COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

MATHEW A. FRAZIER,

Petitioner

v.

BARNSTABLE COUNTY RETIREMENT BOARD and,
PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION

Respondents.

CR-06-0190

DECISION

Petitioner Matthew A. Frazier appealed from a decision of Barnstable County Retirement Board, finding that he had overearnings for the years 2002, 2003, and 2004, and from a determination by intervener Public Employee Retirement Administration Commission (PERAC) of overearnings for 2000 through 2004. The Division of Administrative Law Appeals (DALA) heard the matter and admitted thirty-eight exhibits.[1] On February 27, 2008, DALA remanded the case "to PERAC to recomputed Matthew Frazier's Section 91A earnings in light of the standards set forth in [the] decision for doing a proper re-assessment of his earnings data,"[2] which PERAC has done, and which DALA has approved.[3]

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[1] DALA Decision at 2.

[2] DALA Decision at 15.

[3] PERAC Memorandum in Response to Petitioner's Objections at 1 & n.1.

Timeliness of Frazier's appeal. DALA concluded, without discussion, that Frazier's "appeal was timely filed."[4] We agree, but consider it prudent to explain our reasoning.

The timeliness of an appeal is controlled by our governing statute, G. L. c. 32, § 16(4), which provides, in pertinent part, that "any person when aggrieved by any action taken or decision of the retirement board or the public employee retirement administration commission . . . may appeal to the contributory retirement appeal board **by filing therewith a claim in writing within fifteen days of notification** of such action or decision[.]" (Emphasis added.)

This statutory language raises two questions relevant to determining the timeliness of Frazier's appeal: when is a claim considered filed with us? when does the time for filing with us begin to run?

First, because the statute speaks in terms of a claim actually being filed with us –"filed therewith" –a claim could be considered filed with us only when we actually receive it, not, for example, when it is placed in the mail. This construction is consistent with the decision of the Supreme Judicial Court in *Harper v. Division of Water Pollution Control*, where a complaint had been "mailed [to the court] within thirty days of the plaintiff's receipt of notice of the final decision, [but] it was not filed in the clerk's office until thirty-one days after that date."[5] The governing statute required that "[p]roceedings for judicial review of an agency decision shall be . . . commenced in the court within thirty days after receipt of notice of the final

[4] DALA Decision at 1, citing DALA Ex. 1.

[5] *Harper v. Division of Water Pollution Control*, 412 Mass. 464, 465 (1992).

decision of the agency."[6] The Supreme Judicial Court reasoned that, "[i]n saying that 'the action shall . . . be commenced in the court,'" the Legislature intended that the complaint be filed within thirty days after receipt of notice of the agency decision."[7] Also, the Court explained, its construction of the statute "tend[ed] to reduce the uncertainty in determining the time at which an agency decision may be treated as conclusive on the matters decided."[8]

On the other hand, a regulation applicable to proceedings before us and other administrative agencies, provides "that "[a]ll papers filed by U.S. mail shall be deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark[.]"[9] Although G. L. c. 32, § 16(4), permits construing filed "therewith" as meaning actually filed with us, we are persuaded by the recent Supreme Judicial Court decision in *Pavian, Inc. v. Hickey* that the statute does not "demand[] it."[10] Hence, even if *Pavian, Inc. v. Hickey* may be distinguishable on its facts, we accept that the animating legal spirit it identifies calls for accepting the postmark date as the date of filing with us. On this basis, Frazier's appeal was timely filed with us.

Second, had we construed the date of filing as the date we received Frazier's appeal, then its timeliness would have turned on whether "notification of such action or decision" refers to the date the Barnstable board gave notice or the date

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[6] G. L. c. 30A, § 14(1).

[7] *Harper*, 412 Mass. at 466.

[8] *Id.*, at 467 (fn. omitted).

[9] 801 Code Mass. Regs § 1.01(4)(b).

[10] *Pavian, Inc. v. Hickey*, 452 Mass. 490, 493 (2008).

