rev. 01-17-2018

DALA WEBSITE DECISION INDEX BY SUBJECT, WITH KEYWORD AND PHRASE DIGEST

Please note:

This Index and Digest covers DALA general jurisdiction decisions issued beginning in 2016. It will be updated periodically as additional DALA decisions are posted to the website. A separate document at the DALA website shows the organization of the Index and Digest by subject. An alphabetical table of the decisions included in the Index and Digest is also posted at the DALA website.

The Index and Digest is provided solely as a helpful finding aid. It is not intended that the decision summaries in the Index and Digest, or the Index and Digest's organization, be cited as authority.

AGRICULTURAL RESOURCES

Animal Shelter, Rescue and Adoption Operations

Pesticide Program

—Herbicide Application–Right of Way Management

Vegetation Management Plan Approval

Herbicide application to manage right of way - Electric transmission utility - Five year vegetation management plan approved by Department of Agricultural Resources and requiring Department's approval of yearly operating plan - Approval of operating plan for 2016 specifying areas off-limits to herbicide spraying, including Zone I areas with public water supply wells - Appeal of operating plan by Cape Cod municipalities where herbicides would be applied - Asserted interference with municipal obligation to provide drinking water to residents - Dismissal - Lack of standing - Failure to allege specific facts showing aggrievement (actual injury different in kind or magnitude from that suffered by general public) - Claim that leaching herbicides would enter groundwater from which towns may draw water unsupported by factual allegations regarding location of spraying relative to town water sources and likely direction of groundwater flow - Failure to assert detail sufficient to support claim that yearly operational plan was inconsistent with five-year vegetation management plan.

Town of Brewster v. Dep't of Agricultural Resources, Docket Nos. MS-16-393, 394, 395 and 396, Recommended Decision (Mass. Div. of Admin. Law App., Feb. 27, 2017).

WIC Farmers' Market Nutrition Program

—Farmers' Market Coupon Program Violations

Enforcement and Civil Penalties

CERTIFIED NURSE AIDE / HOME HEALTH AIDE DISCIPLINE

Abuse

Certified Nurse Aide - Patient abuse charge sustained - Complaint investigation report by Department of Public Health (DPH) reciting finding of patient abuse by respondent CNA against elderly female skilled nursing facility resident with dementia known to be overanxious, easily startled, and physically combative with caregivers on a daily basis - Video posted by respondent CNA on social media site (Facebook), after resident died, showed her elbowing, poking and laughing at resident, and continuing to taunt resident who was asking to be left alone, and was crying and striking out at CNA and a staff nurse - Video deleted by CNA after another staff CNA showed it to other CNAs at facility and it was viewed by facility supervisors - Pending criminal proceeding regarding incident - Physical and mental abuse of resident shown by preponderance of evidence - Credible testimony by witnesses who had viewed the video before it was deleted established that video showed respondent CNA poking, teasing, prodding, taunting and laughing at resident to the point of her crying - CNA's conduct and email comments after the incident displayed coldness and lack of remorse.

Dep't of Public Health v. Wilds, Docket No. PHNA-15-300, Decision (Mass. Div. of Admin. Law App., Jul. 28, 2017)

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Insufficiency of evidence - Clarification of decision - Administrative Magistrate's discretion in assessing witness credibility and weight of testimony - Determination as to violation alleged - Moving nursing home resident without assistance or use of gait belt - Evidence showed neglect (not charged) but not abuse - No entry of nurse aide's name in Nurse Aide Registry.

Dep't of Public Health v. Bernal, Docket No. PHNA-16-314, Ruling on Motion for Clarification – Revised Conclusion and Order (Mass. Div. of Admin. Law App., Dec. 21, 2016).

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Transfer of resident from bed to walker without required assistance - Bruising to forearm - Insufficient evidence of abuse - Unawareness that resident needed additional assistance due to visual impairment.

Dep't of Public Health v. Bernal, Docket No. PHNA-16-314, Decision (Mass. Div. of Admin. Law App., Nov. 30, 2016).

Certified Nurse Aide - Nursing home resident - Abuse - Willfulness - Walking frail resident too quickly or with excessive wrist or forearm grip - Thrown pillows - Insufficient evidence - Conflicting witness accounts.

Mbugua v. Dep't of Public Health, Docket No. PHNA-15-398, Decision (Mass. Div. of Admin. Law App., Sept. 7, 2016)

Neglect

Property Misappropriation

EDUCATOR LICENSE REVOCATION

Dismissal of Appeal

Notice of probable cause to revoke educator license - Criminal indictment, and failure to report it to Department of Elementary and Secondary Education - Lack of prosecution dismissal - Failure to attend two previously-scheduled mandatory prehearing conferences - Filing response to order to show cause regarding dismissal, following failure to appear at second prehearing conference, that asserted constitutional right not to appear at DALA conference prior to criminal trial, despite warning in order to show cause that continued pendency of criminal charges was not good cause for failing to attend conference.

Dep't of Elementary and Secondary Education v. Andrade, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 27, 2017).

EMERGENCY MEDICAL TECHNICIAN CERTIFICATION

Revocation and Suspension of EMT Certification

EMT Paramedic - Immediate suspension and revocation of EMT certification by Department of Public Health (DPH) - Demonstration of sufficient grounds - Undisputed conviction of criminal offenses related to violence, and guilty plea as to two counts of assault and battery on household member (girlfriend) - Claim by EMT that he presents no danger to public and that police reports misstated events leading to criminal charges not disputable before DALA in view of guilty pleas and conviction - Violation of public trust and endangerment of public health and safety shown sufficiently by conviction of criminal offenses related to domestic violence - Unfitness of individual prone to violence to work with difficult, upset and combative persons encountered during EMT response - Failure to report criminal convictions within five days to DPH Office of Emergency Medical Service (OEMS) as required by agency's regulations - Duty to inform OEMS not discharged by informing fire department supervisor of convictions.

Dep't of Public Health, Office of Emergency Medical Services v. Pessini, Docket No. PHET-16-162, Recommended Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

EXPEDITED PERMITTING - M.G.L. c. 43D

Constructively-Granted Permit

Proposed planned commercial/industrial business development - Industrially-zoned area within designated "priority development site" - Town planning board's failure to take final action on permit application before 180-day review period expired - Expedited permit granted constructively - Scope of constructive permit - Approval confined to work in priority development site that was proposed in permit application - Permit does not include conditions that planning board might have required had it acted within 180-day review period that Chapter 43D prescribes - Permit does not include, or preclude, work that town may require before "paper street" alongside project site was accepted as public way, including full turnaround for fire and emergency equipment and trucks entering and leaving developed site, where the site's private and "paper street" sections meet, or other modifications to meet municipal and state traffic safety requirements and/or to improve traffic circulation.

Corliss Landing Condominium Tr. v. *North Attleborough Planning Bd.,* Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

FAMILY CHILD CARE LICENSING

Family Child Care Provider License Denial

—Generally

Discretionary denial of family child care provider license by Department of Early Education and Care (EEC) - Broad discretionary authority delegated to EEC by statute (M.G.L. c. 15D, §§ 3, 7 and 8) to determine who is suitable for employment or licensure in agency-licensed programs, in light of concern for safety of children - On appeal, DALA is not to re-evaluate EEC's discretionary decision, but rather it should evaluate whether or not the agency's decision was arbitrary, capricious or otherwise not supported by law.

Dep't of Early Education and Care v. Reyes, Docket No. OC-17-086, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 1, 2017).

Appeal challenging discretionary denial of family child care provider license by Department of Early Education and Care (EEC) - Broad discretion of EEC to decide whether applicant has provided clear and convincing evidence of suitability for licensing in light of concern for safety of children - Denial evaluated on appeal to DALA not to second-guess EEC but, instead, to determine whether decision was based upon sufficient facts, was not arbitrary or capricious, or was not otherwise unsupported by law.

Dep't of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—Denial of Original License Application

History of Child Neglect

Appeal challenging discretionary denial of family child care provider license by Department of Early Education and Care (EEC) in January 2017 - Summary decision affirming license denial - Background check by EEC revealed 2008 "51B report," by Department of Children and Families (DCF), of applicant's alleged child neglect (seven month old child left alone in bathtub, and applicant's own three year old son left alone in play pen, while she walked to a bus stop to pick up another child who was being dropped off) - EEC determined that 51B report showed applicant to be unsuitable to receive family child care license in view of the circumstances and seriousness of the prior child neglect incident, including the age of the children involved, and applicant's provision of conflicting stories to investigators about the incident, including claim that an unauthorized care giver (applicant's brother) was watching the two children and, therefore, that at least someone was watching them - Broad discretionary authority delegated to EEC by statute (M.G.L. c. 15D, §§ 3, 7 and 8) to determine who is suitable for employment or licensure in agency-licensed programs, in light of concern for safety of children - On appeal, DALA is not to re-evaluate EEC's discretionary decision, but rather it should evaluate whether or not the agency's decision was arbitrary, capricious or otherwise not supported by law - No genuine dispute as to allegations of neglect or their support by a 51B report, or that EEC followed its regulations in considering a discretionary license disapproval based upon a DCF record check, including evaluation of the factors specified by the regulations and affording the applicant an opportunity to submit other relevant information (*see* 606 C.M.R. § 14.13(3)) - Applicant claimed on appeal that while leaving the children unattended was wrong, the incident was not "not so horrible an act" that she should be denied a family child care provider license, and that she was an excellent care giver and could call witnesses to support that assertion at a hearing - Claims did not show that the factual basis for DCF's discretionary license denial was genuinely or materially disputed, and instead sought re-evaluation of DCF's discretionary decision based upon undisputed facts.

Dep't of Early Education and Care v. Reyes, Docket No. OC-17-086, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 1, 2017).

Discretionary family child care provider license denial by Department of Early Education and Care (EEC) in late 2016 - Background check by Department of Children and Families showing applicant's neglect of her own children (1999 sexual abuse of applicant's then-five year old son by playmate as a result of lack of supervision; 28 days of school missed by then-six year old son, who had already been held back for one year once before; 2008 neglect based upon admission by applicant that she disciplined her then-fourteen and eleven year old children by open-hand face slapping) - Determination of unsuitability for day care provider licensing - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Prior child neglect findings undisputed - Thoughtful and lengthy analysis of background check by EEC and its discretionary decision to deny family child care license application - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, was not arbitrary or capricious, and was not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining license denial.

Dep't of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—Denial of License Renewal

Disqualifying Background of Family Member

Denial of application to renew family child care provider license by Department of Early Education and Care (EEC) in late 2016 based upon applicant's unsuitability - Initial license approved in 2006 and renewed in 2012, both when applicant's son was under 15 and not subject to background record check, despite son having been found guilty, at age 12, of assault and battery charge - Massachusetts Criminal Record Information (CORI) check in 2016 revealed delinquency finding as to son regarding anal penetration of friend during sleepover, when both were 13, witnessed by victim's 10 year old brother - Discretionary license renewal denial by EEC based upon potential risk of harm to children based upon son's disqualifying background check, applicant's refusal to ensure that son was out of home during family child care hours, son's downplaying of earlier assault and battery conviction, and no demonstrated rehabilitation by son - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts - Summary decision in favor of Department sustaining denial of family child care provider license renewal.

Dep't of Early Education and Care v. Hoyt, Docket No. OC-17-034, Summary Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Family Child Care Provider License Revocation

—Generally

In determining whether to revoke a family child care provider license, Department of Early Education and Care must take into account licensee's actions to correct instances of non-compliance with department's regulations. *See* 102 C.M.R. § 1.07(d)(2).

Dep't of Early Education and Care v. Lentini, Docket No. OC-15-656, Recommended Final Decision (Mass. Div. of Admin. Law App., Dec. 7, 2017).

Per M.G.L. c. 15D, § 10, Department of Early Education and Care (EEC) has authority to revoke a family child care provider license when the licensee "fails to comply with applicable rules and regulations," which the EEC regulations also make a ground for revoking, suspending, refusing to renew, or refusing to issue a family child care provider license, as the regulations also do for the licensee's "failure to comply with a deficiency correction order, notice of sanction, suspension, or agreement or terms of probation." *See* 102 C.M.R. § 1.07(4)(a)(1).

Dep't of Early Education and Care v. Boodakian, Docket No. OC-17-151, Recommended Decision (Mass. Div. of Admin. Law App., Dec. 28, 2017).

Grounds for revoking family child care provider license include violation of Dep't of Early Education and Care regulations requiring that licensed child care program children be appropriately supervised, *see* 606 C.M.R. § 7.10(5), and any form of neglect or abuse of children while in family child care, *see* 606 C.M.R. § 7.11(4)(a), "neglect" being defined as "the failure, either deliberately or through negligence or inability, to adequately care for, protect, or supervise children." 102 C.M.R. § 1.02.

Dep't of Early Education and Care v. Boodakian, Docket No. OC-17-151, Recommended Decision (Mass. Div. of Admin. Law App., Dec. 28, 2017).

Department of Early Education and Care has burden to prove that it had reasonable cause to revoke a family child care provider's license, and Division of Administrative Law Appeals' role in appeal challenging license revocation is to evaluate whether or not there was substantial evidence to support EEC's decision that there was reasonable cause to revoke the license, bearing in mind that under M.G.L. c. 15D, § 6(a), the legislation delegating family child care licensing authority to EEC, the agency has a wide range of discretion in establishing the parameters of its authority.

Dep't of Early Education and Care v. Boodakian, Docket No. OC-17-151, Recommended Decision (Mass. Div. of Admin. Law App., Dec. 28, 2017).

—Insufficient Basis for Revoking License

Insufficient basis for revoking family child care provider license - Death of infant in provider's care three years prior to issuance, and then revocation, of new license - Three month old infant born prematurely - No visible indication that child was ill when brought to provider by father on August 7, 2012 - Provider had one more child in her care than license allowed - Following bottle feeding before 1 p.m., infant placed on back in crib for afternoon nap while provider performed household chores - Provider able to hear infant but not see her - Heard crying at 2:10 p.m. and gave infant pacifier - Upon returning to check infant 10-15 minutes later, in infant noted to have dress pulled up to face and limp arm - Husband called 911 while provider attempted to perform CPR - Infant died after being taken to hospital - During investigation two days later by Department of Early Education and Care (EEC) and Department of Children and Families (DCF), provider denied knowing of EEC's safe sleep rule but stated she had left door of room where children slept open, and then surrendered her child care provider license - Middlesex District Attorney's office advised investigators of concern that infant had been placed on belly for nap - Investigation determined that provider had failed to provide direct supervision of infant, and had been neglectful in providing care - Death certificate issued August 13, 2012 listed infant's cause of death as having been from Klebsiella Pneumonia Septicemia - DCF issued finding on August 29, 2012 that provider had neglected infant who died - Provider appealed, and, based upon death certificate, DCF overturned neglect finding on September 17, 2014 - Provider reapplied to EEC for day care license on May 12, 2015, acknowledging she had surrendered license previously due to infant who died in her care, but answering "no" as to whether she ever had dealings with any child protection or child welfare agency such as DCF, including whether there were any findings that she had abused or neglected a child,,anad "no" as to whether she had previous involvement with EEC due to unlicensed child care - EEC issued new license to provider four months later, but two months afterward, EEC revoked license based upon false information provided in her application as to previous involvement with agency due to unlicensed child care and no involvement with child welfare agency, and also because she had neglected four month old infant by failing to provide direct visual observation of infant for fifteen minutes, during which time the child was found dead, and because her day care program was overenrolled on that day, which impacted provider's ability to provide appropriate supervision of day care children - Grounds for revocation unsubstantiated - Although EEC suspected provision of unlicensed day care in March 2007 and sent provider letter ordering her to cease doing so, suspicion was never transformed into proof, and provider denied having provided unlicensed day care because she was only caring for children related to her at the time, and therefore had valid basis for believing she had not provided unlicensed child day care and answering "no" to application question - Provider also had valid basis for answering "no" as to whether there had been any findings she had abused or neglected a child, because DCF had reversed its neglect finding upon appeal and cleared her of any neglect regarding the deceased infant, and although answer was inaccurate as to whether she had had involvement with child welfare agency over alleged neglect of child, she admitted on her application that she had surrendered her previous license due to child that died while in her care, which sufficed to alert EEC that the child's death had been investigated - Application was therefore accurate as a whole and not misleading, as EEC's initial granting of license in 2015 following a four- month review suggested - Overenrollment of children by one day care child on August 7, 2012 was unrelated to infant's death - All other children were napping when infant in question expired, and were therefore not distracting provider from caring for infant - Failure to maintain visualization of infant was violation of EEC's safe sleep rule, but there was no evidence this led to infant's death, or that provider placed infant on stomach, thereby causing death by sudden infant death syndrome (SIDS) - Although infant's sudden death suggested initially that infant had died of SIDS, death certificate resolved that infant had died from Klebsiella Pneumonia Septicemia - No evidence regarding epidemiology of this bacterial infection, particularly how it killed infant with no apparent warning - No ground for EEC to revoke license for death of infant in her care, or, even if safe sleep rule had been violated, for agency to depart from its usual rule of requiring a retraining following a one-time violation of this rule, rather than revoking a family day care provider license.

Dep't of Early Education and Care v. Lentini, Docket No. OC-15-656, Recommended Final Decision (Mass. Div. of Admin. Law App., Dec. 7, 2017).

—Sufficient Basis for Revoking License

Evidence sufficient to show reasonable cause to revoke family child care provider license - Violation of 606 C.M.R. § 7.10(5) and 606 C.M.R. § 7.11(4)(a) - Child neglect (failure . . . through negligence or inability to adequately care for, protect or supervise" a child, *see* 102 C.M.R. § 1.02 - Family child care program child, a 23 month old boy, wandered away from child care provider and traveled approximately 350 feet and was missing at least 15 minutes before being found unhurt, playing on excavating equipment at local park - Provider knew that children new to day care are inclined to wander off, and that child in question had tried to wander off before - Child care provider, who turned her back on child briefly to give a bottle to a baby who was also in her care, took her eyes off the child long enough for him to wander off - Although the lack of a fence all the way around family child care program's outdoor play area did not violate any EEC policy, it was a factor provider should have considered when deciding how to supervise the child in question - Provider's failure to call police when she could not find the child after he wandered off, based upon phone call to child's mother during which mother said she would call police, violated her emergency plan and made it impossible for EEC to fulfill its obligation to ensure that the family child care program had an appropriate emergency plan in place, and also showed poor judgment (*see* 606 C.M.R. § 7.11(7)(f)), particularly since the only way for the provider to assure that the police would be called was for her to call them herself, and because the police would have arrived sooner if provider had made the call - EEC considered these factors in deciding whether to revoke the family child care provider license - Other factors weighing in favor of license revocation were (1) provider's history of serious non-compliance, including leaving day care children outside unsupervised, that resulted in EEC and the provider entering into agreement placing restrictions on the family day care provider license, (2) risk of catastrophic consequence in view of missing child's distance from child care facility when he was found, and being found playing on excavating equipment, and (3) provider's statement, during hearing, as to not calling the police was that she would not do anything differently - That parents of children enrolled in the child day care program had positive things to say about it, and that provider properly supervised other children, did not change the facts pertaining to the child who wandered off, and was irrelevant to the incident involving that child - It was also irrelevant that provider may not have been purposefully neglectful, since EEC regulations define child neglect as including failure to adequately care for, protect or supervise children through negligence or inability - License revocation recommended upon these grounds - However, fact that allegations of neglect as to the child in question were found to have been supported by a "51B" report prepared by EEC and the Department of Children and Families would not be included among grounds for recommending license revocation because (1) although 51B report was prima facie evidence that there was an emergency endangering the life, health or safety of children in the child care program, there was no such emergency because (1) provider voluntarily ceased providing day care two days after child wandering incident, (2) provider had appealed the 51B Report by requesting a fair hearing, and no decision on that appeal had been issued when the record of the DALA proceeding closed, and basing license revocation upon 51B report would give rise to constitutional issues, and (3) the other evidence presented at DALA hearing supported family child care license revocation sufficiently.

Dep't of Early Education and Care v. Boodakian, Docket No. OC-17-151, Recommended Decision (Mass. Div. of Admin. Law App., Dec. 28, 2017).

Sufficient basis for revoking family child care provider license - Multiple instances of exceeding licensed child care children capacity, noncompliance with required children-to-staff ratios and utilizing unapproved caregivers - Failure to comply with sanction order freezing enrollment and reducing child care children capacity - Following appeal by license holder to DALA, failure to file prehearing memorandum or proposed hearing exhibits, and failure to appear for hearing rescheduled at license holder's request - Recommended dismissal of appeal for lack of prosecution, and finalization of family child care license revocation order.

Dep't of Early Education and Care v. Barbas, Docket No. OC-15-556, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 21, 2017).

Family Child Care Provider License Suspension

—Generally

Suspension of family child care provider's license for failure to comply with any applicable regulation that results in emergency situation endangering life, safety or health of children or staff present in program or facility must be based upon failure of licensee to comply, not failure of outsider who is not under her professional control to comply, and the suspension must be based upon the child care provider's violation of a specific regulation.

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

In an appeal challenging suspension of a family child care provider's license for failure to comply with a particular regulation, the Department was required to prove all of the elements of its case affirmatively, and could not rely upon the provider's failure to contest all of the elements of noncompliance the Department alleged.

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

—Insufficient Basis for Suspending License

Insufficient basis for suspending family child care provider license - False statement by provider's niece to Department of Early Education and Care staffpersons during a site visit regarding the parentage of one of the infants observed in the child care space - Insufficient ground for recommending that Department continue to suspend, or revoke, provider's family fay care license on ground that she provided false information to Department licensing staff - License suspension must be based upon the provider's violation of a specific regulation, and not upon violation by someone other than the provider - No evidence that provider herself made a false statement to Department licensing staff, or that her niece did so at her direction.

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

No recommendation that Department of Early Education and Care continue to suspend, or revoke, family child care provider's license based upon alleged violation of regulation requiring that family child care program nap infants in individual cribs, portacribs, playpens or bassinets, and interpretive policy stating, per the regulation, that car seats and other sitting devices were not allowed for "routine sleep" - Regulation and policy inapplicable in circumstances - Infant 's mother dropped off unenrolled child in car seat at day care program - Infant, who was crying in crib, was placed by provider's assistant in car seat so she could rock him back to sleep and then place him back in crib - Car seat arrived with child - No evidence that the day care program routinely put infants to sleep in a car seat.

