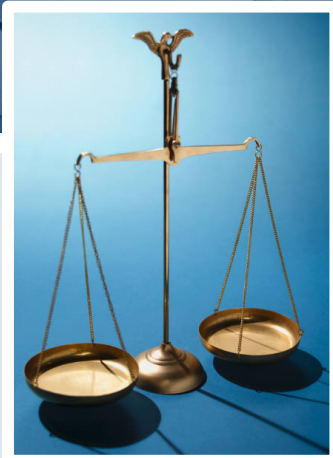


# MACRS



## Post-Retirement Earnings and *Plymouth Retirement Board v. CRAB*

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MACRS 2018 SPRING CONFERENCE LEGAL PANEL

## ***Plymouth Retirement Board v. CRAB and Others***

- **Case No.:** 17-P-23
- **Decision Date:** February 16, 2018
- A Rule 1:28 decision of the Appeals Court, meaning it represents only the views of the particular panel and may not be used as binding precedent.
- However, it upholds a decision of the Contributory Retirement Appeal Board (“CRAB”).

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## ***Daley v. Plymouth Retirement Board & PERAC, CR-Numbers 11-441 and 13-409***

CRAB Decision issued 8/7/14, and Order Clarifying Decision 10/9/14

- 1) Discovery sanction
- 2) Retirement Board free to prove excess earnings
- 3) All retirees, even those retired prior to July 1, 2009, subject to restrictions of Section 91(b)

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### **NOTES:**

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## Background

- Daley founded financial services company in 1994.
- Clients include political subdivisions of Commonwealth.
- Remained an active employee of Town of Plymouth until 1997.
- Retired for superannuation in 2006.

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## Events Leading Up to Case

- Chapter 21 of the Acts of 2009 enacted.
- Amended Section 91(b).
- PERAC interpreted amendment as exempting certain retirees from Section 91(b) restrictions if they retired prior to July 1, 2009.

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## Chapter 21 Amendments to G.L. c. 32, Section 91(b)

- (b) ...any person who has been retired and who is receiving a pension or retirement allowance... may, subject to all laws, rules and regulations, governing the employment of persons in the commonwealth, county, city, town, district or authority, be employed in the service of the commonwealth, county, city, town, district or authority, including as a consultant or independent contractor or as a person whose regular duties require that his time be devoted to the service of the commonwealth, county, city, town, district or authority during regular business hours for not more than nine hundred and sixty hours in the aggregate, in any calendar year...

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## Excerpt from G.L. c. 32, Section 91(c)

- (c) Each person referred to in paragraph (b) shall certify to his employer and the treasurer or other person responsible for the payment of the compensation for the position in which he is to be employed... (Emphasis added)

(Another portion of Section 91(c) excerpted later in the slide show.)

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## Events Leading Up to Case *(Continued)*

- January 2010: Retirement Board seeks information on Daley's earnings from 2007 to 2010.
- Daley urgently asks PERAC's opinion as to whether the Retirement Board may seek this information.
- PERAC issues technical advisory outlining its position.
- PERAC later joined as a party by the Division of Administrative Law Appeals ("DALA") because of the advisory.

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## CRAB's Discovery Sanction

- Throughout case, Daley refuses to produce documents board requests.
- Successfully turns back an attempt to get Superior Court to require production of documents.
- Good faith belief in PERAC's position.
- Argues res judicata regarding document production after dismissed Superior Court case.

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## Route to Appeals Court

- Retirement board sues in Superior Court to get more than the retirement allowance.
- PERAC does not appeal.
- Daley does not appeal timely.
- Superior Court upholds CRAB, retirement board appeals.

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## Appeals Court

- Upholds CRAB decision in all respects.
- Appeals Court does not reach the merits of the question of the 91(b) amendments but CRAB's decision becomes final.

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## One Issue Left Undecided

May a retirement board take more than the member's retirement allowance when there are excess earnings?

- Statute says yes
- Reported appellate cases suggest otherwise
- This panel's views clear

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## Another Section 91(c) Excerpt

... [I]f the earnings therefrom exceed the amount allowable under paragraph (b), he shall return to the appropriate treasurer or other person responsible for the payment of compensation all such earnings as are in excess of said allowable amount. The amount of any excess not so returned may be recovered in an action of contract by the appropriate treasurer or other person responsible for the payment of the compensation of any such person. (Emphasis added.)

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## Two Reported Cases

- *Flanagan v. Contributory Retirement Appeal Board*, 51 Mass. App. Ct. 862 (2001)
- *Bristol County Retirement Board v. Contributory Retirement Appeal Board*, 65 Mass. App. Ct. 443 (2006)

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## The Panel in *Daley*

- Discovery sanction reviewed only under an abuse of discretion standard.
- Board requested recovery of \$350,927.03.
- The amount requested by Board would result in excessive sanction.
- “Judges should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms...”

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## The Panel in *Daley* (Continued)

- “Here, the sanctions limiting recovery to the benefits paid to Daley for the years that he received excess earnings under G.L. c. 32, [Section] 91(b), appropriately balanced the parties’ positions to reach a fair outcome.”

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## A Fair Outcome?

- Daley’s retirement allowance began at just under \$10k a year in late 2006.
- Board sought @ \$350,000+ from him (and seeks more post this case).
- For four years in question, discovery sanction of @ \$40k.
- Amounts eerily similar to amounts in famous 8<sup>th</sup> Amendment case of *U.S. v. Bajakajian*.
- Wage Act arguments unaddressed.

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## What's Next?

- For Daley and the Retirement Board, the matter of his excess earnings continues, for the years in question and beyond.
- For the public pension community, at some point, an appellate court in Massachusetts will likely consider this issue of excessiveness of penalty.
- An Appellate Court will likely consider the Wage Act arguments.
- Legislative action may be undertaken.

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## But For Now?

- The next slide sums up the present state of post-retirement earnings in the public sector in Massachusetts.
- Many public policy reasons behind the restrictions on retirees receiving a retirement allowance and earning money from the Commonwealth.
- Cases like *Daley* are unusual.

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## Post-Retirement Earnings in Public Sector in Massachusetts

- Retirees (regardless of retirement date or retirement type) may not be employed by Mass. or one of its political subdivisions for more than 960 hours total in any calendar year.
- Earnings + allowance cannot exceed the current salary for pre-retirement position + \$15,000.
- May waive retirement allowance and no limitations.
- Certain positions (some elected officials) and income (jury pay) are exempt from limits.

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