. Ms. Kemp did not offer the exhibit to prove the truth of this proposition, however; instead, she offered it for the more limited purpose of showing, in support of her time-bar and laches defenses to the recoupment of overearnings, that her receipt of a headmaster salary and pension in 2005 and 2006 was a matter of public record over eight years ago, on June 28, 2008, when the *Globe* article was published. This, she argues, makes June 28, 2008 the latest date on which her alleged overearnings in 2005 and 2006 should be deemed to have been discovered and, thus, the latest date from which the six-year contract statute of limitations for recouping her overpayments should run, if it applies at all here (in which case, it would have expired at the end of June 2014, still before the Board's appealed decision dated October 15, 2014, if the six-year limitations period did not run from earlier dates on which the overearnings actually occurred), or from which a reasonable time to recoup those overearnings should be computed for the purposes of her laches defense. (Kemp posthearing mem. (Mar. 25, 2016) at 4-5.) I admit Exhibit K8 as the factual support Ms. Kemp offers for her time-bar and laches defenses, without passing upon the merits of either of these defenses or the arguments Ms. Kemp advances in support of them.

Exhibit K9 comprises emails from September 2013 and December 2013 between Ms. Kemp's counsel, Attorney Nicholas Poser, and Boston Retirement Board General Counsel, Timothy Smyth. Ms. Kemp offers them collectively in support of her argument that the Board "announced its intention to seek to collect overearnings [in] late 2013 . . . more than 6 years after the pension payments of 2005 and 2006." I admit Exhibit K9 for this limited purpose, without passing upon the merits of Ms. Kemp's argument.

critical shortage waiver application form that DESE has prescribed.<sup>11</sup>

The admission of these additional exhibits brings the total number of exhibits admitted in this appeal to 17.

*Findings of Fact*

1. Petitioner Peggy S. Kemp, a certified teacher and secondary school principal (and, as well, a 1980 Harvard Law School graduate and a member of the Massachusetts Bar) was employed by the Boston Public Schools (BPS) as a teacher and administrator between 1971 and 1992. (Exh. K3: curriculum vitae of Peggy S. Kemp; Kemp direct testimony.)

2. Ms. Kemp began teaching in the Boston public schools, and became a member of the Boston Retirement System, on September 1, 1971. She taught history and geography at the Lewenberg Middle School (grades 6-8) in Boston from 1971 to 1980. From 1980 to 1983, Ms. Kemp taught history and economics at the Boston Latin School (grades 7-12). In 1983, she was appointed Chair of the Boston Latin School's History Department, a position she held until she retired in 1992. In 1990 and 1991, Ms. Kemp was also the citywide social studies program director for the Boston Public Schools, a position in which she was responsible for coordinating the grades K-12 social studies curriculum for approximately 115 schools. (Id.)

3. Ms. Kemp retired effective August 31, 1992, when she was 44, following 20 years

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<sup>11</sup>/ The full title of the form I have admitted as Exh. B8 is "Request for Critical Shortage Waiver for Purposes of Employing a Retired Educator (Teacher, Administrator or Professional Support Personnel)." The form states that it was "updated" in December 2014.

and 8 months of creditable service. Her initial annual superannuation retirement allowance was \$16,790.40. As of 2006, this annual retirement allowance had increased to approximately \$20,000. (Exh. B1: Boston Retirement System computation of Ms. Kemp's retirement allowance, and Letter, Public Employee Retirement Administration to Boston Retirement Board, dated January 5, 1993, confirming the approval of her retirement and retirement allowance; Exh. B5: Boston Public Schools salary information for Peggy Kemp, provided to Boston Retirement Board counsel via email dated July 25, 2012, at 3 (printout showing retirement allowances paid to Ms. Kemp each year from 2000-2012); Exh. K5: In re Excess Earnings of Peggy S. Kemp, Recommended Decision of Boston Retirement System Hearing Officer, Jul. 9, 2014 ("Rec. Dec."), at 6, Finding 21); Kemp prehearing mem. at 1; Board prehearing mem. at 1.)

4. Between September 1992 and August 2001, Ms. Kemp held various teaching positions at private colleges, including the Harvard Graduate School of Education and Northeastern University. (Exh. K5: Rec. Dec. at 5, Finding 4.)

5. In August 2001, Boston Public Schools Superintendent Thomas W. Payzant asked Ms. Kemp whether she would be interested in returning to work in a paid position as headmaster of the John D. O'Bryant School of Math and Science, a BPS pilot school. She accepted the offer, held the headmaster position from August 13, 2001 until October 1, 2002, and then returned to work at Harvard. (Exh. K5: Rec. Dec. at 4, Findings 4-5; Kemp direct testimony.)

6. The record is without any evidence that Superintendent Payzant or BPS applied in writing to the Department of Education (DOE), the predecessor agency of the current Department of Elementary and Secondary Education (DESE), for approval to employ Ms. Kemp as the O'Bryant

School's headmaster during the 2002-02 academic year. In late 2012, BPS Human Resources Director Ann Chan concluded that BPS had requested that the Department of Education approve a "critical shortage waiver" allowing this employment. BPS understood, or believed, that DOE had granted this approval, although no such written approval is in the record, and there is no evidence that BPS or DOE has a copy of any such approval in their respective records. (See Exh. K1: email, Ann Chan to Peggy S. Kemp, dated Nov. 27, 2012, regarding her "critical shortage waiver history" for years 2001-02 through 2011-12; Exh. K5: Rec. Dec. at 4, Finding 6; see also Board prehearing mem. at 2, para. 3.)

7. Ms. Kemp received her full pay as headmaster of the John D. O'Bryant School for the period August 13, 2001–October 1, 2002 and the full amount of her retirement allowance for 2001 and 2002. (Kemp direct testimony; Exh. B5.)

8. In March 2003, BPS Superintendent Payzant and/or the governing Board of Trustees of Fenway High School, a BPS pilot school, offered Ms. Kemp the position of Fenway High School's headmaster. She accepted the position and began her employment as the school's headmaster on July 1, 2003. Ms. Kemp has held that position since, pursuant to one-year contracts running from July 1 through the following June 30 for each school year from July 2003 through June 2011, and pursuant to a four-year contract running from June 30, 2011 through June 30, 2015.<sup>12</sup> She expects that 2016 will be her last year as Fenway High School's Headmaster. (Kemp direct

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<sup>12</sup>/ The record is unclear as to whether the 2011-15 contract was extended through June 30, 2016 or whether BPS and Ms. Kemp signed a one-year contract for the period July 1, 2015 through June 30, 2016. This point does not require resolution, however, because it is not dispositive of the issues raised here.

testimony; Exh. B3 (Principal/Headmaster Employment Agreements between BPS and Peggy Kemp.)

9. In early March 2003, Ms. Kemp asked BPS whether it would be applying for a critical shortage waiver allowing her employment as Fenway High School's Headmaster, and was told that BPS was seeking the waiver from the Department of Education. Because she was uncertain whether BPS had sent the waiver request or whether she was required to do so, Ms. Kemp sent her own request for a critical shortage waiver to DOE Commissioner David P. Driscoll, dated March 10, 2003, that would allow her to "collect my Boston teachers' retirement pension while serving as Fenway's headmaster." Ms. Kemp's request explained that her annual Boston teachers' pension was approximately \$18,600; she was earning a salary of \$84,700 at Harvard, with Harvard also contributing \$8,705 to her personal retirement plan; her salary as Fenway High School's headmaster would be approximately \$100,000, with no employer's retirement contribution to her retirement plan; and she would "incur a financial loss of approximately \$12,000 annually" if she were not granted a critical shortage waiver. Ms. Kemp also stated in her letter to Commissioner Driscoll that the "critical shortage" Fenway High School faced in selecting a new headmaster was of "applicants for school leadership positions who have effective prior experience in urban teaching and administration, national school restructuring, grant development and management, communication with boards, professional development programming, and student internship collaborations," and asserted that she had this experience. Ms. Kemp included her resume with the letter to Commissioner Driscoll. (Kemp direct testimony; Exh. K3: Letter, Peggy S. Kemp to Department of Education Commissioner David P. Driscoll requesting a critical shortage waiver for the 2003-04

school year, dated March 10, 2003.)

10. At some point afterward, Tricia Federico, a Department of Education employee who processed critical shortage waiver requests, told Ms. Kemp that she could not submit a critical shortage waiver request herself, and that the request had to be made by the Superintendent of the Boston Public Schools. (Exh. K5: Rec. Dec. at 4, Finding 9.)

11. On April 16, 2003, Superintendent Payzant prepared a memorandum to Commissioner of Education David P. Driscoll requesting a “waiver” for Ms. Kemp to serve as headmaster of Fenway High School for the 2003-04 school year. The memorandum did not specifically use the term “critical shortage waiver.” In the memorandum, Superintendent Payzant stated his “understanding” that the school’s governing Board of Trustees had “contracted a search consultant to identify candidates with skills and experiences that were aligned with Fenway’s unique needs,” and that “[a]fter a lengthy search process, the Trustees determined that it was in Fenway’s best interests to have Ms. Kemp assume the headmaster position.” The superintendent also stated that he agreed with the Trustees’ decision and endorsed Ms. Kemp’s selection as the school’s headmaster. His memorandum listed the documents included with the waiver request as a “position profile” for the school’s headmaster, a copy of Ms. Kemp’s March 10, 2003 letter to Commissioner Driscoll, and Ms. Kemp’s resume. The “position profile” stated that the requirements for the position of Fenway High School Headmaster included, at a minimum, a Master’s Degree in Education or in “an appropriate related field,” with a Doctorate preferred; three to five years of urban teaching experience, with “alternative school experience, particularly in areas of [student] performance assessment, project-based learning and multiple intelligences” preferred; “[e]xperience

with diverse ethnic, cultural and economic settings along with urban education exposure,” which was described as “a must”; “familiarity with national school restructuring efforts along with the philosophy of the coalition of Essential Schools,” which was described as “critical”; [t]wo to three years of managing student support services (counseling, clinical services and discipline,” which was described as “essential”; and, for “the ideal candidate,” experience in “community and/or public relations, along with preparation of grants and budgets.” Ms. Kemp was listed at the end of the superintendent’s memorandum as one of the persons who was to receive a copy of it. (Exh. K3: Memorandum, Thomas W. Payzant, Superintendent, Boston Public Schools to David P. Driscoll, Commissioner of Education, dated Apr. 16, 2003.)

11. It is not clear whether Superintendent Payzant’s April 16, 2003 memorandum requesting a waiver was actually mailed or otherwise delivered to the Department of Education on that date or at any time in April 2003. On May 11, 2004, Ms. Kemp sent an email to Beverly Pina, the assistant director for staffing in BPS’s human resources department, asking about the status of the “pension waiver” request for 2003-04 that Superintendent Payzant had sent to the Department of Education. Inquiries among staff in the BPS human resources department revealed that the “pension waiver” request “appear[ed] to have been lost,” although it is unclear whether it was “lost” at BPS or at the Department of Education. Subsequently, someone found a copy of the Superintendent’s memorandum and the materials accompanying it in the BPS human resources department files. Ms. Pina faxed these materials to Tricia Federico at the Department of Education, per Ms. Federico’s advice that they be faxed or mailed to her. Ms. Pina confirmed that she had faxed them to Ms. Federico in an email she sent to Ms. Kemp on May 19, 2014. (Exh. K4: emails

dated May 11-19, 2004)

12. BPS Assistant Director of Human Resources Information Management Edward F. Kelleher received from Ms. Federico a “verbal authorization to employ Ms. Kemp for the 2003-04 school year” as headmaster of the Fenway School, and was told that written verification would follow. Because Mr. Kelleher had not received this written confirmation as of June 29, 2004, he sent an email to Ms. Federico on that date requesting that a copy of the written authorization be faxed to him. (Exh. K3: email, Kelleher to Federico, dated Jun. 29, 2004.)

13. The record does not include a copy of the written authorization Mr. Kelleher requested from Ms. Federico at the Department of Education on June 29, 2004. Eight years later, on November 27, 2012, BPS confirmed to Ms. Kemp that her “waiver history” showed that a waiver was approved for her employment as headmaster during the 2003-04 school year. (*See* Exh. K2: email, Ann Chan to Peggy S. Kemp, dated Nov. 27, 2012; see also Board prehearing mem. at 2.)

14. On June 29, 2004, Mr. Kelleher sent Ms. Federico an email advising that that BPS “had not yet heard” back from DOE about a request he had sent to her on May 21, 2004 for authorization to employ Ms. Kemp pursuant to a “waiver” during the 2004-05 school year. The request itself is not in the record. (Exh. K3: email, Ed Kelleher to Tricia Federico, dated Jun. 29, 2004.)

15. The record shows no further communication by BPS to Ms. Kemp regarding the waiver request for 2004-05 until late 2012. In an email dated November 27, 2012, BPS advised Ms. Kemp that her “waiver history” showed that a waiver was “not approved” for 2004-05. (Exh. K1: email, Ann Chan to Peggy S. Kemp, dated Nov. 27, 2012.) The email did not state whether “not



approved” meant that DOE had actually denied the request for authorization to employ Ms. Kemp with a waiver during the 2004-05 school year, or whether it meant that DOE did not act on BPS’s request. It also did not state whether BPS had received anything in writing from DOE stating its disposition of the request.

16. On July 11, 2005 and July 14, 2005, respectively, Ms. Kemp and BPS Superintendent Payzant signed a “Principal/Headmaster Employment Agreement” pursuant to which Ms. Kemp would be employed as headmaster of Fenway High School for the period July 1, 2005 to June 30, 2006. The agreement did not mention, or condition Ms. Kemp’s employment as a salaried headmaster upon, critical shortage waivers or their approval by DOE. Paragraph 10 stated that the agreement comprised the entire agreement between the school district and the headmaster and that “there are not inducements, promises, terms, conditions or obligations made or entered into by either party” other than those the agreement contained. (Exh. B3.)

17. On December 13, 2005, Ms. Kemp sent an email to BPS Assistant Director of Information Management Ed Kelleher that asked:

Will Boston be able to request a pension waiver for me for the calendar year 2006? Is there anything that I should do?

(Exh. K4: email, Peggy S. Kemp to Edward Kelleher dated Dec. 13, 2005.)

18. Mr. Kelleher replied by email several days later to Ms. Kemp’s inquiry. He stated:

I’ve contacted the DOE to request form and verification of anything else that we need to do. Will keep you posted.

(Exh. K4: email, Edward Kelleher to Peggy S. Kemp, dated Dec. 16, 2005.)

19. On June 30, 2006 and July 6, 2006 respectively, Ms. Kemp and BPS Interim

Suiperintendent Michael Contompasis signed a “Principal/Headmaster Employment Agreement” pursuant to which Ms. Kemp would be employed as headmaster of Fenway High School for the period July 1, 2006 to June 30, 2007. The agreement did not mention, or condition Ms. Kemp’s employment as a salaried headmaster upon, critical shortage waivers or their approval by DOE. Paragraph 13 stated that the agreement comprised the entire agreement between the school district and the headmaster and that “there are not inducements, promises, terms, conditions or obligations made or entered into by either party” other than those the agreement contained. (Exh. B3.)

20. On August 12, 2006, Ms. Kemp sent another inquiry to Mr. Kelleher regarding the critical shortage waiver. It stated:

I am wondering if you’ve received a reply from the DOE regarding the request for my pension waiver.

Ms. Kemp’s inquiry did not specify the year or years to which her inquiry referred. (Exh. K4: email, Peggy S. Kemp to Edward Kelleher, dated Aug. 12, 2006.)

