



***GRIMES* AND OTHER CASES OF INTEREST**

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SPRING 2017

Notable Recent Cases

NOTABLE RECENT CASES

- | | |
|------------|-------------|
| • Grimes | • Fair |
| • Gomes | • O'Leary |
| • Moore | • Witkowski |
| • Khramova | • Morse |
| • Marzilli | • Sarno |
| • Giacoppo | • Lamonica |
| • Maddox | • DeFelice |
| • Fant | • Barker |



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Grimes v. Malden Ret. Bd. & PERAC

- Case No. CR-15-5 (CRAB)
- Decision Date: November 18, 2016
- In a nutshell: CRAB determined that creditable service for reserve police officers and call firefighters under G.L. c. 32, § 4(2)(b) does not require payment by the member if they were never compensated.
- Not appealed.

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NOTES:

Gomes v. Plymouth Ret. Bd. & PERAC

- Case No. CR-14-127 (CRAB)
- Decision Date: November 18, 2016
- In a nutshell: CRAB held that reserve police officers and call firefighters under G.L. c. 32, § 4(2)(b) are able to buy back service if make-up payments are made equal to what would have been contributed based on the salary paid to them.
- On appeal to Superior Court.

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Moore v. Boston Ret. Bd. & PERAC

- Case No. CR-12-73 (CRAB)
- Decision Date: September 30, 2016
- In a nutshell: Retirement boards must use “prescribed forms, approved by the Actuary” for all beneficiary situations and a DRO cannot be used as a prescribed form.
- On appeal to Superior Court.

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NOTES:

Khramova v. Boston Ret. Bd.

- Case No. CR-11-522 (CRAB)
- Decision Date: July 25, 2016
- In a nutshell: CRAB upheld the DALA decision awarding ADR. That an action is a bona fide personnel action is not an exception to personal injury standard when the action constitutes the “intentional infliction of emotional harm.”
- On appeal to Superior Court.

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Marzilli v. State Bd. of Ret.

- Case No. CR-12-564 (DALA)
- Decision Date: December 23, 2016
- In a nutshell: In order to be eligible for a termination allowance under G.L. c. 32, § 10(2) a member must demonstrate that their termination was involuntary.
- Appealed to CRAB.

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NOTES:

Giacoppo v. State Bd. of Ret.

- Case No. CR-12-563 (CRAB)
- Decision Date: November 22, 2016
- In a nutshell: Accidental disability based on gradual deterioration from exposure to workplace condition or hazard is not a personal injury unless the workplace hazard rose to the level of an “identifiable condition that is not common and necessary to all or a great many occupations.”
- On appeal to Superior Court.

8

Maddox v. MTRS

- Case No. CR-15-301 (DALA)
- Decision Date: November 2, 2016
- In a nutshell: If a member defaults on an installment agreement for the purchase of service and then wishes to begin the purchase again they must execute a new installment plan and may be subject to higher interest rates.
- Not appealed.

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NOTES:

Fant v. Middlesex County Ret. Bd.

- Case No. CR-13-68 (CRAB)
- Decision Date: August 9, 2016
- In a nutshell: Engaging in work duties at home, even important duties, does not transform the home into a work location and injuries suffered at home are not injuries that are in the performance of a member's duties and thus are not a basis for ADR.
- Not appealed.

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PERAC Memorandum #39/2012

THRESHOLD REQUIREMENTS	FURTHER CRITERIA
<ul style="list-style-type: none">• The payments must either be part of the base salary of the employee or "other base compensation of the employee". Payments cannot be found to be "other base compensation" if a payment is of only limited duration or if the payments lack predictability.• The payments must be for services performed. A retirement board would have to find that working in lieu of taking vacation is a "service performed".	<ul style="list-style-type: none">• Payments for unused vacation leave are not excluded by statute, regulation or case law.• Such payments are not '1 time' because they have been made year after year.• Such payments have not been made primarily in the last three years or for any other period of limited duration such that they could be considered 'salary enhancements or salary augmentation plans which will recur for a limited or definite term...'• If an individual elects to participate in a buyback program, he or she must do so in a consistent manner from year to year and in conformity with the legal restrictions of salary augmentation contained in the statute and regulations.• Participation in such a plan is available to all similarly situated employees.• Such payments were actually earned during the 12 month period for which such purchase is authorized.• Such a payment has not been made as a result of giving notice of retirement.• Payments must only be made pursuant to an official written policy of the employer, a collective bargaining agreement, or an individual employment contract that allows an employee to receive compensation in lieu of vacation time.• Payments must be in a reasonable amount which would not cause a substantial burden on the retirement system.• If such payments are deemed to be regular compensation, anti-spiking provisions would apply in the calculation of retirement benefits.