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

In determining whether family child care provider violated Department of Early Education and Care regulation because "household members" did not undergo a background check (102 C.M.R. § 1.05(1)), specifically the five residents of the second floor of a two-family house belonging to the provider, the first floor of which was the provider's residence and child-care space, the circumstances in evidence did not show, on balance, that all the residences in the house were in the same household; even though most of the residents were the provider's relatives and the house had a single address, each of the two floors had a kitchen and bathroom; the child care space on the first floor was distinguished from entrances to the second floor residence by signs, doors and locks, and the provider's residence was controlled by a solid door with a strong-looking lock (rather than, for example, an unlocked screen door); and the provider rented the second floor to her brother and allowed him to rent out the rooms on that floor, giving him control of the second floor; in these circumstances, each of the two floors was a separate residence, and the residents of the second floor were not members of the provider's household who were required to undergo a background check, and the fact that a Department staff member observed a second-floor resident enter the licensed day care space and removed an unrelated infant from the day care program showed that the program had questionable security, not that the second-floor residents were household members, absent any evidence that all five second-floor residents had "clear and unfettered access to the day care space," as the Department contended; moreover, the Department did not suspend the day care license under a separate provision of the regulation requiring "any person regularly on the premises when family child care children were present" to undergo a background check," and had acted instead based upon its conclusion that all of the second-floor residents, including the individual in question, was a household member, but even if had done so, the record did not show that the second-floor resident who removed the child had regular access to the day care space.

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

—Sufficient Basis for Suspending License

Valid grounds proven for Department of Early Education and Care to continue suspension of a provider's family child care license, or to revoke the license - Provider violated staff-to-children ratio requirements by leaving a single assistant to care for nine children—three more than the maximum the Department regulations allowed a single child care provider to supervise (606 C.M.R. § 7.10(3)(a))—while provider left the premises for at least 45 minutes - Provider allowed day care child to be placed to sleep behind a closed door, in violation of 606 C.M.R. § 7.10(7)(d).

Dep't of Early Education and Care v. Santizo, Docket No. OC-17-087, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 10, 2017).

Child neglect - Failure to comply with applicable Department of Early Education and care regulations resulting in emergency situation endangering lives of children in day care program - Violations observed during unannounced Department inspections - Infant asleep in bouncy seat in room that was not part of licensed day care space - Failure to provide separate mat, cot, sofa, portacrib, playpen, bassinet or bed, and blanket for each child - Provision of false and conflicting information about children enrolled in day care program - Uncorrected violations - Prima facie evidence - Occurrence of violations documented in 51B Report - Unnecessary to prove license-holder's knowledge of documented violations.

Dep't of Early Education and Care v. Sanchez, Docket No. OC-16-485, Recommended Decision (Mass. Div. of Admin. Law App., Jan. 6, 2017).

LEAD INSPECTOR LICENSING

Denial of License Renewal

—Dismissal of Appeal

Licensed lead inspector - Appeal of proposed license renewal denial by Department of Public Health - Alleged multiple violations of M.G.L. c. 111, § 197B and DPH lead poisoning prevention and control regulations, 105 C.M.R. § 460.000(H), during residential lead inspections, including failure to follow procedures for initial lead inspection by repeatedly failing to identify or test surfaces in accordance with DPH Childhood Lead Poisoning Prevention Program policies and training materials, using an x-ray fluorescence analyzer that was more than six years old that had not been checked recently for functionality or re-sourced, failure to test and inspect surface or components at several residences including windows, doors, closets and hallways, stairs and/or entire rooms, and falsification of lead inspection test results for areas not tested or that were later found to have dangerous lead levels on both interior and exterior surfaces despite having been reported as negative for lead - Following prehearing conference session, proposed agreement offered by DPH describing what inspector would need to do to renew his lead inspector license, including six-month license non-renewal period, purchase or lease of new x-ray fluorescence analyzer, and completion of apprenticeship inspection s with a license lead inspector - Inspector's response stating that compliance with agreement's terms would be extremely difficult and financially burdensome and that he was no longer interested in becoming a Massachusetts lead inspector or renewing his license, with qualification that he so stated with "all [his] legal rights reserved" and no statement that he was withdrawing his appeal - Order issued directing inspector to clarify whether he wished to withdraw or pursue his appeal, and warning that failure to respond would result in appeal's dismissal and finalization of DPH's refusal to renew his license - No response to order - Recommended Decision that DPH Commissioner dismiss appeal for lack of prosecution and that agency's proposal to deny lead inspector license renewal be made final.

Dep't of Public Health v. Tilahun, Docket No. PH-17-148, Recommended Decision (Mass. Div. of Admin. Law App., Oct. 13, 2017).

MEDICAL MARIJUANA

Medical Marijuana Certification

—Authority to Issue, and Delegation of Authority

Physician - Summary suspension by Board of Registration in Medicine - Alleged delegation by physician to nurse practitioner of authority to issue medical marijuana certification - Recommendation to not suspend - Insufficient evidence of delegation - Independent authority of nurse practitioners to issue marijuana certification.

Bd. of Registration in Medicine v. Nadolny, Docket No. RM-16-238 , Recommended Decision (Mass. Div. of Admin. Law App., Sept. 23, 2016).

Dispensary Agent Registration

—Temporary Revocation

Medical Use of Marijuana Program - Dispensary Agent - Registration - Temporary revocation - Recommendation to suspend and revoke dispensary agent registration - Submission of misleading, incorrect, false or fraudulent dispensary agent application (omission of information regarding prior conviction for distributing marijuana, positive testing for THC and revocation of probation) - Due to lack of notice, no recommendation of suspension pursuant to Department of Public Health Guidance for Registered Marijuana Dispensaries Regarding Background Checks or agency policy that dispensary agents must be honest.

Dep't of Public Health Medical Use of Marijuana Program v. Willis, Docket No. PH-15-589, Decision (Mass. Div. of Admin. Law App., Sept. 19, 2016).

PHYSICIAN DISCIPLINE

Conduct Placing Into Question Competence to Practice Medicine

Gross misconduct in practice of medicine and unprofessional behavior during appendectomy, calling into question competence to practice medicine - On-call surgeon and locum tenens physician called into hospital that did not staff surgery department on weekends - Emergency surgery - Appendicitis - Numerous instances of disruptive behavior during single surgical procedure - Failure to call in anesthesiologist, as required by hospital policy, and insistence that nursing supervisor do so - Throwing around surgical tools and instruments in operating room - Failure to complete an appropriate scrub prior to performing surgery, including failure to allow hands to dry and refusal to dry hands with special towel provided by scrub tech - Shortness and rudeness toward operating staff assisting with surgery - Refusal to allow sponge count - Refusal to replace punctured glove as requested by scrub nurse, necessitating its physical removal from his hand - Not speaking clearly during procedure, making it difficult for surgical staff to hear and understand his instructions - Insistence that patient was moving and directing anesthesiologist to give more anesthesia when patient was not moving - Failure to alert surgical team when shifting to open procedure due to inability to locate appendix laparoscopically, leaving team to chance to prepare for the procedure by gathering needed supplies, such as blade and sponges - Violation of sterile operation field during surgery (reaching under gown to pull up falling pants during procedure and resistance to re-gowning and changing gloves, making it necessary for surgical tech to use force to keep him away from patient until he finally re-gowned and re-gloved - Refusal to re-glove when scrub tech pointed out he had torn a hole in sterile gloves, and doing so only when anesthesiologist advised that sterile procedure had been breached - Grabbing instruments without requesting that scrub tech hand him the instruments - Throwing instruments onto scrub tech's tray - Striking scrub tech with needle causing her to bleed, and continuing to stitch patient using same needle, compelling scrub nurse to physically take the contaminated needle to prevent possible contamination of the patient - Failure to conduct sponge count while closing the surgical site, in violation of hospital's general surgical procedure - Recommendation that Board of Registration in Medicine impose appropriate sanctions.

Bd. of Registration in Medicine v. Pomerantz, Docket No. RM-16-483, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 1, 2017).

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital.

Bd. of Registration in Medicine v. Kohn, Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Conduct Undermining Public Confidence in Integrity of Medical Profession

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif, Docket No. RM-16-163, Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of Admin. Law App., May 11, 2017).

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital.

Bd. of Registration in Medicine v. Kohn, Docket No. RM-15-122 (Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Failure to Meet Standard of Care

Alleged violation of standard of care by physician - Prescription of opioids to pregnant patient and to other patients without recognizing their drug-seeking behavior - Failure to develop and implement treatment plans and meet minimum requirements for medical record keeping - Physician's death following DALA hearing, filing of closing briefs, and closure of record - Recommended decision that matter be dismissed as moot.

Bd. of Registration in Medicine v. Fraser, Docket No. RM-13-224, Recommended Decision (Mass. Div. of Admin. Law App., May 4, 2017).

Opthamologist/retinal specialist - Insufficient Evidence - Diagnosis of retinal detachment and serous choroidal vitrectomy to reattach retina, possibility of melanoma or lesion noted, and clear treatment plan developed (patient 1) - Diagnosis of visual problems, including "floaters," following cataract procedure by another specialist, and performance of vitrectomy with lensectomy to remove retained lens fragments without subsequent complications (patient 2) - Reasonable choices of care between alternative treatment approaches.

Bd. of Registration in Medicine v Hughes, Docket No. RM-14-810, Recommended Decision (Mass. Div. of Admin. Law App., Mar. 30, 2016).

Gross Misconduct in Practice of Medicine

Gross misconduct in practice of medicine and unprofessional behavior during appendectomy, calling into question competence to practice medicine - On-call surgeon and locum tenens physician called into hospital that did not staff surgery department on weekends - Emergency surgery - Appendicitis - Numerous instances of disruptive behavior during single surgical procedure - Failure to call in anesthesiologist, as required by hospital policy, and insistence that nursing supervisor do so - Throwing around surgical tools and instruments in operating room - Failure to complete an appropriate scrub prior to performing surgery, including failure to allow hands to dry and refusal to dry hands with special towel provided by scrub tech - Shortness and rudeness toward operating staff assisting with surgery - Refusal to allow sponge count - Refusal to replace punctured glove as requested by scrub nurse, necessitating its physical removal from his hand - Not speaking clearly during procedure, making it difficult for surgical staff to hear and understand his instructions - Insistence that patient was moving and directing anesthesiologist to give more anesthesia when patient was not moving - Failure to alert surgical team when shifting to open procedure due to inability to locate appendix laparoscopically, leaving team to chance to prepare for the procedure by gathering needed supplies, such as blade and sponges - Violation of sterile operation field during surgery (reaching under gown to pull up falling pants during procedure and resistance to re-gowning and changing gloves, making it necessary for surgical tech to use force to keep him away from patient until he finally re-gowned and re-gloved - Refusal to re-glove when scrub tech pointed out he had torn a hole in sterile gloves, and doing so only when anesthesiologist advised that sterile procedure had been breached - Grabbing instruments without requesting that scrub tech hand him the instruments - Throwing instruments onto scrub tech's tray - Striking scrub tech with needle causing her to bleed, and continuing to stitch patient using same needle, compelling scrub nurse to physically take the contaminated needle to prevent possible contamination of the patient - Failure to conduct sponge count while closing the surgical site, in violation of hospital's general surgical procedure - Recommendation that Board of Registration in Medicine impose appropriate sanctions.

Bd. of Registration in Medicine v. Pomerantz, Docket No. RM-16-483, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 1, 2017).

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif (Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of Admin. Law App., May 11, 2017).

Failure to determine with certainty that patient's care had been transferred to another cosmetic plastic surgeon before engaging in cybersex and text message flirtation.

Bd. of Registration in Medicine v. Perrone, Docket No. RM-14-311, Recommended Decision (Mass. Div. of Admin. Law App., July 1, 2016).

Malpractice

—Order of Default

Failure to file status reports as ordered - Failure to respond to or communicate with opposing party's counsel.

Bd. of Registration in Medicine v. Provow, Docket No. RM-13-510, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 22, 2016).

Misconduct in Practice of Medicine

Inappropriate restraint of, and disruptive behavior toward, psychiatric patient presenting no danger to herself or others - Mitigating factors - Tense circumstances at psychiatric hospital including disruptive patients and "Code Green" behavioral management emergency.

Bd. of Registration in Medicine v. Kohn, Docket No. RM-15-122, Recommended Decision (Mass. Div. of Admin. Law App., July 8, 2016).

Practicing Medicine While Ability to Practice is Impaired by Alcohol or Drugs

—Order of Default

Failure of physician to file answer to Board's statement of allegations - Notice of prehearing conference returned by U.S. Postal Service as "not deliverable as addressed" - Subsequent order to show cause why default should not enter for want of prosecution sent to same address but not returned by U.S. Postal Service - No response to order to show cause - Order of Default and Recommended Decision adverse to physician issued.

Bd. of Registration in Medicine v. Russell, Docket No. RM-17-089, Order of Default-Recommended Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Sexual Misconduct

—Insufficient Evidence

Married hospitalist - Patient with history of panic attacks admitted to hospital after presenting in emergency room with possible heart attack symptoms - Hospitalist diagnosed demand ischemia (stress on heart but not heart attack), discussed sources of stress in patient's life, including husband and children, switched medication from Atavan (prescribed previously for panic attack control) to longer-lasting Klonopin and told her to follow with her primary care physician for anxiety and with endocrinologist regarding high level of thyroid-stimulating hormone - Found patient attractive, hugged her and wished her good luck prior to discharge (which she found at the time to be strange but caring) but did not ask whether he could see her following her discharge from hospital - Discharge ended doctor-patient relationship for hospitalist - Shortly after returning home, patient initiated contact via Facebook friending request - Exchange of text messages, subsequent meeting in parking lot, at hotel, and in local park, all without sex - Hospitalist returned home to Florida and stopped responding to former patient's text messages - Exaggerated or misleading statements by former patient in complaint she filed against hospitalist regarding his intention to "maneuver" her into a sexual relationship that did not occur - Routine answers by hospitalist to patient's brief questions about use of Klonopan and Atavan during conversations following discharge insufficient to establish continuing doctor-patient relationship - No evidence of sexual relationship - No evidence that hospitalist used knowledge of former patient's medical problems to exploit her during brief romantic relationship following discharge from hospital - Evidence showed, instead, brief personal relationship between two adults with marital problems, following former patient's hospital discharge, and from which both backed away - No ethical violation.

Bd. of Registration in Medicine v. Soumelidis, Docket No. RM-15-25, Recommended Decision (Mass. Div. of Admin. Law App., May 2, 2016), *additional findings made following Board remand, without changing conclusions*, Amended Recommended Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Summary Suspension of Physician as Immediate and Serious Threat to Public Health, Safety or Welfare

—Generally

Immediacy and seriousness of threat or potential threat posed by physician to public health, safety or welfare - Evidence - Board of Registration in Medicine's delay in moving to suspend physician - Only slight indication that physician did not pose immediate and serious threat, or possible serious threat, to public health, safety or welfare - Testimony by Board investigator that investigation related to physician's conduct took a year, depending upon Board's staffing, how readily records and experts could be obtained, and whether it had higher priorities, and potentially more serious dangers to public health, it needed to address - Delay in taking disciplinary action not necessarily indicative of lack of immediate and serious threat to public health, safety or welfare.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

—Insufficient Evidence

Physician licensed to issue medical marijuana certificates and working at medical marijuana practice - Issuance of medical marijuana certificate to pregnant patient, three months before child's birth, while patient was taking Subutex (similar to Suboxone), from which baby would later require withdrawal - No action by Board of Registration in medicine for more than 1½ years after receiving complaint from staff person at Massachusetts Department of Children and Families regarding physician's issuance of medical marijuana certificate to pregnant mother - Physician established bona fide relationship with patient - No record support for Board's argument that physician could not have spent more than 20 minutes with patient based upon total number of medical marijuana certificates he issued and number of says he worked - Expert testimony (by physician board-certified in internal medicine and addiction medicine, with 15 years of experience as medical director of local hospital's addiction recovery program, and with academic credentials in addiction medicine) that 20 minutes of time with patient sufficed to determine whether had a debilitating medical condition qualifying for medical marijuana certification and establish a bona fide physician-patient relationship - Department of Public Health's medical marijuana regulations did not specify how doctors should evaluate patient and decide whether to issue medical marijuana certificate, and neither statute nor regulations did not disqualify anyone categorically from receiving a medical marijuana certificate, including a pregnant woman - Issuance of medical marijuana certificate to pregnant woman by physician did not itself show that physician was immediate or serious threat, or may be a serious threat to public health, safety or welfare - Medical history of which physician was aware included four bad disks, severe back of several years' duration, worsening pain following epidural injection, ineffectiveness of physical therapy in relieving back pain, opinion of treating physician that surgery would not relieve pain, recent back injury, patient's pregnancy and addiction to opioids and participation in drug rehabilitation program taking Suboxone, which ruled out use of opioids for pain relief, and declining pain medication, patient's use of cane and back brace, patient taking Prozac and using marijuana, fetus already exposed to whatever risks were posed by use of Suboxone, marijuana and Prozac, risk that patient would seek illegal marijuana (with questionable concentration and quality, including risk of containing pesticide residue) if not issued medical marijuana certificate, risk that chronic pain posed to pregnant woman and fetus including fetal loss, stillbirth and pregnancy complications, patient's exhaustion of other medical options not posing known risks to fetus before seeking medical marijuana - Variability of medical and scientific studies regarding risks to children from exposure to medical marijuana while in womb - Reasonableness of issuing medical marijuana certificate to patient in circumstances - No violation of applicable standard of care - No violation of medical marijuana statute or regulations - Physician's subsequent decision not to issue medical marijuana certificates to pregnant women minimized any risk to public health, safety and welfare that such issuance would pose - Recommendation not to temporarily suspend physician.

> *Bd. of Registration in Medicine v. Cushing*, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Physician licensed to issue medical marijuana certificates and working at medical marijuana practice - Proposed summary suspension based upon physician's status as third-highest issuer of medical marijuana certificates in Massachusetts - No correlation between number of marijuana certificates issued and immediacy or seriousness of threat to public health, safety or welfare - Medical marijuana statute (St. 2012, c. 369) contemplated that some physicians licensed to issue medical marijuana certificates would issue more of them than would others - At least some large medical institutions avoiding involvement with medical marijuana due to receipt of federal funds and continuing illegality of marijuana under federal law - No allegation that physician violated medical marijuana statute or regulations promulgated under statute by Massachusetts Department of Public Health regulations other than as to single, pregnant patient - No control by physician over his ranking in terms of number of medical marijuana certificates issued in state - Expert opinion testimony (by physician board-certified in internal medicine and addiction medicine, with 15 years of experience as medical director of local hospital's addiction recovery program, and with academic credentials in addiction medicine) that judgment of physician care and conduct based upon number of marijuana certificates issued to patients without knowledge of those patients' circumstances was "unsound extrapolation of data to prove a preconceived belief" - No blanket immunity under medical marijuana statute's immunity clause providing that physician shall not be penalized under Massachusetts law or denied any right or privilege for "[p]roviding a qualifying patient with written certification based upon a full assessment of the qualifying patient's medical history and condition, that the medical use of marijuana may benefit" that patient (*see* St. 2012, c. 369, § 3) - Immunity clause does mean, however, that physician cannot be disciplined for simple act of issuing one valid medical marijuana certificate, or (as in this case), 4,648 valid certificates, or for being the third-highest issuer of valid medical marijuana certificates - Recommendation not to temporarily suspend physician.

> *Bd. of Registration in Medicine v. Cushing*, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Physician's self-prescription of medication classified as controlled substance (Clonazepam) to assist sleeping and control seizures related to his Parkinson's Disease - Single instance of self-prescription five years earlier after prescription from another physician ran out - Conduct placed only physician at risk, and risk was hypothetical in circumstances - Recognition by physician that self-prescription was error - Unquestioned that self-prescription of controlled substance violated Board regulations - No evidence, however, that single instance of self-prescription in question likely compromised physician's professional objectivity and unduly influenced his medical judgment , or that he was an immediate and serious threat, or may be a serious threat, to the public health, safety or welfare - Recommendation not to temporarily suspend physician.

Bd. of Registration in Medicine v. Cushing, Docket No. RM-16-249, Summary Recommended Decision on Order of Temporary Suspension (Mass. Div. of Admin. Law App., Jun. 15, 2017).

Improper delegation of physician's authority to issue medical marijuana certification to nurse practitioner - Recommendation to not suspend physician - Insufficient evidence of delegation - Independent authority of nurse practitioners to issue marijuana certification.

Bd. of Registration in Medicine v. Nadolny, Docket No. RM-16-238 , Recommended Decision (Mass. Div. of Admin. Law App., Sept. 23, 2016).

Prescribing medication outside usual course of practice to girlfriends and female acquaintances with drug problems - Recommended limited suspension - Insufficient evidence to support general summary suspension - Sufficient to support suspension from prescribing to girlfriends and female acquaintances outside normal course of physician's hospital practice.

Bd. of Registration in Medicine v. Shepherd, Docket No. RM-16-350, Recommended Decision on Summary Suspension (Mass. Div. of Admin. Law App., Oct. 14, 2016).

PRACTICE AND PROCEDURE

Decision Upon Written Submissions

Petitioner's waiver of hearing and submission of case upon written submissions, pursuant to 801 C.M.R. § 1.01(8)(c) - Appropriateness - Neither party disputed any facts presented or challenged any submitted documents - Appeal presented only legal issues that could be decided based upon the parties' exhibits and memoranda.

Hogan v. State Bd. of Retirement, Docket No. CR-16-243, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Directed Decision

—Granted as "Summary Decision" Following Hearing

Physician Discipline Appeals

Practicing medicine in violation of probation agreement with Board of Registration in Medicine and permanent restrictions imposed by Board on medical license following allegations of substandard practice (practice of medicine confined to private offices; no performance of surgical procedures, whether in-patient, out-patient or office-based; practice limited to performance of non-surgical orthopedics and conducting independent medical examinations; expansion of this restricted medical practice prohibited - indefinite suspension of license to practice medicine stayed pending compliance with probation agreement) - subsequent expansion of practice - Treating workers' compensation claimants and providing rehabilitation services and physical medicine (performing examinations and then referring patients for physical therapy treatments by individual whose license to practice medicine had been revoked by Board following criminal convictions on multiple controlled substances violations unsupervised by licensed physician) and ownership interest in this practice - Failure to notify Board of this business relationship or involvement of person with revoked medical license - Failure to disclose, to Board, ownership interest in facility providing physical therapy services - Aiding and abetting unlicensed person to perform activities requiring a license - Performance of activities beyond conducting independent medical examinations, as required by probation agreement, and therefore outside parameters of restricted license to practice medicine - Conduct undermining public confidence in integrity of medical profession, and comprising dishonesty, fraud or deceit related to practice of medicine - Lifting of stay of indefinite suspension of license to practice medicine sustained.

Bd. of Registration in Medicine v. Nasif, Docket No. RM-16-163, Ruling on Motion for Summary Decision and Recommended Decision (Mass. Div. of

Admin. Law App., May 11, 2017).

