COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 069406-76**

Raymond F. Gaines	Employee
Town of Adams	Employer
Royal Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Harpin[1])

This case was heard by Administrative Judge Herlihy.

APPEARANCES
W. Frederick Uehlein, Esq., for the insurer at hearing and on appeal
Dorothy M. Linsner, Esq., for the insurer at hearing
Edmund R. St. John, Esq., for the employer at hearing and on appeal

LONG, J. The insurer appeals from an administrative judge's decision wherein the judge invoked a two-year statute of limitations to limit the period of time that the insurer was entitled to reimbursement from the employer for cost of living adjustments (hereinafter "COLA"), pursuant to M.G.L. c. 152, § 34B and § 65(2).[2] Finding merit in

[1] Judge Harpin participated in panel discussions but left the reviewing board prior to the publication of this decision.

[2] M.G.L. c.152, § 34B provides in pertinent part:

> Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted, without application, in accordance with the following provisions; provided, however, that no increase in benefits shall be payable which would reduce any benefits the recipient is receiving pursuant to federal social security law.
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> ….
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> (c) The supplemental benefits under this section shall be paid by the insurer concurrent with the base benefit. Insurers shall be entitled to quarterly reimbursements for supplemental benefits, pursuant to section sixty-five, for cases involving injuries that

both of the insurer's appellate arguments, we reverse the decision and order the employer to reimburse the insurer for all claimed COLA reimbursements.

The case was tried by the parties by way of a joint hearing stipulation, accompanied by oral presentations at the hearing held on July 19, 2017, and hearing briefs filed thereafter. The judge listed the issues in dispute as follows:

> occurred on or before October first, nineteen hundred and eighty-six, and for those cases occurring thereafter, to the extent such supplemental benefits are due to the increase of greater than five percent in the average weekly wage in the commonwealth in any single year. No self-insurer, self-insurance group or municipality that has chosen non-participation in the assessment provisions for funding such reimbursements pursuant to section sixty-five shall be entitled to such reimbursements.

M.G.L. c.152, § 65 provides in pertinent part:

> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B; … No reimbursements from the Workers' Compensation Trust Fund shall be made under clauses (a) to (g), inclusive, to any non-insuring public employer, self-insurer or self-insurance group which has chosen not to participate in the fund as hereinafter provided.
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> . . . .
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> No private employer with a license to self-insure and no private self-insurance group shall be required to pay assessments levied to pay for disbursements under clauses (a) to (g), inclusive, and neither the commonwealth, nor any city, town, or other political subdivision of the commonwealth or public employer self-insurance group shall be required to pay assessments levied to pay for disbursements under clause (a), (b), (c), (d), (e), (f) or (g) if such employer or group has given up an entitlement to reimbursement under said clauses by filing a notice of non-participation with the department. Such notice shall be made to the commissioner on or before March first of any year in order to be effective as of July first of that year. Notice of non-participation shall be irrevocable and shall be signed by the chief executive officer or board of trustees of the employer or group. . . .
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> A public employer which has a policy with a workers' compensation insurer shall have the ability to file a notice of non-participation as specified above; provided, however, that its insurer shall not be entitled to reimbursement from the Workers' Compensation Trust Fund, and the insured public employer shall be required to reimburse its insurer for any payments the insurer makes on its behalf that would otherwise be subject to reimbursement under clauses (a) to (g), inclusive.

1. Is a notice of opt out is [sic] required
2. Has the Town met its burden of proof on affirmative defenses
3. Amount of reimbursement due

(Dec. 4.)

