



# PENSION FORFEITURE

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MACRS  
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## Statutory citation

- The possibility of pension forfeiture is found in Section 15 of Chapter 32.
- Section 15 is entitled “Dereliction of duty by members.”
- In its current form, Section 15 has 8 subsections.

## The subsections one by one

- Although we will go through most of the eight subsections individually, with special focus on subsection 15(4), we will start with subsection 15(2).
- Whenever a pension may be forfeited, forfeiture proceedings must be initiated.

## Section 15(2)

In pertinent part, Section 15(2) reads as follows:

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.

## Section 16(1)

Describes the time frame, and how hearings under Section 15 must be conducted.

## **Who may initiate forfeiture proceedings?**

Forfeiture proceedings may be initiated by the following:

- Retirement Board
- PERAC
- Head of Department
- Board of the Commonwealth or any political subdivision thereof;
- County Commissioners
- The Board of Selectmen

## **In addition, the following enumerated entities may initiate a forfeiture proceeding:**

- Massachusetts Housing Finance Agency
- Massachusetts Port Authority
- Greater Lawrence Sanitary District
- Blue Hills Regional School System
- Minuteman Regional Vocational Technical School District

### **May proceedings be brought against someone who has already been retired?**

It is important to note that 15(2) specifically mentions that the political subdivision where the member is employed may initiate proceedings, or the political subdivision where *the member was last employed if not then in service*. Clearly, Section 15 is meant to apply to retirees as well.

### **What does it mean to “initiate” proceedings?**

Section 15(2) describes what must be done to initiate proceedings. Specifically, it references Section 16(1) for the necessary procedure. As a first step, a letter should be sent to the member, notifying him or her that forfeiture proceedings are being initiated.

### **What should this initial letter of notice contain?**

This letter should notify the member that the retirement board (or other individual or entity) is initiating proceedings concerning the member's right to benefits pursuant to a subsection of Section 15.

### **How should the charge letter be sent?**

The letter notifying the member of a possible forfeiture, his or her rights to a hearing, and the appeal rights thereof should be sent by registered mail, return receipt requested.

## **What is the specific information this charge letter should contain?**

- A detailed explanation of why forfeiture is sought
- A notice to the member that he or she is entitled to a public or private hearing pursuant to Section 16(1)
- A notice that the member must request such a hearing in writing
- A notice of appeal rights, should the member be aggrieved by the outcome of the determination made

## **Are there any other service requirements?**

Yes. Pursuant to Section 16(1), the individual or entity initiating these proceedings must also file, with the board, a written notice of such delivery, including the date thereof, signed under the penalties of perjury.

### **How long would a member have in which to request a public or private hearing?**

The member has 15 days to request a hearing. The letter should indicate that unless a request for a hearing is made within 15 days, the facts asserted therein will be deemed admitted.

### **Public v. private hearing**

- Many are taken aback by this notion of a public entity conducting a “private hearing” but that is what the statute requires if the person so requests.
- Likely they would have the right to ask to go into executive session anyway, under two of the “purposes” for going into executive session.



## Executive session

### Purposes which might apply

Purpose 1: To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties.

## Executive session

### Purposes which might apply

- **Purpose 5: To investigate charges of criminal misconduct or to consider the filing of criminal complaints;**
- This might also be used, since usually criminal misconduct is involved in Section 15 matters, but this purpose is really about the actual filing of criminal charges.

## **When must the hearing be held?**

- The statute provides that such a hearing will be held not less than 10 nor more than 30 days after the member files their request.
- A member could agree to alter this time frame, if he or she so desired.

## **Who will actually hold the hearing?**

- With the exception of matters arising under Section 15(7), the hearing will be held by the retirement board.
- PERAC will conduct hearings in regard to Section 15(7).

### **What if a retirement board refuses to hold a hearing?**

- The retirement board must hold a forfeiture hearing. If they refused to do so, for whatever reason, PERAC would instruct them to hold such a hearing.
- If they continued to refuse, PERAC would seek an injunction in Superior Court.

### **What should such a hearing consist of?**

A member's rights will be preserved if he or she is permitted to present evidence on his or her own behalf and cross-examine witnesses presented by the proponent of the forfeiture. Additionally, the member must have a right of judicial review.

### **Is there a right of judicial review in these forfeiture cases?**

Yes. In fact, the avenue of appeal in these cases is to the district court within the territorial jurisdiction in which the member resides.

### **What is the time limit for filing such an appeal with the district court?**

A member aggrieved by the decision of the retirement board must file an appeal with the district court within 30 (thirty) days after the certification of the decision by the board.