Frazier received notice. The board gave notice on March 8, 2006;[11] Frazier received notice on March 10, 2006.[12] "Notification" is an ambiguous term, which we are disinclined to construe to cut off a party's appellate rights, especially considering the shortness of the fifteen-day appellate period. Moreover, in § 16(4), the Legislature knew how to be clear when wanted to specify that an appeal period begins to run from the date of a decision: decisions by DALA "shall be complied with . . ., unless **within fifteen days after such decision**" a party objects in writing to us (or unless we ourselves choose to review the decision). (Emphasis added.) For these reasons, were the filing date to be held to be the date we actually received Frazier's appeal, we still would conclude that Frazier's appeal was timely filed.[13]

Background. Frazier became a Truro police officer in 1988.[14] Before becoming a police officer, he began three businesses that he continued to operate: (1) landscaping, (2) snow plowing and sanding, and (3) renting portable toilets.[15] In 1989, he was injured in the line of duty as a police officer. He was involuntarily retired on accidental disability retirement in July, 1992. Since then, he has not been determined to be able to return to work.[16]

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[11] DALA Ex. 2.

[12] DALA Ex. 1.

[13] We note that, in this case, notice actually was received within two days of the date it was given. We neither decide nor intimate how we would decide a case in which the petitioner claimed to have received notice more than three days after the date notice was given.

[14] DALA Finding of Fact 1. Except as they are inconsistent with this opinion, we adopt DALA's findings of fact as our own.

[15] DALA Finding of Fact 2. We infer continuous operation of the businesses.

[16] DALA Finding of Fact 1.

In 1990, Frazier incorporated various of his businesses as Matthew Frazier Enterprises, Inc. (MFE).[17] In 1992, he incorporated his portable toilet business as Waste Associates, Inc. (WAI).[18]

In 1999, Frazier and WAI entered into an agreement with a third party for the purchase and sale of WAI and some trucks owned by MFE.[19] To receive the proceeds from the sale, Frazier set up a third corporation, AMF Consulting Group, Inc. (AMF).[20] Although he was principally responsible for the start up, growth, and worth of WAI,[21] Frazier was the nominal owner of only 20% of AMF; the remaining 80% was in his wife's name.[22]

Beginning in 2000, the Fraziers purchased storage containers and dumpsters that they, in turn, rented to MFE, which was in the business of renting and subleasing them.[23] In 2000 or 2001, Frazier bought a commercial building from which he has been receiving rental income.[24]

The overearnings review. Pursuant to G. L. c. 32, § 91A, Frazier had to file with PERAC an annual form "certifying the full amount of his earnings from earned

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[17] DALA Finding of Fact 2. See also DALA Ex. 11 (showing date of MFE's incorporation as January 19, 1990).

[18] DALA Finding of Fact 2. See also DALA Ex. 11 (showing date of WAI's incorporation as October 27, 1992).

[19] DALA Finding of Fact 7.

[20] *Id.*

[21] DALA Finding of Fact 10.

[22] DALA Finding of Fact 7. See also DALA Ex. 11 (showing date of AMF's incorporation as August 26, 1999.

[23] DALA Finding of Fact 11.

[24] DALA Finding of Fact 13.

income during the preceding year." Section 91A goes on to provide that, if the sum of a retiree's earnings and retirement allowance exceeds by $5,000 or more "the amount of regular compensation which would have been payable to such member if such member had continued in service in the grade held by him at the time he was retired," then the excess (overearnings) must be refunded.

After reviewing Section 91A filings for 2000-2004, PERAC concluded that Frazier had overearnings. As permitted by Section 91A, Frazier sought a hearing before the Barnstable board. Believing the evidence for 2004 to be incomplete, the board addressed only PERAC's overearnings findings for 2000-2003. Contrary to PERAC, the board concluded that Frazier had overearnings only in 2002 and 2003.[25]

By letter dated October 26, 2005, the Barnstable board notified PERAC of its decision "for the purposes of PERAC providing a recalculation of Mr. Frazier's earnings consistent with the decision[.]"[26] PERAC asked the board to reconsider its decision, in part, "to allow the Commission to provide testimony and evidence in support of its claim against Mr. Frazier" and to include Frazier's earnings for 2004.[27] In February 2006, the Barnstable board's hearings officer issued a supplemental report,[28] which the board adopted, concluding that Frazier had

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[25] DALA Findings of Fact 20–21.

[26] DALA Finding of Fact 21. The Barnstable board's letter is DALA Ex. 21. The board's hearing officer's report, which the board adopted as its decision, is DALA Ex. 20.

[27] DALA Finding of Fact 21. PERAC's letter is DALA Ex. 22.