21. In his email reply to Ms. Kemp dated August 16, 2006, Mr. Kelleher stated:

Nick Balasalle [of BPS’s Office of Human Resources] is working with the DOE on this.

As you recall, they seem to take forever on this particular type of request.

(Exh. K4: emails, Peggy S. Kemp to Edward Kelleher, dated August 12, 2006; and Edward Kelleher to Peggy S. Kemp, dated August 16, 2006.)

22. The record includes no further communication in 2006 between BPS and Ms. Kemp regarding a request for a critical shortage waiver on her behalf until December 1, 2006. On that date, Ms. Kemp sent an email to Mr. Kelleher asking him whether the Department of Education had

responded to the waiver request. The email stated:

Hi Ed,

I apologize for continuing to pester you about this, but I am wondering if the DOE ever responded to the request for a waiver for me.

Thank you,  
Peggy.

(Exh. K4: email, Peggy Kemp to Ed Kelleher, dated Dec. 1, 2006).

23. The record includes no reply from Ed Kelleher, or anyone else, to Ms. Kemp's December 1, 2006 inquiry.

24. During the morning of August 31, 2007, Mr. Kelleher sent an email to two staffpersons at BPS (Sarah Daniels and Joseph Shea) with the subject line "Salary." It stated:

I thought that we got the DOE extension to keep this retired principal employed?

The email did not state the years or dates of Ms. Kemp's employment to which this "DOE extension" referred. (Exh. K4: email, Ed Kelleher to Sarah Daniels and Joseph Shea, dated Aug. 31, 2007, 11:26 a.m.) (emphasis added).

25. The record is without a reply to Mr. Kelleher (if there was any) from Ms. Daniels, Mr. Shea or anyone else. Nonetheless, during the early afternoon on August 31, 2007, Mr. Kelleher advised Ms. Kemp by email that:

The DOE approved a waiver request beginning July 1, 2007.

I thought that Joe [Shea] had forwarded a copy to you. I'll place one in courier mail to you.

(Exh. K4: email, Edward F. Kelleher to Peggy S. Kemp, dated Aug. 31, 2007, 1:29 p.m.)

26. Ms. Kemp replied to Mr. Kelleher's email almost immediately: "Thank you. I had not heard." (Exh. K4: email, Peggy S. Kemp to Edward F. Kelleher, dated Aug. 31, 2007, 1:31 p.m.)

27. In early June 2008, Jonathan Palumbo, a "Media Relations Specialist" from the BPS Communications Office, advised Ms. Kemp that the *Boston Globe* was planning to publish a story regarding "retired employees working under emergency waivers," and that a *Globe* reporter (Jan Tracy) had mentioned that Ms. Kemp was among these retired employees and was seeking a comment by BPS. Mr. Palumbo asked that Ms. Kemp clarify her situation for him before he replied to the *Globe* reporter's inquiry. (Exh. K4: email, Jonathan Palumbo to Peggy S. Kemp, dated Jun. 3, 2008.)

28. Ms. Kemp spoke with Mr. Palumbo, and then sent a followup email to him on June 5, 2008 explaining why she had received a critical shortage waiver allowing her to receive her full pension and, as well, her full salary as Fenway High School's headmaster. Her email stated:

Thank you for keeping me apprised of the pending *Globe* article, and for listening to my rationale regarding my retirement. I realized after we ended our conversation that I did not address why the rationale for BPS and DOE to grant me the waiver in the area of "critical need."

There is a basis for it. Fenway's Board conducted a national search, seeking someone who met the following criteria:

- A background in urban education
- Familiarity with the Coalition of Essential Schools
- Experience with Fundraising
- Experience developing partnerships
- An appreciation of collaborative leadership
- Experience with education reform

I met these criteria and was asked by the board to insure that Fenway continue to be a well performing school with a national reputation.

During the past 5 years Fenway has continued to receive recognition as a high performing school as evidenced by:

Selected as Coalition of Essential Schools' Mentor School  
Awarded Compass School Status by Mass DOE for our MCAS performance  
Achieved 4-year graduation rate of over 88% in 2007  
One of 3 high school math programs profiled nationally by the Gates Foundation  
Recognized for the academic success of our Latino students by a Gaston Institute study of BPS schools.

(Exh. K4:email, Peggy S. Kemp to Jonathan Palumbo dated Jun. 5, 2008.)

29. The *Boston Globe* published its article on June 28, 2008, under Jan Tracy's byline.

According to the *Globe* article:

(a) More than 100 retired educators were earning full school district salaries, while collecting full pensions, under "special arrangements" that were "routinely approved" in "critical shortage waivers" issued each year by the Department of Elementary and Secondary Education, which "frequently ignored its own guidelines requiring school districts to provide proof that they advertised for the position and were unable to find other qualified candidates."

(b) The retirees "collectively made more than \$5 million on the job while taking home \$5.5 million in pension payments, according to information obtained by the *Globe*."

(c) Although this practice "was designed to make it easier for [school] districts to fill hard-to-staff positions," critics referred to it as "state-sanctioned 'double dipping,'" and said that it "leaves the door open for abuse, enticing a pool of well-connected retirees to move from one job to the next or stay indefinitely in a position that should have been filled by a

nonretiree. In some cases, school districts have been allowed to continue rehiring the same retiree rather than readvertising for the position each year and providing fresh proof that they could find no one else to fill the spot, another state requirement.”

(d) Nothing prevented the waivers from being renewed indefinitely. The State Education Department related that approximately 25 percent of school districts requested renewals,” and “several retirees had already been granted permission to continue in their positions next school year.”

(e) A Department of Education spokesperson told the *Globe* that “[w]e just don’t rubber stamp these applications,” and that the agency worked “with the District to make sure they have done their due diligence . . . .”

(f) Several “working retirees” had been granted waivers by the Department of Education to receive their full pensions and, as well, full salaries after returning to work as public school principals. They included a retired Framingham High School principal who had retired in 2004 with an annual pension of \$87,311 and was returning to work as principal of a Fall River high school at a salary of \$140,000 per year; and another educator who received an annual pension of \$85,000 and had returned to work as the superintendent of the Framingham public schools at a salary of \$192,000 per year. They also included Peggy Kemp, a Boston headmaster who retired in 1992, but had been leading Fenway High School for the last five years. Ms. Kemp “commands a \$116,945 salary as well as a \$20,822-a-year pension.” Ms. Kemp “declined to comment, but the application the district submitted contained no documentation of yearly advertising or any attempt to find a nonretired

candidate.” In addition, “materials supporting her yearly renewal request have not been updated since 2003.”

(Exh. K8.)

29. On June 29, 2008, Ms. Kemp sent an email to Eileen de los Reyes, the Deputy Superintendent for Academics for the Boston Public Schools, pointing out that she was one of three persons singled out in the *Boston Globe* article for what it described as “double dipping” and BPS’s failure to advertise Fenway’s position each year,” and asking how BPS wanted to respond. Among other things, Ms. Kemp’s email stated her understanding in June 2008 that BPS had been requesting critical shortage waivers on her behalf since Superintendent Payzant had first requested that DOE issue one in 2003, and that they had been approved each year, except that there had been a delay in communicating to Ms. Kemp the waiver approval for 2007-08. (Exh. K4: email, Peggy S. Kemp (with name of recipient not readable), dated Jun. 29, 2008; email, Peggy S. Kemp to Eileen de los Reyes, dated Jul. 1, 2008, referring to the June 29, 2008 email and thereby confirming that its recipient was Ms. De los Reyes.)

30. In the early evening of December 2, 2008, Ms. Kemp emailed Sarah Daniels (the BPS staffperson to whom Mr. Kelleher had addressed his email inquiry on August 31, 2007 regarding the “DOE extension” allowing Ms. Kemp to remain employed; see Finding 24) that asked: “[D]id you ever receive a response regarding my pension waiver request?” The email did not state to which year or years this “pension waiver request” referred. (Exh. K4: email, Peggy Kemp to Sarah Daniels at BPS, dated Dec. 2, 2008, 6:08 p.m.)

31. Ms. Daniels replied to Ms. Kemp within twenty minutes:

Yes - it was approved. I had assumed they sent you a copy of that letter, but I guess not. I can fax you a copy of it tomorrow when I'm back at the office.

(Exh. K4: email, Sarah Daniels to Peggy Kemp, dated Dec. 2, 2008, 6:26 p.m..)

32. On September 3, 2010, Ms. Kemp inquired of Sarah Daniels whether BPS would again submit a "pension waiver request" for her. (Exh. K4: email, Peggy S. Kemp to Sarah Daniels, dated Sept. 3, 2010.)

33. On the same day, Ms. Daniels, who had become the Director of Licensure and Educator Quality of the BPS Office of Human Resources, replied to Ms. Kemp that:

I haven't really been involved in this process for the past couple of years, but I will print the forms out and let [BPS Assistant Superintendent] Bill Horwath and [BPS Chief of Staff] Rachel Skerritt know that you are trying to pursue another pension waiver with [BPS Superintendent] Dr. [Carol] Johnson's support.

Ms. Kemp replied to Ms. Daniels later that day, asking whether she should contact Mr. Horwath or Ms. Skerritt about her pension waiver request. Ms. Daniels replied, in turn, that:

I'm not sure if that's necessary. I copied them on the last email, and passed off to Bill [Horwath], so he is getting it taken care of, I believe.

(Exh. K4: emails between Peggy Kemp and Sarah Daniels dated September 3, 2010.)

34. On May 14, 2012, Ms. Kemp sent an email to BPS Superintendent Carol Johnson inquiring about the status of the critical shortage waiver requests for her for the 2010-2011 and 2011-2012 school years. The email related that when Ms. Kemp spoke with BPS Academic Superintendent for High Schools Dr. Linda Cabral about this in the fall of 2011, "she said there was no record that the 2010-2011 [waiver request] was approved." Ms. Kemp also related that the BPS Human Resources Department had told her of an inquiry from the Boston Retirement Board



regarding the waiver status, as a result of which Ms. Kemp told Superintendent Johnson that she wanted to “resolve any outstanding questions and learn if there are funds I will need to return to the Retirement Board.” Ms. Kemp also stated that she would not be asking Superintendent Johnson to seek any further waivers. (Exh. K4: email, Peggy S. Kemp to Carol R. Johnson, dated May 14, 2012, 11:28 a.m.)

35. Later that day, BPS Academic Superintendent for High Schools Dr. Linda Cabral replied to Ms. Kemp by email that she was “following up with Ann Chan, Director of Human Resources.” (Exh. K4: email, Linda Cabral to Peggy S. Kemp, with cc to Carol R. Johnson, dated May 14, 2012, 3:43 p.m.)

36. Apparently in response to a previous request for information by the Boston Retirement Board regarding Ms. Kemp’s headmaster salary and waiver status, Deborah E. Pullen, the Director of Operations in BPS’s Office of Human Capital, sent an email on July 25, 2012 to Boston Retirement Board General Counsel Timothy Smyth with the subject line “Peggy S. Kemp.” The email stated that John McDonough (then BPS’s chief financial officer, later its interim superintendent) “is aware of Peggy Kemp’s financial situation.” The email then stated:

Here is the salary for the years that there is no waiver for the position of Dep’t Head BASAS (Boston Association of School Administrators and Supervisors) Union Group 7. I’m including the education Add’l Pay and Career Award she would have received if still in the position.

The email then listed six school years (2004-05, 2005-06, 2006-07, 2009-10, 2010-11 and 2011-12) and, for each of those years, a figure for “Salary,” “Educational,” “Career Award,” and “Total Salary.” The email then concluded, “Let me know if you need any more additional information.”

The email shows no “cc” recipient, and there is nothing else in the email showing that a copy of it was sent to Ms. Kemp, or to BPS Director of Human Resources Ann Chan. (Exh. B4: email, Deborah E. Pullen to Timothy Smyth, dated July 22, 2012, 6:21 p.m.)

37. On November 27, 2012, Boston’s Treasury Department notified BPS that it intended “to recoup the money that Ms. Kemp received as compensation in excess of her retirement benefit for the years in which no critical shortage waiver from the state has been received,” and that it estimated this amount to be “approximately \$170,146.35.” The email also stated that the Treasury Department and the Boston Retirement Board intended to recoup this money by setting off Ms. Kemp’s excess compensation against future pension payments to her, and that it wanted to discuss and reach agreement on a repayment plan by December 14, 2012. The email did not state the years for which no critical shortage waiver had been received from the state. (Exh. K4: email, Meredith Weenick, Chief Financial Officer and Collector-Treasurer of the City of Boston, to [BPS Human Resources Department Assistant Superintendent] Ann Chan, dated Nov. 27, 2012, 11:54 a.m.)

38. Upon receiving this email, Ms. Chan learned who Ms. Kemp could contact at the Boston Treasurer’s Office regarding repayment (First Assistant Treasurer-Collector Vivian Leo), and forwarded this information and the Boston Treasury Department’s email regarding recoupment to Ms. Kemp. (Exh. K4: email, Ann H. Chan to Peggy Kemp, dated Nov. 27, 2012, 3:16 p.m.)

39. Ms. Chan sent a separate email to Ms. Kemp on November 27, 2012 regarding her “waiver history,” which, according to this email, was:

2001 - 2002	Waiver Approved
2002 - 2003	No request made; only worked 7/1 - 10/2 to cover leave
2003 - 2004	Waiver Approved

2004 - 2005	Not approved
2005 - 2006	Waiver not applied
2006 - 2007	Not approved
2007 - 2008	Approved
2008 - 2009	Approved
2009 - 2010	Waiver not applied
2010 - 2011	Waiver Application Pending
2011 - 2012	Waiver Application Pending

The copy of this email in the record includes a handwritten notation to the right of “2010 - 2011 Waiver Application Pending” that reads “none (no paperwork).” It does not show who wrote this notation, or when it was written, and the remainder of the record does not supply this information. (Exh. K1: email, Ann Chan to Peggy S. Kemp, dated Nov. 27, 2012.)

40. Ms. Chan’s November 27, 2012 email does not identify who, or which agency, prepared the “waiver history” to which it refers, what documents were used to prepare it, or whether BPS or any other agency maintained records showing the status of critical shortage waiver requests or Department of Education action taken on those requests (if any) for any of the years in question, and the remainder of the record does not supply any of this information. (Exh. K1.)

41. On August 27, 2012, Ms. Kemp requested, pursuant to M.G.L. c. 32, § 90B, that the Boston Retirement Board waive the entire amount of her pension beginning August 31, 2012. (Kemp direct testimony; Exh. B4.)

42. The Boston Retirement Board held a hearing on March 25, 2014 “to determine Ms. Kemp’s possible excess earnings.” The Board appointed a hearing officer (Robert G. Fabino) to hold the hearing and prepare a recommended decision, which he issued on July 9, 2014. According to the recommended decision, the Board and Ms. Kemp stipulated during the hearing that the

calendar years in issue were 2005 and 2006, and that for all other years following her retirement in 1992, Ms. Kemp was either granted a critical shortage waiver by the Department of Education, did not work for the Boston Public Schools, or did not exceed the M.G.L. c. 32, § 91 limits on earnings and hours. It states, as well, that the parties “agreed that the total amount of excess earnings at issue was \$86,824.76.” (Exh. 5: Hearing Officer’s Recommended Decision, Jul. 9, 2014, at 1-2, 7.)

