

THE COMMONWEALTH OF MASSACHUSETTS

Appeals Court

2021-P-0354
SUFFOLK SS

Paul Mahan,
PLAINTIFF-APPELLANT

v.

Boston Retirement System and Central Division of the Boston Municipal Court
DEFENDANT-APPELLEES.

ON APPEAL FROM A JUDGEMENT OF THE SUPERIOR COURT
DEPARTMENT IN AND FOR SUFFOLK COUNTY
CIVIL ACTION NO. 1984CV2160

Brief of Appellant Paul Mahan

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Question presented

Does conviction of workers compensation fraud from the former employer, the City of Boston, during a period commencing 2 years after retirement, without holding public employment, trigger pension forfeiture under Chapter 32 sections 15 (3) and 15(4)?

Statement of the Case and Facts

In this case of first impression, Paul Mahan was employed by the Suffolk County Sheriff's Department from May 1997 to 2000. On August 15, 2000 Mr. Mahan was injured breaking up a fight among inmates. He received workers compensation benefits for that injury until 2015. On May 4, 2004 Mr. Mahan applied to the Boston Retirement Board (hereinafter "Board "or "Boston") for Accidental Disability Retirement benefits due to his disability caused by the August 15, 2000 incident per Ch. 32 sec. 7(1). His application was approved effective November 4, 2003. Record Appendix Volume II p. 38 (Hereinafter "R.A. Vol. ____"). His yearly pension benefit was \$30,353.80. R.A. Vol. II p 116.

On February 14, 2013, Mr. Mahan was indicted on two counts, one count of Workers Compensation fraud per Ch. 152 sec. 14(3) for acts between January 1, 2006 and January 1, 2013, and one count of larceny over \$250.00

per Ch. 266 sec. 30(1) over the same time period. R.A. Vol. I pp 103-104.

On May 28, 2015, Mahan pled guilty to both counts of the indictment. He was ordered to make restitution and was placed on five years probation. During the period January 1, 2006 through January, 2013, the Commonwealth alleged that Mahan was paid \$205,618.25 in workers compensation benefits, \$181,825.59 in assault pay, and \$49,841.18 in retirement benefits. R.A. Vol. I 183-184.

By decision dated March 23, 2018, defendant-appellee Boston Retirement System served notice of its March 21, 2018 decision to forfeit Mr. Mahan's pension pursuant to G.L. Ch. 32 sec. 15(3) and sec. 15(4). R A. Vol. II p.194. In its decision, the Retirement Board found that Mahan's convictions for Workers Compensation Fraud and larceny over \$250.00 triggered pension forfeiture under Ch. 32 sec. 15(3) and Ch. 32 sec. 15(4). R.A. Vol. II pp 112-133. The pension forfeiture was retroactive to the date of the commission of the offenses, per Ch. 32 sec. 15(6). Id. at 116-117¹. It

¹Hearing Officer Fabino recommended and the Board agreed that Mr. Mahan's pension be revoked retroactive to the date of his criminal offense per Ch. 32 sec. 15(6) inserted by Acts of 2011 Ch. 176 sec. 31. R. A. Vol. II pp 132-133. Said section
(continued...)

found that he had misappropriated a total of \$305,618.00. R.A. Vol. II p. 119. Mr. Mahan's pension and retiree health insurance was stopped immediately after the Boston Retirement Board's adoption of Hearing Officer's Recommended Decision.

Mahan filed a timely Petition for Review of the forfeiture decision by the Boston Retirement Board, per Ch. 32 sec. 16(3) in April, 2018 to the Boston Municipal Court, Central Division.

By decision entered January 29, 2019, Justice Robert McKenna of the BMC affirmed the pension forfeiture decision of Boston Retirement Board. Despite the fact that Mahan has been retired from public employment for over two years before his criminal conduct commenced, R.A. Vol. I 42-51, Judge McKenna decided that Mahan's pension was properly forfeited under Ch. 32 sec. 15(4) because "but for his being an employee of the City of Boston he would not have been

¹(...continued)
states: "If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received after the date of the offense of which the member was convicted. " This provision applies only to retirements on or after April 2, 2012 Per Acts of 2011 Ch. 175 sec. 65. Mahan retired on November 4, 2003, more than eight years prior to the effective date of Ch. 32 sec. 15(6). It does not apply to Mahan.

injured at work and eligible thereby for workers compensation payments from the self-insured City of Boston and thereby in the position to be convicted of workers compensation fraud and larceny over \$250.00 from the City of Boston, and that is a factual link between his job and his convictions." R. A. Vol. I p. 48. Despite the fact that Mahan was not convicted of fraud or larceny from his former employer, the City of Boston, while he was employed by it, Judge McKenna held that Boston had properly applied Ch. 32 sec. 15(3) to Mahan's convictions because he was a "member" of the Boston Retirement System when he committed the crimes, citing Retirement Board of Somerville v. Buonomo, 467 Mass. 662 (2014), for the proposition that Buonomo's pension was properly forfeited because he was a member of the Somerville Retirement System when he committed larceny from the Commonwealth while he was Middlesex Register of Probate. Judge McKenna rejected the application of Ch. 32 sec. 15(6) to Mahan. R.A. Vol. I pp.49-51.

Mahan filed a timely Complaint in the nature of certiorari for review of the decision of the BMC to the Single Justice of the Supreme Judicial Court, which was transferred to Suffolk Superior Court by order dated

June 10, 2019. Justice Lenk wrote in her order of transfer:

"While the Boston Retirement Board argues that the petitioner, who had been retired for several years before the criminal conduct at issue occurred, was a "member" of a retirement system, even though inactive, the petitioner argues that his misconduct was not conduct "applicable to" his former position, Essex Regional Retirement Board v. Swallow, 481 Mass 241, 248 - 250 (2019). The record before this court is not sufficient for a determination whether such a necessarily fact specific analysis, Garney v. Massachusetts Teachers Retirement System, 469 Mass. 384, 385 (2014), was supported by substantial evidence before the board."

R.A. Vol. I pp 13-14.

Judge Donnatelle of the Suffolk Superior Court affirmed the pension forfeiture, R.A. Vol. I pp 15-24. The Superior Court found that there was a direct factual connection between Mahan's criminal offense and his correction officer position. More specifically:

"Mahan was convicted of workers compensation fraud. The workers compensation act was designed to provide financial compensation for the impairment of an injured workers earning capacity (citations and parentheticals omitted). Mahan received workers compensation payments because he was injured while performing one of his job responsibilities as a corrections officer, that is, to maintain order and prevent harm to prisoners. Stated differently, Mahan was convicted of lying about his eligibility for workers compensation, which he was receiving because he was injured while performing his duties as a corrections officer. Thus, there is a factual link between the criminal offense of workers' compensation fraud and his position as a corrections officer, and there was substantial evidence before the Board that Mahan's misconduct was 'applicable to' his former

position". (Citations omitted).

R.A. Vol. I p 21.

The Superior Court remanded the case to the District Court for consideration of the application of excessive fines clause of the Massachusetts Declaration of Rights Art. 26. R.A. Vol. I p 25. Mahan filed an assented-to motion for relief from judgment under M.R.C.P. 60(b)(6) to stay the remand and for entry of final judgment, which was granted by the Superior Court. R.A. Vol. I p. 29. This appeal followed timely. R.A. Vol. I p 30.

Summary of the Argument

The Boston Retirement Board's decision to forfeit Mahan's pension rights under chapter 32 section 15 (3) is unlawful because the statute only applies to misappropriation of funds of a governmental entity committed while serving as a public employee. Mahan's criminal activity commence two years after he retired and severed all employment relations with the City of Boston and occurred while he held no public job.

The Boston Retirement Board's decision to forfeit Mahan's pension rights under chapter 32 section 15 (4) is unlawful because that statute requires a direct link between the criminal activity and the Retirement system

member's public employment. During all times relevant to the commission of Mahan's criminal conduct, he held no public job and thus there is no public job with which he could have facilitated his criminal activity. Under the required narrow construction of chapter 32 section 15 (4), which is a penal statute, chapter 32 section 15 (4) does not cover Mahan's post retirement non-public employment criminal convictions.

ARGUMENT

A. BOSTON RETIREMENT BOARD'S FORFEITURE OF MAHAN'S PENSION IS NOT PROPER UNDER EITHER CH. 32 SEC. 15(3) OR CH. 32 SEC. 15(4)

I. Burden of Proof

The Boston Retirement Board is the moving party in the pension forfeiture under review per Ch. 32 sec. 15(2)² and 16(1). It initiated the forfeiture processs

² Ch. 32 sec.15(2) Initiation of Proceedings. 15(2) provides in pertinent part-
Initiation of Proceedings. - Proceedings under this section may be initiated by the [retirement] board, by the head of the department, by the commission or board of the commonwealth or of any political subdivision thereof wherein the member is employed or was last employed if not then in service, or in a county by the county commissioners, in a city by the mayor, in a town by the board of selectmen, in the Massachusetts Department of Transportation by the authority, in the Massachusetts Housing Finance Agency by the agency, in the Massachusetts Port Authority by the authority, in the Greater Lawrence Sanitary District by the district, in the Blue Hills Regional School System by the system or in the Minuteman Regional Vocational Technical School

(continued...)

and is the actor whose decision stopped the payment of pension to Mahan. It has the burden of proof on all issues. Judge Learned Hand stated "the burden of proof always rests upon the moving party," Jays Inc. v. Jay-Originals Inc., 341 Mass. 737, 741 (1947) quoting Lambert Pharmacal Co. v. Bolton Chemical Corp., 219 Fed. 325 (D.C.N.Y. 1915).