## **Why wouldn't the member be able to appeal to CRAB?**

The statute does not provide for an appeal to CRAB in forfeiture cases. Section 16(3) expressly directs Section 15 appeals to the district court.

## **Section 16(3)(a)(2) provides that:**

[A]ny member who is aggrieved by any action taken or any 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...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.

### **Is the district court's jurisdiction mentioned anywhere else in Chapter 32?**

The express grant of district court jurisdiction in Section 16(3) is reinforced in Section 16(4) which expressly limits CRAB's ability to hear appeals to matters "other than those subject to review by district court as provided for in subdivision(3)."

### **What is the extent of the district court's review in these cases?**

The court will review the decision and action in question, and hear any and all evidence and will determine whether or not such action was justified. If the court finds the action of the board or PERAC to be justified, the action will be affirmed. If the court finds that the action was not justified, such action "shall be reversed and of no effect."

## Is there a right to appeal from the District Court decision?

- In a word, no.
- However, most of these cases make their way up under G.L. c. 249, Section 4.

## Chapter 249, Section 4

A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court... Such action shall be commenced within sixty days next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene...

## Bottom line

- An attempt at pension forfeiture under Section 15 will always result in the member having a right to a hearing as described in Section 16(1).
- The proper avenue of judicial appeal will be to the District Court.

## 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)



## Section 15(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.  
(Emphasis supplied)

## The time of the forfeiture under Section 15(4) is set in stone (in the statute)

- A pension forfeiture happens by operation of law.
- For those retiring before April 2, 2012, a pension will be forfeited as of the date of the conviction.
- For those retiring on or after April 2, 2012, a pension will be forfeited as of the date of the criminal offense from which the conviction results.

### **Section 15(4): Can the date of the forfeiture be stayed?**

- Absolutely not. It is either the date of the offense or the date of conviction, depending upon when the member seeks to retire.
- The law allows no provision for delaying the operation of the statute.

### **Section 15(4): Is there anyway around this?**

- The only way around this is not to be convicted of a crime related to your office or position.
- Occasionally, a case will be resolved through a “continuance without a finding” or “CWOFF”
- Such a judicial finding is not a conviction and a pension may be paid.

### **Section 15(4): When does the requisite “link” exist?**

- Off-duty police officer convicted of manslaughter for shooting and killing a patron in bar because he was unruly.
- 35 Year Teacher pled guilty to viewing images of child pornography while at his house.
- Clerk Magistrate pled guilty to perjury and obstruction of justice for lying to a grand jury.
- Plumbing inspector breaks down door in City Hall to pull damaging information from his personnel file.

### **Gaffney v. CRAB, 423 Mass. 1(1996)**

- Section 15(4) requires a direct link between criminal activity and office or position.
- Legislature did not intend pension forfeiture to follow as a sequelae of any and all criminal convictions.

Scully v. Retirement Board of Beverly  
80 Mass. App. Ct. 538  
(September 30, 2011)

Though indicted for seven counts of possession of child pornography, one count of providing obscene matter to a minor, and one count of indecent assault and battery on a person age fourteen or over, the director of the community services at a local library was only convicted of two counts of possessing child pornography on his home computer.

Scully v. Retirement Board of Beverly  
80 Mass. App. Ct. 538  
(September 30, 2011)

- The charge of which he was convicted occurred at his home and involved his *personal computer*.
- A direct link between member's position and the crimes of which he was convicted did not exist.

**Scully v. Retirement Board of Beverly**  
**80 Mass. App. Ct. 538**  
**(September 30, 2011)**

- No connection between the member's convictions and his position as director of community services in a library was established.
- Member does not forfeit his pension.

**PERAC v. Bettencourt**  
**81 Mass. App. Ct. 1113**  
**(February 10, 2012)**

- Police officer on duty as watch commander on Christmas Day, 2004 hacks into Commonwealth website to look up the scores of fellow officers.
- Convicted of 21 counts of unauthorized access to a computer system (G.L. c. 266, Section 120F.)
- Newspaper headlines exclaimed, "Bettencourt convicted of snooping!"

**PERAC v. Bettencourt**  
**81 Mass. App. Ct. 1113**  
**(February 10, 2012)**

- Retirement Board: In a split decision, finds that Bettencourt's crimes were not related to his office or position, and grants him a retirement allowance.
- PERAC: Reviews Retirement Board's determination and finds that pension should be forfeited. Bettencourt appeals to district court.

**PERAC v. Bettencourt**  
**81 Mass. App. Ct. 1113**  
**(February 10, 2012)**

- District Court judge: These were mere personal transgressions wholly unrelated to [Bettencourt's] office.
- Superior Court judge: In the present case, the only link is that Bettencourt is a police officer who committed a crime. That is insufficient.