43. The BPS hearing officer “found Ms. Kemp to be an extremely likeable and credible witness . . . who sought to play by the rules but in her case was penalized for her patience in letting the process play itself out,” but that:

Ultimately, DESE never granted waivers for 2005 and 2006. It appears from the documentary evidence that the Boston Public Schools made such requests of DESE but that an official waiver was not granted for reasons that are still unclear. Again, the result is very unfortunate considering Ms. Kemp’s efforts, but the statute is clear.

It does not appear that the [Retirement] Board has the authority to find a critical shortage waiver existed *de facto* because to do so would be placing the Board in the shoes of DESE in making the determination that DESE is charged by statute with, i.e., that the district made a good faith effort to hire licensed personnel but has been unable to find such qualified candidates. 603 CMR 7.15(13).

(*Id.*; Hearing Officer’s Recommended Decision at 10.) The hearing officer also rejected Ms. Kemp’s assertions that the Board was barred from recouping her 2005 and 2006 overearnings by the six-year contract statute of limitations, because it had a fiduciary obligation to do so, *citing* M.G.L. c. 32, § 20(5)(b) and *Flanagan v. Contributory Retirement App. Bd.*, 51 Mass. App. Ct. 862, 750 N.E.2d 489 (2001). (*Id.* at 10-11). The hearing officer therefore recommended that the Board vote to approve the recoupment of her 2005 and 2006 overearnings, in the amount of \$86,824.76, from Ms. Kemp. (*Id.* at 12.)

44. Ms. Kemp moved for reconsideration of the hearing officer's decision on July 28, 2014 based upon her assertions that the Board's recoupment of her 2005 and 2006 overearnings was barred by the six year limitations period applicable to contract actions. The hearing officer denied the motion for reconsideration on August 12, 2014, on the ground that under M.G.L. c. 32, § 20(5)(b), the Board's efforts to recoup retiree overearnings were not confined to pursuing contract claims subject to the six-year statute of limitations. (Exh. K6.

45. On October 15, 2014, the Board voted to adopt the hearing officer's recommended decision, but found that the amount of Ms. Kemp's overearnings for 2005 and 2006 totaled \$40,204.89, rather than \$86,284.76. (Letter, Susan M. D'Amato, Esq., Board counsel, to Attorney Nicholas Poser, dated Oct. 15, 2014.)

46. Ms. Kemp timely appealed the Board's October 15, 2014 decision to the Division of Administrative Appeals on October 23, 2014.

47. On March 10, 2015, Ms. Kemp agreed to pay the \$40,204.89 overearnings amount to the Board in monthly installment payments of \$900 per month for 44 months, followed by a final 45th monthly payment of \$604.89. (Exh. B7.) The parties do not dispute that this repayment agreement is without prejudice to Ms. Kemp's position and rights in this or subsequent appeals.

### *Discussion*

#### *1. Summary of Analysis and Conclusions*

At issue here is whether, in 2005 and 2006, when Ms. Kemp was employed as Fenway High

School's salaried headmaster while she also continued to receive teacher pension benefits payments, she had overearnings in violation of M.G.L. c. 32, § 91(b) for lack of a state Department of Education waiver allowing this employment based upon a "critical shortage of certified teachers available for employment" in Boston. If she did, an additional issue is whether (as Ms. Kemp contends) the Boston Retirement Board is barred from recovering the overearnings by the six-year statute of limitations, estoppel and laches and, as well, the absence of a court judgment allowing the overearnings to be offset against her future pension payments.

I review, below, M.G.L. c. 32, § 91(e), together with its legislative history, to determine the statute's objectives and the meaning of its operative phrase "critical shortage of certified teachers available for employment in a school district." I conclude that the statute did not in 2005 and 2006, and does not now, require that the Department of Education or its successor, the Department of Elementary and Secondary Education ("DESE"), determine or confirm the existence of a "a critical shortage of certified teachers available for employment in a school district" before the district could employ a retired educator as a teacher or administrator pursuant to section 91(e), or, thus, before limits on post-retirement earnings that would otherwise apply to the rehired educator's earnings were lifted based upon the waiver that section 91(e) provides. Nor does section 91(e) limit the duration of a critical shortage, or employment based upon it, to one year.

Following my review of the statute and its legislative history, I also review below the Department of Elementary and Secondary Education ("DESE") regulations requiring that agency's prior determination, or confirmation, that such a critical shortage exists before a school district may employ a retired educator as a teacher or administrator for one year (or for any additional year)

pursuant to section 91(e) and, thus, before limits on post-retirement earnings that would otherwise apply to the rehired educator's earnings were lifted based upon the waiver that section 91(e) provides. *See* 603 C.M.R. § 7.15(13)(b) and (c). I find no evidence that these regulations, or an earlier iteration of them, applied in 2005 or 2006.

Finally, even if a version of the regulations governing critical shortage waivers was in effect in 2005 and 2006, and BPS could not employ Ms. Kemp as Fenway High School's headmaster during those years pursuant to M.G.L. c. 32, § 91(e) unless it applied for, and received from the state Department of Education, a waiver approving this employment, DOE was likely processing these types of waiver requests via the computerized waiver system that the Massachusetts courts invalidated in *Nordberg v. Dep't of Education*, 29 Mass. L. Rptr. 163, 2011 WL 6351860 (Super. Ct., Worcester Cty., 2011) (Douglas H. Wilkins, J.)(partial summary judgment invalidating DOE's computerized waiver system as implemented, but granting judgment on the pleadings denying award of monetary damages against the DOE Commissioner), *aff'd*, 87 Mass. App. Ct. 1101, 22 N.E.3d 178, 2015 WL 114916 (2015) (unpublished op. pursuant to Mass. Rules App. Prac. Rule 1:28). In view of this already-adjudicated defect, and absent any evidence that DOE did not use a different system to decide critical shortage waiver requests at the time, I conclude that whatever decision DOE made or could have made with respect to Ms. Kemp's employment as Fenway High School's salaried headmaster in 2005 or 2006 (or in earlier years) would have been invalid per *Kemp*, and therefore would not show that she was not properly employed pursuant to M.G.L. c. 32, § 91(e) during those years based upon the critical shortage determination that BPS Superintendent Payzant made in early 2003.

I conclude that Ms. Kemp’s employment as Fenway High School’s headmaster in 2005 and 2006 pursuant to a “critical shortage of certified teachers available for employment” in Boston was governed solely by, and fully met the requirements recited by, M.G.L. c. 32, § 91(e). As a result of this “critical shortage” employment, Ms. Kemp’s post-retirement earnings during those years were not subject to the limitations of M.G.L. c. 32 that otherwise applied, and she had no overearnings during those years that the Boston Retirement Board may recoup.

*2. Post-Retirement Earnings by Retired Public Sector Employees Under M.G.L. c. 32*

*a. Generally*

A Massachusetts public employee who retires and receives a pension, disability pension or retirement allowance from the Commonwealth or any of its political subdivisions may work and earn money in the private sector without restriction. However, he or she may not be paid for post-retirement services rendered to the Commonwealth or any of its counties, cities, towns, districts or authorities, with exceptions that M.G.L. c. 32, § 91 specifies. One of these exceptions is:

emergency service for a period not to exceed one year in any position after certification that an emergency exists, that a vacancy exists, and that no person having the same or similar skill is available for such position, which certification shall, in each instance, be made by the appointing authority . . . .

M.G.L. c. 32, § 91(a). Another exception allows a school district to rehire a retired public school teacher when there exists a “critical shortage of certified teachers in the district available for employment.” M.G.L. c. 32, § 91(e). Rehiring into the state or municipal public sector may also



occur if the retiree has “waived the retirement allowance” pursuant to M.G.L. c. 32, § 90B.<sup>13</sup>

Even if a retiree returns to paid state or municipal employment under one of these exceptions, section 91 limits the retiree’s hours and earnings unless the exception states otherwise. M.G.L. c. 32, § 91(b) provides that a public sector retiree may not be employed by the Commonwealth or one of its political subdivisions for more than 960 hours “in the aggregate, in any calendar year,” and the earnings from such employment, “when added to any pension or retirement allowance he is receiving [may] not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated plus \$15,000,” although the additional \$15,000 cannot be earned until after the first full calendar year immediately following the effective date of retirement. The overall purpose of these limitations is to prevent retirees from becoming eligible for an additional pension, *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 446, 841 N.E.2d 274, 277 (2006), or, from a combination of state or municipal pension benefits and post-retirement public sector employment, to “make more money than if [he or she] had not retired.” *Id.*; 65 Mass. App. Ct. at 447, 841 N.E.2d at 278; *Borin v. Massachusetts Teachers Retirement System*, Docket No. CR-14-53, Decision at 10-11 (Mass. Div. of Admin. Law App., Oct. 2, 2015.) If the retiree’s post-retirement state or municipal public sector earnings exceed what section 91(b) allows, the excess earnings, or “overearnings,” must be repaid to the public entity

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<sup>13</sup>/ Other exceptions that section 91(a) specifies, and that do not apply here, include jury service; certain services as a retired justice; work as an election officer at a polling place at a primary or election; service in a public office to which the retiree has been elected by direct vote of the people; service in a confidential capacity in the executive department; contractual service, or service as a nonemployee, to the legislature or one of its committees or special commissions; and service as a physician, or as a member of a medical panel or similar board under this chapter, aggregating not more than thirty days in any year.

employing the retiree, or to the retirement board paying the retiree's pension, M.G.L. c. 32, § 91(c), and the retirement board may recover the overpayments that the retiree does not return. *Bristol County Retirement Bd.*; 65 Mass. App. Ct. at 448, 841 N.E.2d at 278.

*b. Under the "Critical Shortage of Certified Teachers"  
Exception of M.G.L. c. 32, § 91(e)*

M.G.L. c. 32, § 91(e), added to section 91 in 2000, *see* St. 2000, c. 114, § 6, allows a school district to employ a retired public school teacher based upon a "critical shortage" in the district of certified teachers who are available for employment in the district, and the earnings of a retired teacher employed pursuant to section 91(e) are not subject to the post-retirement earnings limitations imposed by M.G.L. c. 32, § 91(b). Section 91(e) provides that:

Notwithstanding the provisions of paragraphs (a) to (d) [of section 91], inclusive, *in any period during which there is a critical shortage of certified teachers available for employment in a school district*, said school district may employ as a teacher or as a mentor to other teachers any person who has retired from the teachers' retirement system or the State-Boston retirement system. Any such retired person who renders service in a public school district as a teacher or as a mentor to other teachers shall be subject to all laws, rules and regulations governing the employment of teachers in the school district. Such person shall not be deemed to have resumed active membership in the teachers' retirement system or State-Boston retirement system and said service shall not be counted as creditable service toward retirement; but in the first two years immediately following the effective date of retirement, the earnings received by a teacher who retired pursuant to subdivision (4) of section 5 when added to any pension or retirement allowance he is receiving shall not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated.

(Emphasis added.)<sup>14</sup>

Neither M.G.L. c. 32, § 91(e), nor the session law that enacted it in 2000 (*see* n. 14), states the purpose of the “critical shortage” exception, or how and by whom a critical shortage of certified teachers in a school district is to be determined. Discerning these details is, nonetheless, critical to determining whether, as the Boston Retirement Board determined, Ms. Kemp was without the benefit of section 91(e)’s critical shortage exemption in 2005 and 2006, and therefore had substantial overearnings in both years that she must return to the Board.

*c. Under Current Regulations Addressing  
“Critical Shortage” Waivers Under M.G.L. c. 91(e)*

Neither M.G.L. c. 32, § 91(e) nor St. 2000, c. 114, § 6 directs that it be implemented by appropriate regulation. Neither the session law nor the statute defines the phrase “critical shortage of certified teachers,” and neither of them directs any agency to do so. Additionally, as has been the case since St. 2000, c. 114 was enacted over the Governor’s veto, section 91(e) does not require that the state education agency determine, or even confirm, the existence of a critical shortage of certified teachers available for employment in a school district before the district can rehire a retired teacher under this section, or before section 91(e)’s waiver of post-retirement earnings limitations can apply to the rehired teacher’s earnings.

Currently, nonetheless, the Department of Elementary and Secondary Education regulations

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<sup>14/</sup> A recent amendment clarifies that the “State-Boston retirement system” to which section 91(e) referred during the years at issue here is the Boston Retirement System. *See* St. 2015, c. 86, § 9.

require that DESE make this determination before a retired teacher may be rehired under M.G.L. c. 32, § 91(e) and, therefore, before the rehired teacher's post-retirement earnings limitations under Chapter 32 may be lifted. *See* 603 C.M.R. § 7.15(13)(b) and (c). These subsections appear in a section of the DESE regulations entitled "Regulations for Educator Licensure and Preparation Program Approval." *See* 603 C.M.R. § 7.00. They follow a subsection that allows DESE's Commissioner to exempt a school district from the requirement of M.G.L. c. 71, § 38G that only licensed or preliminarily-licensed educators may be employed as a public school teachers or administrators in Massachusetts. *See* 603 C.M.R. § 7.15(13)(a).<sup>15</sup>

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<sup>15/</sup> 603 C.M.R. § 7.15(13) provides that:

(a) The Commissioner may exempt a district for any one school year from the requirement to employ licensed or certified personnel in accordance with M. G. L. c. 71 § 38G. The Commissioner may deem a district to have a great hardship in securing licensed or certified personnel for the purposes of M. G. L. c. 71 § 38G upon request of a superintendent and demonstration to the Commissioner that the district has made a good-faith effort to hire licensed or certified personnel, and has been unable to find a licensed or certified candidate who is qualified for the position. Persons employed under waivers must demonstrate that they meet minimum requirements as established by the Department and are making continuous progress toward meeting the requirements for licensure or certification in the field in which they are employed. During the time that a waiver is in effect, service of an employee of a school district to whom the waiver applies shall not be counted as service in acquiring professional teacher status or other rights under M. G. L. c. 71, § 41.

(b) The Commissioner may deem a district to have a critical shortage of licensed or certified teachers for the purposes of M. G. L. c. 32 § 91 (e) upon request of a superintendent and demonstration that the district has made a good-faith effort to hire personnel who have not retired under M.G.L. c. 32 and has been unable to find them. A district deemed to have a critical shortage of licensed or certified teachers for the purposes of M. G. L. c. 32 § 91 (e) may employ retired teachers subject to all laws, rules, and regulations governing the employment of teachers. The period of a determination of a critical shortage of licensed or certified teachers shall not exceed one year, but a district may seek to invoke this provision in consecutive years upon a new demonstration of a good-faith effort to hire personnel who have not retired. The Commissioner shall

DESE promulgated 603 C.M.R. § 7.15 in 2010, and has revised it since, based upon the agency's statutory authority under M.G.L. c. 69, §§ 1B, 1J and 1K, as amended by St. 2010, c. 12, § 3, and M.G.L. c. 71, § 38G. All of these statutes are part of the Commonwealth's education law.<sup>16</sup>

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notify the Teachers' Retirement Board of each determination of a critical shortage made for the purposes of M. G. L. c. 32 § 91 (e).

(c) In each instance when, after a good-faith effort, a district is unable to hire a licensed or certified teacher who has not retired under M. G. L. c. 32, the superintendent of the district has discretion to choose whether to seek a waiver, pursuant to 603 CMR 7.14 (13) (a) or to seek a determination of a critical shortage, pursuant to 603 CMR 7.14 (13) (b).

<sup>16/</sup> M.G.L. c. 69, in general, sets out the powers and duties of the Department of Elementary and Secondary Education. M.G.L. c. 69, § 1B sets out the duties of the Commonwealth's Board of Elementary and Secondary Education, including "establish[ing] standards for certifying all teachers, principals, and administrators in public early childhood, elementary, secondary and vocational-technical schools, as provided in and subject to section thirty-eight G of chapter seventy-one.