B. Misappropriation of Funds under Chapter 32 Sec. 15(3) Is Directed to "Dereliction of Duty". It Is Not Applicable to Mahan's Convictions Where His Criminal Conduct Occurred Years after He Retired from Public Employment and Had No Public Job.

Ch. 32 sec. 15(1), which describes the government employers whose funds the retirement system member has "misappropriated" in Ch. 32 sec. 15(3), must be applied as written and must be construed using the plain meaning of its words. "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Olmstead v. Department of Telecommunications and Cable, 486 Mass. 582, 588 (2013), citing Sullivan v. Brookline, 435 Mass. 353, 360 (2001). Ch. 32 sec. 15(1) provides:

²(...continued)
District by the district. (Emphasis added)

"Any member who has been charged **with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service, as the case may be, or of any system of which he is a member**"

Ch. 32 secs. 15(1), 15(2) and 15(3), read together as the core original pension forfeiture provisions inserted by Chapter 658 sec. 1 of the Acts of 1945, show a legislative intent to condition the receipt of a pension by a member, which is defined in chapter 32 Section 1 "as an employee" of a governmental unit in Massachusetts, upon the absence of any misappropriation of funds of his employer or from his recent employer³. As noted in the facts section, Justice Lenk remanded the case from the SJC single Justice session to the Superior Court. The thrust of her remand was to question the factual support for Boston's conclusion

³"Ch. 32 s. 1: Member", any employee included in the state employees' retirement system, in the teachers' retirement system or in any county, city, town, the Massachusetts Turnpike Authority, the Massachusetts Housing Finance Agency, or the Massachusetts Port Authority contributory retirement system, the Massachusetts Bay Transportation Authority police retirement system, the Blue Hills Regional Vocational school retirement system, the Minuteman Regional Vocational Technical School District Employees' retirement system, and the Greater Lawrence Sanitary District Employees' retirement system, established under the provisions of sections one to twenty-eight, inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law.

that there is a direct connection between Mahan's job as a corrections officer and his criminal activity years after his retirement, namely, his workers' compensation payments fraud. R.A. Vol. I pp 13-14. It is clear that Justice Lenk felt that Boston's pension forfeiture decision was not supported by substantial evidence in that Mahan's conviction was not applicable to his former job as a corrections officer as a basis for his pension forfeiture.

No reported case has ever applied the sections of the retirement law to condition the receipt of a pension by a person who had been retired years earlier, who was convicted of crimes that relate to workers compensation payments received from his self-insured employer literally a decade after he retired. See Opinion of A.G. no. 6, A.G. Shannon to Treasurer Crane, June 11, 1990 page 35, Pub Doc 42 1990, which expressly states that Ch. 32 secs 15(1) & 15(3) were intended to remedy misappropriation of governmental funds "by an employee"⁴. Id.(emphasis supplied.) Mahan's November 2003 retirement is a separation from his public employment, equivalent to resignation. Ch. 32 sec.

⁴Every case cited by the Board in its decision concerns a crime committed while holding public employment. See R.A. Vol. II 112-133.

3(1)(a)(i).

Ch. 32 section 15(1) expressly states that misappropriation of funds is limited to larceny in all its various forms, while the member of the retirement system is an employee. It does not apply to any financial crimes committed after employment has ended. See, Fidelity and Deposit Company of Maryland v. Sproules, 60 Mass. App. Ct. 93, 95 (2003) ("General Laws c. 32, s. 15, entitled "Dereliction of duty by members," consists of five subsections, and governs the consequences to their retirement rights that flow from the commission of certain criminal offenses by public employees.") Accord, Doherty v. Medford Retirement Board, 425 Mass. 130 (1997): Misappropriation of funds of "'any governmental unit in which . . . he . . . was employed'" meant employed at the time of the crime". Id. at 145. Doherty, a Medford police officer, was found to have given his son a copy of the Medford police department entrance exam. His son was hired as a Medford Police Officer and paid \$157,000 in salary to which he was not entitled. Id. See also Deleire v. Contributory Retirement Appeal Board, 34 Mass. App. Ct. 1, 6 (1993) ("General Laws c. 32, Section 15, provides certain consequences relating to pensions for public

employees based upon dereliction of duty.") The Deleire court noted that "G. L. c. 32, Section 15(3), . . . provides that, upon conviction of an offense involving misappropriation of any funds of the governmental unit in which the person was employed," id. at 7 (emphasis added). See also Arruda v. CRAB, 28 Mass. App. Ct. 366, 367 (1990) (Director of Fall River Housing Authority convicted of arranging for \$155,852.00 in kickbacks to him while employed by same was convicted of "misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement" under Ch. 32 sec. 15(3)). Curiously, the Board's decision cites with approval Kennedy v. City of Holyoke, 312 Mass. 248 (1942) for the broad policy that an employee removed from his position for misappropriation of his employers funds cannot receive a pension. R.A. Vol. II p 132. The Kennedy Court stated the posture of the case: "The alleged retirement was illegal and invalid for the reason that Stone had already ceased to be an employee of the city before he was 'retired.' . . . [the statute], . . ." contemplates the retirement only of persons still in 'active service' and receiving pay at the time of retirement and not that of persons who have

previously been discharged or for some other reason separated from the service" (some citations omitted). Id. at 249. Not only is Kennedy a case that predates Ch. 32 sec. 15(3), but it, like all cases cited by Boston, deals with an employee who misappropriated his employer's funds while he was its employee. Id. In contrast, Mahan was retired from his job as a Suffolk County Corrections Officer effective November 4, 2003. R.A. Vol. II p 38. He pled guilty to crimes committed over the period January 1, 2006 through January 1, 2013.

It is true that in Retirement Board of Somerville v. Buonomo, 467 Mass. 662 (2014), the SJC ruled that the fact that Buonomo had no pension rights associated with his job as Register of Probate did not negate his convictions triggering forfeiture under 15(4), because he was a member of the Somerville Retirement System at the time he committed the crimes. Id. at 663. The Buonomo Court stated the rule: "There is no requirement in § 15 (4) that the public office to which a member's criminal convictions relate be the same as the public office from which that member is receiving a retirement allowance," Buonomo, 467 Mass. at 663. The Court held that Buonomo's criminal conduct violated the Canons of

Judicial Ethics. Id. at 671. The Court did not decide that his criminal convictions violated 15(4) as a factual matter. Rather, it stated: "By pleading guilty to eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer, Buonomo violated the laws applicable to the office of register of probate, a position of public trust, and thereby forfeited his entitlement to any retirement allowance under G. L. c. 32, §§ 1-28." Id. at 672. The Court declined to read into Ch. 32 sec. 15(4) a requirement that the conviction must be related to the position that the member held while earning the pension. Id. at 672. Buonomo's pension was not forfeited based on Ch. 32 sec. 15(3). See Buonomo at 663 fn 2.

Despite the fact that Mahan was not convicted of fraud or larceny from his former employer while he was employed by it, Judge McKenna held that Boston had properly applied Ch. 32 sec. 15(3) to Mahan's convictions because he was a "member" of the Boston Retirement System when he committed the crimes, citing Retirement Board of Somerville v. Buonomo, for the proposition that Buonomo's pension was properly forfeited because he was a member of the Somerville

Retirement System when he committed larceny from the Commonwealth while he was Middlesex Register of Probate. R.A. Vol. I pp 50-51. The flaw in Judge McKenna's analysis is that, unlike Mahan, Buonomo was convicted of stealing from his employer, the Commonwealth of Massachusetts, while he was the Register of Probate. Id. at 467 Mass. 666. Mahan held no public job when he committed his crimes.