The joint stipulation provides the factual and pre-hearing procedural history of the claim as follows:

1. The employee, Raymond Gaines, suffered a fatal industrial injury on December 11, 1976 during the course of his employment with the Town of Adams.
2. Arrowood Indemnity Company, the insurer, was the insurer for the Town of Adams, the Town, on December 11, 1976.[3]
3. From December 11, 1976 through October 31, 1986 the insurer paid weekly benefits to the employee's widow, but no supplemental benefits were due under G.L. c. 152, § 34B and § 65(2)(a).
4. During the period beginning November 1, 1986 and continuing to this date, the insurer has paid weekly benefits to the employee's widow, as well as supplemental benefits concurrent with base benefits pursuant to G.L. c. 152 § 34B and § 65(2)(a), COLA.
5. Prior to July 1, 1992, the Town joined the Massachusetts Interlocal Insurance Association, MIIA, and thereafter became responsible for payment of workers' compensation benefits for the Town's new claims. It has continued to be a member of MIIA to this date.
6. On February 14, 1992, MIIA notified the Department of Industrial Accidents of its decision to opt out of participation in the Trust Fund as of July 1, 1992.
7. MIIA is a licensed self-insurance group that is incorporated in Massachusetts.
8. The insurer received COLA reimbursement from the Workers' Compensation Trust Fund, from October 20, 1988 to July 14, 1997, including for the period after MIIA opted out of the Trust Fund on July 1, 1992.
9. On March 22, 2011 counsel for the insurer refiled a claim for reimbursement of COLA benefits with the Trust Fund which was previously filed by the insurer but not reimbursed in the amount of $33,714.52 for the period of October 1, 2007 to December 31, 2010. On August 4, 2011 counsel for the insurer filed a claim for

[3] The DIA lists the insurer as Royal Insurance. Arrowood Indemnity Company is the successor to Royal Insurance. (Tr. at 3.)

reimbursement of COLA benefits with the Trust Fund in the amount of $7,511.04 for the period from January 1, 2011 to June 30, 2011. On May 25, 2012 counsel for the insurer filed a claim for reimbursement of COLA benefits with the Trust Fund in the amount of $11,812.21 for the period July 1, 2011 to March 31, 2012. Only the period from April 1, 2008 to March 31, 2009 was reimbursed by the Fund.

10. On or about May 20, 2012 the Trust Fund notified counsel for the insurer that it no longer would reimburse the insurer for COLA benefits it had paid to the employee's widow because the Town had opted out of the Trust Fund pursuant to G.L. c. 152, § 65(2) by virtue of the fact that MIIA had opted out. As of May 20, 2012 the insurer had direct knowledge that the Trust Fund denied responsibility for payment of COLA reimbursement as a result of MIIA's opt-out from the Trust Fund.
11. The insurer continued to file with the Trust Fund for COLA reimbursement for benefits paid between April 1, 2012 and March 31, 2016, submitting requests on January 24, 2014 in the amount of $28,783.69, on May 5, 2015 in the amount of $21,109.54 and on April 21, 2016 in the amount of $17,678.48.
12. The Secretary of the Commonwealth lists MIIA with a date of organization of April 12, 1982.
13. Counsel for the insurer filed a written demand against the Town on April 11, 2016 for reimbursement in the amount of $120,609.48 for COLA payments made from October 1, 2007 through March 31, 2016, excluding the period of April 1, 2008 through March 31, 2009, which was already reimbursed by the Trust Fund, on the ground that it was the Town's obligation to reimburse the insurer pursuant to G.L. c. 152 § 65(2) because it had opted out of the Trust Fund. No other written demand from counsel for the insurer prior to April 11, 2016 was made against the Town.
14. On April 26, 2016 the insurer filed a claim against the Town pursuant to G.L. c. 152 § 65(2) for reimbursement of COLA benefits paid to the employee's widow from October 1, 2007 through March 31, 2016 in the amount of $120,834.50, subsequently revised to $120,609.48 and continuing COLA benefits paid after March 31, 2016 plus interest under § 50.
15. A conference on the insurer's claim for reimbursement from the Town was held on November 8, 2016. An order was entered on November 10, 2016 requiring the Town to pay reimbursement of COLA benefits under G.L. c. 152 § 34B from April 11, 2014 and continuing. The town reimbursed the insurer $2,242.60 which is the amount by which

the COLA payments increased each year during that period. The insurer filed a timely appeal of the order.