[28] DALA Ex. 25.

Section 91A overearnings for 2002-2004, but not for 2000-2001.[29] On March 8, 2006, the board notified Frazier of its decision and his appellate rights.[30]

The earnings allowed Frazier under Section 91A for 2000—2004 are shown in the following table:[31]

	2000	2001	2002	2003	2004
Regular comp.	$42,205.20	$44,728.64	$46,073.44	$48,130.48	$50,352.64
Retirement allowance	$20,711.28	$20,969.28	$21,329.28	$21,689.28	$22,049.28
Allowable earnings	$26,493.92	$28,759.36	$29,744.16	$31,441.20	$33,303.36

According to PERAC, Frazier had overearnings in each of these years.[32]

	2000	2001	2002	2003	2004
Actual earnings	$97,526.00	$55,526.50	$64,476.25	$70,918.50	$69,992.50
Allowable earnings	$26,493.92	$28,759.36	$29,744.16	$31,441.20	$33,303.36
Overearnings	$71,032.08	$26,767.14	$34,732.09	$39,477.30	$36,689.14
Repayment due	$20,711.28	$20,969.28	$21,329.28	$21,689.28	$22,049.28

[29] DALA Finding of Fact 24-25.

[30] DALA Ex. 2.

[31] The table is based on DALA Finding of Fact 27 and G. L. c. 32, § 91A.

[32] PERAC appears to have accepted the DALA magistrate's decision regarding the determination of overearnings in this case. See PERAC Memorandum in Response to Petitioner's Objections at 1 & n.1.

PERAC made its determinations of Frazier's actual earnings, as follows:[33]

	2000	**2001**
AMF ordinary income, 100%	$72,626.00[34]	n/a
AMF officer's compensation, 100%	$24,900.00[35]	$4,200.00[36]
MFE officer's compensation, 75%	n/a	$19,995.00[37]
WAI capital gain, 50%	n/a	$29,372.50[38]
Rental income, 50%	n/a	$1,959.00[39]
	2002	
MFE officer's compensation, 75%	$24,645.00[40]	
Rental income, 50%	$25,210.00[41]	
	2003	**2004**
MFE officer's compensation, 75%	$35,867.25[42]	$30,705.00[43]
MFE ordinary income, 75%	$11,051.25[44]	$22,912.50[45]
Rental income, 50%	$24,000.00[46]	$16,375.00[47]

[33] From the attachment to PERAC's letter to Frazier's counsel dated March 13, 2008. DALA affirmed PERAC's calculations on April 28, 2008.

[34] See DALA Finding of Fact 8 and Decision at 22-23.

[35] See *id.*

[36] See DALA Finding of Fact 9 and Decision at 22-23.

[37] See 2001 Form 1120, Line 12 and Decision at 22-23.

[38] See 2001 Form 1040, Line 13 and Decision at 23.

[39] See DALA Finding of Fact 12 and Decision at 22.

[40] See DALA Finding of Fact 14 and Decision at 21-22.

[41] See DALA Finding of Fact 12 and Decision at 22.

[42] See DALA Finding of Fact 14 and Decision at 21-22.

[43] See 2004 Form 1120, Line 12 and Decision at 21-22.

[44] See DALA Finding of Fact 14 and Decision at 21-23.

[45] See 2004 Form 1120, Line 30 and Decision at 21-23.

[46] See DALA Finding of Fact 12 and Decision at 22.

[47] See DALA Finding of Fact 12 and Conclusion at 22.

Discussion.[48] Frazier makes four specific objections to the DALA decision, each of which we discuss in turn.

1. Jurisdiction to determine overearnings for 2000 and 2001. In appealing to us, Frazier claimed to be aggrieved by both (1) the decision of the Barnstable board for the years 2002–2004 and (2) PERAC's overearnings determinations for 2000–2004.[49] Frazier now argues, however, that his latter "notation," as he calls it, "does not confer jurisdiction over those years for this appeal."[50] The reason, he says, is that PERAC made its determinations "over a year before," and "[a]n appeal of those determinations, in that manner, was not timely under c. 32 sec. 16(4)."[51] Moreover, he purportedly "withdrew his statement that he is aggrieved by PERAC's actions with regard to his earnings for the years 2000–2004, in his Opposition to PERAC's motion to Intervene as a Party."[52]

We disagree. Once a timely appeal is filed with us from a decision by a local board or PERAC, we have jurisdiction over the decision as a whole.[53] Nor does our statute authorize a party to the appeal to withdraw unilaterally any part of the case from our review. Hence, even if Frazier had not appealed from PERAC's overearnings determinations, his appeal from the Barnstable board's decision

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[48] We adopt DALA's Conclusion as our own, except as it may be inconsistent with this opinion.