In holding that Ch. 32 sec. 15(3) regarding misappropriation of governmental funds applied to Mahan, Judge McKenna ignored the SJC's express linkage of Buonomo's public employment as the Middlesex Register of Probate with his pension forfeiture by noting that Ch. 3 sec. 1 defines "member" as a public employee. See Buonomo at 663 fn. 3. The SJC's holding in Buonomo that his status of being a "member" at the time of his arrest triggered pension forfeiture under Ch. 32 sec. 15(4)) was grounded in two interdependent facts: 1) that Buonomo, like Mahan, was a retiree at the time of his arrest, and 2) that Buonomo, unlike Mahan, was a public employee at the time of his arrest. "There is no requirement in § 15 (4) that the public office to which a member's criminal convictions relate be the same as the public office from which that member

is receiving a retirement allowance". Buonomo at 663. The SJC affirmed Buonomo's pension forfeiture expressly based on its legal analysis that he was a public employee who committed crimes against his employer, the Commonwealth, and that, considering the language of Ch. 32 sec. 15(4), "in no event shall any member, after final conviction", the word "member" pertained to Buonomo. *Id.* The language of Ch. 32 sec. 15(3) is the same in this context.

Chapter 32 sec. 15(3) is not applicable to Mahan's convictions.

C. Ch. 32 Sec. 15(4) Is Not Applicable to Mahan's Convictions. Section 15(4) Prohibits Pension Payments to Those Who Are Convicted of Misconduct in Office. Mahan Was Not Convicted of Misconduct Connected with His Job.

Ch. 32 sec. 15(4)⁵ was first construed in Gaffney v. Contributory retirement Appeal Board, 423 Mass. 1 (1996). Gaffney was the Shrewsbury Water and Sewer Superintendent. He was in charge of budgeting and collecting payments of water bills from Shrewsbury. He pled guilty to multiple charges of stealing from the

⁵Ch. 32 sec. 15(4) states in pertinent part:
Forfeiture of pension upon misconduct. - In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty eight, inclusive, . . .

Town of Shrewsbury. The Gaffney court discussed the proper analysis for which convictions trigger pension forfeiture under Ch. 32 sec. 15(4):

Gaffney's approach would have s. 15 (4) operate only in cases of violations of highly specialized crimes addressing official actions, while not providing the same when officials engage in criminal activities in the course of their duties that satisfy the elements of traditional criminal offenses. Thus, according to this view, violations of conflict of interest laws would work pension forfeiture, while embezzlement (a form of common law larceny) would not. We disagree. The substantive touchstone intended by the General Court is criminal activity connected with the office or position. Yet it is also apparent that the General Court did not intend pension forfeiture to follow as a sequelae of any and all criminal convictions. Only those violations related to the member's official capacity were targeted. Looking to the facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent of s. 15 (4).

Gaffney v. CRAB, 423 Mass. 1, 4-5 (1996) (emphasis supplied).

Under Chapter 32 sec. 15(4), the board and any reviewing court must examine the facts that underlie the conviction in order to determine whether there is a direct legal or factual link between the conviction and the retirement system member's official capacity.

Scully v. Beverly Retirement Board, 80 Mass. App. 538, 543 (2011), cf Retirement Board of Maynard v. Tyler, 83 Mass. App. Ct. 109, 112 (2013), Herrick v. Essex Reg.

Retirement Bd., 77 Mass. App. Ct. 645, 654 (2010). A direct link is one that is more than a mere "link in the chain of evidence," Commonwealth v. Pickering, 479 Mass. 589, 597 (2018, quoting Commonwealth v. Sicari, 434 Mass. 732, 750 (2001), cert. denied, 534 U.S. 1142 (2005) ("Relevant evidence 'need not establish directly the proposition sought; it must only provide a link in the chain of proof'").

In Buonomo the SJC held that Buonomo used his public office to facilitate his crimes:

By pleading guilty to eighteen counts of breaking into a depository, eight counts of larceny under \$250, and eight counts of embezzlement by a public officer, Buonomo violated Canon 2, and, therefore, he violated the laws applicable to the office of register of probate. Buonomo's commission of such criminal offenses, which was **facilitated** by his access and proximity to the cash vending machines, compromised the integrity of and public trust in the office of register of probate.

Buonomo at 671. (emphasis added).

The Buonomo court did not hold that the pension forfeiture was triggered by a factual connection between Buonomo's crimes and his position as Register of Probate. Rather, it held that his being a member of the retirement system at the time of the commission of his crimes, combined with the fact that he violated the code of ethics promulgated by the SJC for clerk's

magistrates, violated the statute and triggered the forfeiture. The SJC later held in Finneran v. State Board of Retirement, 476 Mass. 714 (2017), that this category of analysis that triggers pension forfeiture was a "legal link" rather than a factual link. Finneran, at 720.

In Garney v. Teacher's Retirement Board, 469 Mass. 384 (2014), the SJC reviewed the Teachers Retirement Board's forfeiture of the pension of a teacher who was convicted of possessing and viewing child pornography off duty on his home computer. Once again the SJC emphasized that pension forfeiture under S. 15(4) is only triggered where the public employment is used to facilitate the criminal conduct.

This "direct link" requirement means that the crime itself must reference public employment or the employee's particular position or responsibilities, or that the crime necessarily must have been committed at or during work. However, where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, there must be some direct connection between the criminal offense and the employee's official capacity by way of the laws directly applicable to the public position. It is clear that the criminal offenses for which Garney was convicted neither referenced public employment nor bore a direct factual link to his teaching position. Garney committed his crimes outside of school, without using school resources or otherwise using his position to **facilitate** his crimes, and without involving students in his illicit activities.

Garney v. Teacher's Retirement Board, 469 Mass. at 388-389 (emphasis supplied, citations omitted). The Merriam-Webster Dictionary defines "facilitate" thus: "transitive verb, : to make easier : help bring about // facilitate growth."⁶

All pension forfeiture cases that have been decided under Ch. 32 sec. 15(4) by the appellate courts fall into four categories: (one) conviction of an act that is a violation of the core functions of the job as expressed by law, see Bulger v. State Board of Retirement, 446 Mass. 169 (2006) and Buonomo v. State Board of Retirement (violation of SJC promulgated Code of Professional Conduct for Clerks Magistrates); (two) where the governmental employer is the victim of the criminal offense, Maher v. Justices of the Quincy District Court, 67 Mass. App. Ct. 612 (2006) (City employee broke into City Hall and stole documents from his personnel file); (three) use of government issued equipment in the commission of the crime (Durkin v. Boston Retirement Board, 83 Mass. App. Ct. 116 (2013) (Boston Police Officer shot a fellow officer using his service weapon)); and (four) corruption in office, MacLean v. State Board of Retirement, 432 Mass.

⁶<https://www.merriam-webster.com/dictionary/facilitate>

339 (2000), and State Board of Retirement v. Woodward, 446 Mass. 698 (2006), (elected officials violation of conflict of interest laws (MacLean) and bribery (Woodward)). Each of the cases was the result of a conviction for misconduct in office. No reported case has ever forfeited the pension of a member of the retirement system who has been convicted of a crime committed after he left public employment.

In Deignan v. Watertown Retirement Board (Rule 1:28 decision 17-P-1379 March 21, 2019), the Appeals Court affirmed pension forfeiture of a police officer from the Town of Watertown who, despite being arrested ten months after he was retired, was convicted of criminal activity while he was an active employee of the Watertown Police department and a member in service of the Watertown Retirement System. The Appeals Court noted: "Deignan took the [driver's] license that was entrusted to him as a police officer and used it for his own personal gain to obtain controlled substances by fraud. Thus, the crimes for which Deignan was convicted had a direct factual link to his position." See Watertown Retirement Bd. v. Deignan, Memorandum and order of the Middlesex Superior Court Docket #15CV5260 Docket Entry 11, Maureen Hogan, J., August 10, 2017.

The court in Deignan rightly states that there is no requirement in Sec. 15(4) that the member commit misconduct in office, only that the misconduct be directly linked to his office or position. In other words, that there must be use of the official position to facilitate the criminal acts. This concept is illustrated by Deignan's case, where he took a driver's license that was in his custody as a police officer and used it to support the purchase of forged prescriptions for controlled drugs. Similarly in Dell'Isola v. State Board of Retirement, 92 Mass. App. Ct. 547 (2017), Dell'Isola, a corrections officer, used his relationship with an inmate, which was not illegal, but was improper, to facilitate his obtaining cocaine. Both of the actual crimes took place off duty but they were directly linked to their public jobs. Similarly, in Finneran v. State Board of Retirement, the Speaker of the House lied about information that he had gained as speaker in testifying untruthfully in federal court in a case challenging the 2001 redistricting law. 476 Mass. 714 (2017). His criminal behavior took place outside of his official capacity and outside of his duties as speaker but they were "inextricably intertwined" with his position as Speaker. Finneran v.

State Board of Retirement, 476 Mass. at 722.

In Winthrop Retirement Board v. Lamonica, 98 Mass. App. Ct. 360, 366-367 (2020) "Massachusetts appellate courts 'uphold pension forfeitures in a narrow set of circumstances: those where [the public employee] had either (1) engaged in criminal activity factually connected to his or her position or (2) violated a law expressly applicable to public employees or officials.' Essex Regional Retirement Bd. v. Swallow, 481 Mass. 241, 248 (2019). In other words, there must be a direct factual or legal link 'between the criminal offense and the [public employee]'s office or position.' Id. at 247." (emphasis supplied, brackets in original). At all times relevant to his conviction, Mahan was not a public employee and held no public job. This opinion is the most recent pension forfeiture case, as of this writing.