M.G.L. c. 69, § 1J and 1K address the designation of one or more schools in a school district as underperforming or chronically underperforming, and adopting regulations allowing DESE to promulgate regulations allowing its Commissioner to make this designation, "tak[ing] into account multiple indicators of school quality in making determinations regarding underperformance or chronic underperformance, such as student attendance, dismissal rates and exclusion rates, promotion rates, graduation rates or the lack of demonstrated significant improvement for 2 or more consecutive years in core academic subjects, either in the aggregate or among subgroups of students, including designations based special education, low-income, English language proficiency and racial classifications." M.G.L. c. 69, § 1J. Section 1J also directs DESE to promulgate regulations for the "turnaround" of schools designated as underperforming or chronically underperforming. The procedure for developing, implementing and amending a turnaround plan is addressed by M.G.L. c. 69, § 1K, as is the interplay of this section with collective bargaining agreements relative to the alteration of compensation, hours and working conditions of the administrators, teachers, principals and staff at a school in the district subject to a turnaround plan.

M.G.L. c. 71, 38G, part of the Education Reform Act of 1993, provides in pertinent part that:

No person shall be eligible for employment as a teacher, guidance counselor, director, school psychologist, school adjustment counselor, school social worker, school nurse, library media specialist, school business administrator, principal, supervisor, director, assistant superintendent of school, and superintendent of schools by a school district unless he has been granted by the commissioner a provisional, or standard certificate

However, 603 C.M.R. § 7.10 does not list M.G.L. c. 32 generally, or M.G.L. c. 32, § 91(e) specifically, as statutory sources of regulatory authority.

Per 603 C.M.R. § 7.15(13)(b), a school district superintendent must apply to DESE for a waiver allowing the employment of a retired educator as a teacher, administrator or support personnel in the district based upon a “critical shortage of licensed or certified teachers for the purposes of M. G. L. c. 32 § 91 (e).” DESE has prescribed a form on which the superintendent must make the waiver request. A copy of this current form is in the record. (*See* Exh. B8, which includes the notation “updated Dec. 2014” at the end of this form.) The superintendent must certify on this form that the district “has made a good-faith effort to hire appropriately-licensed personnel who are not retired” and has been unable to do so for the position in question. He must submit “evidence” to support this certification and his request that the “district be deemed to have a critical shortage of appropriately licensed personnel in this field.” This evidence must include a “cover letter explaining the district’s circumstances and reason for the request,” “hiring materials” showing that

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with respect to the type of position for which he seeks employment; provided, however, that nothing herein shall be construed to prevent a school committee from prescribing additional qualifications; and provided further, that a superintendent may upon request be exempt by the commissioner for any one school year from the requirement in this section to employ certified personnel when compliance therewith would in the opinion of the commissioner constitute a great hardship in securing teachers for that school district.

M.G.L. c. 71, 38G also prescribes requirements for the provisional and standard certification of teachers, and the renewal of teaching certificates. It requires further that:

as a provision of an administrator's or educator's initial certification, that all educators and administrators shall have training in strategies for effective inclusive schooling for children with disabilities, instruction of students with diverse learning styles and classroom organization and management. Such training shall include, at a minimum, practical experience in the application of these strategies.

the district advertised the position in at least two publicly-accessible resources (the list of which includes the district website) for at least two weeks, and the names of all applicants and the reasons why they were not hired to fill the position in question. (*Id.*). Per the DESE regulations, the duration of a retired educator's employment based upon a critical shortage of certified teachers that DESE must approve is limited to one year, although a school district can request that DESE issue a critical shortage waiver for the educator in subsequent years "upon a new demonstration of a good-faith effort to hire personnel who have not retired." 603 C.M.R. § 7.15(13)(b).

Despite these detailed requirements, 603 C.M.R. § 7.15(13) does not define "critical shortage of certified teachers available for employment in a school district," or "critical shortage," and neither does the definitions section of section 7.00 of the DESE regulations, 603 C.M.R. § 7.02. In contrast, words and phrases pertinent to the requirements of 603 C.M.R. § 7.15(13)(a) regarding educator certification requirement waivers, such as "license" and "preliminary license," are defined at 603 C.M.R. § 7.02, as are other terms having to do with educator licensure and proficiency in subject-matter areas and teaching skills.

Neither the record, nor my own search for the relevant regulatory history, reveals whether 603 C.M.R. §§ 7.15(13)(b) and (c), or a different iteration of them, was in effect in 2005 or 2006, the two years of concern here. I discuss this further below (beginning at 59). At this point, I do no more than summarize the current requirements of these DESE regulations, because the Boston Retirement Board relies upon them in asserting that Ms. Kemp had overearnings during 2005 and 2006 subject to recoupment for lack of a DESE waiver authorizing her employment as Fenway High School's headmaster under section 91(e). I also do so for the sake of comparing what the DESE

regulations currently require with what section 91(e) requires, and what, at least per its plain language, it does not.

*3. Construing Section 91(e)'s "Critical Shortage" Exception*

*a. Relevance of, and Need for, Extrinsic Aids to Statutory Construction*

The parties have presented their dispute in terms of avoiding an absurd or impracticable result in applying section 91(e)'s "critical shortage of certified teachers" exception to limitations on public sector earnings by rehired public sector retirees.

From Ms. Kemp's perspective, an erroneous result would be requiring her to return a sizeable portion of her 2005 and 2006 earnings many years after she received them. Taken alone, that argument pays almost no heed to what section 91(e) (or any regulations in effect during either of those years) required in terms of a "critical shortage waiver," and emphasizes, instead, what Ms. Kemp views as an unfairly stale recoupment effort by the Boston Retirement Board. Restated in terms of what section 91(e) required, an erroneous result from Ms. Kemp's perspective would be requiring her to repay "overearnings" if there was (or had remained, since 2003) a critical shortage of certified teachers in Boston in 2005 and 2006 who were qualified for the Fenway High School headmaster position, and she was best qualified (or the only one qualified) among them to perform the duties of that position successfully. From the Board's perspective, an erroneous result here would be allowing Ms. Kemp to keep her overearnings in 2005 and 2006, absent a DOE "critical shortage waiver" it claims she needed for section 91(e) to apply. That outcome, in the Board's view,



would give Ms. Kemp a financial windfall, contrary to the limitations on post-retirement earnings that section 91 imposes, and to the detriment of the pension system that the Board administers.

At the core of this dispute is the meaning of section 91(e)'s phrase "critical shortage of certified teachers in the school district." The "black letter text," or plain meaning, of the statute is "[t]he primary source of insight into the intent of [l]egislature" in employing this phrase, *see International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 853, 443 N.E.2d 1308, 1316 (1983), and if this language is clear, I cannot add words the legislature did not include, and nor can I read the statute in a manner that, in effect, amends it. *See General Electric Co. v. Dep't of Env't'l Protection*, 429 Mass. 798, 803, 711 N.E.2d 589, 593 (1999); *Comm'r of Revenue v. Cargill, Inc.*, 429 Mass. 79, 82, 706 N.E.2d 625, 627 (1999). Indeed, if the meaning of "critical shortage of certified teachers available for employment in the school district" is evident from the wording of the phrase alone, or at least from the language of section 91(e), there would be no justification for seeking evidence of its meaning elsewhere.

That is not the case here, however, as neither section 91(e) nor any other section of Chapter 32 defines this "critical shortage" or states how, or by whom, its existence is to be determined. The meaning and function of the phrase must be discerned, therefore, with the assistance of extrinsic aids suggesting the legislature's intent in enacting section 91(e), including that section's legislative history. *See International Fidelity Ins. Co. v. Wilson*; 387 Mass. at 853-54, 443 N.E.2d at 1316-17.

*b. Overall Purpose of Section 91(e) and Underlying Legislative Intent*

The backdrop to St. 2000, c. 144, whose sixth section became M.G.L. c. 32, § 91(e), was

legislation proposed in 1999 that included an incentive for early retirement by Massachusetts public school teachers. This was part of an omnibus early retirement bill covering most public employees in Massachusetts that the legislature's Joint Committee on Public Service reported out favorably on June 22, 1999, and that became part of the legislative conference committee's budget recommendations for fiscal year 2000. *See* St. 1999, c. 127, § 52 (amending M.G.L. c. 32 by adding a new section 104 establishing an alternative superannuation retirement benefit for teachers in the Teachers Retirement System and teachers employed by the City of Boston).

Under the "rule of 90" then in effect for public school teachers, a teacher could retire with a full pension if his or her age, and years of creditable service, added up to 90. The 1999 early retirement legislation allowed some public school teachers to achieve that combination, and qualify for a full pension, earlier. It did this by offering several additional years of creditable service upon retiring to "Group 1" employees, which included public school teachers, who had at least 25 years of creditable service and who contributed five percent of their salary to their retirement plans.

Governor Celucci opposed St. 1999, c. 127, § 52, but in lieu of vetoing this session law outright, he returned it to the legislature for amendment. *See* 1999 Mass. Session Laws, Governor's Veto Message (Nov. 16, 1999), at 771.<sup>17</sup> He also sent the text of his recommended amendments in separate letters to the House of Representatives and the Senate. *Id.* Although those letters are not part of the 1999 veto message printed in the Session Laws, the Governor explained his opposition to the teacher early retirement legislation in a contemporaneous policy brief that was posted to the

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<sup>17</sup>/ Although returns of proposed legislation for amendment are not vetoes, they are typically included in the Governor's veto message printed in the Session Laws.

Administration and Finance Secretariat's website. *See Potential Impact of Teacher Early Retirement Legislation on Education Quality*, Executive Office for Administration and Finance, Policy Brief Series, No. 4 (Nov. 15, 1999), (link to pdf version at the Massachusetts state archives online: <http://archives.lib.state.ma.us/handle/2452/48967>) He emphasized the cost of providing enhanced retirement benefits, and the fiscal impact of early retirement upon the Commonwealth's unfunded pension liability. Teacher testing and certification requirements had made it more difficult to find eligible teacher candidates, and the Governor projected that the early retirement offered under the legislation would generate an exodus of veteran teachers that would, in turn, worsen an existing shortage of teachers while student enrollment continued to rise. The Governor noted that to combat existing teacher shortages exacerbated by early retirement legislation, other states (Hawaii, California, Maryland, South Carolina and Texas) had enacted legislation allowing school districts to rehire retired teachers, who "often continue[d] receiving pension benefits while also receiving a regular salary for returning to the classroom." The Governor stated his concern that "[t]he Massachusetts early retirement legislation may set the stage for a replay of these costly and irrational actions here." *Id.*; *see also Early Retirement Moves to Front Burner*, at *Mass Retirees Online* (July 2, 1999): [https://archive.org/stream/potentialimpacto00mass/potentialimpacto00mass\\_djvu.txt](https://archive.org/stream/potentialimpacto00mass/potentialimpacto00mass_djvu.txt) (select the "full text" download option on the right side of the web page).

A different type of early retirement emerged during the legislative session that followed, and on June 22, 2000, the legislature passed, over the Governor's veto, a session law entitled "An Act improving teacher recruitment, retention and retirement." *See* St. 2000, c. 114. Among other things, this session law amended Chapter 32 so as to allow teachers with at least 30 years of creditable

service to retire with a full pension as early as age 55. *See* St. 2000, c. 114, § 2, third para., *adding* new subdivision 4(ii) to M.G.L. c. 32, § 5. For those teachers who qualified, this provision essentially modified the “rule of 90” applicable to teacher retirement. It allowed a teacher to retire with a full pension if his or her age and years of creditable service added up to 85, in lieu of allowing the Commonwealth to make a one-time early retirement offer that added five years of creditable service to allow a teacher to achieve an age and years of creditable service combination totaling 90. The legislation also mandated that teachers hired after July 1, 2001 who were members of the state teachers’ retirement system and the State-Boston retirement system participate in an “alternative superannuation retirement benefit program” and make increased contributions to their retirement plans (11 percent of their regular compensation). St. 2000, c. 114, § 2, second para., *adding* new subdivision 4(i) to M.G.L. c. 32, § 5. In addition, the legislation allowed retired teachers to be employed “*in any period* during which there is a critical shortage of certified teachers available for employment in a school district” (emphasis added) and, after two years following retirement, to earn a full salary in that position and continue to collect teacher retirement benefits. St. 2000, c. 114, § 6. This section of the session law became M.G.L. c. 32, § 91(e).

Allowing school districts to rehire retired teachers, and allowing the rehired teachers to collect a salary and continue receiving pension benefits, was a remedy that several other states had implemented after early teacher retirement had worsened teacher shortages. Governor Celucci had pointed this out in opposing the 1999 early teacher retirement legislation. In doing so, the Governor had emphasized that this remedy for teacher shortages could itself generate additional costs, including paying rehired teacher retirees drawing pension payments more than they would have

earned if they had not retired, and allowing them to boost their pension benefits in the process.

Possibly in response to this criticism of the 1999 early retirement legislation, St. 2000, c. 114, § 6 included language that precluded a retired teacher's employment due to a critical teacher shortage to boost the teacher's pension, and this language carried over intact into M.G.L. c. 32, § 91(e). Section 91(e) provides that the service of a retired public school teacher who is rehired based upon a "critical shortage of certified teachers available for employment in a school district," (1) does not restart the teacher's active membership in the state or Boston retirement systems that ceased when the teacher retired, and (2) does not count as creditable service in calculating the teacher's retirement benefits.<sup>18</sup> Those limitations apply whenever the retired teacher is rehired based upon a "critical shortage of certified teachers available for employment in a school district," and however long that rehiring lasts. Both St. 2000, c. 114, § 6 and section 91(e) also maintained, for a teacher employed under the statute, Chapter 32's limitations on post-retirement earnings by a retiree who is rehired into the state or municipal public sector, but only during the first two years following the date on which the teacher retired. As a result, a retired public school teacher who is rehired, more than two years after retiring, based upon a "critical shortage of certified teachers" in the school district may continue to receive pension benefits payments and earn a salary, even if the combined amount exceeds what the teacher would have earned had he or she not retired.

Notwithstanding the public policy arguments that might be raised against this type of earnings supplementation, this is what section 91(e) has allowed specifically since it was enacted in

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<sup>18</sup>/ The statutory language is quoted above, at 34-35.

2000. The legislative history suggests strongly that this was intended as a financial incentive to attract retired, experienced educators back to classroom, and to insure that this employment would be an effective tool for offsetting shortages of certified educators that early teacher retirement might cause or exacerbate. Although the legislative history does not reveal a lack of concern with the costs of rehiring retired teachers under section 91(e), the legislature chose to address that concern in two ways—first, with language that precludes “pension padding” (that is, generating an additional pension for a retired teacher, or increasing the basis upon which the retired teacher’s pension benefits are calculated) at any time during “critical shortage” employment, and second, with language that limits the post-retirement earnings of rehired teachers during the two years following the teacher’s retirement date, but not afterward.

Based upon its review of the 1999 early retirement legislation after the Governor returned it for amendment, the legislature could have concluded, rationally, that these limitations would suffice to reduce the cost of hiring retired teachers, and that maintaining post-retirement earnings limitations for retired teachers rehired beyond the two-year period following retirement was unnecessary. Other equally rational conclusions may have been subsumed into this one, among them the following—teacher shortages were a genuine problem in most Massachusetts school districts, as they were across the nation; school districts needed the flexibility to address the problem without unnecessary delay; and rehiring retired teachers accomplished this objective by tapping into an available pool of professional and practical experience, one that had already been developed over the years at the taxpayers’ expense. The legislature could have concluded rationally, as well, that the pension and earning-related limitations it included in St. 2000, c. 114, § 6, and in M.G.L. c. 32,

§ 91(e) not only sufficed to limit the fiscal impact of rehiring retired teachers drawing pension benefits payments, but did so more effectively than would adding a layer of additional review to determine whether there actually existed a critical shortage of certified teachers available for employment in any particular school district seeking to rehire retired teachers.

