

POLICE

MA POLICE ASSOCIATION

# Pension Forfeiture after *Bettencourt*, and Other Cases of Interest



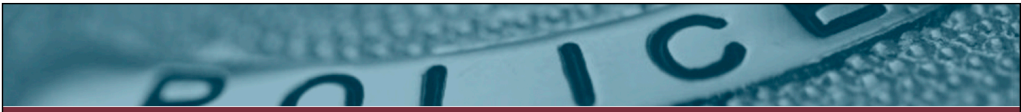
Judith A. Corrigan  
Deputy General Counsel, PERAC  
October 27, 2016



## PERAC

- ▶ The Public Employee Retirement Administration Commission (PERAC) was created for and is dedicated to the oversight, guidance, monitoring, and regulation of the Massachusetts Public Pension Systems. The professional, prudent, and efficient administration of these systems is the public trust of PERAC and each of the 104 public pension systems for the mutual benefit of the public employees, public employers, and citizens of Massachusetts.

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## PERAC *(continued)*

- ▶ 7 Commissioners, including a Chairman chosen by the following six members:

### The Governor Appoints:

- His designee
- A representative of a public safety union
- An investment professional

### The Auditor Appoints:

- Her designee
- President of the AFL/CIO or his designee
- A representative of the Massachusetts Municipal Association

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## Among PERAC's Many Responsibilities:

- ▶ Review termination, ordinary, and accidental disability retirement allowances approved by the Boards.
- ▶ Offer trainings to Board members (under Chapter 176) and Board administrators (under G.L. c. 7, Section 50 (f)).
- ▶ Assure compliance with the provisions of Chapter 176 of 2011.
- ▶ Monitor post-retirement earnings.

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## Let's Begin With *Bettencourt*

Involves:

- ▶ A police officer committing minor criminal offenses while on duty
- ▶ The 8<sup>th</sup> Amendment to the United States Constitution
- ▶ A first in the nation decision about pension forfeiture
- ▶ A commission established to take a critical look at our pension forfeiture statute

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## Our Pension Forfeiture Statute G.L. c. 32, Section 15(4)

(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. (Emphasis supplied).

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## Bettencourt: The Timeline

12/25/2004 | THE CRIMES ARE COMMITTED

10/26/2006 | INDICTMENT

4/4/2008 | CONVICTION

5/23/2008 | EVIDENTIARY HEARING BEFORE RETIREMENT BOARD

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## Bettencourt: The First Defense

**“The crime is not related to my office or position.”**

- ▶ Peabody Retirement Board: (5/23/08) Agreed
- ▶ PERAC: (9/10/08) Disagreed
- ▶ Peabody District Court: (6/15/09) Agreed
- ▶ Suffolk Superior Court: (8/7/10) Agreed
- ▶ Massachusetts Appeals Court: (2/10/12) Disagreed

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## Bettencourt: The Second Defense

**“This pension forfeiture is an Excessive Fine prohibited by the 8<sup>th</sup> Amendment to the U.S. Constitution.”**

- ▶ Peabody District Court: (11/5/12) Agreed.
- ▶ Suffolk Superior Court: (2/16/14) Disagreed.
- ▶ SJC: Agreed, he gets to keep his pension. (4/6/2016)

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## The Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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## The SJC Decision: There is an Extraction.

- ▶ Property exists in both tangible and intangible forms.
- ▶ There doesn't have to be a transfer of funds for it to be an extraction.
- ▶ By operation of Section 15(4), the pension share of the allowance is transferred to the government, "so it is an extraction of payment from the employee to the sovereign within the meaning of Austin and Bajakajian."

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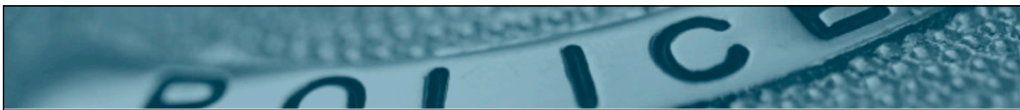
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## The SJC Decision: This is Punishment.

- ▶ A criminal proceeding is required.
- ▶ Section 15(4) requires a conviction.
- ▶ It cannot be imposed on someone not convicted of a criminal offense.
- ▶ “We conclude, therefore, that the forfeiture required by [Section] 15(4) qualifies as ‘punishment.’”

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## The SJC Decision: This Was “Grossly Disproportional” to the Gravity of the Offense.