Beginning with Retirement Board of Maynard v. Tyler, supra, a case concerning a firefighter who molested his neighbor's child, that happened off duty and did not involve using his position as a firefighter to facilitate the crime, Massachusetts appellate courts have uniformly held that merely being paid as a public employee when committing a crime does not trigger

pension forfeiture. Courts continue to return to the bedrock principles enunciated in the first pension forfeiture decision under chapter 32 section 15 (4), Gaffney, that a direct factual link must be proved between the member of the Retirement system's criminal conduct and his official position as a public employee. Gaffney, supra, 423 Mass. At 4-5. See also Garney, supra,

That holding was extended to police officers in the dual cases of O'Hare and Swallow v. the State Board of Retirement and the Essex Regional Retirement System, 481 Mass. 241 (2019). Those cases reiterated the doctrine that merely being paid as a public employee, even in a position of high public trust such as police officer, did not trigger pension forfeiture unless there is a factual basis to connect the criminal act and the official public position.

All of those cases cite the proposition that not every conviction of a public employee will trigger pension forfeiture under chapter 32 section 15(4). There must be a factual or legal connection between the job and the crime. The logical corollary to those cases, and the doctrines underlying those cases, is that there must be some behavior by the employee in the

commission of the crime that connects the criminal act to his official position. In this case, Mahan was being paid by the City of Boston post-retirement when he was committing the crime of workers compensation fraud and larceny from the City of Boston. There is no other connection to his job. It was error for Boston, the District Court, and the Superior Court to find that his being paid by the City of Boston workers compensation money while committing the crimes is sufficient to trigger pension forfeiture under these circumstances.

In order to trigger pension forfeiture under 15(4), there must be three elements present. First, the person must be a member of the retirement system while he commits the crime; Two, he must hold public employment at the time of the commission of the crime; and Three, it must be shown that he used the public employment to facilitate the criminal acts.

Applying this analysis, Mahan was a member inactive of the Boston Retirement System when he committed his criminal acts, but he held no public job, nor did he have a public job with which to facilitate the commission of his criminal acts. Therefore no pension forfeiture is triggered under 15(4).

It is not possible that workers compensation

statutes could be construed as being laws governing Mahan's former public position as a corrections officer for Suffolk County. Unlike the Canons of Judicial Ethics that applied to Bulger and Buonomo as Judicial Officers, which are "laws directly applicable to the public position", the workers compensation laws apply to all workers, public and private. See Garney at 389.

The Boston Retirement Board's decision is sloppy and legally unsound. This is illustrated not just by the failure to properly analyze the application of both chapter 32 section 15(3) and section 15(4), but also by its application of chapter 32 section 15(6) to Mahan's case. That statute, inserted by Acts of 2011 chapter 176 sec. 31, is not applicable to him, because he retired in 2003. It is applicable only to persons retired in April 2012 and thereafter. See Acts of 2011 chapter 176 sec. 65.

Neither the District Court nor the Superior Court properly analyzed the application of chapter 32 section 15(4) to Mahan's convictions. Both courts found a link between the convictions and his work as a Suffolk County corrections officer, in that he was being paid workers compensation by the City of Boston when he was charged with workers compensation fraud. That is not

sufficient, though. The second part of a proper analysis, which eluded the Retirement Board, the District Court and the Superior Court, is to connect the facilitation of the criminal acts with the public employment. As Buonomo and Garney explain, the member of the retirement system must use his public position to facilitate his criminal activities. That, Mahan did not, and could not, do.

Mahan has none of these features. His criminal activity took place years after he retired from his job as a corrections officer. Also, his being a corrections officer did not aid him in the commission of the crime of workers compensation fraud and grand larceny. He had no public employment with which to "facilitate" his crimes.

Chapter 32 Sec. 15 is entitled "Dereliction of Duty by Member". Courts use the title of a statute as an aid in its interpretation, see Gaffney, supra, 423 Mass. at 4 and Champigny v. Commonwealth, 422 Mass. 249, 252 (1996). Use of the term "dereliction of Duty by Member" indicated the Legislature's intent to limit the application of the forfeiture provision of Chapter 32 sec. 15 to criminal conduct while employed in public service.

Despite the fact that Mahan had been retired from public employment for over two years before his criminal conduct commenced, Judge McKenna decided that Mahan's pension was properly forfeited under Ch. 32 sec. 15(4) because "but for his being an employee of the City of Boston he would not have been injured at work and eligible thereby for workers compensation payments from the self-insured City of Boston and thereby in the position to be convicted of workers compensation fraud and Larceny over \$250.00 from the City of Boston, and that is a factual link between his job and his convictions". R.A. Vol. I p 48. The flaw in Judge McKenna's analysis is that Mahan was not a public employee when his crimes were committed.

Similarly, Judge Donnatelle's analysis is also flawed. She held: "Mahan was convicted of lying about his eligibility for workers compensation, which he was receiving because he was injured while performing his duties as a corrections officer. Thus, there is a factual link between the criminal offense of workers' compensation fraud and his position as a corrections officer, and there was substantial evidence before the Retirement Board that Mahan's misconduct was applicable to his former position". (Citations omitted.) R.A. Vol.

I p 21. The error in the Superior Court's decision is its failure to find that Mahan used his former position, which he had not held for over two years when his crimes began in 2006, to facilitate his workers compensation fraud and grand larceny.

On its face, Ch. 32 sec. 15(4) requires a direct link between the facts that underlie the conviction and the public job. Mahan had no public job to which to link his criminal conduct.

Mahan's 2013 arrest occurred ten years after his November 2003 retirement. Under those facts, his conviction cannot be a conviction involving violation of the laws applicable to his office or position as a Suffolk County Sheriff's Department guard as required by Sec. 15(4). He did not hold any position as a public employee when he was arrested and convicted. The fact of his being retired when he was arrested is an intervening superseding fact that severs any connection between his crime and his former position. Dube's Case, 70 Mass. App. Ct. 121, 125 n. 5 (2007). Mahan's act of retiring from his position broke any possible chain of causation between his employment and his criminal activity.

Both the District and Superior Court judges have

overemphasized the word "member". As a matter of statutory construction, that is not proper.

In this case there is no dispute that Mahan was, at all times relevant, a member inactive of the Boston Retirement System. See Ch. 32 sec. 3(1)(a)(ii).

However, merely being an inactive member with a criminal conviction does not by itself trigger pension forfeiture. The other part of the statute must also be satisfied. There must be a direct link between his conviction in this case, for workers compensation fraud and grand larceny from the City of Boston, with his work as a corrections officer. No appellate court has ever applied the statute to these circumstances. The decisions under review in this case have ignored a critical part of the plain language of Ch. 32 sec. 15(4) 'involving the laws applicable to the office or position'. These decision are "contrary to the basic tenet of statutory construction that we must strive to give effect to each word of a statute so that no part will be inoperative or superfluous." Ciani v. MacGrath, 481 Mass. 174, 179 (2019).

In Suffolk Construction Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444, 458-459 (2007) the SJC stated:

We do not employ the conventions of statutory construction in a mechanistic way that upends the common law and fundamentally makes no sense. See Sun Oil Co. v. Director of the Div on the Necessaries of Life, 340 Mass. 235, 238 (1960) (statutes to be construed, wherever possible, "in accordance with sound judgment and common sense"). Cf. Commissioner of Corps. and Taxation v. Dalton, 304 Mass. 147, 150 (1939) ("A matter may be within the letter of a statute and not come within its spirit, if the matter is beyond the mischief intended to be reached or if to include it would require a radical change in established public policy or in the existing law and the act does not manifest any intent that such a change should be effected").

Under the required narrow construction of the statute, pension forfeiture is not possible under these very unique circumstances. It is also indisputable that at the time of the commission of his offenses, Mahan was not a public employee. His retirement effective November 2003 ended his employment relationship with the City of Boston. Unlike Deignan, he had used nothing obtained during employment to help facilitate his crimes. There could therefore be no direct link between his employment as a corrections officer and his commission of the crime of workers' compensation fraud and grand larceny.

No reported case has ever applied pension forfeiture in Ch. 32 sec. 15(4) to a crime that was committed after the member retired from public employment and held no public job.

CONCLUSION

The Court should reverse Boston's pension forfeiture decision because neither Ch. 3 sec. 15(3) nor Ch. 32 sec. 15(4) is triggered by Mahan's post retirement, post public employment, criminal activities and convictions.

Respectfully Submitted,
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By his Attorney,

July 30, 2021

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Certification Pursuant to M.R. A.P. 16(k)

I, Nicholas Poser, hereby certify the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including but not limited to, Rules 16,18,20,and 21 of the Massachusetts Rules of Appellate Procedure. Compliance with Rule 20 was achieved using a monospaced Courier New at 10.5 characters per inch font, with 31 compliant pages of text.