The legislature included no such additional review requirement in St. 2000, c. 114, § 6 or in M.G.L. c. 32, § 91(e), and it imposed no limitation on the earnings of a retired teacher rehired under the statute beyond two years from the retirement date. Bearing in mind that St. 2000, c. 114, § 6 and M.G.L. c. 32, section 91(e) created an exception to Chapter 32's general limit on post-retirement earnings in order to alleviate teacher shortages exacerbated by early retirement, the combination of full salary and pension benefits payments that a retired teacher employed due to a "critical shortage" could earn more than two years after rehiring is more sensibly viewed as a financial incentive intended to attract experienced retired teachers back to school districts with shortages of certified teachers, rather than as a loophole in post-retirement earnings limitations intended to enrich a small group of most-favored, retired educators.

To recapitulate—the legislative history, structure and language of St. 2000, c. 114, § 6 suggest strongly that this session law was intended not only to facilitate the early retirement of teachers but also to address the fiscal impact and teacher shortage concerns that were raised in response to the 1999 teacher early retirement legislation. As a result, St. 2000, c. 114, § 6 allowed older teachers to retire earlier with full pensions, which opened teaching positions for younger certified teachers whose increased pension contributions would offset teacher pension liability to some degree. At the same time, section 6 of the session law, which became M.G.L. c. 32, § 91(e),

gave school districts an additional tool to address shortages of certified teachers—allowing the rehiring of retired teachers by offering, as an incentive, the opportunity to receive full pay and continued pension benefits payments after two years of retirement, as a specific exception to the post-retirement earnings limits that would apply otherwise. It did so without defining the phrase “critical shortage of certified teachers available for employment in a school district,” and also without requiring that the existence of this “critical shortage” be confirmed in any particular manner or by anyone other than the school district.

Notably, as well, St. 2000, c. 114, § 6 became part of Chapter 32, the Commonwealth’s retirement statute, rather than part of an education statute. This signaled the legislature’s intent that the school district, which was responsible for employing public school teachers, would determine whether there existed a critical shortage of certified teachers in the district justifying a retired teacher’s employment. Because section 91(e) created a specific exception to Chapter 32’s general limitations on post-retirement income, its placement in Chapter 32 made sense from a drafting perspective. Beyond that, however, placing section 91(e) in the retirement statute was fully consistent with the statute’s predominant objectives—providing an early retirement option for older educators, and providing school districts with an effective means of offsetting teacher shortages that early retirement might cause or exacerbate, by offering employment to retired educators with the incentive of relief from post-retirement earnings limitations.

There is a point to be made that realizing these retirement-related objectives may have affected the composition of the educator workforce by age and in terms of the distribution of experienced and less-experienced educators, and that these impacts relate to education as well as to



retirement. That said, section 91(e)'s retirement objectives are not met by circumventing educator licensing requirements or by providing any other exceptions to the Commonwealth's education law, whether recited at M.G.L. Chapters 69 or 71 or in the education regulations. The educational impacts of M.G.L. c. 32, § 91(e) were, thus, matters of peripheral concern but were not of changes to statutory, or regulatory, education objectives or education policy. In contrast, section 91(e) intentionally changed the Commonwealth's retirement law.

Overall, then, the retirement-related objectives of this statute, and the retirement-related statutory changes it effected, predominated over any education-related concerns the statute may have generated. This is shown clearly enough by the incorporation of St. 2000, c. 116, § 6's provisions into a section of the retirement statute, M.G.L. c. 32, § 91(e), rather than into an education statute.

The predominant objectives of section 91(e) did not change despite persistent concerns that it facilitated pension abuse, in the potential for excessive rehiring of retired teachers earning more than they would have had they not retired, based upon questionable "critical shortages of certified teachers available for employment in the district," as one of the exhibits in the record suggests. (*See* Exh. K8, the 2008 *Boston Globe* article examining several "high profile" retired teacher rehiring based upon critical shortages of certified teachers, including Ms. Kemp's employment as Fenway High School's headmaster starting in 2003). The *Globe* article noted two sides of a public policy debate over employing retired teachers based upon "critical teacher shortages." One was, of course, that this was intended to allow school districts to fill hard-to-staff teaching positions left vacant when public school teachers elected early retirement, and also to find educators willing to serve as school superintendents or principals, positions that, as the article put it, had "become more difficult to fill

nationwide with an increased focus on accountability.” The other was that school districts had not made good-faith efforts to hire non-retirees, or to document that there were actually “critical shortages” of unretired public school teachers. This had encouraged abuse, in turn, “enticing a pool of well-connected retirees to move from one job to the next or stay indefinitely in a position that should have been filled by a nonretiree,” collecting both a full salary and retirement benefits, while the school district did not readvertise the position or furnish “fresh proof” that it could find no one other than a retired teacher drawing a pension to fill it. According to the 2008 *Boston Globe* article, “[s]ome watchdogs criticize[d] the very premise of granting anyone this sort of exemption,” and “several pension officials” had added that the pension system was established “to provide retired public employees with a measure of security and income, not to supplement a salary.”

Beyond presenting a critique of section 91(e)’s current provisions, however, these arguments do not assist in construing the statute’s current text, which has remained as it was since section 91(e) became effective in 2000. They are not, thus, extrinsic statutory construction aids that assist in construing the statute’s existing text, including the phrase “critical shortage of certified teachers available for employment in the district,” or what the legislature intended by including this phrase in section 91(e).

Additionally, the criticisms of “critical shortage” rehiring voiced in the 2008 *Globe* article furnish no basis for reading into section 91(e) constraints on employing retired educators that are not now in the statutory text, even if doing so might arguably avoid pension abuse that the legislature cannot have intended to facilitate. The record presents no basis for such a preemptively-reforming construction of section 91(e). Criticisms such as those identified in the 2008 *Boston Globe* article

do not themselves show that the current language of section 91(e) has actually generated pension abuse, or that any particular school district has abused its discretion in rehiring retired teachers based upon poorly-supported, or self-serving, perceptions of critical teacher shortages. Neither party presented evidence on those points, and even if they had done so, this forum could not better the statute by reading additional requirements into it or otherwise grant relief from the provisions of section 91(e) as they are written. Arguments that section 91(e) should be amended by limiting the duration of critical shortage rehiring, requiring documentation of critical shortages of certified teachers and of good-faith efforts to recruit qualified teachers in the district, and requiring review and approval of proposed critical shortage rehiring by the state education agency, must be presented to the legislature. Reading such limitations or requirements into section 91(e) would amend it, in effect, something that only the legislature can do.

Even if it could be argued that doing so would not amend section 91(e), interpolating such limitations or requirements into the statute is without justification in the legislative history. Pension abuse concerns related to the rehiring of retired teachers are not new. They were raised during the debate that ensued over the 1999 early retirement legislation and the Governor's message returning the legislation for amendment. The legislature responded by including, first in St. 2000, c. 114, § 6, and then in section 91(e), provisions precluding "pension padding" by retired teachers rehired under the "critical shortage" exemption, and maintaining limitations on what those retired teachers could earn but only during the first two years following retirement. The legislature omitted from the session law and section 91(e) any further constraints on "critical shortage" rehiring of retired teachers. The omissions were as much a part of the legislature's response to the 1999-2000 debate

over early teacher retirement legislation as were the constraints it chose to include in St. 2000, c. 114, § 6 and in M.G.L. c. 32, § 91(e). Both the inclusions and the omissions must be viewed as intentional on the legislature's part. The legislature chose, after all, to override the Governor's veto of St. 2000, c. 114 and add section 6 of this session law as M.G.L. c. 32, § 91(e), rather than leave it to the next legislative session to address early retirement by public school teachers, and the employment of retired teachers to alleviate teacher shortages that early retirement might have exacerbated.

*c. Construing the Phrase "Critical Shortage of Certified Teachers Available for Employment in the District"*

M.G.L. c. 32, § 91(e) employs the phrase, but does not define, "critical shortage of certified teachers available for employment in the district," and no other section of Chapter 32 defines this phrase. Even assuming that the DESE regulations, or a prior iteration of them, applied in 2005 and 2006, the regulations also do not define "critical shortage of certified teachers."

As neither the statute nor the regulations are helpful in construing the phrase, I apply the rule of construction that:

Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

M.G.L. c. 4, § 6, third.

Section 91(e)'s legislative history provides considerable assistance in construing this phrase because it highlights the statute's objectives, which can be summarized thus:

- (1) Providing a means by which older public school teachers could retire earlier;
- (2) Mitigating teacher shortages that early teacher retirement may have aggravated, by:
  - (a) Allowing school districts to employ retired, experienced teachers; and
  - (b) Providing a financial incentive for their return to service by lifting post-retirement earning limitations that would otherwise apply; and
- (3) Limiting the fiscal impact of this incentive by:
  - (a) Deferring its availability for two years following retirement; and
  - (b) Precluding “pension padding” by retired, rehired teachers.

I construe “critical shortage of certified teachers” consistent with these legislative objectives. *See Wing v. Comm’r of Probation*, 474 Mass. 368, 373, 43 N.E.3d 286, 290 (2015), quoting *Lowery v. Klemm*, 446 Mass. 572, 576-77845 N.E.2d 1124, 1128 (2006) and *Hanlon v. Rollins*, 286 Mass. 444, 447, 190 N.E. 606, 608 (1934) (in construing a statute, courts must apply “[t]he general and familiar rule . . . that a statute must be interpreted according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated”). In view of those objectives, “critical shortage of certified teachers” should not be construed as ever-moving goalposts, requiring so much analysis and documentation to the satisfaction of officials outside the school district as to effectively preclude the timely rehiring of retired educators under M.G.L. c. 32, § 91(e).

The lack of a statutory (or regulatory) definition of a “critical shortage of certified teachers”

may indicate a drafting oversight, but it may also indicate that this is a phrase of art or special meaning among educators. Even if that is the case, “critical shortage” appears to mean different things to different educators, depending upon the educational “school of thought” to which they subscribe. According to some educators, for example, teacher shortages that matter most are not those caused by an overall shortage of qualified teachers available to fill vacant position, but, instead, by insufficient teacher distribution. That may be the case in urban or rural schools serving low-income students where otherwise qualified teachers do not prefer to teach, or where there are relatively higher numbers of teachers with lower content-knowledge levels or who teach out-of-subject, or in schools or school districts where the teacher turnover rate is relatively high.<sup>19</sup> Other educators may assume that any teacher shortage is inherently “critical,” or may discern no significant difference between a “critical” teacher shortage or any other type of teacher shortage, such as the general teacher shortage that concerned the Massachusetts legislature and the governor after early teacher retirement legislation was proposed in 1999.<sup>20</sup> In other instances, a “critical” shortage of

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<sup>19/</sup> See, e.g., Scherer, M., ed., *Keeping Good Teachers* (Assoc. for Supervision and Curriculum Development, 2003), *passim*. A synopsis, and a link to the full-text online edition, of this book can be found at: <https://www.questia.com/library/119454709/keeping-good-teachers>

<sup>20/</sup> The lack of meaningful distinction between “critical” teacher shortages and teacher shortages in general is also suggested by federal policy regarding education loan forgiveness. For the past 30 years, teaching in a federally-designated “teacher shortage area” has qualified the borrower for loan repayment deferrals or debt forgiveness without any requirement that the teacher shortage in the designated area be “critical” under some federal student loan programs. During this same 30 year period, education loan repayment deferments of up to three years have been available for a student who borrowed funds to pay for higher education under the Federal Stafford Loan Program and Federal Supplemental Loans for Students Program, who is in the process of repaying these loans, and who teaches in a “nationwide Teacher Shortage Area” designated by the United States Department of Education. See 34 C.F.R. § 682.210(q). Under 34 C.F.R. § 674.53(c), educators who borrowed funds for high education under the federal Perkins Loan Program, and who are full-time teachers of mathematics, science, foreign languages, bilingual education or any other field of expertise where the

teachers has been defined in a relatively simple and pragmatic manner for educator recruitment purposes. In seeking to link prospective candidates for teaching and administrative positions with local school division (districts), for example, the Virginia Department of Education identifies “critical shortage areas” as “positions for which school divisions face the largest difficulty in filling with qualified educators,” which it identifies as special education and elementary education grades on grades pre-K to 6, English in grades 6-12, middle education in grades 6-8, career and technical education, mathematics and science in grades 6-12, and foreign languages, school counseling and health and physical education in grades 6-12. *See* <http://teachvirginia.org/critical.html> .

The current iteration of DESE’s critical shortage waiver regulations suggests, although without a formal definition of the phrase, that a “critical shortage of certified teachers available for employment in the district” exists when a school district cannot find such teachers despite a good-faith effort to do so. *See* 603 C.M.R. §§ 7.15(13)(b) and (c). If this is the definition DESE applies, it deemphasizes the difference, if any, between a teacher shortage and a “critical” teacher shortage. The regulations leave it to the school district to determine how it will search for certified teacher candidates in the district and when the search reveals no such candidate can be found in the district for a particular educator position other than a retired teacher, with DESE determining only whether the search was actually made in “good faith.” Seemingly, that determination by DESE would address only the sufficiency of the local search effort for non-retired certified teachers in the district, rather

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state educational agency determined there is a shortage of qualified teachers,” may qualify for the cancellation of up to 100 percent of their Perkins loan debt. *See Teacher Shortage Areas, Nationwide Listing, 1990–1991 through 2016–2017* (U.S. Dep’t of Education, Office of Postsecondary Education, Aug. 2016), <https://www2.ed.gov/about/offices/list/ope/pol/tsa.pdf>

than whether there exists in the district a “critical shortage of certified teachers.”

In view of these approaches, I conclude that the phrase “critical shortage of certified teachers available for employment in the district,” which is defined by neither M.G.L. c. 32, § 91(e) nor the DESE regulations (assuming their applicability for the sake of argument), means, consistent with section 91(e)’s legislative history, the same thing as a school district’s inability to find a certified, non-retired teacher within the district who qualifies for the teaching or administrative position in question despite a good-faith effort to do so. I still need to determine whether the Department of Education needed to make or review this determination in 2005 or 2006 (before the current version of the DESE regulations became effective), before a school district could employ a retired teacher pursuant to M.G.L. c. 32, § 91(e) and limitations on that teacher’s post-retirement earnings were lifted for that teacher, as section 91(e) provides.

*d. Per M.G.L. c. 32, § 91(e), Who Makes the “Critical Shortage” Determination?*

In addition to not defining “critical shortage of certified teachers available for employment in the district,” M.G.L. c. 32, § 91(e) does not limit the duration of a “critical shortage” or the duration of a retired teacher’s salaried re-employment by the school district based upon a critical shortage of certified teachers. Nor does section 91(e) state who determines that a critical shortage of certified teachers available for employment in a school district exists, how the determination is to be made, or whether any agency other than the school district must review or approve the school district’s determination.

In view of these ambiguities, I turn to extrinsic aids in construing section 91(e)’s phrase



“critical shortage of certified teachers available for employment in the district,” beginning with who determines that this critical shortage exists. In making this determination, it is helpful to examine another of section 91’s exceptions to post-retirement earnings in the state or municipal public sector—the “emergency service” exception provided by M.G.L. c. 32, § 91(a).