Retirement Appeals - Accidental Disability Retirement

Insufficient evidence of work-related causation - Public school teacher assistant - Assignment to classroom with several behaviorally-challenged students - Fibromyalgia - Nausea, vertigo and disequilibirum - Superannuation retirement - Subsequent application for accidental disability retirement based upon medical conditions (Fibromyalgia, Meniere's Disease (severe vertigo) and Sjogren's Syndrome (long-term autoimmune disease affecting moisture-producing glands)) exacerbated by job requirements and work-related stress - Accidental disability denial sustained on appeal - Undisputed material facts - Failure of teacher assistant to prove that she sustained compensable personal injury, or that her employment presented a hazard not common or necessary to all or a great many occupations - Vertigo and nausea symptoms occurred at work only once, and were generally experienced in the evening, after work - Absence from work toward end of employment due to leave to care for grandson under Family Medical Leave Act - No notice of injury report or incident report filed with employer - No evidence in record as to effect (if any) of medications she was taking in development of her vertigo - No showing of mature and established disability when teacher's assistant last performed her duties - No contemporaneous report in record from treating physician supporting teacher assistant's claim to be totally and permanently disabled on last day of employment - Admission, in disability retirement application, of non-job related factors exacerbating her Fibromyalgia, Meniere's Disease and Sjogren's Syndrome, including constant movement and exposure to elements and "all sorts" of weather conditions including hot, cold, rain and wind, none of which were job-related hazards, and all of which were common and necessary exposures related to daily life in New England - No positive medical panel evaluation supporting her claim (2 of 3 members voting yes as to disability and its permanence, of whom 1 voted yes and 1 voted no as to job-related causation, and 1 member voting no as to disability, based upon finding normal hearing and ears and no Meniere's Disease, and therefore not answering remaining questions as to permanence of disability and job-related causation) - No evidence that panel members lacked pertinent facts, applied erroneous standard or were biased.

Lambert v. Hampden County Regional Retirement Bd., Docket No. CR-15-209, Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Retirement Appeals - Group Classification for Retirement Purposes

[no entries]

Discovery

—Document Requests

Motion to Compel Production of Documents

Motion to compel denied - Retirement appeal - Creditable service purchase request by retired public school teacher for prior teaching at nonpublic school (Boston School for the Deaf operated by Sisters of St. Joseph) - Denial by retirement system - Teacher's eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Request by teacher to retirement system for documents regarding other system members allowed retirement credit for prior service at Boston School for the Deaf - Information beyond scope of material factual issues, notwithstanding retirement system's production of limited, redacted documents regarding members who taught previously at the School but had not worked there for ten years and did not qualify for retirement benefit from Sisters of St. Joseph Retirement Plan - No discretion under statute to allow retirement credit for prior service at School if retirement system member qualified for benefit under Retirement Plan - Order to compel production of other documents unnecessary - Retirement system produced documents and remained under continuing obligation to supplement production if it found other relevant documents.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Compel Production of Documents (Mass. Div. of Admin. Law App., May 24, 2017).

Motion to Serve Record-Keeper Subpoena

Subpoenas allowed - Appeal of creditable service purchase denial - Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Subpoenas to record-keepers of successors to Plan administrator and actuary - Records regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry under M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

—Interrogatories

Generally

Prior leave of Administrative Magistrate required for service of interrogatories - Standard for deciding motion for leave to serve - Relevance of information sought - "Relevant information" not defined by Standard Rules of Practice and Procedure - Application of standards used by courts to determine relevance of information sought through discovery under Massachusetts and Federal Rules of Civil Procedure.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Retirement Appeals

Partial allowance of interrogatories, with subject-matter limitations - Proposed interrogatories to contributory retirement system - Appeal of creditable service purchase denial - Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Proposed interrogatories related to denial of creditable service based upon eligibility to receive retirement allowance from any source allowed as seeking relevant information - Proposed interrogatories asking whether tuition of students that teacher taught at Boston School for the Deaf was publicly funded in whole or part denied as seeking irrelevant information - Retirement credit not denied on this ground, and no claim on appeal that it was - Proposed interrogatories seeking information regarding other public school teachers allowed retirement credit for prior teaching service at Boston School for Deaf denied as seeking irrelevant information - Denial of credit for prior teaching service at nonpublic school pursuant based upon eligibility for retirement benefit from "any source" not discretionary - Teacher allowed to pursue discovery via allowed interrogatories, and via subpoenas to successor to Retirement Plan administrator and actuary, regarding factual issues relevant to inquiry under M.G.L. c. 32, § 4(1)(p): whether she was eligible to receive retirement benefits under Sisters of St. Joseph

Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Dismissal

—Lack of Jurisdiction Dismissal

Failure to State a Claim for Relief

Motion to dismiss granted - Constitutional claim - Retirement appeal - Forfeiture of pension approved by retirement board pursuant to M.G.L. c. 32, § 15(4) following retirement system member's 2015 conviction in federal district court, pursuant to 18 U.S.C. § 371, for conspiring to defraud United States, and sentencing to three months' imprisonment and $100 fine - Potential pension loss as a result of forfeiture estimated to be $679,430 - Member's request to retirement board to reinstate pension following Supreme Judicial Court's 2016 decision that pension forfeiture under M.G.L. c. 32, § 15(4) qualified as "fine" under "excessive fines" clause of U.S. Const. Amend. VIII (*see Public Employee Retirement Administration Comm'n v. Bettencourt*, 47 N.E.3d 667 (2016) - Decision by retirement board not to act on request - Appeal of retirement board's "no-action" decision to DALA by member, based upon claim that pension forfeiture was excessive fine in violation of U.S. Const. Amend. VIII - DALA lacked jurisdiction to decide constitutional claim, and no specialized factfinding by DALA was necessary to decide it - In addition, because member's challenge to retirement board action or decision "with reference to" his involuntary retirement or dereliction of duty was already pending before a Massachusetts district court, court was empowered to make required factfinding regarding constitutionality of pension forfeiture as part of its statutory jurisdiction to determine whether board's action was justified (*see* M.G.L. c. 32, §16(3)).

Fitzpatrick v. Chelsea Retirement System, Docket No. CR-16-216, Decision (Mass. Div. of Admin. Law App., Sept. 29, 2017).

Motion to dismiss granted - Statutory invalidity claim - Retirement appeal - M.G.L. c. 90G3/4 - Statute governing retirement system member's election to discontinue retirement deductions at age 70 while continuing employment - District Court full-time first assistant clerk magistrate - Recision, by Public Employee Retirement Administration Commission (PERAC), of State Board of Retirement's approval of clerk magistrate's accidental disability retirement application based upon disabling mold exposure at courthouse, on ground that as a result of election to discontinue contributions to retirement system, clerk magistrate was no longer a "member in service," per M.G.L. c. 32, § 3(1)(a)(i), and was therefore ineligible for accidental disability retirement - Appeal by clerk magistrate challenging PERAC decision - Alternative claim that to extent it made election to discontinue retirement deductions at age 70 while continuing to work irrevocable, M.G.L. c. 32, § 90G3/4 violated the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. - Claim rejected, as Division of Administrative Law Appeals lacks authority to declare a statute invalid - However, statute did not appear to be invalid on its face, as it allowed a retirement system member who continued working past age 70 to decide whether or not he wanted to continue contributing to his retirement system based upon which course of action best suited his particular circumstances, and did not preclude the member from continuing to contribute to the retirement system - Eligibility for accidental disability retirement benefits determined on clerk magistrate's main claim on appeal (no loss of "member in service" status, or eligibility for accidental disability retirement under M.G.L. c. 32, § 7(1), as a result of election to discontinue retirement contributions under M.G.L. c. 32, § 90G3/4).

Reardon v. Public Employee Retirement Administration Commission, Docket No. CR-15-91, Decision (Mass. Div. of Admin. Law App., May 5, 2017).

Lack of Standing

Motion to dismiss granted - Agricultural resource appeals - Herbicide application to manage right of way - Electric transmission utility - Five year vegetation management plan approved by Department of Agricultural Resources and requiring Department's approval of yearly operating plan - Approval of operating plan for 2016 specifying areas off-limits to herbicide spraying, including Zone I areas with public water supply wells - Appeal of operating plan by Cape Cod municipalities where herbicides would be applied - Asserted interference with municipal obligation to provide drinking water to residents - Lack of standing - Failure to allege specific facts showing aggrievement (actual injury different in kind or magnitude from that suffered by general public) - Claim that leaching herbicides would enter groundwater from which towns may draw water unsupported by factual allegations regarding location of spraying relative to town water sources and likely direction of groundwater flow - Failure to assert detail sufficient to support claim that yearly operational plan was inconsistent with five-year vegetation management plan.

Town of Brewster v. Dep't of Agricultural Resources, Docket Nos. MS-16-393, 394, 395 and 396, Recommended Decision (Mass. Div. of Admin. Law App., Feb. 27, 2017).

Mootness

Appeal dismissed - Retirement appeal - Department of Developmental Services (DDS) Mental Retardation Worker IV - Appeal challenging denial of request to reclassify position from Group 1 to Group 2 - Superannuation retirement at age 66 while appeal of group reclassification denial was pending - State Board of Retirement's motion to dismiss appeal as moot granted - Superannuation retirement allowance calculated, per M.G.L. c. 32, § 5(2), as product of retirement system member's creditable service, member's annual rate of regular compensation, and an age factor determined by member's age at retirement and group classification - Maximum age factor used in calculation is 2.5 - Maximum age factor of 2.5 reached in Group 1 at age 65, and in Group 2 at age 60 - Upon retirement at age 66, DDS employee reached maximum age factor of 2.5 for Group 1 employee, and would have reached it earlier, at age 60, had he been classified in Group 2 - Reclassification in Group 2 would not increase his retirement allowance, as he was already receiving the maximum retirement allowance - Reclassification appeal was therefore moot.

Pierre-Louis v. State Bd. of Retirement, Docket No. CR-10-20, Decision (Mass. Div. of Admin. Law App., Jul. 21, 2017).

Dismissal recommended - Physician discipline appeal - Alleged violation of standard of care by physician - Prescription of opioids to pregnant patient and to other patients without recognizing their drug-seeking behavior - Failure to develop and implement treatment plans and meet minimum requirements for medical record keeping - Physician's death following DALA hearing, filing of closing briefs, and closure of record - Recommended decision that matter be dismissed as moot.

Bd. of Registration in Medicine v. Fraser, Docket No. RM-13-224, Recommended Decision (Mass. Div. of Admin. Law App., May 4, 2017).

Appeal dismissed - Retirement appeal - Early Retirement Incentive Program (ERIP) - Denial of ERIP application - Employment by non-qualifying agency - University of Massachusetts - Appeals - Dismissal - Mootness - Withdrawal of ERIP application - Expiration of ERIP application deadline.

Jochim v. State Bd. of Retirement, Docket No. CR-15-328, Decision (Mass. Div. of Admin. Law App., Oct. 28, 2016).

Appeal dismissed - Veterans' benefits appeal - Termination of M.G.L. c. 115 veterans' benefits payments for failure to document current residence - Agreement by parties resolving veteran's appeal, comprising handwritten, signed provisions and amplifications to which parties stipulated during prehearing conference - Continued Cambridge, Massachusetts residence established sufficiently by veteran's temporary residence at Salvation Army men's shelter in Cambridge six days at a time, resumed after several days at a Watertown apartment maintained by another organization - Residence arrangement complied with number of consecutive days the Cambridge shelter allowed for being furnished with a bed, and was likely to improve veteran's chance of obtaining Cambridge inclusionary housing for which he had applied - Although not currently financially eligible to receive M.G.L. c. 115 veteran's benefits, veteran could reapply for them if he signed a lease and incurred rental expenses, or if he incurred medical expenses not reimbursed by other sources - Waiver of any obligation veteran may have had to refund benefits paid to him after local veterans' services department terminated Chapter 115 benefits payments remains in place and applies to benefit payment issued to him while his appeal was pending - No objection by parties to draft order of dismissal clarifying terms of agreement - Veteran's appeal dismissed as moot based upon agreement.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision (Mass. Div. of Admin. Law App., Aug. 31, 2017).

Untimeliness

Generally - DALA adheres to the "postmark rule" and considers an appeal to have been filed when it is postmarked at a United States Postal Service facility.

Nelson v. State Bd. of Retirement, Docket No. CR-15-10, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017).

Retirement appeals - Appeal timely filed within 15 days of notification of the retirement board's decision, as required by M.G.L. c. 32, § 16(4) - Denial by retirement board of firefighter's request for Group 4 classification for his prior call firefighter service - Board's decision postmarked December 26, 2014 - Petitioner could not have received notice prior to the postmark date - Appeal postmarked January 10, 2015 was exactly 15 days after the earliest date he could have been notified of Board's decision - Board's challenge to appeal's timeliness during hearing therefore rejected.

Nelson v. State Bd. of Retirement, Docket No. CR-15-10, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017).

—Lack of Prosecution

Educator License Revocation Appeals

Lack of prosecution dismissal granted - Educator license revocation - Notice of probable cause to revoke license - Criminal indictment, and failure to report it to Department of Elementary and Secondary Education - Failure to attend two previously-scheduled mandatory prehearing conferences - Filing response to order to show cause regarding dismissal, following failure to appear at second prehearing conference, that asserted constitutional right not to appear at DALA conference prior to criminal trial, despite warning in order to show cause that continued pendency of criminal charges was not good cause for failing to attend conference.

Dep't of Elementary and Secondary Education v. Andrade, Docket No. MS-16-430, Final Decision-Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 27, 2017).

Family Child Care Licensing Appeals

Lack of prosecution dismissal recommended - Revocation of family child care provider license - Multiple instances of exceeding licensed child care children capacity, noncompliance with required children to staff ratios and utilizing unapproved caregivers - Failure to comply with sanction order freezing enrollment and reducing child care children capacity - Following appeal by license holder to DALA, failure to file prehearing memorandum or proposed hearing exhibits, and failure to appear for hearing rescheduled at license holder's request - Recommended dismissal of appeal for lack of prosecution, and finalization of family child care license revocation order.

Dep't of Early Education and Care v. Barbas, Docket No. OC-15-556, Recommended Decision (Mass. Div. of Admin. Law App., Sept. 21, 2017).

Lead Inspector Licensing Appeals

Lack of prosecution dismissal recommended - Licensed lead inspector - Appeal of proposed license renewal denial by Department of Public Health - Alleged multiple violations of M.G.L. c. 111, § 197B and DPH lead poisoning prevention and control regulations, 105 C.M.R. § 460.000(H), during residential lead inspections, including failure to follow procedures for initial lead inspection by repeatedly failing to identify or test surfaces in accordance with DPH Childhood Lead Poisoning Prevention Program policies and training materials, using an x-ray fluorescence analyzer that was more than six years old that had not been checked recently for functionality or re-sourced, failure to test and inspect surface or components at several residences including windows, doors, closets and hallways, stairs and/or entire rooms, and falsification of lead inspection test results for areas not tested or that were later found to have dangerous lead levels on both interior and exterior surfaces despite having been reported as negative for lead - Following prehearing conference session, proposed agreement offered by DPH describing what inspector would need to do to renew his lead inspector license, including six-month license non-renewal period, purchase or lease of new x-ray fluorescence analyzer, and completion of apprenticeship inspection s with a license lead inspector - Inspector's response stating that compliance with agreement's terms would be extremely difficult and financially burdensome and that he was no longer interested in becoming a Massachusetts lead inspector or renewing his license, with qualification that he so stated with "all [his] legal rights reserved" and no statement that he was withdrawing his appeal - Order issued directing inspector to clarify whether he wished to withdraw or pursue his appeal, and warning that failure to respond would result in appeal's dismissal and finalization of DPH's refusal to renew his license - No response to order - Recommended decision that DPH Commissioner dismiss appeal for lack of prosecution and that agency's proposal to deny lead inspector license renewal be made final.

Dep't of Public Health v. Tilahun, Docket No. PH-17-148, Recommended Decision (Mass. Div. of Admin. Law App., Oct. 13, 2017).

Physician Discipline Appeals

Practicing medicine while ability to practice is impaired by alcohol or drugs - Failure of physician to file answer to Board's statement of allegations - Notice of prehearing conference returned by U.S. Postal Service as "not deliverable as addressed" - Subsequent order to show cause why default should not enter for want of prosecution sent to same address not returned by U.S. Postal Service - No response to order to show cause - Order of Default and Recommended Decision adverse to physician issued.

Bd. of Registration in Medicine v. Russell, Docket No. RM-17-089, Order of Default-Recommended Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Malpractice - Failure of physician to file reports, as ordered, on status of efforts to resolve matter based upon amended sanction - Failure to respond to or communicate with Board counsel - Entry of default and judgment against appealing party recommended.

Bd. of Registration in Medicine v. Provow, Docket No. RM-13-510, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 22, 2016).

Retirement Appeals

Early Retirement Incentive Program (ERIP) - Ineligibility - Group 1 classification for retirement purposes - Reclassification to Group 2 denied - Massachusetts Department of Mental Health - Clinical Social Worker "C" - Dismissal of appeal - Lack of prosecution - Failure to file prehearing memorandum and hearing exhibits, appear for hearing, or elect submission of appeal upon written filings - Statement of intention not to pursue appeal further.

> *Howard (Kathleen A.) v. State Bd. of Retirement*, Docket No. CR-15-322, Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 13, 2017).

Veterans' Benefits Appeals

Ordinary veterans' benefits under M.G.L. c. 115 - Veteran's adult dependent, not himself a veteran, and adjudicated incapacitated person with court-appointed guardians not including veteran - Denial based upon veteran's financial ineligibility for benefits, 108 C.M.R. § 5.06(3) - Appeal by veteran as representative of adult dependent and his mother - Failure by veteran to respond to order to clarify representational authority, or whether he intended to proceed with appeal or, instead, request that Department of Veterans' Services Commissioner issue him a waiver of his financial ineligibility for veterans' benefits - Failure to respond to Department's motion to dismiss for lack of prosecution - Dismissal without prejudice to request for financial ineligibility waiver that veteran might file, to his dependent's continued receipt of "medical only" Chapter 115 benefits he may be receiving, or to any future determination of dependent's eligibility for ordinary Chapter 115 benefits if veteran applies to Commissioner for, and is issued, a financial ineligibility waiver.

> *Murphy v. Dep't of Veterans' Services*, Docket No. VS-17-056, Order of Dismissal (Mass. Div. of Admin. Law App., Oct. 20, 2017).

Wage and Hour Laws Appeals

Failure to timely pay wages to employee - Citation ordering payment of restitution and civil penalty - Lack of prosecution dismissal following warnings of this sanction - Failure to appear for status conference scheduled by prior order - Ignoring several prior orders directing petitioners to specify grounds on which they challenged citation, identify their hearing witnesses and the subject of their expected direct testimony, and identify their hearing exhibits - Petitioners' failure to identify, on multiple occasions, their authorized representative or notify DALA or the Fair Labor Division of changes of address to which the petitioners were requesting that filings, or notices, orders and decisions issued, were to be mailed - Petitioners' failure to respond to subsequent order to show cause why their appeal should not be dismissed - Appealed citation, including restitution amount and civil penalty, made final.

Chiles v. Fair Labor Div., Docket No. LB-14-439, Decision (Mass. Div. of Admin. Law App., Mar. 13, 2017).

Reconstruction of Final Decisions

Generally

Motion for reconsideration - Repetition of arguments made previously and rejected - Failure to identify clerical or mechanical error in the decision or significant factor that the DALA Administrative Magistrate overlooked in deciding appeal.

Clement v. Essex County Regional Retirement System, Docket Nos. CR-14-184, CR-13-294, Order Denying Motion for Reconsideration (Mass. Div. of Admin. Law App., Nov. 21, 2017).

Motion for reconsideration of final decision made pursuant to 801 C.M.R. § 1.01(7)(l) - Denial - Failure to identify clerical or mechanical error in the decision or significant factor that the DALA Administrative Magistrate overlooked in deciding appeal.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision on Motion for Reconsideration (Mass. Div. of Admin. Law App., Dec. 1, 2017).

Claim amounting to lack of personal jurisdiction asserted in appealing agency action may be forfeited, and thus may present no ground for reconsidering final decision - Forfeiture is fact-specific and depends upon circumstances presented and party's conduct, including degree to which party participated in appeal, or in its resolution by agreement, without moving for dismissal or summary decision, and delay in reasserting jurisdictional claim, *e.g.*, until final decision was issued and party then moved for reconsideration.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision on Motion for Reconsideration (Mass. Div. of Admin. Law App., Dec. 1, 2017).

Retirement Appeals

Motion to reconsider decision sustaining retirement system's denial of member's request to purchase additional prior service for retirement credit - Retired town fire chief - Failure of member to prove by preponderance of the evidence that he worked permanent 20-hour per week schedule during time period at issue - Retirement system's denial of member's request to purchase additional prior service for retirement credit - Retired town fire chief - Failure of member to prove by preponderance of the evidence Repetition of arguments made previously and rejected - Failure to identify clerical or mechanical error in the decision or significant factor that the DALA Administrative Magistrate overlooked in deciding appeal - Time sheets that member prepared showing hours he worked offered for first time in motion for reconsideration and to reopen record, following evidentiary hearing and decision - No ground for reopening record for purpose of introducing new evidence - Time sheets showing hours worked were neither new evidence nor evidence that could not have been discovered by due diligence and produced at time of hearing - Evidence also unhelpful to member's case even if accepted and record were reopened - Time sheets not dated between 2007 and 2010, time period for which fire chief sought to purchase service, and hours member worked after becoming retirement system member late, in 2009, were not in dispute - Motion for reconsideration (and to reopen record) denied.

Clement v. Essex County Regional Retirement System, Docket Nos. CR-14-184, CR-13-294, Order Denying Motion for Reconsideration (Mass. Div. of Admin. Law App., Nov. 21, 2017).

Veterans' Benefits Appeals

Veteran's "reply" to final decision - Treated as motion for reconsideration made pursuant to 801 C.M.R. § 1.01(7)(l) - Reconsideration denied for failure to identify clerical or mechanical error in the decision or significant factor that the DALA Administrative Magistrate overlooked in deciding appeal.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision on Motion for Reconsideration (Mass. Div. of Admin. Law App., Dec. 1, 2017).