- ▶ The amount of the forfeiture: \$659,000 plus an underdetermined amount of health insurance.
  - The nature and circumstances of the offense
  - Unrelated to other illegal activities
  - Maximum potential penalties show legislature not that concerned: \$1,000 per count, 30 days in jail per count
  - “The aggregate maximum penalty that could have been imposed on Bettencourt - imprisonment in the house of corrections for 630 days and a fine of \$21,000 - does not indicate a substantial level of culpability for purposes of this analysis...”

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## Future Pension Forfeiture Cases

1 <sup>st</sup> , “Was the Crime Related to the Person’s Office or Position?”	“Should the 8 <sup>th</sup> Amendment Halt the Forfeiture?”
• District Court	• District Court
• Superior Court	• Superior Court
• Appeals Court, possibly	• Appeals Court, possibly SJC
• SJC	
<i>If this question answered in the affirmative, then on to --</i>	

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## Who Decides If It Is “Grossly Disproportional?”

Retirement boards (and PERAC) can’t pass on constitutional issues. A court of law must do so.

### ➡ What is the retirement board’s role, then?

- To make as good a record as possible for review above, even though the burden of establishing that the 8<sup>th</sup> Amendment has been violated purportedly belongs to the member.

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## SJC to Legislature

*... [I]n light of our determination that the excessive fines clause applies to the statutory pension forfeiture program prescribed by [§ 15\(4\)](#), might the Legislature choose to establish a wholly different forfeiture system—for example, one that provided for different percentages of pension forfeiture depending on the nature and circumstances of the crime? These types of determinations are ones that fit squarely within the legislative, not the judicial, domain, and we believe that the more prudent approach is to defer to the Legislature for its resolution of such issues in the first instance...*

Bettencourt v. PERAC, 474 Mass. 60, 78 (2016)

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## Section 151 of Chapter 133 of the Acts of 2016

*There shall be a special commission on pension forfeiture to review the decision of the Supreme Judicial Court in Public Employee Retirement Administration Commission v. Edward A. Bettencourt, 474 Mass. 60 (2016)... The special commission shall make recommendations, including proposed amendments to section 15 of chapter 32 of the General Laws. The special commission shall file its recommendations, including any proposed legislation, with the clerks of the senate and house of representatives not later than March 1, 2017.*

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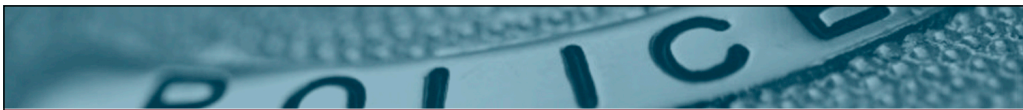
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## Let's Shift Gears to the Police Detail Case...

To briefly recap, a Magistrate of Division of Administrative Law Appeals (“DALA”) had ruled on January 9, 2015 that injuries sustained while on paid details could not result in the award of accidental disability benefits.

The Contributory Retirement Appeal Board (“CRAB”) has now repudiated that decision.

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## Three Reasons DALA Found This Officer Was Not Entitled to ADR

- ▶ Lack of a positive medical panel
- ▶ Not injured “as a result of, or while in the performance of” her duties
- ▶ Injured on a paid detail

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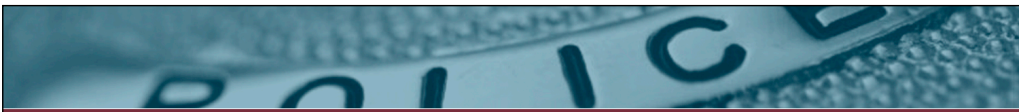
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## Lack of a Positive Panel

- ▶ A positive medical panel certificate is a condition precedent for the award of a disability retirement.
- ▶ A retirement board may decide that a medical panel's negative answer on causation was based on an erroneous standard in a PRESUMPTION case only.
- ▶ A negative certification as to incapacity and/or permanence will always be fatal to a claim, and a negative certification as to causation will be fatal to all non-presumption claims and many presumption claims.

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## Not Injured “in the performance of his [or her] duties”

No to:

- Coworker horseplay
- Performing a duty outside of your job description
- Being injured going to, from, or in the bathroom
- Being injured going to, from, or at lunch or on a break

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## Injured on a Paid Detail

- ▶ This finding was made despite all parties agreeing injuries on a paid detail should be compensable, and despite previous decisions of DALA regarding the same.
- ▶ PERAC was permitted to intervene as a party and provided data from its disability data base to show that since its inception on November 7, 1996, it has been approving both accidental disability retirement and death benefits, if officers are injured or killed on paid details.