CERTIFICATE OF SERVICE

I, Nicholas Poser hereby Certify that I have caused to be served the Appellant's Brief and two volume Record Appendix in this matter upon Counsel of Record by E-File.

/s/Nicholas Poser

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Chapter 32 sec. 1-"Member"

"Member", any employee included in the state employees' retirement system, in the teachers' retirement system or in any county, city, town, the Massachusetts Turnpike Authority, the Massachusetts Housing Finance Agency, or the Massachusetts Port Authority contributory retirement system, the Massachusetts Bay Transportation Authority police retirement system, the Blue Hills Regional Vocational school retirement system, the Minuteman Regional Vocational Technical School District Employees' retirement system, and the Greater Lawrence Sanitary District Employees' retirement system, established under the provisions of sections one to twenty-eight, inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law.

Chapter 32 sec. 3(1)

Section 3. (1) Kind of Membership. - (a) Membership in a system shall consist of two kinds as follows:-

(i) Member in Service.- Any member who is regularly employed in the performance of his duties, except a member retired for disability who upon partial recovery is restored to active service as provided for in paragraph (2) (a) of section eight. Any member in service shall continue as such during any period of authorized leave of absence with pay or during any period of authorized leave of absence without pay if such leave is due to his mental or physical incapacity for duty or if such authorized leave of absence without pay is for not more than one year or is to permit such member to perform his duties as a member of a retirement board. In any event the status of a member in service shall continue as such until his death or until his prior separation from the service becomes effective by reason of his retirement, resignation, failure of re-election or reappointment, removal or discharge from his office or position, or by reason of an authorized leave of absence without pay other than as provided for in this clause. Any member in Service shall have full voting powers in the system as provided for in section twenty of this chapter and in section sixteen of chapter fifteen.

(ii) Member Inactive. - Any member in service who has been retired and who is receiving a retirement allowance, any member in service whose employment has been terminated and who may be entitled to any present or potential retirement allowance or to a return of his accumulated total deductions under the provisions of sections one to twenty-eight inclusive, or any member in service who is on an authorized leave of absence without pay other than as provided for in clause (I) of this paragraph. Any member in-active shall have full voting rights as provided for in section twenty of this chapter and in section sixteen of chapter fifteen.

Chaptwe 32 Section 15. Dereliction of duty by members.

Section 15. (1) Misappropriation of Funds. - Any member who has been charged with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service, as the case may be, or of any system of which he is a member, and who files a written request therefor shall be granted a hearing by the board in accordance with the procedure set forth in subdivision (1) of section sixteen. If the board after the hearing finds the charges to be true, such member shall forfeit all rights under sections one to twenty eight inclusive to a retirement allowance or to a return of his accumulated total deductions for himself and for his beneficiary, or to both, to the extent of the amount so found to be misappropriated and to the extent of the costs of the investigation, if any, as found by the board. He shall thereupon cease to be a member, except upon such terms and conditions as the board may determine.

(2) Initiation of Proceedings. - Proceedings under this section may be initiated by the board, by the head of the department, by the commission or board of the commonwealth or of any political subdivision thereof wherein the member is employed or was last employed if not then in service, or in a county by the county commissioners, in a city by the mayor, in a town by the board of selectmen, in the Massachusetts Department of Transportation by the authority, in the Massachusetts Housing Finance Agency by the agency, in the Massachusetts Port Authority by the authority, in the Greater Lawrence Sanitary District by the district, in

the Blue Hills Regional School System by the system or in the Minuteman Regional Vocational Technical School District by the district. The procedure set forth in subdivision (1) of section sixteen relative to delivery of copies, statement of service thereof, notice, hearing, if requested and the filing of a certificate of findings and decision, so far as applicable, shall apply to any proceedings under this section.

(3) Forfeiture of Rights upon Conviction. - In no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of this section, be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty eight inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member, unless and until full restitution for any such misappropriation has been made.

(3A) Forfeiture of rights upon conviction. - In no event shall any member after final conviction of an offense set forth in section two of chapter two hundred and sixty eight A or section twenty five of chapter two hundred and sixty five pertaining to police or licensing duties be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member.

(4) Forfeiture of pension upon misconduct. - In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

(5) If the attorney general or a district attorney becomes aware of a final conviction of a member of a retirement system under circumstances which may require forfeiture of the member's rights to a pension, retirement allowance or a return of his accumulated

total deductions pursuant to this chapter, sections 58 or 59 of chapter 30 or section 25 of Chapter 268A, he shall immediately notify the commission of such conviction.

[Subdivision (6) applicable as provided by 2011, 176, Sec. 65.]

(6) If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received after the date of the offense of which the member was convicted.

[Subdivision (7) added by 2012, 36, Sec. 9 effective February 16, 2012 applicable as provided by 2012, 36, Sec. 50. See 2012, 36, Sec. 52.]

(7) In no event shall any member be entitled to receive a retirement allowance under sections 1 to 28, inclusive, which is based upon a salary that was intentionally concealed from or intentionally misreported to the commonwealth, or any political subdivision, district or authority of the commonwealth, as determined by the commission. If a member intentionally concealed compensation from or intentionally misreported compensation to an entity to which the member was required to report the compensation, even if the reporting was not required for purposes of calculating the member's retirement allowance, the member's retirement allowance shall be based only upon the regular compensation actually reported to that entity or the amount reported to the board, whichever is lower. Unless otherwise prohibited by law, such member shall receive a return of any accumulated total deductions paid on amounts in excess of the compensation actually reported, but no interest shall be payable on the accumulated deductions returned to the member.

Chapter 32 sec. 16

ection 16. Involuntary retirement; right to a hearing; right of review or appeal.

Section 16. (1) Involuntary Retirement and Right to a Hearing. - (a) Any head of a department who is of the

opinion that any member employed therein should be retired for superannuation, ordinary disability or accidental disability, in accordance with the provisions of section five, six, or seven, as the case may

be, may file with the board an a prescribed form a written application for such retirement. Such application shall include a fair summary of the facts upon which such opinion is premised. The applicant shall forthwith deliver to such member by registered mail, with a return receipt requested, a true copy of such application, together with a brief statement of the options available to such member on his retirement and a statement of his right, if any, to request a hearing with regard to such retirement and of the right, if any, of review available to him, as provided for in this section, in case he is aggrieved by any action taken or decision of the board rendered or by failure of the board to act upon his request or to render a decision within the time specified in this subdivision. Upon such delivery to such member the head of the department, or one acting in his behalf, shall file with the board under the penalties of perjury a written notice of such delivery, including the date thereof.

[Paragraph (b) of subdivision (1) effective until April 2, 2012. Far text effective April 2, 2011, see below.]

(b) Any member in service classified in Group 1, Group 2 or Group 4 who has attained age fifty five and completed fifteen or more years of creditable service, or any member in service so classified who has not attained age fifty five but who has completed twenty or more years of creditable service, for whom an application for his retirement is filed by the head of his department as provided for in paragraph (a) of this subdivision, may, within fifteen days of the receipt of his copy of such application, file with the board a written request for a private or public hearing upon such application. If no such request is so filed, the facts set forth in such application shall be deemed to be admitted by such member; otherwise such hearing shall be held not less than ten nor more than thirty days after the filing of the request. The board, after giving due notice, shall conduct such hearing in such manner and at such time or times as the best interests of all parties concerned may require. The board shall

prepare and file with its clerk or secretary a certificate containing its findings and decision, copies of which shall be sent to the proper parties within fifteen days after completion of such hearing.

[Paragraph (b) of subdivision (1) as amended by 2011, 176, Sec. 32 effective April 2, 2012. See 2011, 176, Sec. 64. For text effective until April 2, 2012, see above.]

(b) (i) Any member in service, classified in Group 1, Group 2 or Group 4 who has attained age 55 and completed 15 or more years of creditable service;
(ii) any member in service, classified in Group 1, Group 2 or Group 4 who has not attained age 55 but who has completed 20 or more years of creditable service;
(iii) any member in service, who entered such service on or after April 2, 2012, classified in Group 1 who has attained age 60 and completed 15 or more years of creditable service; or
(iv) any member in service, who entered such service on or after April 2, 2012, classified in Group 1 who has not attained age 60 but who has completed 20 or more years of creditable service, for whom an application for such member's retirement is filed by the head of such member's department under paragraph (a) of this subdivision, may, within 15 days of the receipt of such member's copy of such application, file with the board a written request for a private or public hearing upon such application. If no such request is so filed, the facts set forth in such application shall be deemed to be admitted by such member; otherwise such hearing shall be held not less than ten nor more than thirty days after the filing of the request. The board, after giving due notice, shall conduct such hearing in such manner and at such time or times as the best interests of all parties concerned may require. The board shall prepare and file with its clerk or secretary a certificate containing its findings and decision, copies of which shall be sent to the proper parties within fifteen days after completion of such hearing.