Under section 91(a), a retired public sector employee receiving retirement benefits payments may be employed in an “emergency service” position “not to exceed one year” based upon certification of an emergency for which there is a vacancy and for which there is no person available who has the “same or similar skill” that this position requires. This determination is made by “the appointing authority.”<sup>21</sup> In this respect, the emergency service exception provided by section 91(a) resembles the critical shortage exception that section 91(e) provides—both are based upon identified conditions of personnel shortages. The difference between them is that section 91(a) provides specifically that the determination of a shortage of persons with the same or similar skills that an emergency service position requires is made by the “appointing authority,” with specified exceptions,<sup>22</sup> while section 91(e) does not specify who determines that there exists a critical shortage of certified teachers available for employment in a school district that seeks to employ a retired

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<sup>21</sup>/ Section 91(a) has included iterations of these provisions since at least 1963. *See* St. 1963, c. 749, § 2.

<sup>22</sup>/ For example, under M.G.L. c. 32, § 91(a), the determination of a shortage of persons with the same or similar skills that an emergency position requires is made by the state personnel director if the position in question is subject to the civil service laws, or is held by a state employee and is not subject to the provisions of M.G.L. c. 31. The board of county commissioners makes the determination in the case of a position held by a county employee. In the case of a city employee, the determination is made by the city manager of a city with a Plan D or Plan E charter, and by the mayor in any other city. In the case of a town employee, the determination is made by the board of selectmen.

public school teacher under that section.

“Appointing authority” is not defined by section 91(a) or elsewhere in Chapter 32. Absent any different definition of “appointing authority” in Chapter 32, or any apparent reason why a different construction should apply in construing M.G.L. c. 32, § 91(a), I apply its usual and ordinary meaning, which is “any person, board or commission with power to appoint or employ personnel.” *See, e.g.*, M.G.L. c. 31, § 1 (definition of “appointing authority” in the civil service context). In Boston, the appointing authority for public school teachers and administrators is currently (as it was in 2005 and 2006) the Superintendent of the Boston Public Schools, who has exclusive authority over personnel decisions. *See* St. 1993, c. 71, § 87 (part of the Education Reform Act of 1993), *continuing in effect* St. 1997, c. 613; as to authority to appoint principals specifically, *see* M.G.L. c. 71, § 59B.<sup>23</sup> Ms. Kemp’s employment contracts for the 2005-06 and 2006-07 academic years (Exhs. B3 and K2), and for subsequent years as well, confirm that the BPS Superintendent was her appointing authority.

The personnel shortage situations to which the exceptions recited by sections 91(a) and (e) apply are similar. Both exceptions address the rehiring of retirees due to a personnel shortage. Under section 91(a), the appointing authority (or other person named specifically by the statute) decides whether there exists a personnel shortage in an emergency service position that justifies

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<sup>23</sup>/ For an overview of public school appointment authority in Massachusetts generally, and where it varies, in Boston specifically, *see* Mass. Dep’t of Elementary and Secondary Education, *Education Laws and Regulations; Advisory on School Governance*, Parts C (Hiring Practices and Policies) and E (Principals’ Contracts), rev. Nov. 1, 1995, <http://www.doe.mass.edu/lawsregs/advisory/cm1115gov.html>

rehiring a retired public employee under that section. Absent any language to the contrary in section 91(e), and because the exception section 91(e) provides involves (as does the section 91(a) exception) the rehiring of public sector retirees due to a personnel shortage, it is reasonable to conclude that a school district's appointing authority determines whether there exists a critical shortage of certified teachers available for employment in the district. Moreover, because section 91(e) refers to a critical shortage of certified teachers "in the district," the school district would be in the best position to know whether that shortage existed or not.

In analogizing the personnel shortage situation and critical shortage of certified teachers situation that sections 91(a) and (e) address, respectively, I presume that the legislature intended that some authority would make the relevant shortage determination, and that, per section 91(a), the legislature knew how to specify an authority different than the appointing authority to make the determination if that is what it wanted to do. Absent any such specified exception in section 91(e), there is no reason apparent in the section's language or in the legislative history why the school district, which would make an emergency personnel shortage determination under section 91(a) as the appointing authority, would not, in the same capacity, determine the existence of a critical shortage of certified teachers available for employment in a school district under section 91(e).

I conclude, therefore, that under M.G.L. c. 32, § 91(e), the BPS Superintendent determined, in 2003 and in subsequent years through at least 2006, whether or not there existed in Boston a "critical shortage of certified teacher available for employment" in that school district, the predicate for employing a retired certified teacher under the statute.

*e. Critical Shortage Determination: What Requirements Applied in 2005 and 2006?*

As discussed above (at 35-40), the current Department of Elementary and Secondary Education regulations require that a school district superintendent apply to it for a waiver allowing the employment of a retired educator as a teacher, administrator or support personnel in the district based upon a “critical shortage of certified teachers available for employment in the district.” 603 C.M.R. §§ 7.15(13)(b) and (c). The Boston Retirement Board relies upon these regulations in asserting that Ms. Kemp needed a state education agency waiver allowing her employment as Fenway High School’s salaried headmaster pursuant to M.G.L. c. 32, § 91(e), and that because she did not have the waiver in 2005 and 2006, she remained subject to M.G.L. c. 32, § 91(b)’s limitations on post-employment earnings. However, the Board stops short of asserting affirmatively that these regulations, or a previous iteration of them, applied in 2005 or 2006.

It is not clear that they did or, thus, that Department of Education approval was needed in either year before a school district, such as BPS, could employ a retired teacher under section M.G.L. c. 32, § 91(e). The search for answers to these questions raises more questions still—why are the critical shortage waiver requirements of 603 C.M.R. §§ 7.15(13)(b) and (c) placed where they are, and how long have they been there? Answering those questions is material to determining whether the regulations apply here at all.

The critical shortage waiver requirements recited by 603 C.M.R. §§ 7.15(13)(b) and (c) relate to a section of M.G.L. c. 32, § 91(e), that allows retired teachers to be rehired based upon a critical shortage of non-retired certified teachers and, if this hiring occurs more than two years after

retirement, to earn more post-retirement than is otherwise allowed under M.G.L. c. 32, § 91(b). Section 91(e) is part of the Commonwealth's retirement statute and relates primarily to retirement issues, in particular an exception to Chapter 32's limitations on post-retirement earnings by retired public school educators. For this reason alone, regulations that affect the implementation of section 91(e), and its "critical shortage" exception to post-retirement earnings limitations, appear oddly placed in a section of the Department of Elementary and Secondary Education's regulations entitled "Regulations for Educator Licensure and Preparation Program Approval." *See* 603 C.M.R. § 7.00. DESE's critical shortage requirements also appear oddly placed in a regulation that addresses teacher licensing requirement waivers, 603 C.M.R. § 7.15(13), since a retired teacher hired under M.G.L. c. 32, § 91(e) is not exempted by that statute from teacher licensing requirements. Indeed, the critical shortage waiver requirements of 603 C.M.R. § 7.15(13)(b) and (c) immediately follow a subsection of 603 C.M.R. § 7.15(13) that allows DESE's Commissioner to exempt a school district from the requirement of M.G.L. c. 71, § 38G that only licensed or preliminarily-licensed educators may be employed as a public school teachers or administrators in Massachusetts. *See* 603 C.M.R. § 7.15(13)(a). 603 C.M.R. § 7.15(13)(a) is not related to 603 C.M.R. § 7.15(13)(b) and (c), thus, in terms of objective or purpose.

There are other factors as well that suggest an anomalous placement of the critical shortage waiver requirements in the DESE regulations. 603 C.M.R. § 7.00 lists only education statutes as having authorized its promulgation—M.G.L. c. 69, §§ 1B, 1J and 1K, as amended by St. 2010, c. 12, § 3, and M.G.L. c. 71, § 38G. Chapter 32 is not listed as an authority under which these regulations were promulgated. (*See* above at 35-38.) 603 C.M.R. § 7.15(13)(a), in particular,

references only an education statute, M. G. L. c. 71 § 38G, and the requirements of that statute regarding the licensing qualifications of public school educators. In contrast, 603 C.M.R. §§ 7.15(13)(b) and 603 C.M.R. § 7.15(13)(c), which address “waivers” allowing the employment of retired teachers based upon critical teacher shortages, is unrelated to educator licensure and proficiency in subject-matter areas and teaching skills, and neither regulation refers to an education statute. Also in contrast with how the DESE regulations define words and phrases pertinent to the teacher license waiver made available by 603 C.M.R. § 7.15(13)(a), neither 603 C.M.R. § 7.15(13) nor the definitions section of the DESE regulations, 603 C.M.R. § 7.02, defines “critical shortage of certified teachers available for employment” in a school district, or even “critical shortage.”

If the anomalous placement of these regulations is puzzling, as well as unhelpful in discerning the meaning of the “critical shortage” to which M.G.L. c. 32, § 91(e) refers, the critical shortage regulations are even less helpful in disclosing when they were added to the state education regulations and, thus, whether they apply to Ms. Kemp’s employment as headmaster in 2005 and 2006.

The current version of 603 C.M.R. § 7.15 was revised on May 2, 2016. Among the authorizing statutes it lists is a 2010 amendment of M.G.L. c. 69— St. 2010, c. 12, § 3, which amended Chapter 69, section 1J and 1K by allowing the DESE Commissioner to designate a school as underperforming and develop a “turnaround” plan for the school. Although St. 2010, c. 12, § 3 does not address critical shortage waivers for employing retired teachers, 603 C.M.R. § 7.15’s reference to this session law suggests that the current version of this regulation dates back to at least 2010, when this session law was enacted.

A memorandum issued in 2010 by the DESE commissioner at that time, Mitchell D. Chester, confirms that the agency had in effect during that year, as it does today, a section of its regulations addressing both waivers of educator licensing requirements by school districts pursuant to M.G.L. c. 71, § 38G, part of the Commonwealth’s education statute, and critical shortage waivers allowing school districts to hire retired educators pursuant to M.G.L. c. 32, § 91(e), part of the Commonwealth’s retirement statute. The memorandum cites the applicable regulation as 603 C.M.R. § 7.14(13), which was the apparent predecessor of 603 C.M.R. § 7.15(13).<sup>24</sup> See “Legal Requirements and Careful Hiring Practices – Massachusetts Department of Elementary and Secondary Education,” a memorandum addressed to “Superintendents of Schools, Charter School Leaders, Directors of Approved Day or Residential Schools, Educational Collaboratives and Other Interested Parties,” dated August 20, 2010, <http://www.doe.mass.edu/news/news.aspx?id=5685>.

Although Commissioner Chester’s memorandum was issued subsequent to 2005 and 2006, the years at issue here, it offers the only explanation by the agency I have been able to find for including regulatory requirements regarding “critical shortage waivers” under M.G.L. c. 32, § 91(e) in a regulatory subsection addressing education licensing waivers.

Furnishing this explanation was not the memorandum’s main purpose. The memorandum focused primarily upon the requirement of M.G.L. c. 71, § 38G that school districts employ only licensed educators as teachers or professional support personnel. It noted that a school district could request, from the DESE Commissioner, a one-year waiver from the requirement to employ licensed

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<sup>24</sup>/ In the current version of 603 C.M.R. 7.00, 603 C.M.R. § 7.14(13) is entitled “Endorsements,” and addresses “endorsements” awarded to educators for specialized skill and knowledge.

educators if its search for a qualified and appropriately licensed candidate was not successful. It instructed that:

Waivers are generally required for individuals whose license is not yet approved, individuals teaching outside of their licensure area for more than 20 percent of their time schedule, and individuals who may have been employed for the validity period of their license (for example, a teacher employed for five years under a Preliminary license who has not yet advanced to the Initial license stage).

To qualify for a waiver, a district must maintain documentation of its efforts to hire an appropriately licensed candidate. Those documents are reviewed by the Department, and should include the following:

1. All actions taken, beyond internal postings, to recruit an appropriately licensed person for the position (for example, letters sent to placement officers/agencies, participation in a job fair, and copies of advertisements placed in the media).
2. The name and license number of any appropriately licensed educators who applied for the position, an explanation of why they were not deemed qualified to perform the duties, and/or the name and license number of any appropriately licensed candidates who declined the position.

This type of waiver concerned the educator licensing requirement of M.G.L. c. 71, § 38G exclusively. The Superintendent's August 20, 2010 memorandum referred to it as a "hardship waiver" from the educator licensing requirement. In addressing this type of waiver, the 2010 memorandum made no mention of the retirement statute, M.G.L. c. 32. In contrast, the memorandum's next section, entitled "critical shortage waivers," addressed the hiring of educators under a section of the retirement statute, M.G.L. c. 32, § 91(e), who were licensed appropriately but who had retired. Perhaps for this reason, the memorandum described the hiring of a retired educator under section 91(e) as being "[i]n addition to hardship waivers under M.G.L. Chapter 71, s. 38G" (emphasis added). Stated another way, the memorandum acknowledged that a critical shortage



waiver was a matter of retirement law, one involving no waiver of any educator licensing requirements, which *was* a matter within DESE's purview in implementing the Commonwealth's education law, particularly M.G.L. c. 71, § 38G.

Turning next to the specifics of a critical shortage waiver, the memorandum stated in pertinent part that:

[S]tate law also provides for "critical shortage waivers" that in certain circumstances permit a school district to employ a retired educator beyond the usual limits. M.G.L. Chapter 32, s. 91 provides generally that a former teacher or administrator who is collecting a retirement allowance from the Massachusetts Teachers' Retirement System, may work for a public employer in Massachusetts only for a maximum of 960 hours in a calendar year. Additionally, the salary that the person receives from this position, when added to his or her retirement allowance, cannot exceed the salary that is being paid for the position from which s/he retired.

*Pursuant to M.G.L. Chapter 32, s. 91(e), the earnings limitations on re-employment of retirees in Massachusetts public schools are eased in the event of a "critical shortage" in a position as determined by the Department of Elementary and Secondary Education. Regulation 603 CMR 7.14 (13) allows the Commissioner to deem that a district has a "critical shortage" upon the request of the superintendent and demonstration that the district has made a good-faith effort to hire non-retirees and has been unable to find them. The "critical shortage" application process is similar to that for requesting a hardship waiver.*

School districts that are interested in hiring a retired educator to fill critical shortage position must complete a Request for Waiver form and provide the required supporting documentation showing that a good faith effort was made to hire a non-retired educator. As a reminder, districts need to advertise for the critical shortage position in a manner that reaches a sufficiently wide range of the public (internal postings alone are not acceptable) and provide a list of all applicants' names along with the reason(s) they were not qualified for the position in question.

*Id.* (emphasis added).

DESE appears to have read M.G.L. c. 32, § 91(e) as requiring that it determine the existence of a "critical shortage of certified teachers available for employment in the district," or at least as to

employment in a particular position, before a retired teacher could be rehired. I have already noted, however, that section 91(e) recites no such requirement, and also does not require that a “critical shortage determination” follow any particular procedure, such as what the DESE regulations currently require at 603 C.M.R. § 7.15(13). Since its enactment in 2000, moreover, M.G.L. c. 32, § 91(e) has included no language directing DESE or its predecessor agency (DOE), or any other agency, to promulgate implementing regulations. 603 C.M.R. § 7.00 has, since 2010 at least, cited only education statutes, and not section 91(e), as the authorities upon which that section of the DESE regulations is based. None of those education statutes directs DESE, or directed the Department of Education, to promulgate regulations implementing M.G.L. c. 32, § 91(e).