16. At hearing the insurer is supplementing its claim for reimbursement to include payments made from April 1, 2016 through March 31, 2017 for a total of $18,276.62. Added to the initial reimbursement claim of $120,609.48, the total amount of the insurer's claim for reimbursement through March 31, 2017 is $138,886.10. Crediting the $2,242.60 paid by the Town of Adams, the balance remaining through March 31, 2017 is $136,643.50, plus interest under G.L. c. 152 § 50, plus ongoing COLA reimbursement from April 1, 2017.
17. The Town does not dispute that MIIA opted out of participation in the Trust Fund and that as a member of MIIA, it is liable for reimbursement to the insurer for the period following MIIA's opt out. What is disputed by the Town is that it is liable for anything prior to two years after notice to it of the opt out from MIIA. The town further disputes the amount it is liable for pursuant to the statute.

(Dec. 2-4.)

The hearing decision was issued on January 16, 2018, and ordered that "[t]he town is to reimburse the insurer for all COLA benefits paid from April 11, 2014 to date and continuing pursuant to § 34B." (Dec. 9.) This order extinguished the insurer's claim for reimbursement of § 34B benefits that were paid more than two years before the insurer first made demand upon the town on April 11, 2016. The judge supported her decision as follows:

> In May, 2012 The Trust Fund notified the insurer it would not reimburse COLA benefits because the town through its association with MIIA had opted out from the Trust Fund. (Stip. 10.) As of May 20, 2012, the insurer had direct knowledge the town had opted out of the Trust Fund but continued to request reimbursement from the Trust Fund. (Stips. 10 & 11.) On April 11, 2016 the insurer sent a demand with the requisite department forms for reimbursement from the town. Counsel for the insurer filed a claim for reimbursement with this Board on April 26, 2016. (Ex. 9; Stips. 13 & 14.)
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> *Discussion*
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> The insurer argues its claims for COLA reimbursement from a non-participating employer are not time sensitive. Counsel premises its argument on an omission or lack of specific inclusion for a claim against a public employer

> who has opted out of the fund. … Relevant to the claim before me now is the regulation dealing with the procedure for reimbursement pursuant to M.G.L. c. 152, § 65(2). 452 CMR 3.03(3) reads in pertinent part, 'A party requesting reimbursement pursuant to G.L. c. 152, § 65(2)(a) or § 65(2)(b), shall file a form prescribed by the Department, … no later than two calendar years from the date on which the benefit payment, for which the reimbursement request being filed, was due.'
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> Purportedly the insurer is asking this Department to except it from the two year filing requirement of 452 CMR 3.03(3). The insurer argues the regulation relates specifically to the Trust Fund. The reason for the regulation is because the Fund is maintained by assessments and is a pay as you go system. The issue before me deals with a non-participating public employer and this reasoning does not apply. Counsel for the insurer argues once the town opted out it became liable for the COLA reimbursement. I agree. The insurer argues it is able to go back to 2007 when it started paying COLA. I disagree.
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> The regulation identifies "a party" which includes definitions for an employer and an insurer. As to the definition of a non-participating employer such as the town in this matter such a scenario is envisioned by the application of § 65(2)(a) or § 65(2)(b). The Commissioner pursuant to statutory authority has promulgated 452 CMR 3.03(3) to administer opt outs from the Fund. Envisioned in 452 CMR 3.03(3) is the time requirement of two calendar years from the date for which the benefit claimed is payable. The Department has the ability to impose time restrictions on COLA reimbursement claims. *See: Beatty's Case, 84 Mass. App. Ct. 565, (2013)*
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> I find the insurer knew of the Town's opt out on May 20, 2012. The insurer filed with the town a demand for reimbursement on April 11, 2016 and on April 26, 2016 it filed a claim with this Department. I find the insurer is bound by 452 CMR 3.03(3) and is entitled to reimbursement from April 11, 2014, the date on which the insurer submitted its demand for reimbursement with the appropriate department forms to the town.