Termination of M.G.L. c. 115 veteran's benefits - Lack of cooperation by failure to document current residence (*e.g.*, with a current lease or rent receipt) or, thus, eligibility to receive benefits through local veterans' services department - Appeal to DVS (which sustained benefits termination but waived recoupment of benefits paid to veteran after notice of termination was issued) and then to Division of Administrative Law Appeals - Claim that benefits termination was void for improper mailing (to prior residential address that was no longer valid due to veteran's eviction, rather than to veteran's post office box number) and for issuance by a person allegedly without authority to do so (local DVS's manager of benefits and services rather than by local veterans' services officer, notwithstanding notice was issued on local DVS letterhead with veterans' services officer's name printed at top) - Forfeiture of defective benefits termination claim in circumstances presented and as a result of veteran's conduct, including degree to which he participated without objection in resolving the DALA appeal by agreement, failure to object to draft Order of Dismissal based upon agreement sent to parties by DALA Administrative Magistrate for their review, belated reassertion of claim after Order of Dismissal was issued when none of the parties objected to the draft, and veteran's request, in seeking reconsideration, that Administrative Magistrate approve payment to him of additional Chapter 115 benefits to which he was not entitled under DVS regulations or under the agreement resolving the matter.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision on Motion for Reconsideration (Mass. Div. of Admin. Law App., Dec. 1, 2017).

Reopening the Record

Generally

Petitioner's motion for reconsideration, treated as motion to reopen record to extent petitioner sought to introduce additional evidence after hearing and decision, denied - Additional evidence (in retirement appeal, time sheets petitioner kept showing hours he worked during period of prior service he sought to purchase for retirement credit) not new evidence or evidence that could not have been discovered by due diligence and produced at time of hearing (*see* 801 C.M.R. § 1.01(7)(k)).

Clement v. Essex County Regional Retirement System, Docket Nos. CR-14-184, CR-13-294, Order Denying Motion for Reconsideration (Mass. Div. of Admin. Law App., Nov. 21, 2017).

Retirement Appeals

Motion to reconsider decision treated as motion to reopen record as well - Decision sustained retirement system's denial of member's request to purchase additional prior service for retirement credit - Retired town fire chief - Failure of member to prove by preponderance of the evidence that he worked permanent 20-hour per week schedule during time period at issue - Repetition of arguments made previously and rejected - Failure to identify clerical or mechanical error in the decision or significant factor that the DALA Administrative Magistrate overlooked in deciding appeal - Time sheets prepared by member showing hours he worked offered for first time in motion for reconsideration and to reopen record, following evidentiary hearing and decision - No ground for reopening record for purpose of introducing new evidence - Time sheets showing hours worked were neither new evidence nor evidence that could not have been discovered by due diligence and produced at time of hearing - Evidence also unhelpful to member's case even if accepted and record were reopened - Time sheets not dated between 2007 and 2010, time period for which fire chief sought to purchase service, and hours member worked after becoming retirement system member late, in 2009, were not in dispute - Motion for reconsideration (and to reopen record) denied.

Clement v. Essex County Regional Retirement System, Docket Nos. CR-14-184, CR-13-294, Order Denying Motion for Reconsideration (Mass. Div. of Admin. Law App., Nov. 21, 2017).

Subpoenas

—Records-Only Subpoena

Subpoena seeking only records from non-party, but not appearance by record-keeper or other witness - Available, upon motion, pursuant to 801 C.M.R. § 1.01(7)(a)1 as "not inconsistent" with Standard Adjudicatory Rules of Practice and Procedure or with " law" Applicable law is Supreme Judicial Court's recognition of the use of this type of subpoena in Massachusetts civil practice for the first time in 2015 amendments to Mass. R. Civ. P. Rule 45 - Subpoena must comply with procedural safeguards governing use of this type of procedure that amended Rule 45 provides (advance notice of subpoena to the other parties; notice to the other parties of any objections to the subpoena - reasonable time to produce records in response to subpoena (30 days unless shortened or lengthened by order allowing records-only subpoena ; opportunity for any party, or subpoenaed third party, to contest subpoena or its enforcement via motion for protective order; protection of third party required to produce documents against undue burden or expense in producing them) - Procedural safeguards may be incorporated in subpoena as conditions so that its issuance is "not inconsistent with law."

Bd. of Registration in Medicine v. Winterer, Docket No. RM-17-1004, Decision and Order Allowing Service of Records-Only Subpoena (Mass. Div. of Admin. Law App., Dec. 29, 2017).

Physician discipline proceeding (commenced by Board of Registration in Medicine's asuspension of physician's license to practice medicine, and issuance of statement of allegations of misconduct) - Board's motion for records-only subpoena to clinic requiring production of records of treatment by physician of three patients on specified dates allowed, pursuant to 801 C.M.R. § 1.01(7)(a)1, as not inconsistent with Standard Adjudicatory Rules of Practice and Procedure or with "law" - "Law" with which records-only subpoena must be "not insconsistent" is Supreme Judicial Court's recognition of the use of this type of subpoena in Massachusetts civil practice for the first time in its 2015 amendment of Mass. R. Civ. P. Rule 45 - Amended Rule 45's procedural protections made conditions to subpoena (advance notice of subpoena to the other parties; notice to the other parties of any objections to the subpoena - reasonable time to produce records in response to subpoena (30 days unless shortened or lengthened by order allowing records-only subpoena ; opportunity for any party, or subpoenaed third party, to contest subpoena or its enforcement via motion for protective order; protection of third party required to produce documents against undue burden or expense in producing them).

Bd. of Registration in Medicine v. Winterer, Docket No. RM-17-1004, Decision and Order Allowing Service of Records-Only Subpoena (Mass. Div. of Admin. Law App., Dec. 29, 2017).

—Subpoena Duces Tecum

Record-Keeper Subpoena

Retirement appeal - Denial of creditable service purchase - Retired public school teacher - Prior teaching at nonpublic school as health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Subpoenas to record-keepers of successors to Plan administrator and actuary - Records regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry per M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance - Subpoenas allowed.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Summary Decision

—Availability and Grounds, Generally

Absence of genuine, material factual issue requiring adjudication by hearing - Burden of party moving for summary decision to make this showing with competent evidence, as well as its entitlement to summary disposition in its favor as a matter of law.

Corliss Landing Condominium Tr. v. *North Attleborough Planning Bd.,* Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

Party entitled to summary decision - Motion searches record to determine whether any genuine, material factual issue is presented - Party opposing motion may be granted summary decision if applicable law, and absence of genuine, material factual dispute, compels this outcome, even if opposing party did not cross-move for this relief.

Corliss Landing Condominium Tr. v. *North Attleborough Planning Bd.,* Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

Denial of motion for summary decision even though non-moving party filed no response to summary decision motion - Facts presented by motion or record insufficient to show absence of genuine, material factual issue - Record revealed existence of genuine, material factual issue.

Corliss Landing Condominium Tr. v. *North Attleborough Planning Bd.,* Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

—Family Child Care Provider License Denial Appeals

Summary decision affirming license denial recommended - Appeal challenging discretionary denial of family child care provider license by Department of Early Education and Care (EEC) in January 2017 - Background check by EEC showed 2008 "51B report" by Department of Children and Families (DCF) of applicant's alleged child neglect (seven month old child left alone in bathtub, and applicant's own three year old son left alone in play pen, while she walked to a bus stop to pick up another child who was being dropped off) - Determination by EEC that 51B report showed applicant to be unsuitable to receive family child care license in view of the circumstances and seriousness of the prior child neglect incident including the age of the children involved, applicant's provision of conflicting stories to investigators about the incident, including claim that an unauthorized care giver (applicant's brother) was watching the two children and opinion that at least someone was watching them - Broad discretionary authority delegated to EEC by statute (M.G.L. c. 15D, §§ 3, 7 and 8) to determine who is suitable for employment or licensure in agency-licensed programs, in light of concern for safety of children - On appeal, DALA is not to re-evaluate EEC's discretionary decision, but rather it should evaluate whether or not the agency's decision was arbitrary, capricious or otherwise not supported by law - No genuine dispute as to allegations of neglect supported by a 51B report, or that EEC followed its regulations in considering a discretionary license disapproval based upon a DCF record check, including evaluation of the factors specified by the regulations and affording the applicant an opportunity to submit other relevant information (*see* 606 C.M.R. § 14.13(3)) - Claim on appeal that while leaving the children unattended was wrong, the incident was not "not so horrible an act" that she should be denied a family child care provider license, and that she was an excellent care giver and could call witnesses to support that assertion at a hearing, did not show that the factual basis for D.F.'s discretionary license denial was genuinely or materially disputed, and instead sought re-evaluation of D.F.'s discretionary decision based upon undisputed facts.

Dep't of Early Education and Care v. Reyes, Docket No. OC-17-086, Recommended Decision (Mass. Div. of Admin. Law App., Aug. 1, 2017).

Summary decision sustaining denial of family child care provider license renewal recommended - Denial of application to renew family child care provider license by Department of Early Education and Care (EEC) in late 2016, following initial license approval in 2006 and renewal in 2012, both when applicant's son was not yet 15 and subject to background record check, despite son having been found guilty, at age 12, of assault and battery charge - Disqualifying background of family member - Massachusetts Criminal Record Information (CORI) check in 2016 revealed delinquency finding as to son regarding anal penetration of friend during sleepover, when both were 13, witnessed by victim's 10 year old brother - Discretionary license renewal denial by EEC based upon potential risk of harm to children based upon son's disqualifying background check, applicant's refusal to ensure that son was out of home during family child care hours, son's downplaying of earlier assault and battery conviction, and no demonstrated rehabilitation by son - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts.

Dep't of Early Education and Care v. Hoyt, Docket No. OC-17-034, Summary Decision (Mass. Div. of Admin. Law App., Apr. 27, 2017).

Summary decision sustaining family child care provider license denial recommended -

Discretionary family child care provider license denial by Department of Early Education and Care (EEC) in late 2016 - History of child neglect - Background check by Department of Children and Families showing neglect of her own children (1999 sexual abuse of applicant's then-five year old son by playmate as a result of lack of supervision; 28 days of school missed by then -six year old son who had already been held back for one year once before; 2008 neglect based upon admission by applicant that she disciplined her then-fourteen and eleven year old children by open-hand face slapping) - Determination of unsuitability for day care provider licensing - EEC discretion to determine appropriateness of applicant for licensure in light of concern for safety of children - Prior child neglect findings undisputed - Thoughtful and lengthy analysis of background check by Department of Early Education and Care and Department's discretionary decision to deny family child care license application - Applicant given opportunity to respond - Discretionary decision based upon sufficient facts, not arbitrary or capricious, and not otherwise unsupported by law - Undisputed material facts.

Dep't of Early Education and Care v. Correa, Docket No. OC-16-548, Summary Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

—Expedited Permit Appeals (M.G.L. c. 43D)

Summary decision granted - Expedited permit appeal (M.G.L. c. 43D) - Appeal challenging expedited permit for industrial/commercial development in industrially-zoned area within designated "priority development site," granted constructively when town planning board's failed to take final action on permit application before statutory 180-day review period expired - Appropriateness of summary decision to decide appeal - Parties' joint status report identified no genuine, material factual issues precluding summary decision - Parties sought ruling as to legal issues only: whether any of procedural defects claimed on appeal required annulling constructively-granted permit; scope of permit (what work it allowed, whether any permit conditions were properly read into it, and which work was outside permit's scope and was reserved for future resolution).

Corliss Landing Condominium Tr. v. *North Attleborough Planning Bd.,* Docket No. MS-15-661, Decision (Mass. Div. of Admin. Law App., Mar. 16, 2016).

—Retirement Appeals

Accidental Disability Retirement Benefits

Summary decision sustaining denial of accidental disability retirement benefits-Psychological or emotional injury - Former Massachusetts Commission Against Discrimination Administrative Assistant I - Alleged emotional injury sustained as a result of exposure to "identifiable condition" not common or necessary to all or a great many occupations - Bipolar disorder and post-traumatic stress disorder, panic disorder, anxiety and depression allegedly resulting from workplace policy changes, following 2010 change in administration at MCAD office where administrative assistant worked, regarding absences and time off for health-related issues and alleged discriminatory application to her - Prior to these changes, history of taking leave for depression and anxiety, chronic bronchial asthma, obstructive sleep apnea, chronic pain, management of panic attacks, difficulty performing work following prescription of medications for depression and anxiety - Belief by administrative assistant that supervisory staff demeaned her efforts and scrutinized her behavior when she took time off - Filed complaint in October 2010 with agency's deputy general counsel against supervisors alleging unfair treatment and undue monitoring (including being required to bring in a doctor's's note following every appointment) on account of being Hispanic and disabled, and of being targeted and accused unfairly of abusing sick time - Additional medical problems including chest pain and abdominal distress, and trips to emergency room due to panic and anxiety symptoms, resulting in more missed work - Cocaine use and, on one occasion, wrist-cutting while under influence of cocaine - Instructed to speak with supervisor prior to being absent from work - During early 2011 meeting with supervisor, accused of abusing sick time and reporting to work late - Belief by administrative assistant that she was being subject to retaliation and ordered to followed policies and procedures applicable to no other employees - Grievance filed with union, with no action taken - Changes by supervisor regarding information to be included in reports on MCAD complaints received and action taken on them - Further panic attacks - Reprimanded in March 2011 for failure to comply with supervisor's directives - Fear of further reprimands and termination - Leave taken under federal FMLA in March 2011, and absent from work for six months, for to mental health reasons - Return to work in mid-September 2011 followed, two months later, by attempted suicide and subsequent hospitalization in intensive care unit and then in adult inpatient psychiatric unit - Based upon report of primary care physician, allowed to return to work part-time on May 14, 2012, - Allowed five-minute breaks to carry out her "anxiety management strategies" each preceded by informing her supervisor she was leaving her work station so there would be appropriate coverage in her absence - Stationed at front desk rather than in former cubicle, which was occupied by another employee - Feeling that she was no longer part of staff, administrative assistant resigned on June 3, 2012 - Applied on March 6, 2013 for accidental disability retirement based upon work-related emotional injury and resulting disability due to "identifiable condition" not common or necessary to all or a great many occupations, with inability to perform job duties as of May 2010 - Employer's statement portion of application noted absence of records of accidents or work-related conditions that created or exacerbated alleged disability - Unanimous positive medical panel certificate as to disability, permanence and work-related causation - Despite panel certificate, denial of accidental disability retirement application, and ordinary disability retirement benefits approved instead - Following appeal to DALA, motion by State Board of Retirement for summary decision - Motion granted, with summary decision in retirement board's favor sustaining denial of accidental disability retirement benefits - No notice of injury reports filed - Alleged work-related stress centered around strained relations with new managers beginning September 2010, mostly administrative assistant's disagreement with attendance and work procedure policies - Documents in record showed that new attendance policy and other guidelines were issued to entire staff and not only to administrative assistant, which undercut her assertion of being singled out and treated unfairly - No showing that alleged emotional injury amounted to more than personal feelings of persecution and perpetual victimization, or that managerial behavior to which administrative assistant was subjected was extreme and outrageous and beyond all bounds of human decency - No evidence that actions of supervisors were intended to inflict emotional distress - History of chronic, excessive absenteeism beginning prior to 2010 change of management and implementation of new leave and absence policies - Not unreasonable for supervisors to require that administrative assistant account for her absences - Supervisors required, as part of their own jobs, to implement quality control measures and hold employees accountable - Actions complained of were bona fide personnel actions - Evidence insufficient to show a compensable personal injury entitled administrative assistant to accidental disability retirement benefits, or that alleged emotional work-related injury and its permanence was subject of genuine, material factual issue that could not be determined summarily.

Reyes v. State Bd. of Retirement, Docket No. CR-13-598, Decision (Mass. Div. of Admin. Law App., Sept. 29, 2017).

Summary decision sustaining denial of accidental disability retirement benefits - Psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

—Veterans' Benefits Appeals

Summary decision sustaining M.G.L. c. 115 veterans' benefits suspension, and recipient's placement into "refund status" on account of benefits overpayment - Failure to look for work - Duplicative benefits - Rental assistance payments received while rent was being paid by another source.

Brelsford v. Dep't of Veterans' Services, Docket No. VS-15-594, Decision (Mass.

Div. of Admin. Law App., Nov. 9, 2016).

—Wage and Hour Laws Appeals

Summary decision against employer affirming citation for failure to pay overtime wages - Painting company - Willful failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty ($7,500) affirmed - No response to Fair Labor Division's motion for sufficiently made and supported summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour violations ($25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016).

RETIREMENT

Accidental Death Benefits

Generally - Beneficiary of public employee retirement system member who died as natural and proximate result of personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties without serious and willful misconduct on his part is entitled to accidental death benefits under M.G.L. c. 32, § 9(1) - Beneficiary has burden of establishing this causal connection between the retirement system members' death and the injury sustained or hazard undergone by a probability or by "more than the possibility or change" that the causal connection exists - Because proof of such connection is beyond common knowledge, expert testimony is needed to show causation, in particular a medical opinion expressing the cause of death with reasonable medical certainty.

Hopkins v. Bristol County Retirement System, Docket No. CR-15-470, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Generally - Suicide cases - Although suicide is arguably "serious and willful misconduct," a retirement system member's suicide does not itself preclude a beneficiary's recovery of accidental death benefits under M.G.L. c. 32, § 9(1) if suicide was natural and proximate result of mental illness caused by or resulting from employment - However, beneficiary must show it to have been more than a mere possibility that work-related psychological stresses caused a mental breakdown resulting in suicide.

Hopkins v. Bristol County Retirement System, Docket No. CR-15-470, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Ineligibility for accidental death benefits - Suicide as a result of mental illness not shown to have been caused predominantly by work-related duties - Police officer - Difficulty separating himself from incidents to which he responded as police officer, in particular a domestic dispute between a mother and her son son following which the son killed the mother, a car crash into a tree where the driver's body was burned beyond recognition, and an elderly man struck and killed while walking his dog - Officer filed no injury report of being traumatized by these events, sought no mental health treatment or therapy, and did not tell a fellow officer who would later testify about behavioral changes about any emotional trauma he was experiencing - Marital difficulties leading to arguments and nasty text messages to the officer from his wife - On day of suicide, officer returned home while on break from work, argued with wife in front of infant daughter immediately, and then shot himself in front of them with his work-issued gun - That suicide occurred while officer was at home on break did not preclude widow from receiving benefits, and whether suicide occurred while officer was in performance of his duties depended, instead, upon whether it was related to work-related stresses or mental health problems the officer developed as a consequence of performing his job and encountering traumatic incidents - Insufficient proof - Psychiatrist certified in forensic psychiatry who had not treated officer and who, in evaluating case for widow, opined that traumatic situations he witnessed as police officer and inability to deal with them caused him to become depressed and isolated, was unaware of his marital conflicts, including the one that immediately preceded the suicide and may have been an immediate and acute stressor that brought on an impulsive and depressed state prompting suicide - No expert opinion in record ruling out martial stress as causative, or evaluating whether martial stress was related to job-related mental health problems - Evidence showed that officer worked for some time in his depressed state - More certainty needed to establish that suicide was brought on by depression caused [primarily by exposure to traumatic incidents at work - Psychiatric opinion did no more than suggest possibility of job-related causation - Retirement board's denial of accidental death benefits affirmed.

Hopkins v. Bristol County Retirement System, Docket No. CR-15-470, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Death of accidental disability retiree - Eligibility of beneficiary for accidental death benefit pursuant to M.G.L. c. 32, § 9(1) - "Proper proof" that retiree's death was a result of the condition for which he was retired - Surviving spouse of former police chief retired in 1994 on accidental disability pursuant to M.G.L. c. 32, § 7 and M.G.L. c. 32, § 94 ("Heart Law") - Retirement due to progressive artherosclerotic coronary artery disease - Numerous catheterizations, stenting and bypass surgeries in years following retirement - Hospitalization several times in years immediately prior to death in 2013 for acute congestive heart failure, ischemic cardiomyopathy and atrial fibrillation - Death certificate listed cause of death as congestive heart failure due to or as consequence of diabetes mellitus - Cardiologist who treated retiree for 10 years, and PERAC-appointed single physician medical panel member, also a cardiologist, opined that immediate cause of death was congestive heart failure and that advanced coronary artery disease was natural and proximate cause of death - Opinions supported by medical evidence and reliable - Retirement board obtained second opinion from another cardiologist who opined that retiree died due to progressive hypoxic respiratory failure from end stage interstitial disease (hypoxic respiratory failure), and not atherosclerotic heart disease - Retirement board denied surviving wife's application for Section 9 accidental death benefits - Supporting letter by treating cardiologist noted severe and advanced cardiac condition prior to retiree's death, that it was impossible for physician to discern to what degree shortness of breath was due to heart causes rather than lung causes, and that death was caused by severe underlying cardiac condition exacerbated by pulmonary fibrosis - That retirement board was not satisfied with opinions of treating cardiologist and panel cardiologist and obtained second opinion was not controlling as to whether proof sufficed to show that retiree's death was result of condition for which he was retired - Little support in record for position of board and opinion of second cardiologist that underlying coronary artery disease was dormant or asymptomatic during final months of his life, and in fact retiree suffered myocardial infarction during hospitalization one month prior to his death - Opinions of treating cardiologist and panel member cardiologist accorded greater weight as both were keenly aware of progressive nature of retiree's coronary artery disease - Denial of accidental death benefits application reversed.

Bell v. Franklin Regional Retirement Bd., Docket No. CR-15-600, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Accidental Disability Retirement Benefits

—Eligibility to Claim Benefits

"Member in service," as defined at M.G.L. c. 32, § 3(1)(a)(i), eligible for accidental disability retirement benefits - Retirement system member working past age 70 and electing to discontinue contributions to retirement system pursuant to M.G.L. c. 32, § 90G3/4 - District Court full-time first assistant clerk magistrate - Recision, by Public Employee Retirement Administration Commission (PERAC), of State Board of Retirement's approval of clerk magistrate's accidental disability retirement application based upon disabling mold exposure at courthouse, on ground that as a result of election to discontinue contributions to retirement system, clerk magistrate was no longer a "member in service,", and was therefore ineligible for accidental disability retirement - Appeal by clerk magistrate challenging PERAC decision - Alternative claim that to extent it made election to discontinue retirement deductions at age 70 while continuing to work irrevocable, M.G.L. c. 32, § 90G3/4 violated the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. - Claim rejected, as Division of Administrative Law Appeals lacks authority to declare a statute invalid - However, statute did not appear to be invalid on its face, as it allowed a retirement system member who continued working past age 70 to decide whether or not he wanted to continue contributing to his retirement system based upon which course of action best suited his particular circumstances, and did not preclude the member from continuing to contribute to the retirement system - Eligibility for accidental disability retirement benefits determined on clerk magistrate's main claim on appeal (no loss of "member in service" status, or eligibility for accidental disability retirement under M.G.L. c. 32, § 7(1), as a result of election to discontinue retirement contributions under M.G.L. c. 32, § 90G3/4).

Reardon v. Public Employee Retirement Administration Commission, Docket No. CR-15-91, Decision (Mass. Div. of Admin. Law App., May 5, 2017).