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## BPD v. BRB & PERAC

**Case Number:** CR-11-397 (CRAB)

**Date of Decision:** August 9, 2016

**In a nutshell:** A police officer is eligible to receive accidental disability retirement on the basis of an injury sustained while working a paid detail.

**Status:** Waiting to see if this case has been appealed. (Appeal must be taken within 30 days but service of complaint may be made up to 90 days after that).

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## CRAB's Findings

*The plain words of the retirement law provide no basis for denying the protections of accidental disability benefits to persons injured while performing their duties during a private detail.*

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## CRAB's Findings (continued)

*Despite the fact that the assignment is requested and paid for by a private entity, the work done by police officers on details is “designed to ensure the safety and well-being of the public,” and officers assigned to such work are no less performing their “duties” than those on regular duty.*

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## And Moving On to Post-Retirement Earnings...

The formula:

- ▶ No public retiree may work more than 960 hours for a Massachusetts governmental unit in a calendar year.
- ▶ Such employment is limited by hours and compensation.
- ▶ Compensation when added to the retirement benefit cannot exceed the salary being paid for the position from which he/she retired, plus \$15,000.

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## Daley v. Plymouth Retirement, CRAB & PERAC

**Case Number:** Plymouth Superior Court, C.A. No. 14-01186-A

**Date of Decision:** September 28, 2016

**In a nutshell:** Even though he retired prior to July 1, 2009, Mr. Daley's service as a consultant or contractor will be subject to the post-retirement earning provisions of G.L. c. 32, Section 91(b). He must return his pension for the last four years, but the Board has not established it may collect his excess earnings.

**Status:** On appeal to Massachusetts Appeals Court.

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## Pomeroy v. Plymouth Retirement Board

**Case Number:** CR-15-258 (DALA)

**Date of Decision:** September 2, 2016

**In a nutshell:** A retired police officer exceeded his earning limitations because his company conducts internal investigations and property and evidence audits for police departments and municipalities in Massachusetts. Board properly considered his gross income, not net. Wife's salary is irrelevant. The issue is Mr. Pomeroy's payments from the state.

**Status:** On appeal to CRAB.

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## Finally...

Several more cases from the past year involving police officers and the public pension system in Massachusetts...

- ▶ Gomes
- ▶ Mullins
- ▶ Slepetz
- ▶ Ackerman

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### NOTES:

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## **Gomes v. Plymouth Retirement System & PERAC**

**Case Number:** CR-14-127 (DALA)

**Date of Decision:** February 5, 2016

**In a nutshell:** A police officer entitled to five years of creditable service under G.L. c. 32, Section 4(2)(b) for the period he served as a permanent intermittent police officer and a temporary full time police officer, must make make-up payments based on the wages he received during those years.

**Status:** On appeal to CRAB.

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## **Mullins v. Needham Retirement Board**

**Case Number:** CR-15-480 (DALA)

**Date of Decision:** April 15, 2016

**In a nutshell:** A police officer may not include “Health Incentive Pay” in her regular compensation. Such payments are bonuses, and therefore not pre-determined, non-discretionary, or guaranteed.

**Status:** Not appealed. This is a final decision of CRAB.

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### **NOTES:**

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## Slepetz v. Worcester Regional Retirement System

**Case Number:** CR-14-253 (DALA)

**Date of Decision:** April 29, 2016

**In a nutshell:** Police officer injured while trying to jump-start a fellow officer's cruiser injured "in the performance of his duties" and could be eligible for accidental disability retirement benefits, even though "jump-starting a cruiser" not explicitly listed in job description.

**Status:** On appeal to CRAB.

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## Ackerman v. Worcester Regional Retirement Board

**Case Number:** CR-11-405 (DALA)

**Date of Decision:** August 5, 2016

**In a nutshell:** In regard to his application for accidental disability retirement, police chief has not met his burden of proving that he sustained either a personal injury or underwent a hazard in the course of his employment, as required by Section 7(1).

**Status:** On appeal to CRAB.

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## Wrap Up

- ▶ We'll continue to monitor all the ongoing cases and report back to you next year.
- ▶ Questions about the cases in this presentation or any other retirement matter?



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**COMMONWEALTH OF MASSACHUSETTS**

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