(c) If the board finds that any member should be retired under the provisions of this subdivision, he shall receive the same retirement allowance as he would have received had the application been made by himself. If the board finds that such member should not be retired, he shall continue in his office or position without loss of compensation, subject to the provisions

of sections one to twenty eight inclusive, as though no such application had been made.

[There is no subdivision (2).]

(3) Right of Review by District Court. - (a) Any member classified in Group 1, Group 2 or Group 4 who has attained age fifty five and completed fifteen or more years of creditable service, or any member so classified who has not attained age fifty five but who has completed twenty or more years of creditable service, or any such member who is a veteran and has completed ten or more years of creditable service, and who is aggrieved by any action taken or decision of a board or the public employee retirement administration commission rendered with reference to his involuntary retirement under the provisions of subdivision (1) or to his removal or discharge as set forth in subdivision (2), or any member who is aggrieved by any action taken or decision of a board or the public employee retirement administration commission rendered with reference to his dereliction of duty as set forth in section fifteen, may, within thirty days after the certification of the decision of the board, bring a petition in the district court within the territorial jurisdiction in which he resides praying that such action and decision be reviewed by the court. After such notice as the court deems necessary, it shall review such action and decision, hear any and all evidence and determine whether such action was justified. If the court finds that such action was justified the decision of the board or the public employee retirement administration commission shall be affirmed; otherwise it shall be reversed and of no effect. If the court finds that such member was unjustifiably retired, removed or discharged from his office or position he shall be reinstated thereto without loss of compensation. The decision of the court shall be final.

(b) Any member whose office or position is subject to chapter thirty ne or to the rules and regulations made under authority thereof, who is ag sieved by any action taken or decision of a board or the public employee retirement administration commission rendered as described in paragraph (a) of this subdivision shall, for the purposes of sections one to twenty eight, inclusive, have and retain such of the rights provided by sections forty two A, forty two B, forty three and

forty five of chapter thirty one as applied to his particular office or position, and the court shall, in addition to the matters it is required to review under such sections of chapter thirty one, affirm or disaffirm the decision of the board or the public employee retirement administration commission as provided for in paragraph (a) of this subdivision.

(4) Right of Appeal to Contributory Retirement Appeal Board. - There shall be an unpaid contributory retirement appeal board which shall consist of three members as follows: an assistant attorney general who shall be designated in writing from time to time by the attorney general who shall act as chairman, the public employee retirement administration commission or an assistant who shall be designated in writing, from time to time, by the said commission, and a member appointed by the governor for a term of five years. In the event the matter before the contributory retirement appeal board deals with any matter related to disability retirement or interim benefits as awarded by the division of administrative law appeals, the commissioner of public health or his designee shall substitute for the public employee retirement administration commission.

The members of the contributory retirement appeal board shall be compensated for any expenses incurred in the performance of their official duties. On matters other than those subject to review by the district court as provided for in subdivision (3), or other than those which would have been subject to review had the requirement for the minimum period of creditable service been fulfilled, any person when aggrieved by any action taken or decision of the retirement board or the public employee retirement administration commission rendered, or by the failure of a retirement board or the public employee retirement administration commission to act, may appeal to the contributory retirement appeal board by filing therewith a claim in writing within fifteen days of notification of such action or decision of the retirement board or the commission, or may so appeal within fifteen days after the expiration of the time specified in sections one to twenty eight, inclusive, within which a board or the commission must act upon a written request thereto, or within fifteen days after the expiration of one month following the date of filing a written request with the board or the commission if no time for action thereon is specified, in case the board or the commission

failed to act thereon within the time specified or within one month, as the case may be. The contributory retirement appeal board, after giving due notice, shall, not less than ten nor more than sixty days after filing of any such claim of appeal, assign such appeal to the division of administrative law appeals for a hearing. The division of administrative law appeals shall maintain the official records of the contributory retirement appeal board. After the conclusion of such hearing, the division of Administrative Law Appeals shall submit to the parties a written decision which shall be final and

binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties, unless within fifteen days after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board, or (2) the contributory retirement appeal board orders, in writing, that said board shall review such decision and take such further action as is appropriate and consistent with the appeal provided by this section. The contributory retirement appeal board shall then pass upon the appeal within six months after the conclusion of such hearing, and its decision shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties. Any person, upon making an appeal involving a disability retirement allowance, shall be permitted to retire for superannuation retirement, if otherwise eligible, pending the decision of the contributory retirement appeal board, but in no event shall such action prejudice the person from receiving any further benefits which the contributory retirement appeal board may grant in its decision nor shall the person upon a finding in favor of the employer be required to reimburse the employer for payments made prior to the decision of the contributory retirement appeal board.

On appeals involving disability or where medical reports are part of the proceedings, the contributory retirement appeal board may request further information from the members of the appropriate regional medical panel, or may employ a registered physician to advise them in determination of an appeal.

The contributory retirement appeal board shall have the power to subpoena witnesses, administer oaths and examine such parts of the books and records of the parties to a proceeding as relate to questions in

dispute. Fees for such witnesses shall be the same as for witnesses before the courts in civil actions, and shall be paid from the Appropriation Fund of the division of administrative law appeals.

The contributory retirement appeal board, acting through the division of administrative law appeals, shall arrange for the publication of its decisions and the cost of such publication shall be paid from the Appropriation Fund of the division of administrative law appeals.

The contributory retirement appeal board shall establish a fee structure for appeals brought under this section, which shall be subject to the approval of the commissioner of administration.

The division of administrative law appeals shall submit to the contributory retirement appeal board on an annual basis a report on the status of all cases that have been assigned to the division of administrative law appeals for a hearing.

(5) Provisions Not Applicable to Certain Members. The provisions of this section relative to the right of any member to a hearing or to the right of review by the district court shall not apply in the case of the removal or discharge of any state official or of any official of any political subdivision of the commonwealth for which provision is otherwise made in any general or special law, anything in this section to the contrary notwithstanding. The provisions of this section relative to the right of any member to a hearing or to the right of review by the district court shall not apply to any teacher or principal or superintendent of schools employed at discretion or any superintendent employed under a contract, for the duration of his contract, or any principal or supervisor, who has been dismissed, demoted, or removed from a position by a vote of a school committee under the provisions of section forty two, forty two A or section sixty three of chapter seventy one. The provisions of this section shall not apply to any member classified in Group 3.

Docket No.: 17-P-1379

Case Name: RETIREMENT BOARD OF WATERTOWN VS. JOSEPH DEIGNAN & others. [1]

Date: March 21, 2019

Panel: /s/Blake, Lemire & Singh, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The retirement board of Watertown (board) revoked Joseph Deignan's pension rights based on his criminal convictions, pursuant to G. L. c. 32, § 15 (4). Deignan argues that there was no direct link between the convictions and his position as a police officer that would justify forfeiture. He also argues that G. L. c. 32, § 15 (4), is unconstitutionally vague as applied to him. We affirm the Superior Court judgment upholding the decision of the board. [2]

The pension forfeiture statute, G. L. c. 32, § 15 (4), provides that "no event shall entitle any member of the State retirement system to a retirement allowance after final conviction of a criminal offense involving violation of the laws applicable to his office or position." Forfeiture "requires a 'direct link between the criminal offense and the member's office or position, either 'factual' or 'legal.'" *Essex Regional Retirement Bd. v. Swallow*, 481 Mass. 241, 249, 114 N.E.3d 581 (2019), quoting *State Bd. of Retirement v. Finneran*, 476 Mass. 714, 720, 71 N.E.3d 1190 (2017) (Finneran). "In reviewing an administrative decision pursuant to a petition for certiorari, we review the entire record to determine whether the decision is legally tenable and supported by substantial evidence." *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 542, 954 N.E.2d 541 (2011).

Here, Deignan pleaded guilty in Federal court to unlawful possession of a controlled substance by fraud (21 U.S.C. § 843[a][3] [2012]) and fraud in connection with identification documents (18 U.S.C. § 1028[a][7] [2012]). During his Federal plea colloquy, Deignan acknowledged that he was employed as a Watertown police officer when he used the information from another person's driver's license to forge and fill more than one hundred false prescriptions for drugs. He also admitted that the driver's license had been confiscated from a motorist by another police officer and, pursuant to Watertown Police Department (police department) policy, turned over to him in his capacity as supervisor of the police department's traffic division.

Deignan took the license that was entrusted to him as a police officer and used it for his own personal gain to obtain controlled substances by fraud. Thus, the crimes for which Deignan was convicted had a direct factual link to his position.