First assistant clerk magistrate employed full time at the Malden District Court who elected to continue working full-time in this position past age 70 but who elected to discontinue retirement deductions, as M.G.L. c. 32, § 90G3/4 allowed him to do, did not accrue more creditable service toward a superannuation retirement while continuing to work, per the statute, but remained a "member in service" of the State Employees' Retirement System, per the definition recited at M.G.L. c. 32. § 3(1)(a)(i) - Clerk magistrate remained regularly employed in the performance of his duties - Section 90G3/4 neither terminates the retirement system membership of a member who elects to discontinue retirement deductions nor changes the member in service status of an employee who makes the election and continues his employment - Clerk magistrate therefore remained eligible for accidental disability retirement pursuant to M.G.L. c. 32, § 7(1) - Decision of Public Employee Retirement Administration Commission (PERAC) rescinding State Board of Retirement's decision approving court clerk's accidental disability retirement application based upon exposure to molds at courthouse where he worked, following majority affirmative medical panel as to disability and job-related causation, therefore reversed.

Reardon v. Public Employee Retirement Administration Commission, Docket No. CR-15-91, Decision (Mass. Div. of Admin. Law App., May 5, 2017).

—Grounds to be Proved

Causation (Causal Nexus Between Work-Related Injury and Disability), Generally

Applicant seeking accidental disability retirement benefits must demonstrate that disability stemmed from a single work-related event or series of events or, if disability was the product of gradual deterioration, that his employment had exposed him to an identifiable condition that is not common or necessary to all or a great many occupations.

McDonough v. State Bd. of Retirement, Docket No. CR-15-98, Decision (Mass. Div. of Admin. Law App., Sept. 8, 2017).

A mental or emotional disability resulting from a single injury or a series of work-related injuries has been recognized as a personal injury under M.G.L. c. 32, § 7(1) - Personal injury is to be interpreted in harmony with workers' compensation statute, M.G.L. c. 152 - Under this statute, personal injuries "include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within employment." M.G.L. c. 152, § 1(7A).

McDonough v. State Bd. of Retirement, Docket No. CR-15-98, Decision (Mass. Div. of Admin. Law App., Sept. 8, 2017).

Suicide cases - Although suicide is arguably "serious and willful misconduct," a retirement system member's suicide does not itself preclude a beneficiary's recovery of accidental death benefits under M.G.L. c. 32, § 9(1) if suicide was natural and proximate result of mental illness caused by or resulting from employment - However, beneficiary must show it to have been more than a mere possibility that work-related psychological stresses caused a mental breakdown resulting in suicide.

Hopkins v. Bristol County Retirement System, Docket No. CR-15-470, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Causation - Insufficient Proof

Insufficient evidence of work-related causation - Failure to prove by preponderance of the evidence that regional medical panel employed incorrect standard or lacked pertinent medical information when it answered question as to disability's work-related causation in the negative - Municipal police officer - Stress-exacerbated hypertension and visual acuity problems - Diagnosed as insulin-dependent diabetic when 12 years old - During first year of work in 1989, responded to call about five year old girl unconscious after drowning in a park, performed CPR, but girl died shortly afterward at hospital, and officer spent time with girl's family and attended the autopsy - Event had tremendous emotional impact because officer had a child the same age, but officer did not file an injury report - Diagnosed with hytpertension in 2003, and diabetes noted as not being well-controlled - Following 18 years as patrolman (1989-2005), reassigned to dispatcher position after suffering left eye hemorrhage while at work and having surgery that repaired some of the eye damage - Performed dispatcher work without restriction until January 25, 2007, when, after arriving at work and logging onto computer, he felt chest tightness, nausea, severe headache and dizziness and was taken to hospital by ambulance, where he was noted to have no vision in left eye and minimal vision in right eye - Unable to return to work and retired for superannuation - No application for or receipt of workers; compensation benefits - Following retirement, officer filed accidental disability retirement application on March 20, 2007 based upon hypertension and job stress contributing to visual impairment, referencing several dates of work injuries or hazards from 1989 to 2007, including work conditions in Dispatch (poor air quality, poor air circulation, dust, and absence of windows) - No mention of PTSD in application, and no diagnosis of PTSD-related hypertension or vision problems, in supporting physician's statement, which stated that work-related stressors increased officer's hypertension and worsened his visual acuity - Examination in July, 2007 by medical panel comprising two cardiologists and one internist - medical panel's certificate unanimously affirmative as to disability and its likely permanence, but unanimously negative as to work-related causation - Noting medical records showing that officer's hypertension was under control, and finding no evidence of disabling cardiac condition or disabling hypertension, panel members concluded that his retinopathy, renal insufficiency and proteinuria were related to diabetic neuropathy brought on by his long-standing diabetes - After panel issued its certificate, retirement board denied accidental disability retirement application, which retired officer appealed in October 2007 - Diagnosed with post-traumatic stress disorder (PTSD) in April 2014 - PSD diagnosis confirmed by another physician in October 2016 - Denial of accidental disability retirement application sustained - Failure to prove by preponderance of evidence that medical panel employed incorrect standard or lacked pertinent medical information when it answered question as to work-related causation of disability in the negative - Panel members reviewed all medical records sent to them, examined the retired officer, was aware of his job stress claim from review of his retirement application and its supporting physician's statement, and mentioned the work stress the officer related in the history section of the panel's narrative report - Panel members also found no evidence of a disabling cardiac condition or hypertension - History of officer's hypertension, diabetes, job stress, anxiety and depression were all before the medical panel and the retirement board - PTSD diagnosis and treatment for mental health issues occurred after the panel examined him, and were not before the panel and, as a result, panel could not consider it and failure to do so was not evidence that it applied improper standard or failed to consider the medical evidence - PTSD claim was also time-barred - It related to drowning of young girl he attempted to save in 1989, but officer did not file an injury report, and the event and the stress the officer claimed as a result occurred more than two years before he filed his accidental disability retirement application in 2007 - PTSD-related claim not an injury or hazard undergone within two years of date on which retirement application was filed, and could not support accidental disability retirement application unless written notice of injury was timely provided to retirement board or other statutory exception to this two-year rule, recited at M.G.L. c. 32, §§ 7(1) and 7(3)(a) and (b), applied, and none did - No worker's compensation received for the injury he alleged, and at any rate, police officers are ineligible to receive worker's compensation - No record of mental injury sustained or hazard undergone in police department's official records - No evidence that any official in police department knew that officer sustained a work-related injury, in particular a stress-related injury as a result of the 1989 child drowning death, or that it had any reason to notify the retirement board about such an injury - Accidental disability retirement claim therefore confined to any injury or injuries that occurred in the two years prior to his retirement application and exacerbated his pre-existing mental health condition - Unclear how the hazards or injuries he claimed to have undergone while he worked as a dispatcher between 2005 and 2007 were so significant as to advance his pre-existing mental health condition - His hearing testimony, and that of his wife, emphasized the 1989 child drowning incident as having caused him the most distress as a police officer, but he could not rely on that event as it occurred more than two years before he filed his accidental disability retirement application, and none of the statutory exceptions to the two-year lookback rule of M.G.L. c. 32, § 7(1) applied.

Carr v. Brockton Retirement Bd., Docket No. CR-07-1033, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Insufficient evidence of work-related causation - Emotional or psychological injury - Registry of Motor Vehicles Clerk IV - Alleged harassment and retaliation by R.V. branch office staff from 1996 through 2010 - Claim of permanent disability based upon exposure to identifiable condition (constant workplace hostility and harassment) - Conflicts with co-workers and state trooper assigned to branch office - One-day suspension in 2000 for unprofessional conduct toward customer - Discipline overturned following grievance through union - Second suspension, for three-days, issued for directing customer to return unnecessarily to automobile insurer to correct registration error made by another R.V. clerk - Loud, harsh and public verbal reprimand heard by fellow employees and by customers issued by supervisor - Suspension overturned following grievance - One-day suspension in 2001 for allegedly failing to assist another staff member while on shift - Perception of being targeted for discipline not meted out to other staff - Employee entered comments about years of harassment, rude treatment and interference with job performance other staff and by management in response to FY 2002 employee performance review form - Management failure in late 2002 to respond to request to take personal day, and marked off-payroll, followed by grievance and attendance correction and reinstatement of pay - 2005 transfer to another RM, followed by three-day suspension for refusal to assist customers, refusal to process transaction for drive-up customer, damage to customer's car caused by opening emergency exit into customer drive-through area, a violation of branch rules, and other violations - Suspension rescinded following hearing - Transferred to another R.V. branch in 2005, along with former supervisor - Perception that work environment at new branch was hostile - In March 2009, after questioning elderly customer about identification and medical support for handicap placard application, conflict with co-worker as to why she did not simply give the customer the placard, in view of her age - Manager sided with co-worker, prompting employee to complain of hostile treatment and working conditions - Subsequent verbal altercation, in July 2009, with co-worker upset about her work load, who told employee to mind her own business, called employee "stupid and crazy" and threatened to "kick [her] ass" - Co-worker not disciplined - Employee's request for transfer to a different R.V. branch based on hostile work environment denied - Continued hostility by same co-worker, this time with racial overtones - Employee fainted at work in July 2009, believed she was kicked when she was on floor, and was taken to hospital - After returning to work several days later, perception that other workers were trying to get rid of her - Employee filed complaint with union about workplace hostility in August 2009 - Conclusion by R.V. counsel that employee had provoked the initial bickering with co-worker - Employee given written warning about her confrontational and volatile behavior, and then, in January 2010, after being overheard making comments about wanting to punch co-worker and give others what they deserved, placed on paid administrative leave pending determination as to whether she posed a danger to herself and others in workplace - Subsequent negative psychological fitness-for-duty evaluation, with examining physician's recommendation of intensive psychopharmacological and psychotherapeutic treatment prior to returning to work and re-evaluation, along with recommendation of occupational therapy to assist employee with workplace relations and working cooperatively with co-workers - Subsequent counseling and treatment generated diagnosis of serious mental illness including major depression, insomnia, low energy and anxiety - Dismissal from behavioral health treatment program due to conflict with another patient - Accidental disability retirement application filed in March 2011 based upon permanent disability due to severe depression, stress, anxiety and PTSD due to workplace harassment and retaliation - Unanimous affirmative medical panel certificate as to disability, permanence and work-related causation (identified by all three panel members as a series of work-related events) - Retirement Board approved ordinary disability retirement but denied accidental disability retirement application, despite unanimous affirmative panel certificate - Denial sustained - Neither employee nor her superiors filed any notice of injury between 1997 and 2010 despite allegations of continuing harassment - Employee's credibility as to continuing nature of alleged harassment, and reliability of her recollection of events suspect, on account of perceived constant fabrications and "set-ups" in five R.V. branches over 13 years, with almost no supporting contemporaneous entries in medical records, and without any witness corroboration of employee's self-serving testimony - No evidence supporting claim of career-long exposure to workplace hazards - No identifiable condition not common and necessary to all or a great many occupations - No showing that alleged injury amounted to more than personal feelings of persecution and perpetual victimization.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Insufficient evidence of work-related causation - Public school teacher assistant - Assignment to classroom with several behaviorally-challenged students - Fibromyalgia - Nausea, vertigo and disequilibirum - Superannuation retirement - Subsequent application for accidental disability retirement based upon medical conditions (Fibromyalgia, Meniere's Disease (severe vertigo) and Sjogren's Syndrome (long-term autoimmune disease affecting moisture-producing glands)) exacerbated by job requirements and work-related stress - Denial of accidental disability retirement benefits sustained on appeal - Undisputed material facts - Failure of teacher assistant to prove that she sustained compensable personal injury, or that her employment presented a hazard not common or necessary to all or a great many occupations - Vertigo and nausea symptoms occurred at work only once, and were generally experienced in the evening, after work - Absence from work toward end of employment due to leave to care for grandson under Family Medical Leave Act - No notice of injury report or incident report filed with employer - No evidence in record as to effect (if any) of medications she was taking in development of her vertigo - No showing of mature and established disability when teacher's assistant last performed her duties - No contemporaneous report in record from treating physician supporting teacher assistant's claim to be totally and permanently disabled on last day of employment - Admission, in disability retirement application, of non-job related factors exacerbating her Fibromyalgia, Meniere's Disease and Sjogren's Syndrome, including constant movement and exposure to elements and "all sorts" of weather conditions including hot, cold, rain and wind exacerbated, none of which were job-related hazards, and all of which were common and necessary exposures related to daily life in New England - No positive medical panel evaluation supporting her claim (2 of 3 members voting yes as to disability and its permanence, of whom 1 voted yes and 1 voted no as to job-related causation, and 1 member voting no as to disability, based upon finding normal hearing and ears and no Meniere's Disease, and therefore not answering remaining questions as to permanence of disability and job-related causation) - No evidence that panel members lacked pertinent facts, applied erroneous standard or were biased.

Lambert v. Hampden County Regional Retirement Bd., Docket No. CR-15-209, Decision (Mass. Div. of Admin. Law App., Apr. 7, 2017).

Insufficient evidence of work-related causation - Correction officer - Post-traumatic stress disorder, depression and anxiety as a result of incidents witnessed and experienced directly as correction officer during two years of employment as correction officer - Decreased sleep and appetite, recurrent intrusive thoughts, and drinking after witnessing incidents between inmates - Tightness, chest pains, and arm pain after speaking with inmate outside his cell - Major depressive disorder and panic attack diagnosed by treating physicians - Unanimous affirmative psychiatric medical panel certificate as to disability, its likely permanence, and job-related causation -

Retirement board denial of accidental disability retirement application despite panel certificate based upon lack of specific dates of injury due to inmate violence, and assertion of stress and trauma based in part upon allegations of injury to other correction officers that employee did not witness - Denial affirmed - Affirmative medical penal certificate not conclusive as to work-related causation - Injuries to third parties (including suicides and suicide attempts among correction officers) insufficient to show compensable personal injury - Credibility issues - Failure to file incident reports as to violence witnessed - Discrepancies in narratives of alleged violence at correctional facility given to physicians, including apparent conflation of memories with alleged reports of co-workers - Presence at related incidents, or even being on duty at time, not documented by incident reports filed by others - Insufficient evidence of specific events that could serve as basis for accidental disability retirement application - No evidence of work environment different from those in which other correction officers worked - No evidence of outrageous working conditions in comparison with work other correction officers in facility performed - No evidence of work-related aggravation of pre-existing psychiatric condition, including depression related to childhood abuse, that appeared to have become clinically quiescent before correction officer employment began, particularly since employee did not followup with psychotherapy or trauma therapy recommended by treating physician and therefore could not show that treatment could not have resolved anxiety, depression and post-traumatic stress disorder - No workmen's compensation benefits awarded for any of the alleged work-related incidents - Receipt of lump-sum workmen's compensation benefit payment by agreement evidence of legal compromise only, not merits-based resolution of claim.

Gale v. State Bd. of Retirement, Docket No. CR-13-205, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Insufficient evidence of work-related causation, and untimeliness of claim - Public school teacher - Aggravation of pre-existing injury (depression and anxiety longstanding since childhood) after 20 years of successful teaching with the aid of psychotherapy and prescribed psychiatric medication - Increasing anxiety about ability to perform classroom duties, meet deadlines and attend to student progress or lack of progress - Development of hair and weight loss, and hoarding and eating disorders, and worsening inability to concentrate, loss of organizational skills, and forgetful, incoherent thought, observed by treating psychiatrist - Attribution to difficult work environment at school, particularly difficult students, increasing administrative work load, and arrival of a new, critical and unsupportive principal - Teacher's transfer to new school with supportive principal, with resulting, but temporary, diminishment of anxiety and restored level of function as teacher - Resumption, and worsening, of psychiatric symptoms for five years following teacher's transfer - Affirmative certificate by psychiatric medical panel majority as to disability, permanence and work-related causation - Rejection by Board following hearing, based upon minority panel member's rejection of work-related causation, for lack of specific traumatic at-work events, and opinion that natural progression of anxiety disorder, rather than work-related injury, caused increasing difficulty in managing job duties and, ultimately, the teacher's disability - Failure to prove job-related causation by preponderance of evidence - Affirmative medical panel findings as to causation not conclusive - No evidence of work-related event or series of events contributing significantly to teacher's psychiatric disability - Evidence supported underlying anxiety about job duties, rather than conditions of job, as the significant factor precipitating teacher's disability - Failure to obtain workmen's compensation for psychological disability itself not preclusive of accidental disability retirement benefits - Failure to submit accidental disability retirement application within two years following allegedly-precipitating events at former school, with no workmen's compensation payments to mitigate lapse of time, violated timely application provisions of M.G.L. c. 32, §§ 7(1) and 7(3)(a).

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Evidence sufficient to show medical panel error as to causation - Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

Insufficient evidence of work-related causation - Sheriff's office employee - Lung cancer - Office mold exposure - Negative unanimous medical panel as to causation, based upon lack of solid medical evidence linking mold exposure to lung cancer development - Panel considered relationship mold may have played in development of employee's lung cancer - No evidence that panel applied incorrect standard or lacked pertinent information in reaching its conclusion, or that conclusion was plainly wrong - Fact that treating physician offered contrary opinion as to causation did not displace panel's medical opinion or show that panel applied incorrect standard - No evidence that treating physician suggested performance of tests relative to alleged connection between mold exposure and cancer before medical panel examined employee.

Hanover v. State Bd. of Retirement, Docket No. CR-12-575, Decision (Mass.

Div. of Admin. Law App., Oct. 21, 2016)

Insufficient evidence of work-related causation - Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations against her, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment was an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Insufficient evidence of work-related causation - Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - no proof that right-sided weakness or confusion were caused by temporary workplace exposure to natural gas - absence of emergency room or other medical records, or employer's records, confirming gas exposure - Nearly three-year gap between alleged exposure and specific complaint - Unsupported hypothesis by treating physicians of reaction to natural gas exposure - No contemporaneous records connecting blood draw following alleged gas exposure to hand weakness - No affirmative medical panel certificate as to work-related causation of injury claimed - No improper panel composition or panel error - denial of accidental disability retirement benefits affirmed.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016)

Insufficient evidence of work-related causation - Housing Authority maintenance worker - Left shoulder injury - Pain experienced first while lifting heavy bag of trash into dumpster, then while removing mowing deck from tractor - Questionable subscapularis tear - History of other injuries and underlying cervical spondylosis - Medical panel - Negative majority panel finding as to job-related causation - No improper panel composition, or application of improper standard or other panel error

- Denial of accidental disability retirement benefits affirmed.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Insufficient evidence of work-related causation - Housing authority maintenance worker - Left shoulder injury - Refusal to undergo recommended surgery for torn rotator cuff - No disqualification from receiving a disability retirement - Medical providers disagreed as to existence of rotator cuff tear warranting surgical intervention, or whether shoulder pain resulted from arthritis and/or cervical pathology - Academic issue - Medical panel did not issue positive certification as to disability's job-related causation.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Causation - Sufficient Proof

Sufficient evidence of work-related causation - Emotional or psychological injury - Unanimous affirmative medical panel as to disability, its likely permanence, and job-related causation - Alcohol and Drug Addiction Counselor I and (during last two years of employment, from 2010 to 2012) Director of Residential and Addictive Services at Chelsea Soldiers' Home - Series of work-related events leading to injury - Following promotion to director position in 2010, increased depression, feeling of increased stress, increased and uncharacteristic uncertainty in determining correct treatment for residents who relapsed into substance abuse - After recommending that one resident who had relapsed be placed on restrictions at the Home, resident disagreed and went over his head, and director was told to leave the resident alone, causing him stress and more self second-guessing - Director wanted resident to enter a detox program but resident disagreed - Against his usual practice and for fear of being overruled, Director decided to send resident to a doctor for another opinion, but doctor told him that the resident did not need detox, and Director placed resident on restriction rather than send him to detox - Resident found dead in his room at Home the next morning (cause of death not in record). - Director learned of this while driving to work in telephone call from another resident he was counseling (as per his duties), who was emotionally upset about the death- After Director arrived at Home, his immediate supervisor confirmed the resident's death, told Director it was not his fault, and sent Director home because he was devastated, beside himself and unable to function as a result of this development - Director felt that if resident had been admitted to detox facility, he would not have been able to continue his drug use, or he could have received medical treatment if his death was due to other causes - Director felt guilty for not having sent resident to detox facility - After staying out of work for a week and then returning, Director could not stop thinking that if he had sent resident to detox the outcome might have been different, and continued to feel he was being second-guessed about his counseling and treatment of residents - Director continued counseling with psychiatrist who had treated him previously for depression, attention deficit disorder and anxiety, and continued working for ten weeks before going on medical leave, and never returning to work afterward - Ordinary and Accidental disability retirement applications filed subsequently based upon generalized anxiety disorder, recurrent major depressive disorder, and attention deficit/hyperactivity disorder, as well as for cardiac and orthopedic-related issues, and identified resident's death as both personal injury and hazard undergone that had caused his emotional and psychological disability - Regional psychiatric medical panel unanimously affirmative as to disability, its likely permanence and work-related causation - Panel members viewed new responsibilities Director undertook following his 2010 promotion as having overwhelmed him, and as primary stressor predisposing him to post-traumatic stress disorder as a result of resident's death, along with worsening depressive and anxiety symptoms - Ordinary disability retirement granted by retirement board based upon emotional injury, leaving only the issue of work-related causation to be determined - Retirement board denied accidental disability application despite unanimous affirmative panel certificate based upon conclusion that Director's condition was not caused or aggravated by a personal injury he sustained or a hazard he underwent as a result of, and while performing, his work related duties - Denial reversed - Director filed accidental disability retirement application within two years of events upon which he relied, *see* M.G.L. c. 32, § 7(1) - Director sustained burden of proving emotional injury's work-related causation, by showing a series of events leading to his injury (increasing uncertainty as to his own decisions on counseling and consequences for residents, reliance upon doctor's opinion rather than his own judgment in assigning resident to restriction rather than sending him to detox, telephone call from upset resident he received while driving to work informing him of resident's death, and supervisor's confirmation of resident's death) - Whether emotional injury is considered to have been result of series of events or any one of them, the events occurred while Director was at work and in performance of his duties, haunted him after the resident's death, and caused remorse over his decision not to assign resident to detox, all of which left him emotionally unable to perform his counseling duties and left him disabled - Important to note that Director was in the performance of his duties when he learned of resident's death - Taking phone call from distraught resident fell within scope of his duties regarding prevention of resident relapse into substance abuse - Retirement board directed to grant Director's accidental disability retirement application.

McDonough v. State Bd. of Retirement, Docket No. CR-15-98, Decision (Mass. Div. of Admin. Law App., Sept. 8, 2017).