[49] DALA Ex. 1.

[50] Frazier Brief at 3.

[51] *Id.*

[52] *Id.* at 4 referring to Frazier Opposition at 2 (unnumbered page).

[53] *Cf.* Rule 3(c), Mass. R. App. P. (requiring a party to a civil appeal to "designate the judgment, decree, order, or part thereof appealed from").

brought the entire case before us. Moreover, PERAC's motion to intervene, which DALA allowed, expressly brought before us the Barnstable board's partial rejection of PERAC's overearnings determinations.[54]

2. The AMF payments. DALA reasoned that Frazier created AMF to receive the proceeds from the sale of WAI and some trucks owned by MFE.[55] His wife "made no capital contribution" in return for the 80% of WAI stock put in her name.[56] Rather, "Frazier was the major source of work that produced any income for [WAI]," a company he "controlled and ran."[57] Although his wife apparently contributed some small efforts to WAI, Frazier "failed to show sufficient evidence" to justify a deduction.[58] For these reasons, DALA attributed all AMF payments to Frazier.

Without contesting any of DALA's subsidiary conclusions, Frazier argues that AMF's "taxable income in 2000 and 2001 . . . represents capital gain from the sale of [WAI] and is not earned income."[59] The problem with Frazier's argument is that profits from the sale of a company that a retiree founded and ran counts as "earnings from earned income."

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[54] All this said, it would have been better practice for PERAC to have exercised its authority to direct the Barnstable board to recover overearnings as determined by PERAC. *See Boston Retirement Bd. v. Contributory Retirement App. Bd.*, 441 Mass. 78, 84-85 (2004) (upholding against challenge by local retirement board PERAC's authority to reverse that board's determination regarding a retiree's overearnings).

[55] DALA Finding of Fact 7.

[56] DALA Decision at 22-23.

[57] DALA Decision at 23.

[58] *Id.*

[59] Frazier Brief at 6.

By regulation, PERAC has defined the statutory phrase "earnings from earned income" as including "[p]rofits derived from the operation of a business through some labor, management or supervision of such profits . . ., regardless of how a retiree categorized such income for income tax or other purposes."[60] "Where an agency's interpretation of a statute is reasonable, the court should not supplant it with its own judgment."[61] As the Supreme Judicial Court explains, "[a] characteristic of closely held corporations is that shareholders are actively employed by the corporation in some capacity and receive what would ordinarily be corporate profits as compensation in their capacity as employees. These earnings, regardless of the form in which the shareholder-employee receives them or how they are labeled, are 'earned income.' The shareholder works for these earnings, and therefore, they are not what would generally be considered a distribution from a passive investment."[62]

MFE, WAI, and AMF all are, or were, close corporations. The earnings of each corporation resulted from Frazier's efforts. Regardless of how the payments may have been classified for tax purposes, for purposes of G. L. c. 32, § 91A, they constitute earnings from earned income.

3. The allocation of 75% of MFE's undistributed profits to Frazier. Frazier argues that, by attributing to Frazier undistributed profits of MFE, DALA

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[60] 840 Code Mass. Regs. § 10.14(4) (codifying a PERAC memorandum issued December 30, 1998).

[61] *Boston Retirement Bd.*., 441 Mass. at 82 (discussing and approving the PERAC memorandum now codified by regulation) (see above at n.58).

[62] *Id.*, at 82-83 (fn. omitted).

improperly pierced that corporation's corporate veil.[63] The basic concept is that stockholder exercise of control over a corporation ordinarily will not "will not create liability beyond the assets of the [corporation]."[64] In other words, the stockholder generally will not be held liable for the acts of the owned-corporation. The corporate form may be disregarded – piercing the corporate veil – however, "when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud."[65]

This concept has no application to the present case. The DALA decision does not disregard MFE's corporate existence to hold Frazier liable for some wrong committed by MFE.