I have found no caselaw addressing this incongruity or, the incongruity aside, whether the critical shortage waiver requirements now found at 603 C.M.R. §§ 7.15(13)(b) and (c) applied in 2005 or 2006, or before. The only DALA decision I have found on point applied these requirements with respect to a retired school administrator’s employment that began in 2009. *See Borin v. Massachusetts Teachers’ Retirement System*, Docket No. CR-14-53, Decision at 13-15 (Mass. Div. of Admin. Law App., Oct. 2, 2015).<sup>25</sup>

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<sup>25</sup>/ *Borin* sustained a retirement system’s calculation, under M.G.L. c. 32, § 91(b), of a retired school administrator’s overearnings as an out-of-district, part-time special education coordinator for a school district between 2009 and 2011 (he had retired on July 1, 2008). It did so based upon his total retirement allowance, rather than upon the amount he received after a portion of the retirement allowance was paid to his former spouse pursuant to a qualified domestic relations order, and without applying a waiver of post-retirement earnings limitations for employment pursuant to M.G.L. c. 32, § 91(e). Although the retired educator had asked the school district superintendent to request a critical shortage waiver on his behalf, the school department did not submit the waiver request to DESE, and consequently DESE did not issue a waiver. *Borin* held that “a school district may hire a retired teacher, but only if the district tries first to hire someone who is not retired, submits a critical shortage waiver [application] to the Commissioner of the Department of Education, and the Department grants the waiver,” and that a

*Borin* presents, however, no facts showing confusion regarding the status of the retiree's critical shortage waiver application during his post-retirement employment, and presents no issue as to whether DESE's requirements governing critical shortage waivers were in place before 2009. There was also no issue in *Borin* as to whether DESE had properly processed a critical shortage waiver application under its regulations because, unquestionably, it received none from the school district. Here, in contrast, confusion reigned from the outset in 2003, and for eight years afterward, regarding the action that the Department of Education had taken regarding Superintendent Payzant's request for approval to employ Ms. Kemp pursuant to a critical shortage determination he had made. It is also unclear whether DOE had in place, in 2005 and 2006, requirements similar to those found in DESE's current critical shortage waiver regulations and that apparently applied in 2009, per *Borin*.

There is no evidence in the record of any Department of Education regulations concerning critical shortage waivers that were effective in 2005 or 2006 (or before) and governed Ms. Kemp's employment as Fenway High School's headmaster during those years. The record and the versions of the regulations before me do not show that the critical shortage waiver requirements currently found in 603 C.M.R. § 7.15(13)(b) and (c) applied prior to 2009. I cannot simply assume that these requirements existed in 2005 or 2006 because Ms. Kemp and the Boston Retirement Board believed they did, or because Boston Public Schools personnel assumed they did when they attempted to confirm, and then reconstruct, Ms. Kemp's "waiver history" between 2003 and 2012.

Because there is before me no version of the regulation that was in force during the years in

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waiver under section 91(e) is not effective until DESE issues it.

question, there is no critical shortage waiver regulation to apply here, and none to guide me in construing “critical shortage of certified teachers available for employment in the district” as section 91(e) uses this phrase, or in determining whether Ms. Kemp needed a critical shortage waiver from the state education agency for her to be employed in 2005 or 2006 pursuant to section 91(e) and, as a result, be relieved of post-retirement earnings limitations that would otherwise apply, as section 91(e) allows.

*f. Critical Shortage Determination by the BPS Superintendent*

*i. Superintendent Payzant’s 2003 Critical Shortage Determination*

That leaves M.G.L. c. 32, § 91(e) as the only controlling authority in determining whether Ms. Kemp was lawfully employed under this statute in 2005 and 2006 and was exempt, as a result, from the limitations that would have otherwise applied to her post-retirement earnings during those years. I have concluded that the statute left it to each school district’s superintendent to determine, in 2003 and in the years that followed through at least 2006, whether there existed the sole prerequisite for employing a retired educator pursuant to section 91(e)—a “critical shortage of certified teachers available for employment in the district” in the position at issue. I must now determine, therefore, whether Superintendent Payzant made this determination in 2003, before the Boston Public Schools employed Ms. Kemp as Fenway High School’s headmaster, and, if so, whether that determination remained in effect through at least the end of the 2006-07 school year.

Superintendent Payzant’s April 16, 2003 memorandum (Exh. K3) explained how he

determined that Ms. Kemp, a retired BPS teacher and high school department chair, should be appointed as Fenway High School's headmaster pursuant to a "critical shortage waiver" during the summer of 2003. After identifying the "position profile" for a Fenway headmaster, which included the education, experience and skills the headmaster would need, Fenway High School's trustees contracted a search consultant to identify qualified candidates. (*See* Finding 11.) As a result of this process, the trustees identified Ms. Kemp as the candidate who best matched the headmaster "position profile," a decision with which the superintendent agreed and that he endorsed, based upon her education, skills and teaching and administrative experience in the Boston public schools that showed her to be "the ideal candidate" for the Fenway High School headmaster position. (*Id.*)

The procedure that Superintendent Payzant's memorandum identified sufficed, under M.G.L. c. 32, § 91(e), to establish that there existed a "critical shortage of certified teachers available for employment" in the district, the predicate for employing a retired educator under that statute. Section 91(e) does not require any more formal findings.

Section 91(e) also does not require that any authority other than the school district superintendent (or equivalent authority) confirm that the critical shortage exists. By analogy to M.G.L. c. 32, § 91(a), which provides an "emergency service" exception to Chapter 32's limitations upon post-retirement employment and earnings (*see* above at 32-33 and 56-59), I have concluded that the BPS superintendent, as the appointing authority for the Boston public schools, determines the existence of critical shortage of certified teachers in Boston for the purpose of rehiring a retired certified teacher under section 91(e). However, section 91(a) does not require a formal determination of an emergency personnel shortage, and it furnishes, thus, no justification for

concluding that the legislature intended to require a formal determination of a critical shortage of certified teachers available for employment in a district before the district could rehire a retired educator. I have also determined, in view of the statute's history, that there was no functional difference between a "critical" teacher shortage and teacher shortages when section 91(e) was enacted in 2000, because teacher shortages were regarded by educators and legislators alike as critical *per se*. Superintendent Payzant needed to make, therefore, no more formal critical shortage determination than he did before BPS could employ Ms. Kemp as a salaried headmaster pursuant to M.G.L. c. 32, § 91(e).

I conclude that Superintendent Payzant's April 16, 2003 memorandum was, in sum and substance, a determination that there was in Boston, at the time, a critical shortage of certified teachers available for employment—in particular, a critical shortage in Boston of certified teachers with the skills and experience that Fenway High School's headmaster needed, in the opinion of the school's board of trustees and of the BPS Superintendent as well. Notably, Superintendent Payzant's memorandum did not request that the Commissioner of Education, or the Department of Education, make this determination. It was implicit in the memorandum, however, that Superintendent Payzant had already made it. Neither of the parties has disputed that he did so. Nor do they dispute that the superintendent did so pursuant to M.G.L. c. 32, § 91(e), and for the purpose of addressing a critical shortage of certified teachers available for employment in Boston as Fenway High School's headmaster. Both parties assumed instead, as Superintendent Payzant appeared to have assumed when he wrote the April 16, 2003 memorandum, that his determination had to be confirmed or approved by the state Department of Education. Section 91(e) recited no such requirement, however,

and the assumption of any such requirement is unsupported by the evidence in the record, the regulatory history, or the language of section 91(e) itself.

*ii. Duration of the Superintendent's 2003 Critical Shortage Determination*

Although the DESE regulations currently in effect limit the duration of a critical shortage determination and hiring to one year, *see* 603 C.M.R. § 7.15(13)(b), third sentence, M.G.L. c. 32, § 91(e) imposes no limits on the duration of a critical shortage determination or a retired educator's employment based upon it. This reflects a deliberate choice on the legislature's part. In contrast, M.G.L. c. 32, § 91(a) limits, to one year, employment in an "emergency service" position based upon certification of an emergency for which there is a vacancy and for which there is no person available who has the "same or similar skill" that this position requires. This one-year limitation is commensurate with the duration of an "emergency" to which fire, police, disaster response, hospital and ambulance personnel (emergency service personnel) respond—as a matter of common sense, an emergency to which emergency personnel respond is of shorter duration than non-emergency situations.

Certified teachers are not emergency personnel, however, and certified teacher shortages, whether "critical" or otherwise, are not specified as emergencies anywhere in M.G.L. c. 32, § 91. Although it is not a determinative point here, I note that teacher shortages may last well beyond one year, particularly because they reflect the supply of, and demand for, teachers "over time," which depends, in turn, upon long-term public school pupil enrollment trends that may be measured over periods of ten years or more. *See, e.g.*, Levin, J., Berg-Jacobson, A., Atchison, D., Lee, K., and

Vontsolos, E., *Massachusetts Study of Teacher Supply and Demand: Trends and Projections* (American Institutes for Research, Dec. 2015).<sup>26</sup>

If the legislature had intended that a “critical” shortage of certified teachers be classified as a type of emergency personnel shortage, it could have so provided, and section 91(a) shows that it knew how to do so—for example, it could have added language to section 91(a) bringing a “critical shortage of certified teachers” within the purview of the emergency personnel shortages it addresses, or it could have employed, in section 91(e), the phrase “emergency shortage of certified teachers available for employment in a district.” It did not do so, however.

For these reasons, I find no basis for presuming that a determination of a “critical shortage” of certified teachers available for employment in a school district may last no longer than one calendar or academic year. Reading this limitation into section 91(e) would effectively amend the statute, something only the legislature can do.

I consider now whether the BPS Superintendent’s critical shortage determination prior to Ms. Kemp’s employment as Fenway High School’s headmaster in July 2003 extended beyond the 2003-04 academic year.

I begin with what Superintendent Payzant’s April 16, 2003 memorandum requested. The memorandum did not refer to section 91(e) specifically, and did not use the phrase “critical shortage waiver.” (*See* Finding 11.) Clearly, however, the superintendent’s memorandum was not requesting

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<sup>26/</sup> This report was prepared for the Department of Elementary and Secondary Education, and may be viewed at DESE’s website:  
<http://www.doe.mass.edu/research/reports/2015/12MATeacherSupplyDemand.pdf>



a waiver of educator certification requirements, a matter that was left to the Department of Education commissioner's discretion by the Education Reform Act of 1993, particularly M.G.L. c. 71, § 39G. Whether or not any education statute or M.G.L. c. 32, § 91(e) required him to do so, the superintendent requested that DOE approve Ms. Kemp's employment as Fenway High School's headmaster pursuant to section 91(e). He did so based upon his determination that there existed, in Boston, a critical shortage of certified teachers available for employment in that position.

On its face, Superintendent Payzant's memorandum requested a "waiver" by DOE for Ms. Kemp's employment as salaried headmaster for one year (2003-04) meaning, presumably, a waiver, during that period, of M.G.L. c. 32's general limitations on post-retirement earnings by a retired teacher employed pursuant to section 91(e). However, M.G.L. c. 32, § 91(e) left this pension-related decision to a school district's appointing authority—here, the BPS Superintendent—and not to the state Department of Education. The memorandum did not state that Superintendent Payzant had relinquished his statutory authority to make this decision, or that he had precluded the renewal of Ms. Kemp's employment as Fenway High School's headmaster after the 2003-04 academic year.

Beyond the email confirmation to Ms. Kemp by BPS's human resources department in late 2012 that the Department of Education had issued a "waiver" for 2003-04, the record is without any evidence that the Department actually issued a "waiver," or any other written response, to Superintendent Payzant's April 16, 2003 memorandum. The record also includes no evidence that Superintendent Payzant, or his successor, withdrew his determination to employ Ms. Kemp as Fenway High School's headmaster after the 2003-04 school year ended. Indeed, Ms. Kemp continued as Fenway's headmaster through June 30, 2006, pursuant to headmaster employment

agreements that Superintendent Payzant signed and, from July 1, 2006 through June 30, 2007, pursuant to a headmaster employment agreement that BPS Interim Superintendent Mike Contompasis signed. (*See Findings 16 and 19.*) None of these employment agreements mentioned a critical shortage waiver, or conditioned Ms. Kemp's employment as Fenway's headmaster upon a critical shortage waiver approval or issuance by the Commissioner of Education or DOE. More to the point here, none of these agreements stated that the critical shortage determination under which Ms. Kemp was employed as Fenway High School's headmaster in July 2003 had been terminated or modified in any way. (*See Exhs. K2 and K3.*)<sup>27</sup>

I conclude that Superintendent Payzant's April 2003 critical shortage determination relating to Ms. Kemp's employment as Fenway High School's headmaster continued in effect through 2006 and, more precisely, to the end of the 2006-07 school year at least. I do so because (1) M.G.L. c. 32, § 91(e) did not limit the duration of critical shortage determinations to one year, prohibit their renewal or extension, or prescribe the substance, content or format of a critical shortage determination; (2) the superintendent's determination, as shown by his April 16, 2003 memorandum, was, in sum and substance, a critical shortage determination with respect to the Fenway High School headmaster position in which BPS sought to employ Ms. Kemp; (3) the determination was not limited in duration to the 2003-04 school year, even though the superintendent requested that DOE approve a critical shortage waiver for that year only; (4) there is no evidence that the superintendent

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<sup>27/</sup> The headmaster employment agreement through June 30, 2005 is not in the record. However, there is no dispute that Ms. Kemp was employed as Fenway's headmaster between July 1, 2004 and June 30, 2005 under an employment agreement similar to those used in subsequent years. *See Exhs. K2, K3.*

or his successor withdrew the critical shortage determination when the 2003-04 school year ended; (5) Ms. Kemp's headmaster employment contracts did not condition her employment upon critical shortage waiver issuance or approval by the Commissioner of Education or the Department of Education; and (6) Ms. Kemp's continued employment as Fenway High School's headmaster after the 2003-04 school year under substantially similar headmaster employment contracts suggests strongly that Superintendent Payzant's 2003 critical shortage determination, and Ms. Kemp's selection as headmaster based upon it, was extended rather than withdrawn or left to expire, even though the contracts themselves say nothing about critical shortage waivers.

Ms. Kemp had, from the beginning of her employment as Fenway High School's headmaster in July 2003 through at least the end of the 2006-07 school year on June 30, 2007, the benefit of a determination by the BPS superintendent that there existed during that time a critical shortage of certified teachers in Boston. That sufficed, under M.G.L. c. 32, § 91(e), for her post-retirement employment as the school's salaried headmaster during that time pursuant to section 91(e). It also sufficed to exempt Ms. Kemp from post-retirement earnings limitations that would have otherwise applied to the headmaster salary and teacher pension benefits payments she received in 2005 and 2006, as well as in 2003 and 2004.