(Dec. 6-7.)

On appeal, the insurer argues that the "decision was contrary to law because notice to the town of the opt-out by MIIA is not legally relevant to Arrowood's right to reimbursement." (Insurer br. 13.) The above-quoted findings reveal that the date upon which the insurer was notified of the town's opt-out, May 20, 2012, was a factor in the judge's ultimate decision to limit the insurer's reimbursement request. Therefore, the judge has implicitly ruled that somehow notice to the insurer from the Trust Fund of a

public employer's opt-out of the Trust Fund system is relevant to the insurer's statutory right to reimbursement. This is error.

The insurer argues:

> The [Administrative Judge's] decision was contrary to law because notice to the town of the opt out is not legally relevant to Arrowood's right to reimbursement. Even if notice was relevant, MIIA's knowledge of the opt out should have been imputed to the town by its agency relationship. … The Town argued that "[t]here is no evidence that MIIA notified the Town of Adams" of the opt-out decision. Town of Adams Hearing Brief at p. 2. This point incorrectly implies that notice is relevant to the reimbursement claims at issue. Neither M.G.L. c. 152, § 65, 452 CMR § 3.03, nor any other statute or regulation seen by Arrowood, requires that an employer have notice of an opt-out. Nor do they state notice of an opt out has any bearing on the statute of limitations in Section 3.03, or even mention this type of notice to the employer at all. Notice is simply irrelevant to whether Arrowood is entitled to reimbursement.

(Insurer br. 13-14.)

We agree with the insurer that the issue of notice of opt-out to either the insurer or the employer has no bearing on the insurer's statutory right to reimbursement. As noted, the judge focused her inquiry on when the insurer was notified of the opt-out by the Trust Fund. She did not address, nor was she required to, when the town was aware that it had opted out. Even if notice to the town of the opt-out was relevant, the insurer correctly notes that "[i]t is undisputed that MIIA was acting as an agent of the Town after July 1, 1992. As such, it is clear that MIIA's decision to opt-out of the Trust Fund was taken with actual or apparent authority of the Town." (Insurer br. 15.)

The insurer also takes issue with the judge's finding that the regulation in question applies to the administration of opt-outs:

> The [Administrative Judge] goes on to state that "The Commissioner pursuant to statutory authority has promulgated 452 CMR § 3.03(3) to administer opt outs from the Fund." Given the lack of any reference to opt-outs in the regulation, it is an impermissible leap to suggest that it was promulgated to administer them.

(Insurer br. 8.)

We agree with the insurer on this issue, as there is no connection, either directly or

implicitly, between the promulgation of 452 Code Mass. Regs. § 3.03(3) and the administration of opt-outs from the fund. The only reference to non-participation is found within § 65(2), and there is no mention made of non-participation or administration of opt-outs within the regulation itself. Thus, this finding is also error.[4]

Additionally, we find merit in the insurer's further argument on appeal that the "decision was contrary to law because Arrowood's requests for reimbursement for payments made prior to April 11, 2014 were timely." (Insurer br. 5.) The insurer and judge correctly note that § 65(2) does not provide any time restrictions on insurers to file for reimbursements of COLA benefits; however the parties agree that the promulgation of 452 Code Mass. Regs. § 3.03(3) and its two-year statute of limitations was a valid exercise of the Commissioner's powers to promulgate rules and regulations consistent with M.G.L. c. 152. (Insurer br. 12; Employer br. 3.) The dispute arises as to whether or not 452 Code Mass. Regs. § 3.03(3) applies to reimbursement requests made by an insurer against a non-participating public employer that assumes responsibility for COLA reimbursements once the public employer opts out of the Trust Fund. We, therefore, refer to the statutory and regulatory provisions to determine if they can be reconciled to produce a consistent body of law on this issue.