Deignan argues nevertheless that the link is indirect in the sense that the crimes were committed in his personal capacity while he was off duty and without the use of employer resources. "The nexus required by G. L. c. 32, § 15 (4), is not that the crime was committed while the member was working, or in a place of work, but only that the criminal behavior be connected with the member's position." *Dell'Isola v. State Bd. of Retirement*, 92 Mass. App. Ct. 547, 552, 90 N.E.3d 784 (2017), quoting *Durkin v. Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119, 981 N.E.2d 763 (2013). The connection between the criminal behavior – use of another person's identity to procure drugs – and Deignan's position as a police officer, is his exploitation of a motorist's driver's license obtained in his official capacity as supervisor of the traffic division of the police department. [3] See *Dell'Isola*, 92 Mass. App. Ct. at 554 (correction officer's pension forfeiture upheld upon officer's conviction for cocaine possession while off duty, where he used his employment-related connection with inmates to commit crime). The board's decision to revoke Deignan's pension is therefore both legally tenable and supported by substantial evidence. [4]

Finally, Deignan argues that the pension forfeiture statute is unconstitutionally vague as applied to him. A law is unconstitutionally vague if it fails to give fair notice that the conduct engaged in was prohibited and is susceptible to arbitrary enforcement. See *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, 873, 444 N.E.2d 922 (1983). A law is not vague, however, "if it requires a person to conform his conduct to an imprecise but comprehensible normative standard so that [people] of common intelligence know its meaning." *Commonwealth v. Hendricks*, 452 Mass. 97, 102-103, 891 N.E.2d 209 (2008), quoting *Commonwealth v. Gallant*, 373 Mass. 577, 580, 369 N.E.2d 707 (1977). Contrary to Deignan's contention, the language of G. L. c. 32, § 15 (4), placed him on fair notice that his misappropriation of a driver's license, entrusted to his care in his official capacity, in order to fraudulently obtain controlled substances, risked forfeiture of his pension.

Judgment affirmed.

By the Court
/s/Blake, Lemire & Singh, JJ.

March 21, 2019

[1]Justices of the Framingham Division, District Court
Department of the Trial Court.

[2]Deignan initially sought review of the board's decision in the District Court, pursuant to G. L. c. 32, § 16 (3) (a). After the District Court judge reversed the board's decision, the board filed an action in the nature of certiorari in the Superior Court, pursuant to G. L. c. 249, § 4. The Superior Court judge ordered judgment on the pleadings in favor of the board, and this appeal followed.

[3]Deignan also argues that forfeiture is inapplicable in his case because his convictions did not involve "misconduct in office." There is no requirement that the convictions must be for crimes of official misconduct. See *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 4-5, 665 N.E.2d 998 (1996). He also argues that forfeiture is inapplicable because he was retired by the time of his convictions. The authority he cites does not support the proposition that one may evade pension forfeiture for committing crimes applicable to one's position simply by retiring prior to conviction.

[4]Deignan also requests that we remand this case to the District Court so that a determination of the value of his pension benefits may be made and an analysis of this penalty, under the excessive fines clause of the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights, may be conducted. We decline to do so as the excessive fines issue was not pressed, litigated, or decided at any point prior to appeal. See *Finneran*, 476 Mass. at 723. Nothing we say here, however, precludes Deignan from raising the issue at any further proceedings in the trial court.

NOTIFY

10/14/✓
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-2160NOTICE SENT
O. 20. 20N.P.
S.R.B.
P.P.L.
B.T.M.
D.P.S.

PAUL J. MAHAN

vs.

BOSTON RETIREMENT BOARD

MEMORANDUM OF DECISION AND ORDER ON PARTIES'
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

This case arises out the Boston Retirement Board's ("Board") determination that the plaintiff, Paul J. Mahan ("Mahan"), should forfeit his retirement allowance pursuant to G.L. c. 32, § 15(3) and (4). The matter is now before the court on the parties' cross-motions for judgment on the pleadings. For the reasons that follow, Mahan's motion is **DENIED** and the Board's motion is **ALLOWED** in part.

BACKGROUND

The record before the Board reveals the following facts. Mahan started working as a correction officer at the Suffolk County House of Correction in 1997. At that time, the job description applicable to Mahan's position required a correction officer to perform general security duties, including maintaining order and preventing harm to prisoners.¹

On August 15, 2000, Mahan was injured attempting to restrain an inmate involved in a fight. Sometime thereafter, Mahan applied to the Board for Disability Retirement benefits. The Board approved his application on September 27, 2005, and the Public Employee Retirement

¹ Another job description in the record before the Board is much more explicit about correction officers potentially having to use physical force to restrain an inmate and the injury that may result therefrom. That job description is dated March 1, 2004, however, well after Mahan had left his position.

Administration Commission (“PERAC”) approved the Board’s decision. On August 10, 2006, PERAC sent a letter to the Board stating that it had approved payment of Mahan’s Accidental Disability retirement allowance effective November 4, 2003.² In addition, effective May 23, 2006, an administrative judge for the Department of Industrial Accidents found Mahan permanently and totally disabled and ordered that he receive permanent benefits under G.L. c. 152, § 34A, the workers’ compensation statute.³ As part of his determination, the administrative judge stated that as a correction officer, Mahan:

was charged with the care and custody of inmates, including feeding and housing them, conducting daily security duties, assisting inmates and accompanying them to various scheduled appointments, tending to their personal needs and problems, breaking up fights among inmates and conducting cell searches for weapons and contraband. His job as a correctional officer requires considerable postural movement throughout every shift, including walking and standing and being physically ready and obligated to intercede and restrain inmates routinely in violent situations.

Relevant to this decision, between January 1, 2006 and January 1, 2013, Mahan received workers’ compensation payments, assault pay from the Suffolk County Sheriff’s Department, and a disability retirement allowance.⁴

On February 14, 2013, a grand jury indicted Mahan for workers’ compensation fraud, in violation of G.L. c. 152, § 14(3), for knowingly making false or misleading statements for the purpose of obtaining benefits under G.L. c. 152 between the dates of January 1, 2006 and January 1, 2013, and for larceny over \$250, in violation of G.L. c. 266, § 30. On May 28, 2015, Mahan pleaded guilty to the offenses. Mahan admitted that he had worked at Shamrock Motors, a business owned by his wife, between January 1, 2006 and January 1, 2013, and that every six

² The parties agreed at the hearing before this court that Mahan was “retired” from his position as of this date.

³ Prior to this, Mahan had been receiving workers’ compensation benefits under § 34 and § 35.

⁴ Mahan’s disability retirement allowance was offset by the workers’ compensation payments.

months, he had certified under the pains and penalties of perjury that he did not earn income and was eligible for benefits. He also admitted that he knowingly failed to report that he was capable of working, which made him ineligible to receive workers' compensation and assault pay benefits. As a result, he had received an overpayment of \$205,618.25 in workers' compensation, \$181,825.25 in assault pay, and \$49,841.18 in retirement benefits. The court (Giles, J.) sentenced him to five years probation concurrent and restitution in the amount of \$205,618 to workers' compensation and \$100,000 in assault pay to the Suffolk County Sheriff's Department.

On June 1, 2015, the Attorney General informed PERAC of the felony criminal conviction of Mahan. On February 1, 2017, the Board informed Mahan that it would consider what effect his criminal convictions had on his retirement allowance pursuant to G.L. c. 32, § 15(3) and (4).

On February 9, 2018, the Board's hearing officer recommended that the Board revoke Mahan's retirement allowance pursuant to G.L. c. 32, § 15(4) because "but for Mr. Mahan's work-related injury, in August 2000, at the Suffolk House of Correction, he would not have been in a position ... to have to complete requisite workers' compensation documents. Completing workers' compensation documents was not an official part of Mr. Mahan's job duties as a corrections officer, yet his criminal offenses are still, 'inextricably intertwined.'" The Board also determined that Mahan's convictions involved misappropriation of governmental funds pursuant to G.L. c. 32, § 15(3). On March 21, 2018, the Board voted to adopt the recommended decision and forfeit Mahan's retirement allowance pursuant to G.L. c. 32, § 15(4).

On April 6, 2018, Mahan filed a petition for review of the Board's decision in the Boston Municipal Court ("BMC"). On January 29, 2019, the BMC entered judgment for the Board, concluding that the Board's decision to forfeit Mahan's pension pursuant to G.L. c. 32, § 15(4)

was correct because there was a factual link between Mahan's crime and his position as a correction officer. The BMC also determined that the Board correctly applied G.L. c. 32, § 15(3).

Mahan then filed for certiorari review pursuant to G.L. c. 249, § 4 in the Supreme Judicial Court. On June 6, 2019, Justice Lenk transferred the petition, pursuant to G.L. c. 211, § 4A, to this Court for further proceedings. Justice Lenk framed the issue as follows: the Board argues that Mahan, "who had been retired for several years before the criminal conduct at issue occurred, was a 'member' of a retirement system, even though inactive." Mahan argues that his misconduct was not conduct "applicable to" his former position. Justice Lenk stated that the record was not sufficient for a determination "whether such a necessarily fact specific analysis" was supported by substantial evidence before the Board.

