

**COMMONWEALTH OF MASSACHUSETTS  
CONTRIBUTORY RETIREMENT APPEAL BOARD**

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**MOHAMMED KHAN,**

**Petitioner-Appellant**

**v.**

**STATE BOARD OF RETIREMENT,**

**Respondent-Appellee.**

**CR-14-524**

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**DECISION AFTER REMAND  
FROM SUPERIOR COURT**

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Petitioner Mohammed Khan appealed the June 29, 20018 decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the decision of the Respondent State Board of Retirement (SBR) to seek recovery of excess earnings paid by Montachusett Regional Transit Authority (MART) from 2003-2013 after MART specifically declined to do so pursuant to G.L. c. 32, §§ 91 and 20(5)(b).

On November 28, 2018, while Mr. Khan's administrative appeal before CRAB was pending, the SBR filed a complaint seeking to recover the excess earnings, *State Board of Retirement v. Khan*, Suffolk Superior No. 1884CV03692, and it simultaneously sought a prejudgment attachment on certain investment property owned by Mr. and Mrs. Khan. On December 6, 2018, after hearing from the parties and providing an opportunity for further briefing, the Superior Court issued a four-page written Order on Motion for Writ of Attachment finding that the SBR had a reasonable likelihood of recovering judgment and granting the requested attachment.

On May 27, 2022, the Contributory Retirement Appeal Board affirmed the DALA decision. Mr. Khan then filed an appeal of this decision to the Suffolk Superior Court pursuant to G.L. c. 30A, §14.<sup>1</sup> On August 31, 2023, the Superior Court upheld CRAB's determination that

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<sup>1</sup> *Khan v. Contributory Retirement Appeal Bd. and State Bd. of Retirement*, Civil Action No. 2284CV01223.

Mr. Khan's post-retirement employment with MART violated G.L. c. 32, § 91 and that the SBR may recoup excess earnings from Mr. Khan.<sup>2</sup> The Superior Court, however, remanded this matter back to CRAB to address the question of whether the discovery rule tolls the statute of limitations in an action for breach of contract brought by SBR pursuant to G.L. c. 32, § 91(c).

After a review of the record, we maintain that the statute of limitations issue does not arise in this appeal under Chapter 30A, which is limited to review of the administrative record.<sup>3</sup> Nevertheless, to the extent the Superior Court determined that the SBR sought recoupment of excess earnings through an action in contract, the six-year statute of limitations does not bar recovery by SBR. Our discussion follows.

While G.L. c. 32, §91(c) authorizes an employer to recover excess earnings through an action in contract, the SBR's authority to seek recoupment derives from G.L. c. 32, § 20(5)(b). This provision does not limit the SBR to bringing actions in contract. We previously explained that because G.L. c. 32, § 91 bars an individual from receiving excess compensation, the SBR may take action to require repayment of the excess earnings. The Appeals Court has determined that a Board has authority to recoup excess earnings through either future offsets or through a direct claim for repayment under the broad statutory authority granted it by G.L. c. 32, § 20(5). See *Flanagan v. CRAB*, 51 Mass. App. Ct. 862, 866-69 (2001)(retirement boards "shall have such other powers and shall perform such other duties and functions as are necessary to comply with such provisions [of the retirement statute]"). In so deciding, the Appeals Court relied on and adopted the reasoning of an Opinion of the Attorney General, stating that the Board had all necessary recoupment authority pursuant to G.L. c. 32, § 20(5)(b), which "carries with it the authority to take all necessary steps to fulfill the Board's responsibilities." *Id.* at 866 (quoting Report of the Attorney General, Pub. Doc. No. 12, at 152-56 (1979)). The Appeals Court noted in *Flanagan* that the Attorney General explicitly opined that the Board has power under G.L. c. 32, § 20(5)(b) to seek recovery by either method: either by "requiring the retiree to return the excess benefits" or by "setting off the overpayments from subsequent retirement payments." *Id.* at 866.

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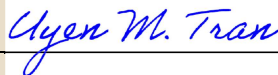
<sup>2</sup> *Khan v. Contributory Retirement Appeal Bd. and State Bd. of Retirement*, Civil Action No. 2284CV01223, was consolidated with Civil Action No. 1884CV03692 (Aug. 31, 2023, R. Connolly, J).

<sup>3</sup> *Khan v. Contributory Retirement Appeal Bd. and State Bd. of Retirement*, Civil Action No. 2284CV01223

Furthermore, even in a contract action, the six-year statute of limitations would have been tolled by the discovery rule, because the SBR did not discover the excess earnings until 2013, less than six years before it brought the consolidated proceeding, *State Board of Retirement v. Khan*, Suffolk Superior No. 1884CV03692. In that proceeding, the SBR submitted evidence establishing the 2013 date of discovery in the form of an affidavit from SBR's Executive Director, Nicola Favorito, dated November 9, 2018. Based on that affidavit, the Superior Court held that the SBR had a likelihood of success with respect to the discovery rule. See *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 631 (1997) (the discovery rule tolls the statute of limitations in a contract case “where the prospective plaintiff did not have, and could not have had with due diligence, the information essential to bringing suit.”). To the extent the Superior Court determined that the SBR sought recoupment of excess earnings through an action in contract, the discovery rule applies here, making the contract action sought by the SBR within the statute of limitations. For the foregoing reasons, the SBR is not barred by the six-year statute of limitations in its recoupment of excess earnings from Mr. Khan.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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