As noted, the fourth paragraph of § 65(2) contains the following provision addressing the ramifications of a public employer's choice to opt out:[5]

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[4] The effect of the decision was to eliminate valid reimbursement claims that had been timely filed by the insurer with the Department in accordance with § 65(2)(a) and 452 Code Mass. Regs. 3.03(3) for the periods October 1, 2007, to April 10, 2014. Even if the insurer filed a claim against the town for the unpaid reimbursements as soon as they were informed by the Trust Fund on May 20, 2012, as the decision suggests they should have, the insurer would still forfeit timely filed reimbursement requests for the period of time between October 1, 2007, and May 20, 2010. We think it worthy to note as well that the insurer received COLA reimbursement payments from the Trust Fund for at least five years, and possibly more, following the town's opt-out, which took effect on July 1, 1992. Until informed by the Trust Fund on May 20, 2012, the insurer had no way of knowing, nor would it have any reason to even contemplate, that the obligation to pay its reimbursement requests was then borne by the Town of Adams.

[5] Neither party asserts that the Trust Fund is responsible for the COLA reimbursement requests at issue.

> A public employer which has a policy with a workers' compensation insurer shall have the ability to file a notice of non-participation as specified above; provided, however, that its insurer shall not be entitled to reimbursement from the Workers' Compensation Trust Fund, and the insured public employer shall be required to reimburse its insurer for any payments the insurer makes on its behalf that would otherwise be subject to reimbursement under clauses (a) to (g), inclusive.

The entirety of 452 Code Mass. Regs. § 3.03(3) provides:

> A party requesting reimbursement pursuant to M.G.L. c.152, § 65(2)(a) or § 65(2)(b), shall file a form prescribed by the Department, received and date stamped by the Department no later than two calendar years from the date on which the benefit payment, for which the reimbursement request being filed, was due.

The insurer "does not contend that Section 3.03 is unenforceable in its entirety nor is it seeking to be excepted from Section 3.03 as the [Administrative Judge] asserted." (Insurer br. 12.) The insurer, however, asserts that the two-year limitation applies only to insurers' claims seeking reimbursement from the Trust Fund and not to claims seeking reimbursement from a non-participating public employer, such as here. The insurer argues as follows:

> The conclusion the AJ reached following these statement [sic] is that "[e]nvisioned in 452 CMR § 3.03(3) is the time requirement of two calendar years from the date for which the benefit claimed is payable", citing *Beatty's Case*, 84 Mass. App. Ct. 565 (Mass. 2013) for the proposition that the Department has the ability to impose time restrictions on COLA reimbursement claims. While the Department may have the ability to do so, it clearly chose not to impose a time limit on claims against non-participating employers, and the regulation and statutes reflect that choice. Technically, *Beatty's Case* may have "[u]pheld the two year statute of limitations" as the Town contends. (Town Hearing Brief at p. 4). However, it did not uphold the statute of limitations to claims for reimbursement by an insurer against the nonparticipating employer. *Beatty* only dealt with claims brought against the Trust Fund. Id. It is thus inapplicable to the instant case.
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> Since neither the statute nor the regulation contains any reference to a statute of limitations on a claim against an employer that has opted out, Arrowood could not have been on notice of any statute of limitations affecting its filing of a claim against the Town.

(Insurer br. 9.)

We agree with the insurer and find that the two-year limitation does not apply to COLA reimbursement requests made upon a non-participating public employer. As noted in the insurer's brief, the two-year statute of limitations imposed by 452 Code of Mass. Regs. § 3.03(3) was upheld by the Massachusetts Appeals Court in Beatty's Case, supra, but it only dealt with claims brought against the Trust Fund. The court focused upon how the Trust Fund's annual budgetary logistics and annual assessments upon employers provide the rational basis for the limitation period:

> The department's stated reasons for promulgating the two-year limitations period in 452 CMR 3.03(3) were to avoid claims for COLA reimbursements more than two years from the date the COLA benefits were due, "and to avoid prejudice to employers in the application of their assessments for reimbursement of claims." Hence, eliminating older reimbursement claims was intended to further the statutory goal of maintaining the Fund's pay-as-you-go design, or, as the administrative judge put it, of protecting the integrity of the Fund and its budget process from stale claims and the risk of a shortfall. We think c. 152, §§ 34B & 65, taken together, evince a clear legislative intent that the department is charged with administering the Fund and providing COLA reimbursements in a manner that promotes prompt payment, accuracy and fairness in the budgetary and assessment process.
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> . . . .
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> A two year limitations period strikes a reasonable balance between the insurer's entitlement to COLA reimbursement and the department's responsibility to estimate the Fund's budget on an annual basis and to levy assessments and administer benefits promptly and accurately.

Beatty, supra, at 570, 572.

This line of reasoning simply does not apply to the present situation involving COLA reimbursements sought from a non-participating public employer, since the non-participating public employer has no involvement in the Trust Fund's COLA assessment or reimbursement funding mechanisms. Without any Trust Fund involvement in this COLA reimbursement claim made against a non-participating public employer, the concerns surrounding the timeliness of annual Trust Fund employer assessments, budget estimates, prompt and accurate benefit administration, and "protecting the integrity of the

Fund," Beatty, supra at 170, are absent. Therefore, the "rational basis" for upholding the two-year statute of limitations is removed from the present equation, and we decline to sanction the borrowing of the two-year statute of limitations in this instance.

We also note that § 65(2) establishes "the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B; (b) reimbursement of adjustments to weekly compensation pursuant to section thirty-five C… ." The regulation, 452 Code Mass. Regs. 3.03(3), specifically references § 65(2)(a) and (b) in imposing the two-year limitations period, and in this context refers to the *Trust Fund* as the entity to which the request for reimbursement is addressed. This is in keeping with the first sentence of § 65(2) that creates the Trust Fund and identifies the Trust Fund as the source of the funds from which conventional reimbursements are made when the reimbursement request is filed pursuant to the first paragraph of § 65(2). There is no reference to a non-participating public employer in the regulation. When a public employer opts out of the Trust Fund, either individually or as part of a self-insured group, the final phrase of § 65(2) becomes operative and mandates "the insured public employer shall be required to reimburse its insurer for any payments the insurer makes on its behalf that would otherwise be subject to reimbursement under clauses (a) to (g), inclusive." As noted, the parties stipulated that it was the public employer's responsibility to pay the insurer's COLA reimbursement requests following the town's opt-out. (Stip. 17; Tr. 13.) The source for the town's newfound COLA reimbursement obligation lies in the fourth paragraph of § 65(2), which also establishes an alternate reimbursement process. We find that this language establishes an alternate "non-conventional" reimbursement process independent of the conventional reimbursement procedure with the Trust Fund, and this alternate reimbursement process is not subject to the two-year statute of limitations found in 452 Code Mass. Regs. 3.03(3).[6]

[6] While we hold today that 452 Code Mass.Regs. §3.03(3) does not apply to COLA reimbursement requests made upon non-participating public employers, we note that all of Arrowood's requests "would otherwise be subject to reimbursement" under § 65(2)(a),

We hold that the two-year statute of limitations found in 452 Code Mass. Regs. § 3.03(3) does not apply to COLA reimbursement requests made by insurers upon non-participating public employers. The hearing decision is reversed and the employer, Town of Adams, is ordered to pay the insurer all of the claimed reimbursement requests, ("supplemental benefits") calculated in accordance with the provisions of § 34B.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **June 27, 2019**

"reimbursement of adjustments to weekly compensation pursuant to section thirty-four B," because the employee's date of injury occurred before October 1, 1986, entitling it to full reimbursement under § 34B(c). In any event, the record establishes that Arrowood filed with the Trust Fund on Department-prescribed forms within the two-year statute of limitations, as prescribed by 452 Code Mass. Regs. § 3.03(3).