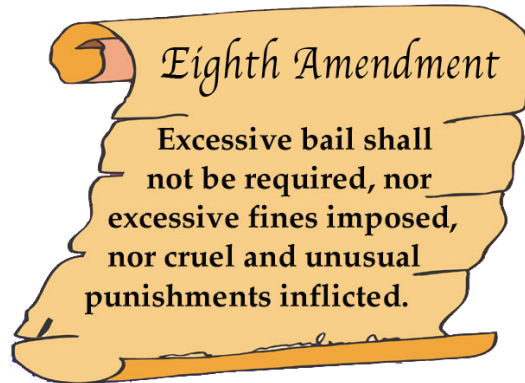
**PERAC v. Bettencourt**  
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- Appeals Court: He illegally accessed the files of the other officers while on duty in his official capacity as a watch commander, on department premises, and while using a department computer. Importantly, his job as a watch commander entailed the supervision of other officers, and he impersonated other officers on-line to facilitate his illegal access to the department computer system. Further, although no direct evidence was presented of exactly how Bettencourt obtained the Social Security numbers of the officers he impersonated, it strains credulity to suggest that he did not obtain at least some of this information through some official means. Based on the facts of this case we have no choice but to conclude that the direct link required by *Gaffney* and *Bulger* is present here.
- There is a “direct link” between Bettencourt’s office and position.

**Is the Bettencourt case done?**

- No, it is not.
- Although the “direct link” between Bettencourt’s crimes and his position has been established, it’s back to the Peabody District Court to consider Bettencourt’s claim that the 8<sup>th</sup> Amendment to the United States Constitution prevents his pension forfeiture.

## The 8<sup>th</sup> Amendment to the United States Constitution



## The Three Prong Test

In order to prove a violation of the Eighth Amendment, a plaintiff must demonstrate that: 1) the government extracted payments as a “fine”; 2) such extraction or fine was “punitive”; and 3) such punitive extraction or fine was “grossly disproportional to the gravity of [the criminal] defendant’s offense.” United States v. Bajakajian, 524 U.S. 321, 334 (1998).



## Massachusetts Law

- To date, no pension forfeiture in Massachusetts has been stopped by the 8<sup>th</sup> Amendment.
- The SJC has declined to say whether it views a pension forfeiture as a fine which is punitive.
- Assuming, without deciding, that a pension forfeiture is a fine and is punitive, the SJC has yet to find the pension forfeited “grossly disproportional” to the gravity of the offense in any case.

## Section 15(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.

## **What is the duty of all public employers regarding notification?**

- All public employers must immediately notify the appropriate Retirement Board when an employee is under indictment for misconduct in his or her elective or appointive office or employment, and has been suspended from his or her position.
- The employer is also required to notify the Retirement Board of the outcome of any charges that were brought against the individual.

## **Where is this requirement found in the law?**

- G.L. c. 268A, Section 25 provides, in pertinent part:  
The employer of a person so suspended shall immediately notify the retirement system of which the person is a member of the suspension and shall notify the retirement board of the outcome of any charges brought against the individual.
- See PERAC Memo # 30/2004 for more details.

### **What is the duty of the attorney general or the district attorneys under Section 15(5)?**

If the attorney general or any district attorney becomes aware of a final conviction of a member of a retirement system under circumstances which may require forfeiture, he or she shall immediately notify PERAC of such a conviction.

### **Section 15(7)**

- Subsection 7 was inserted by Chapter 36 of the Acts of 2012.
- Applicable to anyone whose retirement allowance wasn't final as of the date of the act, which is February 17, 2012.

## Section 15(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. (Emphasis added).

## Hearing requirement

- Because subsection 7 is part of Section 15, a hearing must be held if the member in question so requests.
- This is the only time an entity other than a retirement board actually conducts a hearing.
- PERAC will conduct the hearing in such cases.

## Brief notes on Section 15's other subsections

- 15(1) – doesn't require a criminal conviction, membership may be lost pending restitution
- 15(3) – requires criminal conviction in the loss of both pension and accumulated deductions but permits restitution
- 15(3A) – violation of named offenses results in the loss of both pension and accumulated deductions, with no road back

## Section 15(1)

“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.

## Section 15(1), continued

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.”

## Section 15(3)

“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.”

## Section 15(3A)

“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.”

## Brain teaser

The subsections of Section 15 are not mutually exclusive BUT:

- Can someone convicted of misappropriating funds from a governmental unit (Section 15(3)) avail themselves of the restitution remedy?