*4. Any Critical Shortage Waiver Determinations by DOE Regarding Ms. Kemp's Employment in 2005 and 2006 were Likely Made with the Computerized System It Used to Determine Educator Licensure Waiver Requests and that the Courts Have Invalidated as Applied*

Even if the Department of Education had regulations similar to 603 C.M.R. § 7.15(13)(b) and

(c) in place in 2005 and 2006, it is unclear whether, and, if so, how, the agency made critical shortage waiver determinations as to Ms. Kemp's employment during those and earlier years. The trail of emails in the record reveals that neither DOE nor the Boston Public Schools could readily determine whether the state education agency had reviewed and decided Superintendent Payzant's 2003 waiver request on Ms. Kemp's behalf. On several occasions, BPS administrators could not confirm that Superintendent Payzant's April 16, 2003 waiver request was actually sent to DOE at that time (*see* Finding 11), or whether DOE had confirmed its alleged "verbal authorization" for her employment for the 2003-04 school year. (*See* Finding 12.) BPS administrators were also unable to obtain timely confirmation from DOE, in writing, that it had acted upon waiver requests allowing Ms. Kemp's continued employment as Fenway High School's headmaster pursuant to a critical shortage waiver. (*See* Findings 14-15 as to a waiver for 2003-04; and Findings 20-25 as to a waiver for 2007-08.) In addition, despite the "waiver history" that the BPS Human Resources Department's email conveyed to Ms. Kemp on November 27, 2012, several years after Ms. Kemp first inquired about her waiver status (*see* Finding 39), it is unclear whether BPS actually found any of the waivers the email listed as "approved" (for 2003-04, 2007-08 and 2008-09), or on what basis the author of the November 27, 2012 email concluded that waivers for Ms. Kemp's employment in other years, including 2005 and 2006, were either not granted or not requested.

With no evidence before me showing that the Department of Education used a different procedure, the process by which DOE would have determined critical shortage waiver requests in 2005 and 2006 (or even in 2003 and 2004) was likely the same one that it used at that time to determine requests to waive teacher licensure requirements, and that the Massachusetts courts

invalidated as applied. *See Nordberg v. Dep't of Education*, 29 Mass. L. Rptr. 163, 2011 WL 6351860 (Super. Ct., Worcester Cty., 2011) (Douglas H. Wilkins, J.)(granting partial summary judgment invalidating DOE's computerized waiver system as implemented, but also granting judgment on the pleadings denying award of monetary damages against DOE Commissioner), *aff'd*, 87 Mass. App. Ct. 1101, 22 N.E.3d 178, 2015 WL 114916 (2015) (unpublished op. pursuant to Mass. Rules App. Prac. Rule 1:28). I examine that procedure next.

Prior to 2012, DOE used a computerized system to process, and grant, thousands of requests to waive state educator certification and licensing requirements. DOE implemented this process in mid-2002 pursuant to its authority, under M.G.L. c. 71, § 38G, to waive these requirements.<sup>28</sup> *See Nordberg*, 2011 Super. Ct. Dec., 20 Mass. L. Rptr 163 \*1, next-to-last para. However, although DOE's statutory authority to review and decide educational licensure waiver requests was beyond dispute, the manner in DOE used its computerized system to process these requests proved problematic. In essence, a request to waive licensure requirements for an educator a school district wished to employ was made by the district's superintendent using a DOE-prescribed form. By signing the form, the superintendent certified, under the penalties of perjury, that he had "taken all usual actions, beyond internal postings, to recruit a licensed and qualified person" for the position in question; that, if requested, he would submit copies of the advertisements by which the position opening was posted in newspapers and placement offices, and online; and that he was "prepared to submit a list of any licensed applications who declined the position AND documentation as to why

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<sup>28</sup>/ *See* above at 37 n. 16.

any licensed applicants were not qualified to perform the duties” of the position for which a licensure waiver was requested. *Id.*; 20 Mass. L. Rptr 163 \*2, first para. (emphasis in original). The Superior Court decision relates that DOE’s computerized waiver system “[did] not request or review the underlying list or documentation supporting the district’s representations.” *Id.*; 20 Mass. L. Rptr 163 \*2, second para. If the school district superintendent requesting the licensure waiver signed the waiver request—and therefore made the preprinted certifications—the computerized waiver system issued the waiver automatically. *Id.*; 20 Mass. L. Rptr 163 \*2, third para.<sup>29</sup> As Superior Court Associate Justice Douglas H. Wilkins described this process:

If the superintendent requesting the waiver makes these certifications, the CWS (computerized waiver system) automatically issues the waiver. Accordingly, a superintendent who determines—honestly or not and with or without bias or favoritism—that all usual actions were taken and that a licensed applicant is not qualified, receives a waiver even if the Commissioner [of the Department of Education] (or delegee) would have disagreed if he or she had reviewed the documentation. The CWS always accepts the superintendent’s statements as true; nothing in the certification permits a determination by the Department (as opposed to the District’s superintendent) whether licensed, qualified applicants have applied and should be hired in lieu of granting a waiver.

*Id.*

Because this process involved no discretionary decisionmaking by an agency official, the Superior Court concluded that DOE had impermissibly delegated its statutory authority to grant educator licensure waivers to a computerized system with no demonstrable capability of exercising judgment or engaging in meaningful review. For this reason, the court granted a summary judgment

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<sup>29</sup>/ *Nordberg* does not reveal whether these automatic waiver grants were sent to the superintendents who requested them and, if they were, whether they were sent by mail or electronically, and whether DOE maintained records showing the action that it took on the waiver requests.

establishing that DOE's computerized waiver system as implemented violated M.G.L. c. 71, § 58G. *See Nordberg*; 2011 Super. Ct. Dec., 20 Mass. L. Rptr 163 \*6. In affirming the Superior Court's decision, the Appeals Court added that the computerized waiver system as implemented also violated DOE's own education licensure waiver regulation, 603 C.M.R. § 7.14(13), because it granted waivers "without an opinion of the DOE regarding whether failure to grant the waiver would work 'great hardship,' whether the 'district has made a good faith effort to hire licensed or certified personnel,' and whether the District is 'unable to find' a qualified licensed applicant," as the regulation requires. *Nordberg*, 2015 Appeals Court decision, 2015 WL 114916 at \*5.

DOE changed its waiver review process subsequently, and, as the Appeals Court's *Nordberg* decision notes, the Superior Court approved those changes in 2012. *Id.*; 2015 WL 114916 at \*2 n. 3.<sup>30</sup> Those changes applied from 2012 forward. They did not implement, consequently, a retroactive

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<sup>30</sup>/ The Appeals Court's 2015 *Nordberg* decision does not identify the changes to the educator licensure waiver system that the Superior Court approved, and the Superior Court's order is neither in the record nor readily available. Some of the changes were summarized in a memorandum that DESE Commissioner Mitchell D. Chester issued shortly after the Superior Court issued its 2012 order. The memorandum can be viewed at the DESE website: <http://www.doe.mass.edu/news/news.aspx?id=6923#>.

The memorandum notes the Superior Court's holding, in its 2011 *Nordberg* decision, that DOE's computerized waiver system was deficient because it did not "obtain and evaluate all the necessary information" from a school district superintendent requesting a educator licensing or certification waiver needed to evaluate the request under the education licensure statute, M.G.L. c. 71, § 38G, and, instead, granted the waiver "automatically based on the information provided." It also notes Judge Wilkins's order, on December 8, 2011, that DOE bring its waiver process into compliance with the statute, and adds that on June 12, 2012, the Worcester Superior Court "accepted the Department's plan regarding a new educator licensure waiver system."

The memorandum then goes on to describe the elements of the new system. In addition to having to certify that the school district made a good-faith effort to hire licensed personnel but had been unable to find a qualified, licensed applicant for the position it sought to fill, the superintendent seeking an education licensure waiver would have to include documentation of these efforts— "[p]roof of specific actions taken to recruit a licensed educator, such as external job postings within the past six months;"

fix of the legally-defective automatic review process by which DOE had processed educational licensure waiver requests during prior years.

*Nordberg* did not address critical shortage waiver processing or the system DOE used to process them. In addition, neither of the *Nordberg* decisions describes what software DOE's

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“[t]he name and license number of all appropriately licensed educators who applied for the position, an explanation of why they were not deemed qualified to perform the duties, and/or the name and license number of any appropriately licensed candidates who declined the position;” “[a]n explanation why the unlicensed candidate is qualified for the position;” and “[p]roof that the candidate has a bachelor's degree, unless the applicable license is a vocational license that does not require a bachelor's degree.” Once DESE received this information, it would “be made ‘ready for review’ by a member of the Licensure Office.”

The new process described by the 2012 DESE memorandum, or at least the elements of it that the memorandum described, does not appear to differ in substance from the waiver system that DOE had in place prior to the Superior Court's 2011 *Nordberg* decision, except in one respect. Previously, the district superintendent's certifications as to actions taken to recruit a licensed and qualified person for the educator position in question, and the availability for DOE's review of documentation showing how this recruitment was carried out (including job position announcements and the list of licensed applicants who declined the position) were simply fed into the computerized waiver system, which automatically issued the waiver based upon the superintendent's verifications without any review of the underlying documentation. *Nordberg*; 29 Mass. L. Rptr 163 at \*2. Per DESE Commissioner Chester's 2012 memorandum, the underlying documentation had to be submitted to DESE along with the district superintendent's waiver application, and would be part of the waiver application package that DESE reviewed, and it would also be scanned into “ELAR,” DESE's education licensing database.

It is not clear from the memorandum, however, whether the mere receipt of this documentation and its presence in the database would, together with the district superintendent's waiver application form and certifications, trigger an automatic issuance of the requested waiver (as the certifications alone had done prior to the Superior Court's 2011 *Nordberg* decision), or whether DESE administrators or other personnel with discretionary authority would review the documentation and determine whether or not to issue the waiver. The latter is more reasonably assumed because that would correct the defect in the automated computerized waiver system that had prompted its invalidation as applied—the improper delegation of discretionary waiver-related decisionmaking under M.G.L. c. 71, § 38G to a computerized system with no demonstrated ability to exercise that discretion. It is reasonable to assume, as well, that DESE presented to the Superior Court, for its approval, a revised waiver evaluation process that complied with the statute, as the court's December 2011 order had directed it to do, and that the court would not have approved anything less than what its earlier order required.



computerized waiver system used, how it was programmed, or whether it was (or could have been) used to process other types of waiver requests DOE received from school district superintendents, such as critical shortage waivers. The circumstances present here suggest, however, that it did so. Since at least 2009, the regulatory requirements for submitting and processing educator licensure waiver requests and critical shortage waiver requests have been grouped in the same section of the state education agency's regulations. Per the Appeals Court's *Nordberg* decision, DOE implemented its computerized educational licensure waiver review process to comply with its own regulations. There is no apparent reason why it would not have done so as well to comply with its own regulatory requirements regarding critical shortage waiver requests. Additionally, *Nordberg* states that the office within the state education agency that processed education licensure waiver requests was the same office to which BPS officials directed inquiries regarding Ms. Kemp's employment under critical shortage waivers. As well, DOE's use of the same automatic computerized waiver system to process critical shortage waiver requests might explain why BPS personnel had so much difficulty documenting on paper, over a period spanning several years, whether DOE had approved critical shortage waivers for Ms. Kemp between 2003 and 2012, and why neither BPS nor DOE could locate even those critical shortage waivers that DOE supposedly granted during that time period.

Absent anything to the contrary in the record or in *Nordberg*, I conclude that if the Department of Education had a process in place in 2005 and 2006 (and in 2003 and 2004 as well) for determining requests to approve critical shortage waivers under M.G.L. c. 32, § 91(e), those determinations were likely made using the same computerized system for determining educational certificate waiver requests automatically that *Nordberg* declared to be invalid as applied.

In short, there is no basis for assuming that DOE's review of critical shortage waiver requests during those years was any less automatic, involving little or no critical review or documentation, than it had been with respect to educational certification waiver requests, or that this review was any less invalid for delegating waiver-related decisionmaking to a computerized system. In view of this probable invalidity, whatever decisions DOE made or could have made with respect to Ms. Kemp's employment pursuant to M.G.L. c. 32, § 91(e) in 2005 and 2006 do not support a finding that Ms. Kemp had overearnings during those years. They furnish no valid basis for determining that she was not employed as Fenway High School's headmaster pursuant to a critical shortage of certified teachers available for employment in the district, or for concluding that, as a result, the limitations on her post-retirement income during any of those years were not lifted pursuant to section 91(e).<sup>31</sup>

All of this leaves M.G.L. c. 32, § 91(e) as the only lawful authority that unquestionably controlled Ms. Kemp's employment as salaried headmaster of Fenway High School in 2005 and 2006 and, as well, during the first year of her employment as headmaster pursuant to a critical shortage of certified teachers available for employment in that position during the 2003-04 school year. Section 91(e) recites none of the conditions and limitations on critical shortage waivers that are found in DESE's current regulations. Superintendent Payzant's critical shortage determination in early 2003, although less formal than what the DESE regulations currently require, was based

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<sup>31</sup>/ Were this matter to be remanded because DOE regulations governing critical shortage waivers were in effect in 2005 or 2006, it would be necessary to determine whether DOE decided critical shortage waiver requests at that time via the computerized waiver system that *Nordberg* invalidated as it was applied in determining educator licensure waiver requests. That would determine, in turn, whether *Nordberg* has the collateral effect on the validity of the critical shortage waiver process that DOE may have used in 2005 and 2006 that I suspect it does.

upon a search for headmaster candidates conducted by Fenway High School and its consultant, and did all that section 91(e) required for BPS to employ Ms. Kemp, a retired educator, as the school's headmaster based upon a critical shortage of certified teachers available in Boston for that position. In turn, because Ms. Kemp had retired more than two years before BPS employed her as Fenway High School's headmaster beginning in July 2003, her employment pursuant to M.G.L. c. 32, § 91(e) based upon Superintendent Payzant's 2003 critical shortage determination sufficed to lift the limitations on Ms. Kemp's post-retirement earnings that would have otherwise applied. Section 91(e) does not limit the duration of either the employment it authorizes, or the critical shortage of certified teachers upon which that employment is based, to a single year, and it also does not preclude the extension of that employment or require that the extension be made formally. Because there is no evidence in the record that Superintendent Payzant or his successor modified or rescinded the 2003 critical shortage determination in subsequent years, it remained in place through at least the end of the 2006-07 academic year, and Ms. Kemp's renewed employment as Fenway High School headmaster during that time period remained valid under section 91(e).

#### *Conclusion and Disposition*

M.G.L. c. 32, § 91(e) was the only applicable authority governing Ms. Kemp's employment as Fenway High School's headmaster, initially for the 2003-04 school year and then through the 2006-07 school year at least, based upon a "critical shortage of certified teachers available for employment in the district" as the school's headmaster. The Boston Public Schools Superintendent's determination, in early 2003, that this critical shortage existed was made in accordance with section

91(e), and was never modified or rescinded. As a result, Ms. Kemp was employed as Fenway High School's headmaster in 2005 and 2006, as she had been in 2003 and 2004, pursuant to M.G.L. c. 32, § 91(e), and she was not subject during those years to the limitations on post-retirement earnings that would have otherwise applied. Ms. Kemp had, therefore, no overearnings in 2005 or 2006, or at any time between the beginning of her employment as Fenway High School's headmaster in July 2003 through at least the end of the 2006-07 academic year. Accordingly, the Boston Retirement Board's decision requiring that Ms. Kemp repay her overearnings in 2005 and 2006 is reversed.<sup>32</sup>

In view of the result here, Ms. Kemp is entitled to receive immediately (unless the parties agree to a different schedule) a full rebate of any and all payments she has made pursuant to her March 10, 2015 agreement with the Boston Retirement Board to repay to the Board, in installments over a 45-month period, the \$40,204.89 overearnings amount the Board computed (*see* Finding 47 and Exh. B7), and, as well, to the immediate rescission of the repayment agreement.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Mark L. Silverstein  
Administrative Magistrate

Dated: October 14, 2016

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<sup>32/</sup> In view of this outcome, Ms. Kemp's claims regarding the staleness of the Board's efforts to recoup overpayments she allegedly received during 2005 and 2006 are moot, and I do not decide them.