Sufficient evidence of work-related causation - Disability as a result of single injury -

Massachusetts Hospital School Nursing Assistant I - Transfer of patient from chair to bed during work shift - Immediate lower back injury with unresolving, disabling lower back pain - Inability to sit or stand for more than five minutes - Majority affirmative orthopedic medical panel opinion, and opinion of treating physicians, as to causal relationship between patient-transfer incident and disabling back injury - Credible testimony by petitioner as to incident and immediacy of back symptoms - No medical evidence of prior back problems or inability to perform duties, despite pre-existing obesity - Sufficiency of evidence to meet petitioner's burden of proof as to causation and shift burden of producing contrary medical evidence to retirement board.

Cobb v. State Bd. of Retirement, Docket No. CR-14-367, Decision (Mass. Div. of Admin. Law App., Feb. 3, 2017).

Sufficient evidence of work-related causation - Water system maintenance worker - Aggravation of pre-existing injury (degenerative spinal condition) by work injury sustained in performance of job duties - Exposure to identifiable condition not common to a great many occupations - Regularly lifting and moving heavy machinery, pipes, and piles of dirt and rocks outdoors in trenches regardless of weather and light - Aggravating injury sustained while attempting to move very heavy pipe cutter out of way of moving crane, so as to avoid imminent collision, during water pipe trench work - Preponderance of evidence as to causation included affirmative certificate by medical panel majority as to causation - Affirmative certificate consistent with opinions of treating physicians and medical records.

Loura v. Taunton Retirement Bd., Docket No. CR-13-186, Decision (Mass. Div. of Admin. Law App., Dec. 2, 2016)

Sufficient evidence of work-related causation - Aggravation of pre-existing injury (attention deficit hyperactivity disorder) by work injury sustained in performance of job duties - Head injury sustained upon falling from moving sanitation truck - Public works and sanitation department laborer - Preponderance of evidence - Unanimous affirmative certificate by medical panel (psychiatric) - Consistency with opinions of treating physicians and medical records - Absence of panel error - Appropriateness of psychopharmacological treatment following injury.

Hollup v. Worcester Retirement Board, Docket No. CR-15-221, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

Sufficient evidence of work-related causation - Principal clerk at municipal senior center - Preexisting injury (chronic left foot conditions and injuries treated previously by surgery) aggravated by work injury sustained in performance of job duties (fall in medical equipment shed while putting away wheelchair and commode, causing left foot to become jammed in wheelchair wheel) - Following injury, unresolving left foot reflex sympathetic dystrophy syndrome, intensifying left foot pain, marked changes in foot temperature, and need to use cane for ambulating - Affirmative certificate by orthopedic medical panel majority as to causation - Majority panel opinion entitled to great weight - No evidence panel majority applied incorrect standard, lacked pertinent medical facts, or engaged in procedural irregularities in reaching conclusion as to causation - Conclusion consistent with opinions of independent medical examiners and treating physicians that unresolving left-foot symptoms related to, and were likely exacerbated by, work injury in question - Medical evidence in record confirmed that left foot symptoms worsened to point of disability and would not resolve over time.

Collari (Sharon) v. Marlborough Retirement Bd., Docket No. CR-15-179, Decision (Mass. Div. of Admin. Law App., Sept. 9, 2016).

Disability (Disabling Injury Sustained During Employment)

Insufficient evidence of disability - Former first-grade public school teacher - Emotional disability (post-traumatic stress disorder, anxiety and panic attacks) based on single incident at school where teacher worked on March 13, 2012—Alleged verbal abuse by school janitor during "code blue" at school (emergency or potential emergency of a medical nature requiring students and faculty to clear the hallways and retreat to classrooms or offices so paramedics could respond without obstruction and so that circumstances surrounding the medical condition were not revealed) - Janitor responsible for assuring that hallways were clear when code blue was called - Upon encountering teacher leading pupils through hallway to classroom, a departure from school's code blue procedure, janitor ordered her to get her students out of the hallway, allegedly while screaming loudly and calling her "moron" - Immediately following incident, teacher experienced shortness of breath, racing heart, nausea, development of body rash and elevated blood pressure, and was taken by wheelchair to school nurse, after which she was taken home by daughter - Teacher unable to work for five weeks - PTSD diagnosis by primary care physician, who prescribed anti-anxiety medications - Workers' Compensation benefits denied, but teacher received compensation for 29 sick days per M.G.L. c. 152, § 29 agreement - Following return to work, teacher felt school minimized event and that she was being called a liar and described as having "freaked out" and taken a leave of absence - Encountered janitor at school several times without experiencing "major inner feelings" - Positive attendance record through end of school year without suffering panic attack - Per teacher's licensed mental health counselor, all symptoms had resolved and no follow-up counseling sessions were requested - Primary care physician recorded that teacher was disabled at time of incident during "Code Blue" at school but that disability did not appear to be permanent and that teacher could return to school - Teacher opted to retire after school year ended and apply for accidental disability benefits based upon PTSD as a result of verbal assault in workplace, and asserted that after returning to work, seeing the janitor had resulted in further panic attacks and that school principal had harassed her and attempted to intimidate her, and that she was unable to perform any job because she was required to take “serious medicine” to treat her condition - Medical panel comprising two psychiatrists and a neurologist issued unanimous affirmative certificate as to disability, its work-related causation and its likely permanence, based primarily upon teacher’s assertions during examination by panel members, and panel members’ impression that being around children or in a school situation triggered unmanageable anxiety to the point that the teacher would be unable to concentrate on her work and her interactions with students and other school personnel, that she could not even approach the school without incapacitating anxiety, and that there was no likelihood of significant improvement of her condition in the foreseeable future despite appropriate treatment for over a year - Upon questions posed by Massachusetts Teachers’ Retirement System, medical panel responded that it had no evidence as to whether teacher was disabled on last day of employment, and that in view of teacher’s confusing accounts, it was impossible to opine as to any possible connection between her encounter with janitor during “code blue”and her condition following the incident- Panel also responded that although medical history showed teacher had experienced stress and stress-caused physical symptoms as far back as 1995, when she was raising her own children, and had continuing intermittently, her anxiety had not abated to point where she could perform her job as of June 2012, and that members panel stood by their original unanimous affirmative certificate - Notwithstanding unanimous affirmative medical panel certificate, teacher failed to prove that she was totally and permanently disabled on last date of her employment, based upon (a) return to work and ability to face janitor without major negative inner feelings, (b) voluntary cessation of visits to her social worker who reported that teacher’s symptoms had resolved, (c) no request by teacher to employer for accommodations in order to carry out duties through remainder of school year, (d) no evidence of inability to perform essential duties of position through school year’s end, and (e) report by teacher’s primary care physician after school year ended that while she was disabled after the code blue incident in March 2012, she was not permanently disabled and would be returning to work - Janitor performed delegated code blue responsibilities in directing teacher and her pupils to clear hallway, albeit forcefully - No evidence that teacher was justified in leading students through hallway after code blue was called - No evidence that janitor knew or should have known that his conduct would likely cause emotional distress - Conduct not extreme, outrageous or beyond all possible bounds of decency - No evidence that workplace hostility teacher perceived upon returning to work after incident went beyond degree of workplace friction and ill will common to many occupations and rose to level of injury sustained in workplace - That teacher felt startled, embarrassed or disrespected by janitor during code blue incident did not suffice to show that she had sustained compensable personal injury at the time or was disabled on last day of work.

Perez v. Massachusetts Teachers' Retirement System, Docket No. CR-15-155, Decision (Mass. Div. of Admin. Law App., Jun. 30, 2017).

Insufficient evidence of disability - Maintenance worker at correctional facility - Ankle sprain while spreading ice melt and sand on correctional facility steps - Return to work with varying degrees of foot pain, and ankle pain and stiffness, and ability to run, walk and stand - Varying diagnoses of treating physicians, including adult acquired flatfoot deformity - without finding of permanent work-related disability or of worker having reached an end result in terms of treatment or ability to continue work with limitations on standing or use of supportive footwear - No imaging studies showing bone fracture - Whole body bone scan three years after injury showed degenerative changes in ankles and mid-feet - Worker performed duties at work for eight months before resigning from job - No evidence that worker was totally and permanently disabled on last day of work, which was four years after injury - Some evidence that worker argued with supervisor before resigning - Unanimous negative medical panel as to disability from performing essential job duties - No evidence panel members lacked pertinent facts including worker's job description and medical records or applied erroneous standards, or that conclusion as to lack of disability was plainly wrong - No entitlement to review by new medical panel.

MacGeachey v. State Bd. of Retirement, Docket Nos. CR-13-403, CR-16-220, Decision (Mass. Div. of Admin. Law App., Apr. 21, 2017).

Insufficient evidence of disability - District Attorney support staff at district court performing data entry, document scanning and duplication, case file preparation, general office and administrative support work - Right arm strain/frozen shoulder syndrome/rotator cuff tear while organizing file cabinet - Improved range of motion and decrease in pain level following rotator cuff surgery - Unanimous negative certificate as to disability by medical panel (2 orthopedic surgeons, one pain management physician) - No evidence that panel applied erroneous standard or lacked pertinent facts - Panel examination revealed modest range of motion loss in arm and shoulder - Medical records showed no large rotator cuff tears or post-surgical lifting requirements - Insignificant omissions from records given to medical panel members - Omissive job description describing receptionist's position without mentioning file management responsibility countered by employee's full description of duties to panel members, including frequently lifting and carrying files weighing 10-15 pounds, and panel's evaluation of file weight and range of motion needed to carry and lift files - Sufficient basis in medical records reviewed, and from employee's responses to questions during panel's examination, from which panel members could conclude that surgery had helped her despite lacking operative report - Panel's unchanged opinion following subsequent review of missing documents supplied by retirement board - No showing that further examination by medical panel would have provided new information material to disability - Request for new medical panel denied - Denial of accidental disability retirement application affirmed.

Henry v. State Bd. of Retirement, Docket No. CR-14-530, Decision (Mass. Div. of Admin. Law App., Oct. 21, 2016)

Insufficient evidence of disability - Developmental Service Worker - Knockdown during work shift during attempted contact by mentally-challenged male group home resident - Lower back injury resolving over time - Post-injury surveillance video showing bending and lifting (picking up large parcels, pushing shopping carts, placing packages of various sizes into vehicle) - No complaint of shoulder injury or pain during physical therapy sessions following injury - Insufficient proof of total and permanent disabling injury sustained during employment.

Schofield (Debra) v. State Bd. of Retirement, Docket No. CR-13-494, Decision (Mass. Div. of Admin. Law App., May 6, 2016)

Permanence (Totality and Permanence of Disabling Injury Sustained During Employment)

Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

School custodian - Elbow, forearm and shoulder injury sustained on job - Permanence of injury - Medical panel error - negative panel majority finding as to permanence of disability - application of incorrect standard (medical certainty, rather than likelihood, of disability's permanence) - ongoing pain evaluation not preclusive of disability's likely permanence.

Lanni v. Everett Retirement Bd., Docket No. CR-15-116, Decision (Mass. Div. of Admin. Law App., Aug. 19, 2016).

Insufficient evidence of permanence - Department of Developmental Services, Developmental Service Worker I - Non-disabling knee, shoulder and arm injuries sustained while lifting or assisting clients at developmental facilities over several years prior to retirement, each time returning to full-time work - Full-duty work without accommodation prior to retirement - Disability retirement application based upon inability to lift or transfer group home residents, or perform outdoor maintenance duties, due to COPD, emphysema, severe arthritis, and numbness and pain in shoulder - Insufficient evidence of permanent disability on last day of work - Absence of medical evidence - Social Security disability award based upon disability under federal law on day after superannuation retirement became effective - Not persuasive of permanent disability on last day of work - History of return to full-time work, and performance of full-time work without accommodations, persuasive of no permanent disability on last work day - Denial of accidental disability retirement application affirmed.

Closser v. State Bd. of Retirement, Docket No. CR-14-111, Decision (Mass. Div. of Admin. Law App., June 24, 2016).

Insufficient evidence of permanence - Housing Authority maintenance worker - Left shoulder injury - Pain first while lifting heavy bag of trash into dumpster, then while removing mowing deck from tractor - Questionable subscapularis tear - History of other injuries and underlying cervical spondylosis - Medical panel - Negative majority panel finding as to job-related causation - No improper panel composition, or application of improper standard or other panel error - Denial of accidental disability retirement benefits affirmed.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

Insufficient evidence of causation - Housing authority maintenance worker - Left shoulder injury - Refusal to undergo recommended surgery for torn rotator cuff - No disqualification from receiving a disability retirement - Medical providers disagreed as to existence of rotator cuff tear warranting surgical intervention, or whether shoulder pain resulted from arthritis and/or cervical pathology - Academic issue - Medical panel did not issue positive certification as to disability's job-related causation.

Soldi v. Worcester Regional Retirement Bd., Docket No. CR-14-525, Decision (Mass. Div. of Admin. Law App., May 20, 2016).

—Medical Panel Review

Entitlement to Initial Panel Review

To be entitled to a medical panel examination, employee must provide sufficient evidence which, if unrebutted and believed, would allow a factfinder to conclude that he was entitled to accidental disability retirement; in other words, the employee must make out a prima facie case to reach the medical panel stage, meaning that he must prove total and permanent disability by reason of a personal injury sustained or hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time, and if the employee's injury was sustained due to serious and willful misconduct on his part, it is not considered to have been sustained while the employee was performing his duties.

Poirier v. New Bedford Retirement Bd., Docket No. CR-15-503, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

In considering whether an employee was engaged in serious or willful misconduct when he suffered the injury on which his accidental disability retirement application was based, all immediately-attending circumstance should be considered - "Serious" refers to the conduct itself and not its consequences, and "willful" implies intent or such recklessness as is the equivalent of intent - Serious and willful misconduct is "conduct of a quasi-criminal nature, done intentionally while either knowing it was likely to result in serious injury or with a wanton and reckless disregard of its probably consequences - Violation of a law or regulation does not constitute serious and willful misconduct absent an admonition or contrary instruction - Likewise, an assumed violation of a policy statement, standing alone, does not rise to the level of serious and willful misconduct.

Poirier v. New Bedford Retirement Bd., Docket No. CR-15-503, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Denial of accidental disability retirement application without convening medical panel reversed, and retirement board directed to request that medical panel be convened to examine applicant - High school custodian - Knee and hip injury sustained in fall while attempting to close below-ground classroom window that was difficult to reach and required standing on ladder, chair and/or two-foot-wide "univent" heating unit - Issue whether use of chair and standing on univent, rather than using ladder, was serious or willful misconduct negating entitlement to accidental disability retirement - Regular duties included closing windows, considered to be important task in terms of preventing vandalism, especially in first floor classrooms with ground-level windows - Failure to close windows could result in disciplinary action against custodians - Custodian covering for absent colleague noticed ground-level classroom window left fully open - Required reaching past 4-6 inch wide sill sill and pulling window inward - Although school administration advised using ladder to reach window, almost all school custodians, and their supervisor, used a chair to climb onto univent and pull window inward - Either method required standing on univent - Ladder placed person using it further from window with less leverage than standing on univent - Using chair was faster and made it unnecessary to carry ladder around from classroom to classroom - No custodians had been disciplined for not using ladder to close window - Plants placed on window sill by teacher obstructed clear access to windows - Custodian had alerted supervisor about this hazard previously, and supervisor had stated he would try to get them removed but for custodian to do the best he could until that happened - While attempting to pull window inward, one of the window tracks that helped control window opening and closing became stuck, causing custodian to lose grip on small window handle, and his elbow to strike one of the larger windowsill plants, in turn causing him to lose balance and fall, first to univent, and then to floor - Left knee and lower back injuries treated at hospital - Despite history of knee arthritis and right knee cartilage tear, custodian had performed job duties prior to accident without pain or restriction - Custodian and colleagues had previously closed this window without incident, and without moving plants on window sill - Accidental disability retirement application denied without convening medical panel because custodian was not in performance of job duties, and medical records indicated that injury was not permanent - In determining that custodian more likely was standing in univent while trying to close window than with one foot on univent and one on chair, greater weight was given to what custodian told supervisor immediately following accident, and what supervisor stated in accident report, than on report custodian filed a day later, when he was in a great deal of pain and could easily have made an error in describing hhow his injury occurred - Without question, custodian was performing one of his most important job duties, closing a classroom window, when he was injured, and was therefore in performance of his duties unless the way he tried to close the window in question is considered serious and willful misconduct - No such misconduct - Although use of ladder was only authorized method of closing window in question, ladders were used primarily for changing classroom light bulbs, most of custodian staff used a chair rather than a ladder to access window, and no custodian had been disciplined for doing so - Standing on univent was necessary to reach and close a fully-extended open window whether or not a ladder was used - Failure to move materials on univent and plants on sill did not rise to level of serious and willful misconduct, as custodian and colleagues had previously closed window in question nearly 100 times without moving any of these items, and items on univent did not contribute to custodian's fall - Failure to close window from outside was not serious or willful misconduct since window could not be locked from outside, and custodian still would have had to come inside and climb up to window in order to lock it, and in addition, custodians were short-staffed and under pressure to complete assigned tasks and those they were performing for absent colleagues, and extra trips outside to close, but not lock, windows was not an efficient way to perform these tasks - Although it might be considered risky in retrospect, custodian's decision to attempt window closing as he did involved a calculatedm informed risk based upon his knowledge of and experience with closing the window in question, and was therefore reasonable in the circumstances rather than serous and willful misconduct, and he was therefore in the performance of his duties when he was injured.

Poirier v. New Bedford Retirement Bd., Docket No. CR-15-503, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Denial of accidental disability retirement application without convening medical panel affirmed - Public high school special education secretary - Increased work load, beginning in summer of 2011, due to budget-related layoff of four other information systems clerks - In addition to regular workload, secretary required to complete 150 student individualized education plans the laid off clerks did not complete, and, at school principal's directive, complete the middle school transportation list - Directive communicated to her in what she believed were "strident tones" - Overwhelmed by great expansion of work duties, secretary experienced symptoms including dizziness, increased anxiety and stress - Left job during lunch break, went home, and called school to say she would not be returning to work - Diagnosed by primary care physician with work-related adjustment disorder and advised not to return to work until further notice - Ultimately advised by primary care physician to return to work in part-time or light duty capacity - Met with principal, employee assistance program counselor and human resources office representative to plan her return to work, and requested personal and vacation days in addition to bereavement time due to father's death - Principal directed her to return to work on specific date and told secretary to speak with employee assistance program counselor if she needed extra time - Program counselor directed her to speak with the principal - Principal spoke in 'strident language" making secretary feel she was not welcome to return to work - During phone call from school reminding her to report for work on specific date, she responded that school principal did not want here to report to work - Despite further reminders from school to return to work, secretary did not do so or contact the school to arrange for resignation - Issued reprimand and ultimately advised that termination proceedings had begun - Involuntarily terminated for position abandonment - Filed workers' compensation claim related to injury allegedly sustained when school principal told her in strident tones that in addition to regular and additional work she was assigned, she had to complete the transportation plan - Notwithstanding secretary's description of her workload as that of four other persons in addition to her own, independent medical examiner unable to determine her specific job assignments or whether they were unreasonable, and found her claims to be vague and indicative of conflict with others at work, and also found her active daily and social life and the interests she pursued inconsistent with a significant mental disorder, and concluded that her condition was in remission or had resolved, and that she required no further mental health treatment - Accidental disability retirement application based upon post-traumatic stress disorder brought about by school principal's verbal abuse and feeling horror and helplessness as a result - Psychiatrist's physician's statement in support of application referred to secretary's being verbally attacked and intimidated by superior, preceded by hostile work environment, and stated that secretary had not made significant progress in 18 months of treatment including a daily drug regimen - Denied by retirement board without convening medical panel because secretary's claim did not constitute personal injury or hazard undergone while in performance of her duties - Denial affirmed - No witnesses to hostile work environment, verbal attacks or intimidation that secretary alleged - No corroborating evidence that principal or any other school staff ever verbally accosted secretary - Addition of middle school transportation list to secretary's duties was a bona fide personnel action taken as school wrestled with budget cuts - No proof that secretary was subject to identifiable condition that was not common or necessary to all or a great many occupations - Job conflicts with superiors and subordinates, despite generating feelings of persecution and unfair treatment and, ultimately, a diagnosed mental illness, were not different from wide variety of other occupations where employees faced similar pressures and demands - Alleged statements made by principal, such as "the job is not yours" and "nobody likes you," were not "extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized society" and therefore did not meet standard for intentional infliction of emotional distress - Asking employee to do work for which they were not ordinarily responsible also not extreme or outrageous, even if employee felt anxious or depressed as a result - No proof that when secretary stopped working after being told to prepare transportation plan she did so due to medical condition on which accidental disability retirement application was based - Even if symptoms of that medical condition were experienced after last day she performed her duties, secretary would have, at best, a subsequently-matured disability that cannot form basis for disability retirement, as disability must mature no later than last dayof performing job duties - No evidence that secretary was totally or permanently disabled on her last day of work due to work-related disabling conditions - As a result, secretary could not be retired based upon disability, as a matter of law, and denial of accidental disability retirement application without convening medical panel was therefore proper.

Faggioli v. Fall River Retirement Bd., Docket No. CR-14-296, Decision (Mass. Div. of Admin. Law App., Aug. 18, 2017).

Denial of accidental disability retirement application without convening medical panel affirmed - Psychological or emotional injury - Municipal administrative assistant in city auditing office and, following transfer, in city purchasing office - Formal complaint filed in initial position against supervisor alleging persistent abuse, including derogatory and foul language, aggressive physical behavior and harassment by supervisor - Counseling sought at time - Prescribed antidepressants - History of depression and antidepressant prescription, with apparent success - Following transfer to city purchasing office, micromanagement by new supervisor and subjection to attendance and telephone use monitoring, and deductions to the minute from lunch or breaks to which other employees were not subjected - Treatment for depression and stress by licensed social worker and EAP counselor, and by psychologist and social worker - Prescribed antidepressants and also medication for thyroid disorder - Absence from work due to diverticulitis and colitis - Progressively withdrawn and incapable of engaging in regular work or other activities - Ceased work on August 30, 2012 - Following workers' compensation-related examination by independent medical examiner and administration of MMPI-2 test (Minnesota Multiphasic Personality Inventory test assessing personality traits and psychopathology of persons suspected of having mental health or other clinical issues), examining physician concluded that the employee did not suffer from acute psychiatric disorder related to work stress, was not mentally or emotionally unstable, and was subjectively claiming disability due to longstanding personality problems including passive-dependent style not related to work stress or injury, had negative work attitudes, exaggerated her symptoms, blamed others for her problems, could return to work if she was motivated to do so, and was malingering for secondary gain - Evaluation by impartial psychiatrist who diagnosed depression and maladaptive personality traits on the borderline and/or histrionic category, including obsessional manner of going over and over a litany of many prior perceived abuses and a relentless fixation on having been treated poorly by colleagues for over two decades, as well as opinion that the employee was temporarily psychiatrically disabled without having reached a psychiatric end point, and that although she may have suffered some degree of mistreatment by co-workers, there was no causal connection between her condition and the work events she described - Accidental disability retirement application asserted that on her last day of work (August 30, 2012) she was performing her regular job duties, office was short-staffed, and she was attempting to assure coverage in her department when the "last straw" occurred and her supervisor harassed her "multiple times" throughout the day, although she also detailed her harassment in her prior city auditor office position by her former supervisor, and she described circumstances, events or physical conditions contributing to her disability as including "cold sore, impetigo, PTSD, depression, insomnia, anxiety, can't focus, can't concentrate, cry all the time, obsessive talk of traumatic (thoughts, flashbacks), fibromyalgia, migraine headaches, nausea and throwing up, thyroid hypo, diverticulitis, colitis, nervousness, nightmares of work related incident" - Noncompliance with city's return-to-work order - City investigation of harassment allegations beginning in October 2012, in which employee declined to participate and her attorney did not respond to requests that she be interviewed, revealed no corroboration by co-workers of harassing behavior employee had alleged - Retirement board approved involuntary retirement application filed by city on her behalf due to absence with, but then without, leave for an extended period, and denied accidental disability retirement application without convening medical panel - No reliable evidence that employee was disabled as of last day she performed her duties - Employee stopped working voluntarily on August 30, 2012 - No proof that alleged disability was permanent and was causally related to her work - Findings and conclusions of independent medical examiners, including no permanent work-related disability despite maladaptive personality traits and lack of motivation to work, were not countered by evidence that employee was mentally disabled when she left employment after working on August 30, 2012 - Symptoms experienced after leaving work were irrelevant to whether employee was disabled on last work day.