DISCUSSION

The scope of judicial review for an action in the nature of certiorari under G.L. c. 249, § 4, is limited. See *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 173 (2006). "Certiorari allows a court to 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff.... In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public.'" *Id.*, quoting *Massachusetts Bay Transp. Auth. v. Auditor of the Commonwealth*, 430 Mass. 783, 790 (2000). The appropriate standard of certiorari review here is "substantial evidence," meaning "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 135 (1997).

The provisions of G.L. c. 32, § 15 pertain to dereliction of duty by a member of a contributory retirement system for public employees. See *Bulger*, 446 Mass. at 170. General Laws c. 32, § 15(3) states:

In no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of this section, be entitled to receive a retirement allowance ... unless and until full restitution for any such misappropriation has been made.^[5]

General Laws c. 32, § 15(4) provides:

In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of [§§ 1-28], inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

General Laws c. 32, § 1, defines a “[m]ember” as “any employee included in the state employees’ retirement system, ... or in any county, city, town ... contributory retirement system, ... established under the provisions of [§§ 1-28], inclusive, or under corresponding provisions of earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law.” There are two kinds of membership in a contributory retirement system for public employees — a “[m]ember in [s]ervice” and a “[m]ember [i]nactive.” G.L. c. 32, § 3(1)(a)(i), (ii). A “[m]ember in [s]ervice” is “[a]ny member who is regularly employed in the performance of his duties.” *Id.* at § 3(1)(a)(i). A “[m]ember

⁵ General Laws c. 32, § 15(1) in turn provides: “Any member who has been charged with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service, as the case may be, or of any system of which he is a member” Here, Mahan pleaded guilty to stealing money from the City of Boston, the governmental unit by which he was employed at the time of his retirement.

[i]nactive” is “[a]ny member in service who has been retired and who is receiving a retirement allowance.” *Id.* at § 3(1)(a)(ii). Mahan is a “member inactive” as he is retired and receiving a retirement allowance.

Because the language in G.L. c. 32, § 15 pertains to “any member,” it applies to Mahan as an inactive member of the Boston retirement system. See *Buonomo v. Retirement Bd. of Somerville*, 467 Mass. 662, 671 n.12 (2014) (if Legislature had wanted to limit applicability of this forfeiture provision to active members, it would have used words “any member in service” instead of “any member”).

I. G.L. c. 32, § 15(4)

Forfeiture of a retirement allowance pursuant to G.L. c. 32, § 15(4), is “mandatory and occurs by operation of law.... [It] is an automatic legal consequence of conviction of certain offenses.” *State Bd. of Retirement v. Woodward*, 446 Mass. 698, 705 (2006). General Laws c. 32, § 15(4) applies, however, only when the criminal activity of which the member is convicted is connected with the member’s office or position. See *Garney v. Massachusetts Teachers’ Ret. Sys.*, 469 Mass. 384, 389 (2014). To determine this, the court looks to the facts of each case for a direct link between the criminal offense and the member’s office or position. *Id.* This “direct link” requirement “does not mean that the crime itself must reference public employment or the employee’s particular position or responsibilities,” *Maher v. Justices of the Quincy Div. of the Dist. Court Dep’t*, 67 Mass. App. Ct. 612, 616 (2006), or that the crime necessarily must have been committed at or during work. *Durkin v. Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119 (2013). There are two recognized types of “direct links” between a public employee’s position and the crime committed: factual links and legal links. *State Bd. of Retirement v. Finneran*, 476 Mass. 714, 720 (2017). Factual links involve a direct factual connection between

the public employee's crime and position. *Id.* Legal links involve a crime directly implicating a statute that is specifically applicable to the employee's position. *Id.* at 721.⁶

Here, there is evidence in the record of a direct factual connection between Mahan's criminal offenses and his correction officer position. More specifically, Mahan was convicted of workers' compensation fraud. The Workers' Compensation Act was "designed to provide financial compensation for the impairment of an injured worker's earning capacity." *Spaniol's Case*, 466 Mass. 102, 107 (2013); *Ahmed's Case*, 278 Mass. 180, 183 (1932) (underlying principle of act "is that the cost of injuries sustained by those employed in industry, save those due to serious and wilful misconduct of the employee, shall be treated as a part of the cost of production"). Mahan received workers' compensation payments because he was injured while performing one of his job responsibilities as a correction officer, that is maintaining order and preventing harm to prisoners. Stated differently, Mahan was convicted of lying about his eligibility for workers' compensation, which he was receiving because he was injured while performing his duties as a correction officer. Thus, there is a factual link between the criminal offense of workers' compensation fraud and his position as a correction officer, and there was substantial evidence before the Board that Mahan's misconduct was "applicable to" his former position. *Essex Regional Ret. Bd. v. Swallow*, 481 Mass. 241, 248-250 (2019). Compare *Dell'Isola v. State Bd. of Ret.*, 92 Mass. App. Ct. 547, 548 (2017) (because how plaintiff came into possession of cocaine was factually linked to his position as correction officer, court held

⁶ There is no direct legal link here. See *Finneran*, 476 Mass. at 721 (direct legal link applicable where crime committed is contrary to a central function of the position as articulated in applicable laws). Compare *Retirement Bd. of Somerville*, 467 Mass. at 664-666, 670-671 (pension forfeiture where register of probate embezzled funds in violation of Code of Professional Responsibility for Clerks of Courts); *Bulger*, 446 Mass. at 177-180 (same with respect to clerk-magistrate who committed perjury and obstruction of justice).

that plaintiff's criminal offense rendered him ineligible to receive retirement allowance pursuant to § 15(4)); *Durkin*, 83 Mass. App. Ct. at 116-117, 119 (police officer who used department-issued firearm to shoot fellow officer while off duty was subject to pension forfeiture); *Maher*, 67 Mass. App. Ct. at 613, 616-617 (city employee who broke into city hall and stole documents from his personnel file was subject to pension forfeiture).⁷ Contrast *Garney*, 469 Mass. at 385-386, 389-391 (no forfeiture where teacher purchased and stored child pornography on home computer because no connection to either his students or school property); *Retirement Bd. of Maynard v. Tyler*, 83 Mass. App. Ct. 109, 112-113 (2013) (no forfeiture where fire fighter sexually abused children because acts occurred off duty outside fire house and fire fighter did not use "his position, uniform, or equipment for the purposes of his indecent acts"); *Scully v. Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 543 (2011) (member not required to forfeit pension after convictions of possession of child pornography on home computer where no direct link between criminal offenses and position at public library); *Herrick v. Essex Regional Retirement Bd.*, 77 Mass. App. Ct. 645, 654-655 (2010) (no forfeiture where housing authority custodian committed indecent assault and battery on daughter because offense not committed on housing authority property nor against any residents there, and did not bear other connection to custodian's position).

II. Eighth Amendment

Mahan also argues that forfeiture of his pension violates the Eighth Amendment's prohibition against excessive fines. See *Public Employee Ret. Admin. Comm'n v. Bettencourt*,


⁷ Mahan argues that his case can be distinguished because he was not still "employed" by the Suffolk County Sheriff's Department/City of Boston when he committed the crimes for which the Board forfeited his pension. There is no language, however, in the statute limiting its application to current employees. Further, the statute uses the term "member," which includes in its definition an individual who is retired.

474 Mass. 60, 72 (2016) (quotations and citation omitted) (touchstone of constitutional inquiry under Excessive Fines Clause is principle of proportionality: amount of forfeiture must bear some relationship to gravity of offense that it is designed to punish). Although briefed by Mahan, the Board did not address this issue in its decision. Nor did the District Court in its review.⁸ The parties agreed at the hearing before this court that the matter should be remanded to the District Court to decide this issue. See *Dell'Isola*, 92 Mass. App. Ct. at 549, 554 (Board determined that plaintiff forfeited his retirement allowance under § 15(4), Boston Municipal Court affirmed Board's decision, plaintiff filed for certiorari review in Superior Court, which reversed judgment of Boston Municipal Court, Board appealed to Appeals Court, which reversed judgment of Superior Court and remanded it for consideration of plaintiff's claim that pension forfeiture would be an excessive fine). The court thus remands the case to the District Court for consideration of Mahan's alternative argument that forfeiture of his pension constitutes an excessive fine.

⁸ In its papers before the District Court, the Board stated that it did not have a present value for Mahan's pension benefits and would have to request an official present value determination from the PERAC actuary. At the hearing before this court, the Board stated that it had received that determination.

ORDER

For the reasons stated above, it is hereby **ORDERED** that Paul Mahan's Motion for Judgment on the Pleadings is **DENIED** and the Boston Retirement Board's Judgment on the Pleadings is **ALLOWED** in part. It is **ALLOWED** in that the court **AFFIRMS** the Board's application of G.L. c. 32 to Mahan's retirement allowance. The matter is **REMANDED** to the District Court for determination of whether forfeiture of Mahan's pension constitutes an excessive fine.


Sharon E. Donatelle
Justice of the Superior Court

Date: October 6, 2020