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NOTES:

Fair v. Middlesex County Ret. Bd.

- Case No. CR-15-294 (CRAB)
- Decision Date: Nov. 18, 2016
- In a nutshell: Payments received for unused sick time do not constitute “regular compensation,” regardless of what is contained within CBA. Such payments are similar to overtime payments, and are not regular and recurrent. CRAB commented — but did not rule — that the same would apply to payments made in lieu of taking vacation days.
- Not appealed.

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O’Leary v. Lexington Ret. Bd. & PERAC

- Case No. CR-15-30 (DALA)
- Decision Date: Oct. 6, 2016
- In a nutshell: Payments made in lieu of taking vacation days did not constitute “other base compensation” as they needed to be elected every year. The payments were also effectively overtime payments and, in this situation, appeared to be salary enhancements as the option was only available to officers with 20 or more years of service.
- On appeal to CRAB.

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NOTES:

G.L. c. 32, § 7. Accidental Disability Retirement

- § 7(1) *Conditions for Allowance*
- “Any member in service...who is unable to perform the **essential duties** of his job and that such inability is likely to be permanent...by reason of a personal injury sustained or a **hazard undergone** as a result of, and while in the performance of his duties...shall be retired for accidental disability...
- ...no such retirement shall be allowed unless such injury was sustained or such hazard was undergone **within two years prior to the filing of such application** or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence.”
(Emphases added).

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Witkowski v. CRAB & Massport Ret. Bd.

- Case No. 15-P-1382 (Appeals Ct.)
- Decision Date: Dec. 29, 2016
- In a nutshell: Member was not entitled to ADR for PTSD, because the member did not apply until ten years after undergoing the hazard, and there is no exception in section 7 for late discovery of a particular diagnosis. Further, there is no tolling of the two-year limitation period because of late discovery of the PTSD.
- Not appealed.

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NOTES:

Morse v. State Bd. of Ret.

- Case No. CR-13-491 (CRAB)
- Decision Date: Aug. 1, 2016
- In a nutshell: Court stenographer was not entitled to ADR for her depression, anxiety and alcohol dependency, because her gradual deterioration from exposure to a work hazard (testimony and exhibits about graphic crimes) was common to occupations throughout law enforcement and the judicial system.
- On appeal to Superior Court.

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Sarno v. Middlesex County Ret. Bd.

- Case No. CR-15-83 (DALA)
- Decision Date: Oct. 21, 2016
- In a nutshell: The essential duties of a position are those that a member is actually required to perform, not the duties that could theoretically be assigned in accordance with a job description.
The member failed to prove that he was unable to perform his actual duties on his last day of work and, therefore, was not entitled to ADR.
- Not appealed.

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NOTES:

Pension Forfeiture

- G.L. c. 32, § 15(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...”

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Lamonica v. Winthrop Ret. Bd.

- Case No. 1605-CV-095 (BMC)
- Decision Date: Dec. 21, 2016
- In a nutshell: A pension should only be forfeited if there exists “substantial evidence” that there is a direct link between a member’s criminal conviction and his or her office or position. Mere allegations constitute conjecture, which should not be considered by a Board when considering the substantial action of forfeiting a pension.
- On appeal to Superior Court.

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NOTES:

G.L. c. 32, § 3 - Membership

- § 3(1)(a)(i) *Member in Service*
- “Any member who is regularly employed in the performance of his duties...the status of a member in service shall continue as such until his death or until his prior separation from the service becomes effective...”
- § 3(2)(d)
- “In all cases involving part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service of any employee in any governmental unit...the board shall have and exercise full jurisdiction to determine such employee’s eligibility for membership...”

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Stoneham Ret. Bd. v. CRAB & DeFelice

- Case No. SJC-12098 (SJC)
- Decision Date: Dec. 22, 2016
- In a nutshell: Once a member is granted initial membership in a retirement system, he or she will retain the membership status so long as he or she remains employed. Accordingly, a member whose hours or pay are reduced below the initial membership threshold of a Board may not have their membership revoked. “Once a member, always a member...” (...but not always).

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NOTES:

Barker v. State Bd. of Ret.

- Case No. CR-15-72 (CRAB)
- Decision Date: Dec. 21, 2016
- In a nutshell: Once a member retires, that retiree cannot change his or her Option C retirement option or designated beneficiary. These policies are based on the “actuarial soundness” of the retirement system.
- Not appealed.

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NOTES:

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