Koerber v. Somerville Retirement Bd., Docket No. CR-15-66. Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

Denial of accidental disability retirement application without convening medical panel affirmed - Psychological or emotional injury - Accountant IV/Financial Analyst - Alleged stress and anxiety due to workplace environment and staff retaliation for "whistleblowing" - Failure to articulate mental or emotional injury arising out of bona fide personnel action, or intentional infliction of emotional harm - Independent medical review for workmen's compensation review performed by psychiatrist negative as to psychiatric condition causally-related to event or events at workplace - No medical record support for work-related emotional injury.

Manning v. State Bd. of Retirement, Docket No. CR-12-325, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Application for accidental disability retirement properly denied without convening medical panel - Denial affirmed - Subsequently-matured disability - Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed "heart law presumption" for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as "hazard undergone" - No notice of injury filed with retirement board as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters' on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers' compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers' compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department's official records inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Initial medical panel review denied - Municipal police chief - Hypertension and knee injury - Nonspecific date of alleged disability - Return to work following alleged disability - Ineligibility for accidental disability retirement benefits - Legal pointlessness of medical panel review.

Holland v. Malden Retirement Bd., Docket No. CR-13-538, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

Entitlement to Review by New Medical Panel

New medical panel granted - Aggravation of pre-existing injury (knee osteoarthritis) - Public works department laborer - Knee injury (twisting and medial meniscus tear) sustained on the job - Unanimous negative panel finding as to causation - Medical panel error requiring examination by new panel - Plainly wrong conclusion and application of incorrect standard - Attribution of injury to weight and deconditioning without medical record support - Unreasonable expectation that weight loss and strength training would allow performance of essential job duties despite ineffectiveness of post-injury physical therapy.

Cayo v. West Springfield Retirement Bd., Docket No. CR-15-468, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

New medical panel denied, and denial of accidental disability retirement application affirmed - Insufficient evidence of disability - District Attorney support staff at district court performing data entry, document scanning and duplication, case file preparation, general office and administrative support work - Right arm strain/frozen shoulder syndrome/rotator cuff tear while organizing file cabinet - Improved range of motion and decrease in pain level following rotator cuff surgery - Unanimous negative certificate as to disability by medical panel (2 orthopedic surgeons, one pain management physician) - No evidence that panel applied erroneous standard or lacked pertinent facts - Panel examination revealed modest range of motion loss in arm and shoulder - Medical records showed no large rotator cuff tears or post-surgical lifting requirements - Insignificant omissions from records given to medical panel members - Omissive job description describing receptionist's position without mentioning file management responsibility countered by employee's full description of duties to panel members, including frequently lifting and carrying files weighing 10-15 pounds, and panel's evaluation of file weight and range of motion needed to carry and lift files - Sufficient basis in medical records reviewed, and from employee's responses to questions during panel's examination, from which panel members could conclude that surgery had helped her despite lacking operative report - Panel's unchanged opinion following subsequent review of missing documents supplied by retirement board - No showing that further examination by medical panel would have provided new information material to disability.

Henry (Donna) v. State Bd. of Retirement, Docket No. CR-14-530, Decision (Mass. Div. of Admin. Law App., Oct. 21, 2016).

New medical panel denied - Municipal firefighter - Fall from ladder during firefighting emergency - Left ankle sprain and left hand sprain that healed, and left knee contusion, with continued pain following arthroscopy - Split medical panel finding leaving no affirmative panel majority as to disability's job-related causation - No evidence that panel members failed to consider pertinent facts, applied erroneous standard in determining issues of disability, its permanence, or likelihood of its job-related causation, or made clearly wrong findings based upon what medical records showed.

Rodriguez v. Springfield Retirement Bd., Docket No. CR-15-216, Decision (Mass. Div. of Admin. Law App., Jan. 13, 2017).

New medical panel granted - Middle school paraprofessional - Disabling lower back injury following assault by special needs student - Pre-existing condition (degenerative disc disease, spinal stenosis and gradually-developing facet arthritis) - Asymptomatic and able to perform job duties prior to work-related injury - Majority negative panel certificate as to job-related causation - Failure to evaluate impact of assault on pre-existing condition - New medical panel needed to fully assess aggravation issue.

Bernier v. Hampden County Regional Retirement System, Docket No. CR-15-555, Decision (Mass. Div. of Admin. Law App., Jan. 13, 2017).

—Panel Affirmative as to Disability, Permanence, or Work-Related Causation

Majority Affirmative Panel

Majority affirmative panel finding as to causation found unpersuasive - Public school teacher - Aggravation of pre-existing injury (depression and anxiety longstanding since childhood) after 20 years of successful teaching with the aid of psychotherapy and prescribed psychiatric medication - Increasing anxiety about ability to perform classroom duties, meet deadlines and attend to student progress or lack of progress - Development of hair and weight loss, and hoarding and eating disorders, and worsening inability to concentrate, loss of organizational skills, and forgetful, incoherent thought, observed by treating psychiatrist - Attribution to difficult work environment at school, particularly difficult students, increasing administrative work load, and arrival of a new, critical and unsupportive principal - Teacher's transfer to new school with supportive principal, with resulting, but temporary, diminishment of anxiety and restored level of function as teacher - Resumption, and worsening, of psychiatric symptoms for five years following teacher's transfer - Affirmative certificate by psychiatric medical panel majority as to disability, permanence and causation - Rejection by Board following hearing, based upon minority panel member's rejection of work-related causation, for lack of specific traumatic at-work events, and opinion that natural progression of anxiety disorder, rather than work-related injury, caused increasing difficulty in managing job duties and, ultimately, the teacher's disability - Failure to prove work-related causation by preponderance of evidence - Affirmative medical panel findings as to causation not conclusive - No evidence of work-related event or series of events contributing significantly to teacher's psychiatric disability - Evidence supported underlying anxiety about job duties, rather than conditions of job, as the significant factor precipitating teacher's disability.

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Orthopedic medical panel - Majority affirmative panel certificate as to causation - Entitlement to great weight - Principal clerk at municipal senior center - Preexisting injury (chronic left foot conditions and injuries treated previously by surgery) aggravated by work injury sustained in performance of job duties (fall in medical equipment shed while putting away wheelchair and commode, causing left foot to become jammed in wheelchair wheel) - Following injury, unresolving left foot reflex sympathetic dystrophy syndrome, intensifying left foot pain, marked changes in foot temperature, and need to use cane for ambulating - No evidence panel majority applied incorrect standard, lacked pertinent medical facts, or engaged in procedural irregularities in reaching conclusion as to causation - Panel conclusion as to causation consistent with opinions of independent medical examiners and treating physicians that unresolving left-foot symptoms related to, and were likely exacerbated by, work injury in question - Medical evidence in record confirmed that left foot symptoms worsened to point of disability and would not resolve over time.

Collari v. Marlborough Retirement Bd., Docket No. CR-15-179, Decision (Mass. Div. of Admin. Law App., Sept. 9, 2016).

Affirmative majority medical panel opinion as to job-related causation - Some evidence as to causation, but not conclusive as to this issue - Nursing assistant - Disabling lower back injury sustained while transferring patient from chair to bed during work shift - Affirmative majority panel opinion sufficient to sustain employee's burden of proof as to causation, together with other proof presented: treating physicians' supporting opinions; employee's credible testimony as to incident in question and immediacy of lower back symptoms; no evidence in medical records of prior back problems or inability to perform job duties, despite pre-existing obesity.

Cobb v. State Bd. of Retirement, Docket No. CR-14-367, Decision (Mass. Div. of Admin. Law App., Feb. 3, 2017).

Unanimous Affirmative Panel

Unanimous affirmative panel finding as to causation found unpersuasive as to work-related causation - Correction officer - Post-traumatic stress disorder, depression and anxiety as a result of incidents witnessed and experienced directly as correction officer during two years of employment as correction officer - Decreased sleep and appetite, recurrent intrusive thoughts, and drinking after witnessing incidents between inmates - Tightness, chest pains, and arm pain after speaking with inmate outside his cell - Major depressive disorder and panic attack diagnosed by treating physicians - Unanimous affirmative psychiatric medical panel certificate as to disability, its likely permanence, and job-related causation - Retirement board denial of accidental disability retirement application despite panel certificate based upon lack of specific dates of injury due to inmate violence, and assertion of stress and trauma based in part upon allegations of injury to other correction officers that employee did not witness - Denial affirmed - Affirmative medical panel certificate not conclusive as to work-related causation - Injuries to third parties (including suicides and suicide attempts among correction officers) insufficient to show compensable personal injury - Credibility issues - Failure to file incident reports as to violence witnessed - Discrepancies in narratives of alleged violence at correctional facility given to physicians, including apparent conflation of memories with alleged reports of co-workers - Presence at related incidents, or even being on duty at time, not documented by incident reports filed by others - Insufficient evidence of specific events that could serve as basis for accidental disability retirement application - No evidence of work environment different from those in which other correction officers worked - No evidence of outrageous working conditions in comparison with work other correction officers in facility performed - No evidence of work-related aggravation of pre-existing psychiatric condition, including depression related to childhood abuse, that appeared to have become clinically quiescent before correction officer employment began, particularly since employee did not followup with psychotherapy or trauma therapy recommended by treating physician and therefore could not show that treatment could not have resolved anxiety, depression and post-traumatic stress disorder - No workmen's compensation benefits awarded for any of the alleged work-related incidents - Receipt of lump-sum workmen's compensation benefit payment by agreement evidence of legal compromise only, not merits-based resolution of claim.

Gale v. State Bd. of Retirement, Docket No. CR-13-205, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Insufficient evidence of causation - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD - Not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts, and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment comprised an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

—Panel Negative as to Disability, Permanence, or Work-Related Causation

Generally

M.G.L. c. 32, § 7(1) sets out the conditions for allowing an accidental disability retirement application and, in conjunction with M.G.L. c. 32, § 6(3)(a), sets out a carefully-defined procedure for processing the application - Section 6(3)(a) requires that following its examination of the applicant,a three-physician regional medical panel issue a certificate as to (1) the applicant's mental or physical incapacity for duty, (2) the likelihood that the incapacity is permanent, and (3) whether the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed - Purpose of medical panel examination and certificate is to vest in the panel the responsibility for determining medical questions that are beyond the common knowledge and experience of retirement board members - Retirement board and Contributory Retirement Appeals Board (and, thus, DALA) are bound by medical panel certificate when majority of panel responds in the negative to any of the three questions posed by the certificate (as to disability, its likely permanence, and its work-related causation), unless medical panel has employed an erroneous medical or legal standard or lacked pertinent medical information.

Carr v. Brockton Retirement Bd., Docket No. CR-07-1033, Decsion (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Medical panel's negative response to any of the three questions posed to it (as to disability, its likely permanence, and its job-related causation) precludes allowing accidental disability retirement benefits application unless panel applied erroneous standard, failed to follow the proper procedure, or its decision is plainly wrong.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Applicant appealing denial of application for accidental disability retirement benefits had burden of proving, by preponderance of the evidence, that Board improperly denied application on basis of invalid medical panel certificate.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Medical panel is not required to agree with opinions of other physicians - That panel majority's negative findings as to permanence of disability did not agree with findings or opinions of other physicians who examined accidental disability retirement applicant did not show that panel members used erroneous standard in reaching their conclusions.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Majority Negative Panel

School cafeteria helper - Upper right extremity injury sustained while lifting tray of pasta from oven rack above eye level - Orthopedic medical panel - Majority negative panel answer as to permanence of disability - Applicant's contention that panel members improperly focused on neck rather than shoulder pain contradicted by her accidental disability retirement application, which claimed both neck and shoulder pain resulting from work-related injury, and by her complaints of neck pain to treating physicians, and the histories she gave them regarding her neck injury - Panel member who found neck injury disabling but not permanent correctly considered value of future physical therapy in reaching this conclusion - Applicant's failure to show that panel members lacked pertinent information or applied erroneous standard - Retirement Board's decision denying accidental disability retirement application based upon majority negative medical panel as to permanence of disability affirmed.

Hallen v. Worcester Retirement Bd., Docket No. CR-14-572, Decision (Mass. Div. of Admin. Law App., Jun. 9, 2017).

Unanimous Negative Panel

Negative medical panel as to disability's work-related causation - Denial of accidental disability retirement sustained - Municipal police officer - Stress-exacerbated hypertension and visual acuity problems - Failure to prove by preponderance of the evidence that panel employed incorrect standard or lacked pertinent medical information - Officer was insulin-dependent diabetic first diagnosed as such at age 12 - During first year of work (1989), responded to drowned juvenile emergency call - Five year old girl unconscious - Officer performed CPR, but girl died shortly afterward at hospital, and officer spent time with girl's family and attended autopsy - Event had tremendous emotional impact because officer had a child the same age, but he did not file an injury report - Diagnosed with hytpertension in 2003, and diabetes noted as not being well-controlled - Following 18 years as patrolman (1989-2005), reassigned to dispatcher position after suffering left eye hemorrhage while at work - Surgery repaired some of the eye damage - Performed dispatcher work without restriction until January 25, 2007, when, after arriving at work and logging onto computer, he felt chest tightness, nausea, severe headache and dizziness and was taken to hospital by ambulance, where he was noted to have no vision in left eye and minimal vision in right eye - Unable to return to work and retired for superannuation - No application for, or receipt of, workers' compensation benefits - Following retirement, officer filed accidental disability retirement application on March 20, 2007 based upon hypertension and job stress contributing to visual impairment, referencing several dates of work injuries or hazards from 1989 to 2007, including work conditions in dispatch office (poor air quality, poor air circulation, dust, and absence of windows) - No mention of PTSD in application, and no diagnosis of PTSD-related hypertension or vision problems, in supporting physician's statement, which stated that work-related stressors increased officer's hypertension and worsened his visual acuity - Examination in July, 2007 by medical panel comprising two cardiologists and one internist - Medical panel's certificate unanimously affirmative as to disability and its likely permanence, but unanimously negative as to work-related causation - Noting medical records showing that officer's hypertension was under control, and finding no evidence of disabling cardiac condition or disabling hypertension, panel members concluded that his retinopathy, renal insufficiency and proteinuria were related to diabetic neuropathy brought on by his long-standing diabetes - After panel issued its certificate, retirement board denied accidental disability retirement application, which retired officer appealed in October 2007 - Diagnosed with post-traumatic stress disorder (PTSD) in April 2014 - PSD diagnosis confirmed by another physician in October 2016 - Panel members reviewed all medical records sent to them, examined the retired officer, was aware of his job stress claim from reviewing his retirement application and supporting physician's statement, and mentioned the work stress the officer related in the history section of the panel's narrative report - Panel members also found no evidence of disabling cardiac condition or hypertension - History of officer's hypertension, diabetes, job stress, anxiety and depression were all before the medical panel and the retirement board - PTSD diagnosis and treatment for mental health issues occurred after the panel examined him, and were not before the panel - As a result, panel could not consider it, and failure to do so was not evidence that it applied improper standard or failed to consider the medical evidence - PTSD claim was also time-barred - It related to drowning of young girl he attempted to save in 1989, but officer did not file an injury report, and the event and the stress the officer claimed as a result occurred more than two years before he filed his accidental disability retirement application in 2007 - PTSD-related claim not an injury or hazard undergone within two years of date on which retirement application was filed, and could not support accidental disability retirement application unless written notice of injury was timely provided to retirement board or other statutory exception to this two-year rule (*see* M.G.L. c. 32, §§ 7(1) and 7(3)(a) and (b)), applied, and none did - No worker's compensation received for alleged injury, and police officers are ineligible to receive worker's compensation - No record of mental injury sustained or hazard undergone in police department's official records - No evidence that any official in police department knew that officer sustained a work-related injury, in particular a stress-related injury as a result of the 1989 child drowning death, or that it had any reason to notify retirement board about such an injury - Accidental disability retirement claim therefore confined to any injury or injuries that occurred in the two years prior to retirement application and exacerbated his pre-existing mental health condition - Unclear how mental health condition was exacerbated by the hazards or injuries he claimed to have undergone while he worked as dispatcher between 2005 and 2007 - Testimony of retired officer and his wife emphasized the 1989 child drowning incident as having caused him the most distress as a police officer, but he could not rely on that event as it occurred more than two years before he filed his accidental disability retirement application, and none of the statutory exceptions to the two-year lookback rule of M.G.L. c. 32, § 7(1) applied.

> *Carr v. Brockton Retirement Bd.*, Docket No. CR-07-1033, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Insufficient evidence of job-related causation, or that medical panel employed incorrect standard or lacked pertinent medical information when it answered question as to disability's work-related causation in the negative - Unanimous negative medical panel certificate as to causation - Former Senior School District Custodian - Accidental disability retirement claimed based upon disabling lower back injury with pain radiating into both legs due to single injury at work in September 2014 (while cleaning school cafeteria floor and returning table, struck in back by another table moved in his direction by co-worker) - Prior history of lumbar disc disease and cervical radiculopathy beginning in 2008 or earlier - 2010 lumbar spine MRI showed spondylotic changes, lower lumbar scoliotic curvature, bilateral L5 neuroforaminal narrowing, right greater than left, with considerable narrowing of neural foramen at left L3, and disc bulging with facet degeneration at L3-4, L405 and L5-S1 levels - Severe degenerative joint disease of both lumbar and cervical areas noted by treating physician in 2010, but school custodian declined surgery notwithstanding back pain - February 2012 lumbar spine MRI showed spondylotic changes causing decrees of minimal to mild thecal impression without dimensional spinal stenosis, and scoliotic curvature, but with disc bulging facet degeneration causing marked narrowing if right L5 neuroforamen with neural impingement, and some lesser narrowing of L3 and L4 neuoforamen - Treating physician in August 2014 (one month before injury in school cafeteria) found it difficult to see how custodian was able to function with pain he could not control well - Immediately following September 2014 injury, custodian returned to work but found it difficult to perform job, and most of work performed was trash removal (lighter than job duty requirement of being able to lift in excess of 60 pounds and trash buckets the size of 55-gallon drums weighing 80 pounds) - Five days of Workers' Compensation benefits awarded following September 2014 injury - November 2014 MRI showed progression of foraminal stenosis with edema at end plates of lower lumbar discs between L4 and S1 compared to previous MRIs - Evaluating physicians in late 2014 noted age-related changes in lumbar spine and pain in lower back/buttock area radiating to left foot, and one recommended light duty with lifting restriction (no more than 20 pounds occasionally, and 10 pounds frequently) - January 2015 MRI showed facet rotary scoliosis at L4 with degenerative joint disease at L3-4, and moderate degenerative joint disease at LS1 and - Opinion of physician performing independent medical examination in March 2015 was return to pre-existing state of chronic degenerative lumbar spine disease, with September 2014 work injury causing mild exacerbation of this condition that was expected to abate after three months of conservative treatment, which school custodian was receiving, along with activity modification - Custodian's treating physician noted in June 2015 that oxycodone was relieving pain but believed that his level of functioning had not returned to pre-injury level and that he was totally disabled - Upon re-examination in July 2015, independent examining physician concluded that custodian was partially disabled, and that September 2014 injury had exacerbated, but had not aggravated, his pre-existing chronic symptomatic degenerative condition of his lumbar spine, meaning the injury had caused a temporary increase in the degenerative conditions's symptoms without causing any structural damage - Accidental disability retirement application filed July 20, 2015 based upon disabling low back pain with injury radiating into both legs, and inability to perform essential job duties as of December 14, 2014, as result of September 10, 2014 injury in school cafeteria - Orthopedic surgeon examining custodian in July 2015 opined that September 2014 injury was major contributing cause to his disability based upon 2014 MRI showing edema at end plates of lower lumbar discs between L4 and S1, consistent with worsening axial back pain - Medical panel comprising three orthopedists issued certificate that was unanimously affirmative as to disability, majority affirmative as to the disability's permanence, and unanimously negative as to whether disability was job-related - Negative certificate as to causation based upon opinion that September 2014 incident superimposed injury upon pre-existing degenerative disc disease without causing permanent changes and that would resolve with surgical treatment, and that disability was due to progression of underlying disc disease rather than to September 2014 injury - Custodian failed to prove causal nexus between September 2014 injury and his disability, or an exacerbation of his underlying condition as a result of the injury - No showing that in issuing unanimous negative certificate as to job-related causation, medical panel employed erroneous standard, lacked knowledge of custodian's job description or medical treatment history, or was improperly comprised - Panel members answered the question of causation they were called upon to address, and in doing so noted custodian's history of degenerative disc disease and stenosis throughout his cervical and lumbar spines as shown on MRI studies from as early as 2010, the discomfort and functional limitations he was experiencing in August 2014, immediately prior to the school cafeteria injury, and that he was able to perform all of his duties following the injury - All three panel members diagnosed multi-level degenerative disc disease with stenosis, and none believed that the September 2014 injury aggravated his pre-existing condition to the point of rendering him totally and permanently disabled - Rationales of medical panel physicians in reaching conclusion they did were well-documented and supported by the medical records - Other medical evidence in record supported medical panel members's analyses - Custodian's return to duty at school and resumption of farming activities, as well as surveillance video showing him shoveling snow during the winter following the September 2014 injury, undercut credibility of his claim that the injury rendered him totally and permanently disabled - Retirement system decision denying accidental disability retirement affirmed.