The present inquiry is governed by § 91A. "The purpose of § 91A is to prevent the overpayment of retirement benefits to individuals who are, by their labor, management, or supervision, earning a significant amount of money while simultaneously receiving a disability allowance."[66] In *Boston Retirement Bd.*, the Supreme Judicial Court held that PERAC properly determined that a retiree's earnings included a so-called shareholder distribution from a close corporation that he co-founded and co-owned. "The shareholder works for these earnings, and therefore, they are not what would generally be considered a distribution from a

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[63] Frazier Brief at 6-10.

[64] *Scott v. N.G. U.S. 1, Inc.*, 450 Mass. 760, 766 (2008) (internal quotation marks and citations omitted).

[65] *Id.* (internal quotation marks, fn., and citations omitted).

[66] *Boston Retirement Bd.*, 441 Mass. at 83.

passive investment."[67] Here, Frazier founded MFE, and DALA found him largely responsible for its business operations. Under the Supreme Judicial Court's decision in *Boston Retirement Bd.*, it is clear that Frazier's earnings from MFE, in whatever form they took, are earnings from earned income subject to § 91A, and not passive investment income.

But this case presents a variation on the *Boston Retirement Bd.* theme. Here, PERAC and DALA treated as Frazier's earned income profits earned by MFE that, instead of being distributed to Frazier, have been retained by MFE. We do not believe that § 91A reaches retained earnings, unless the record were to show, which it does not, that they somehow were being used for Frazier's personal benefit, for example, through loans or an excessive expense account.[68] First, treating true retained earnings as earned income to a retiree does not further the purpose of § 91A because such retained earnings are not available to the retiree for personal use. Second, whenever retained earnings are distributed to a retiree they will count as earned income, even if they are called dividends. PERAC's theory would result in a double counting: once when the corporation earns the income and a second time when it distributes some or all of the retained earnings. Third, retained earnings are at risk. If the corporation suffers reverses, they may be lost rather than

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[67] *Id.*

[68] Reliance by DALA on *Benoit v. Everett Retirement Bd.*, CR-05-1311 (DALA, Nov. 2, 2006) (no CRAB decision), is misplaced. Although the current DALA decision refers to the retiree's "ownership interest in a company," the company was an LLC (Finding of Fact 2), all of whose income was taxable to its shareholders. Indeed, *Benoit* refers to the retiree as a "partner" (*id.*) and notes that he was paid on a K-1, which stated his business income at the amount imputed to him by the retirement board.

distributed. Accordingly, we conclude that this portion of the DALA decision was incorrect.

4. Income from the Fraziers' rental of dumpsters and storage containers to MFE. Frazier argues that his income from renting dumpsters and storage containers to MFE constitutes passive income derived from the ownership of property rather than income attributable to him.[69] We disagree. The record establishes that the Fraziers bought these items for use by MFE in its business. As Frazier acknowledges, "MFE was not able to obtain bank loans" to buy the equipment itself.[70] In effect, the Fraziers' purchase of dumpsters and storage containers for use by MFE was a contribution of capital to MFE. *Teti v. PERAC*, CR-05-0190 (DALA March 8, 2006, *aff'd* CRAB July 5, 2006), on which Frazier relies, is distinguishable.

Conclusion. Except as to the attribution to Frazier of MFE's ordinary income for 2003 and 2004, the DALA decision is affirmed. But reversing that portion of the DALA decision only affects the repayment due for 2004. In 2003, his adjusted overearnings of $28,426.05 exceeded his retirement allowance of $21,689.28. Hence he owes $21,689.28. In 2004, his retirement allowance was $22,049.28 and his adjusted overearnings were $13,776.64. Hence he owes $13,776.64, and not $22,049.28, for 2004. Except as so corrected, the decision of the DALA magistrate is affirmed.

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[69] Frazier Brief at 11-12 (discussing 840 Code Mass. Regs. § 1-0.14(4)).

[70] Frazier Brief at 12. It is not apparent why the Fraziers did not either lend MFE the necessary funds or offer to guarantee bank loans.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

/s/

Joseph I. Martin
Public Employee Retirement Administration Commission
Appointee

Vacant
Governor's Appointee

/s/

David A. Guberman
Assistant Attorney General
Chairman
Attorney General's Appointee

Date: December 23, 2008