Strong v. Worcester Regional Retirement System, Docket No. CR-15-597, Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Insufficient evidence of disability - Maintenance worker at correctional facility - Ankle sprain while spreading ice melt and sand on correctional facility steps - Return to work with varying degrees of foot pain, and ankle pain and stiffness, and ability to run, walk and stand - Varying diagnoses of treating physicians, including adult acquired flatfoot deformity - without finding of permanent work-related disability or of worker having reached an end result in terms of treatment or ability to continue work with limitations on standing or use of supportive footwear - No imaging studies showing bone fracture - Whole body bone scan three years after injury showed degenerative changes in ankles and mid-feet - Worker performed duties at work for eight months before resigning from job - No evidence that worker was totally and permanently disabled on last day of work, which was four years after injury - Some evidence that worker argued with supervisor before resigning - Unanimous negative medical panel as to disability from performing essential job duties - No evidence panel members lacked pertinent facts including worker's job description and medical records or applied erroneous standards, or that conclusion as to lack of disability was plainly wrong - No entitlement to review by new medical panel.

MacGeachey v. State Bd. of Retirement, Docket Nos. CR-13-403, CR-16-220, Decision (Mass. Div. of Admin. Law App., Apr. 21, 2017).

Certified nursing assistant - Back and neck injury sustained during nursing home patient transfer from chair to bed - Claimed disability due to cervical spine disc herniation - Alleged exacerbation of pre-existing degenerative changes in cervical and lumbosacral spine (hip arthritis and cervical radiculopathy) - Medical record evidence that work-related injury resolved significantly - Clearance for return to work preceded termination for failure to return to work - Unanimous negative certificate by orthopedic medical panel as to disability, its permanence, and work injury-related causation - No evidence that panel members employed erroneous medical standard or lacked pertinent facts in reaching their conclusions.

Asare v. Taunton Retirement Bd., Docket No. CR-12-445, Decision (Mass. Div. of Admin. Law App., May 5, 2016).

—Procedural Requirements

Notice of Injury to Retirement Board Within 90 Days Following Injury or Hazard Undergone

Summary decision sustaining denial of accidental disability retirement - Psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

No evidence of written notice of injury to retirement board within 90 days following injury or hazard undergone - Notice period not tolled by receipt of workmen's compensation payments for disabling injury claimed - No evidence of receipt of workmen's compensation payments - Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - Accidental disability retirement benefits also denied for insufficient proof of causation, including failure to obtain a supporting affirmative certificate from medical panel.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

Untimely notice of injury to retirement board - Notice period not tolled - Group 4 police officer - Post-traumatic stress disorder, major depression and panic disorder - Absence of workers' compensation-related tolling of notice period - Group 4 police officers ineligible for workers' compensation - No evidence of mental health problems within two years preceding accidental disability retirement application - Failure to get along with co-workers and superiors not so uncommon as to be "identifiable condition" leading to disability - Accidental disability retirement benefits denial affirmed.

Rosario v. Fall River Retirement Bd., Docket No. CR-13-233, Decision (Mass. Div. of Admin. Law App., Apr. 15, 2016).

Failure to give notice of injury to retirement board - No evidence of injury while in performance of employee's duties within two years of filing accidental disability retirement application - Accidental disability retirement benefits denial affirmed.

Simpreux v. Cambridge Retirement Bd., Docket No. CR-14-770, Decision (Mass. Div. of Admin. Law App., Mar. 25, 2016).

<u>Occurrence of Injury or Hazard Undergone More Than Two Years Prior to Accidental Disability Retirement Application</u>

Per M.G.L. c. 32, § 7(1), state retirement system member who applies for accidental disability retirement benefits must generally do so within two years of sustaining an injury or undergoing a hazard, unless (1) the member, or someone on his behalf, filed written notice with the appropriate retirement system within 90 days of sustaining the injury or undergoing the hazard in question, *see* M.G.L. c. 32, § 7(1); (2) the member received workers' compensation for the injury or hazard in question, *see* M.G.L. c. 32, § 7(3)(a); (3) if the member was classified for retirement purposes in Groups 2, 3 and 4 and was not eligible for workers' compensation benefits, there is a record of the injury sustained or hazard undergone in the official records of her department, *see* M.G.L. c. 32, § 7(3)(a); or (4) within 15 days of receipt of knowledge of a personal injury sustained by a member of his department as a result of, and in the performance of the member's duties, the head of the department notifies the retirement board in writing of the time, place, cause and nature of such injury, together with such other information relative to the injury that he obtains, see M.G.L.

c. 32, § 7(3)(b).

Clifford v. State Bd. of Retirement, Docket No. CR-16-187, Decision (Mass. Div. of Admin. Law App., Oct. 20, 2017).

Legislature provided no remedy for failure of department head to notify state retirement system of personal injury while performing duties to retirement system member employed in department and classified in Group2, 3 or 4 for retirement purposes, within 15 days of learning of injury, as M.G.L. c. 32, § 7(3)(b) requires, and Division of Administrative Law Appeals was without jurisdiction to enforce this requirement—because the failure to act was by a department head, rather than by a retirement board—or to create a remedy for it, such as waiving the general requirement that the member file an accidental disability retirement application within two years of sustaining an injury or undergoing a hazard; in addition, a department head's failure to notify the retirement board of the personal injury could not be construed as the equivalent of notice of a member's personal work-related injury or as creating an exception to the two-year filing rule, as that would add a further exception that the statute does not provide and practically negate the requirement of M.G.L. c. 32, § 7(3)(b) that a department head with knowledge file an injury report.

Clifford v. State Bd. of Retirement, Docket No. CR-16-187, Decision (Mass. Div. of Admin. Law App., Oct. 20, 2017).

State Board of Retirement's refusal to refer accidental disability retirement application filed by retirement system member (Division of Capital Asset Management and Maintenance (DCAMM) program manager) on February 20, 2015 to medical panel would be affirmed because the application was not filed within two years of sustaining an injury or undergoing a hazard at work, as required by M.G.L. c. 32, § 7(1); application stated that member's psychological disability (major depressive disorder) began in May 2010, more than two years before application was filed; in addition, application did not state when DCAMM allegedly exacerbated member's depression by retaliating against her for filing an MCAD discrimination complaint after DCAMM repeatedly denied a schedule adjustment allowing member to attend counseling sessions during the workday, excluded her from management meetings, denied her training "and ultimately, in October 2013" placed her involuntarily on paid administrative leave, and the record contained no medical records that identified a workplace hazard or stressor that exacerbated the member's major depressive disorder within the two years preceding the retirement application, or supported otherwise her claim that her stressors included her workplace; and, in addition, there applied none of the exceptions to the two-year deadline recited by M.G.L. c. 32, § 7(1) and (3) (written notice was not filed with retirement system within 90 days of sustaining the injury or undergoing the hazard in question; member received no workers' compensation for the injury or hazard in question; record of injury sustained or hazard undergone by member in retirement groups 2, 3 and 4 who was not eligible for workers' compensation, was on file in her department's official records; or department head with knowledge of personal injury sustained by member while in performance of duties notified retirement board of injury within 15 days of learning about it).

> *Clifford v. State Bd. of Retirement*, Docket No. CR-16-187, Decision (Mass. Div. of Admin. Law App., Oct. 20, 2017)

Although corrections officer's 2012 application for accidental disability (based upon disabling PTSD as a result of stabbing by inmate in 2002) was not filed within two years of that injury (*see* M.G.L. c. 32, § 7(1)), his application qualified for "official record" exception to this requirement for retirement Group 2, 3 and 4 members (*see* M.G.L. c. 32, § 7(3)(a)) because he was a member of Group 4, and an official report was filed at the time of the 2002 stabbing incident.

> *Andrade v. State Bd. of Retirement,* Docket No. CR-13-104, Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

Retirement system member's injuries or hazard undergone on job that occurred more than two years before date on which application for accidental disability retirement was filed are not considered in evaluating application unless written notice was provided to member's retirement board (*see* M.G.L. c. 32, § 7(1)) or if exception applies under M.G.L. c. 32, § 7(3)(a) and (b)).

> *Benoit v. Everett Retirement Bd*., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed "heart presumption" for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as "hazard undergone" - No notice of injury filed with retirement board as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters' on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers' compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers' compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department's official records inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009 - Application for accidental disability retirement properly denied without convening medical panel.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Failure to submit accidental disability retirement application within two years following events at school where teacher worked before transferring, allegedly causing exacerbation of pre-existing anxiety and depression, with no workmen's compensation payments to mitigate lapse of time, violated timely application provisions of M.G.L. c. 32, §§ 7(1) and 7(3)(a) - Denial of accidental disability retirement application affirmed on this ground, and for failure to prove by preponderance of evidence that teacher's psychiatric disability was due to a work-related injury.

Milton v. Boston Retirement Bd., Docket No. CR-14-19, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017)

Summary decision sustaining denial of accidental disability retirement - Claimed psychological or emotional injury - Police chief - Harassment by selectmen - Stress and depression - Absence of genuine or material factual issue - Injury not sustained within two years prior to accidental disability retirement application - Failure to file written notice of injury within 90 days after its occurrence.

Ackerman v. Worcester Regional Retirement Bd., Docket No. CR-11-405, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

Steam fireman at state college - claimed work-related exposure to natural gas fumes following third party's gas line installation, and, during emergency room visit that followed, injury to hand during blood draw - Injuries alleged to have caused disability occurred more than two years prior to accidental disability retirement application - Accidental disability retirement benefits also denied for insufficient proof of causation, including failure to obtain a supporting affirmative certificate from medical panel.

Maillet v. State Bd. of Retirement, Docket No. CR-13-327, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

—Psychological or Emotional Injury

Generally

Applicant claiming to be disabled due to emotional condition must prove that she sustained personal injury sustained or hazard undergone while in the performance of her duties based upon a single incident or series of incidents, or that the injury is the result of exposure to an identifiable condition that is not common or necessary to all or a great many occupations, bearing in mind that (1) unfortunately, some degree of workplace ill will is all too common in many occupations; (2) disagreement with management's attendance and work procedures does not constitute a workplace hazard that is not common to all or a great many occupations; (3) alleged emotional injury amounts to more than applicant's own feelings of persecution and perpetual victimization; and (4) behavior to which applicant was subjected was extreme and outrageous and beyond all bounds of human decency.

Reyes v. State Bd. of Retirement, Docket No. CR-13-598, Decision (Mass. Div. of Admin. Law App., Sept. 29, 2017).

Mental or emotional disability resulting from a single injury or a series of work-related injuries has been recognized as a personal injury under M.G.L. c. 32, § 7(1) - Personal injury is to be interpreted in harmony with workers' compensation statute, M.G.L. c. 152 - Under this statute, personal injuries "include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within employment." M.G.L. c. 152, § 1(7A).

McDonough v. State Bd. of Retirement, Docket No. CR-15-98, Decision (Mass. Div. of Admin. Law App., Sept. 8, 2017).

Even with an affirmative medical panel opinion, an applicant seeking accidental disability retirement benefits (in this case, correction officer claiming disability as a result of post-traumatic stress disorder suffered as a result of being stabbed by inmate at correctional facility where he worked) had the burden of proving that he was disabled, the disability was likely to be permanent, and his inability to work was the natural and proximate result of an injury he sustained as a result of, and while performing, his duties.

> *Andrade v. State Bd. of Retirement,* Docket No. CR-13-104, Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

Applicant seeking accidental disability retirement benefits due to psychological or emotional injury must present reliable evidence that she was disabled as of the last day she performed her duties and that she stopped work due to the medical condition upon which her application was based; voluntarily ceasing work but experiencing symptoms after doing so does not suffice to make this showing or, thus, to sustain her burden of proof.

> *Koerber v. Somerville Retirement Bd.*, Docket No. CR-15-66. Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

Applicant asserting disability retirement benefits due to emotional condition - Burden of proof - Grounds for accidental disability retirement benefits - Sustained psychological or emotional injury based on single incident or series of incidents - Injury must be shown to have been the result of exposure to an identifiable condition, or that employment presented a hazard, that is not common and necessary to all or a great many occupations.

> *O'Connor v. State Bd. of Retirement*, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Some degree of workplace ill will is all too common in many occupations, and therefore does not itself prove that a claimed disabling psychological or emotional injury was the natural and proximate result of an employment-related injury.

> *O'Connor v. State Bd. of Retirement*, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Emotional suffering resulting from petitioner's inability to get along with co-workers, or their inability to get along with her, does not alone suffice to show a compensable work injury.

> *O'Connor v. State Bd. of Retirement*, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Insufficient Proof; Accidental Disability Retirement Benefits Denial Affirmed

Summary decision sustaining denial of accidental disability retirement benefits-Psychological or emotional injury - Former Massachusetts Commission Against Discrimination Administrative Assistant I - Alleged emotional injury sustained as a result of exposure to "identifiable condition" not common or necessary to all or a great many occupations - Bipolar disorder and post-traumatic stress disorder, panic disorder, anxiety and depression allegedly resulting from workplace policy changes, following 2010 change in administration at MCAD office where administrative assistant worked, regarding absences and time off for health-related issues and alleged discriminatory application to her - Prior to these changes, history of taking leave for depression and anxiety, chronic bronchial asthma, obstructive sleep apnea, chronic pain, management of panic attacks, and difficulty performing work following prescription of medications for depression and anxiety - Belief by administrative assistant that supervisory staff demeaned her efforts and scrutinized her behavior when she took time off - Filed complaint in October 2010 with agency's deputy general counsel against supervisors alleging unfair treatment and undue monitoring (including being required to bring in a doctor's's note following every appointment) on account of being Hispanic and disabled, and of being targeted and accused unfairly of abusing sick time - Additional medical problems including chest pain and abdominal distress, and trips to emergency room due to panic and anxiety symptoms, resulting in more missed work - Cocaine use and, on one occasion, wrist-cutting while under influence of cocaine - Instructed to speak with supervisor prior to being absent from work - During early 2011 meeting with supervisor, accused of abusing sick time and reporting to work late - Belief by administrative assistant that she was being subject to retaliation and ordered to follow policies and procedures applicable to no other employees - Grievance filed with union, with no action taken - Changes by supervisor regarding information to be included in reports on MCAD complaints received and action taken on them - Further panic attacks - Reprimanded in March 2011 for failure to comply with supervisor's directives - Fear of further reprimands and termination - Leave taken under federal FMLA in March 2011, and absent from work for six months, for to mental health reasons - Return to work in mid-September 2011 followed, two months later, by attempted suicide and subsequent hospitalization in intensive care unit and then in adult inpatient psychiatric unit - Based upon report of primary care physician, allowed to return to work part-time on May 14, 2012, - Allowed five-minute breaks to carry out her "anxiety management strategies" each preceded by informing her supervisor she was leaving her work station so there would be appropriate coverage in her absence - Stationed at front desk rather than in former cubicle, which was occupied by another employee - Feeling that she was no longer part of staff, administrative assistant resigned on June 3, 2012 - Applied on March 6, 2013 for accidental disability retirement based upon work-related emotional injury and resulting disability due to "identifiable condition" not common or necessary to all or a great many occupations, with inability to perform job duties as of May 2010 - Employer's statement portion of application noted absence of records of accidents or work-related conditions that created or exacerbated alleged disability - Unanimous positive medical panel certificate as to disability, permanence and work-related causation - Despite panel certificate, denial of accidental disability retirement application, and ordinary disability retirement benefits approved instead - Following appeal to DALA, motion by State Board of Retirement for summary decision - Motion granted, with summary decision in retirement board's favor sustaining denial of accidental disability retirement benefits - No notice of injury reports filed - Alleged work-related stress centered around strained relations with new managers beginning September 2010, mostly administrative assistant's disagreement with attendance and work procedure policies - Documents in record showed that new attendance policy and other guidelines were issued to entire staff and not only to administrative assistant, which undercut her assertion of being singled out and treated unfairly - No showing that alleged emotional injury amounted to more than personal feelings of persecution and perpetual victimization, or that managerial behavior to which administrative assistant was subjected was extreme and outrageous and beyond all bounds of human decency - No evidence that actions of supervisors were intended to inflict emotional distress - History of chronic, excessive absenteeism beginning prior to 2010 change of management and implementation of new leave and absence policies - Not unreasonable for supervisors to require that administrative assistant account for her absences - Supervisors required, as part of their own jobs, to implement quality control measures and hold employees accountable - Actions complained of were bona fide personnel actions - Evidence insufficient to show a compensable personal injury entitling administrative assistant to accidental disability retirement benefits, or that alleged emotional work-related injury and its permanence was subject of genuine, material factual issue that could not be determined summarily.

Reyes v. State Bd. of Retirement, Docket No. CR-13-598, Decision (Mass. Div. of Admin. Law App., Sept. 29, 2017).

Denial of accidental disability retirement application without convening medical panel - Psychological or emotional injury - Municipal administrative assistant in city auditing office and, following transfer, in city purchasing office - Formal complaint filed in initial position against supervisor alleging persistent abuse, including derogatory and foul language, aggressive physical behavior and harassment by supervisor - Counseling sought at time - Prescribed antidepressants - History of depression and antidepressant prescription, with apparent success - Following transfer to city purchasing office, micromanagement by new supervisor and subjection to attendance and telephone use monitoring, and deductions to the minute from lunch or breaks to which other employees were not subjected - Treatment for depression and stress by licensed social worker and EAP counselor, and by psychologist and social worker - Prescribed antidepressants and also medication for thyroid disorder - Absence from work due to diverticulitis and colitis - Progressively withdrawn and incapable of engaging in regular work or other activities - Ceased work on August 30, 2012 - Following workers' compensation-related examination by independent medical examiner and administration of MMPI-2 test (Minnesota Multiphasic Personality Inventory test assessing personality traits and psychopathology of persons suspected of having mental health or other clinical issues), examining physician concluded that the employee did not suffer from acute psychiatric disorder related to work stress, was not mentally or emotionally unstable, and was subjectively claiming disability due to longstanding personality problems including passive-dependent style not related to work stress or injury, had negative work attitudes, exaggerated her symptoms, blamed others for her problems, could return to work if she was motivated to do so, and was malingering for secondary gain - Evaluation by impartial psychiatrist who diagnosed depression and maladaptive personality traits on the borderline and/or histrionic category, including obsessional manner of going over and over a litany of many prior perceived abuses and a relentless fixation on having been treated poorly by colleagues for over two decades, as well as opinion that the employee was temporarily psychiatrically disabled without having reached a psychiatric end point, and that although she may have suffered some degree of mistreatment by co-workers, there was no causal connection between her condition and the work events she described - Accidental disability retirement application asserted that on her last day of work (August 30, 2012) she was performing her regular job duties, office was short-staffed, and she was attempting to assure coverage in her department when the "last straw" occurred and her supervisor harassed her "multiple times" throughout the day, although she also detailed her harassment in her prior city auditor office position by her former supervisor, and she described circumstances, events or physical conditions contributing to her disability as including "cold sore, impetigo, PTSD, depression, insomnia, anxiety, can't focus, can't concentrate, cry all the time, obsessive talk of traumatic (thoughts, flashbacks), fibromyalgia, migraine headaches, nausea and throwing up, thyroid hypo, diverticulitis, colitis, nervousness, nightmares of work related incident" - Noncompliance with city's return-to-work order - City investigation of harassment allegations beginning in October 2012, in which employee declined to participate and her attorney did not respond to requests that she be interviewed, revealed no corroboration by co-workers of harassing behavior employee had alleged - Retirement board approved involuntary retirement application filed by city on her behalf due to absence with, but then without, leave for an extended period, and denied accidental disability retirement application without convening medical panel - Denial of accidental disability retirement application affirmed - No reliable evidence that employee was disabled as of last day she performed her duties - Employee stopped working voluntarily on August 30, 2012 - No proof that alleged disability was permanent and was causally related to her work - Findings and conclusions of independent medical examiners, including no permanent work-related disability despite maladaptive personality traits and lack of motivation to work, were not countered by evidence that employee was mentally disabled when she left employment after working on August 30, 2012 - Symptoms experienced after leaving work were irrelevant to whether employee was disabled on last work day.

Koerber v. Somerville Retirement Bd., Docket No. CR-15-66. Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

Insufficient evidence of job-related causation - Unanimous negative medical panel certificate as to causation - Former Senior School District Custodian - Accidental disability retirement claimed based upon disabling lower back injury with pain radiating into both legs due to single injury at work in September 2014 (while cleaning school cafeteria floor and returning table, struck in back by another table moved in his direction by co-worker) - Prior history of lumbar disc disease and cervical radiculopathy beginning in 2008 or earlier - 2010 lumbar spine MRI showed spondylotic changes, lower lumbar scoliotic curvature, bilateral L5 neuroforaminal narrowing, right greater than left, with considerable narrowing of neural foramen at left L3, and disc bulging with facet degeneration at L3-4, L405 and L5-S1 levels - Severe degenerative joint disease of both lumbar and cervical areas noted by treating physician in 2010, but school custodian declined surgery notwithstanding back pain - February 2012 lumbar spine MRI showed spondylotic changes causing decrees of minimal to mild thecal impression without dimensional spinal stenosis, and scoliotic curvature, but with disc bulging facet degeneration causing marked narrowing if right L5 neuroforamen with neural impingement, and some lesser narrowing of L3 and L4 neuoforamen - Treating physician in August 2014 (one month before injury in school cafeteria) found it difficult to see how custodian was able to function with pain he could not control well - Immediately following September 2014 injury, custodian returned to work but found it difficult to perform job, and most of work performed was trash removal (lighter than job duty requirement of being able to lift in excess of 60 pounds and trash buckets the size of 55-gallon drums weighing 80 pounds) - Five days of Workers' Compensation benefits awarded following September 2014 injury - November 2014 MRI showed progression of foraminal stenosis with edema at end plates of lower lumbar discs between L4 and S1 compared to previous MRIs - Evaluating physicians in late 2014 noted age-related changes in lumbar spine and pain in lower back/buttock area radiating to left foot, and one recommended light duty with lifting restriction (no more than 20 pounds occasionally, and 10 pounds frequently) - January 2015 MRI showed facet rotary scoliosis at L4 with degenerative joint disease at L3-4, and moderate degenerative joint disease at LS1 and - Opinion of physician performing independent medical examination in March 2015 was return to pre-existing state of chronic degenerative lumbar spine disease, with September 2014 work injury causing mild exacerbation of this condition that was expected to abate after three months of conservative treatment, which school custodian was receiving, along with activity modification - Custodian's treating physician noted in June 2015 that oxycodone was relieving pain but believed that his level of functioning had not returned to pre-injury level and that he was totally disabled - Upon re-examination in July 2015, independent examining physician concluded that custodian was partially disabled, and that September 2014 injury had exacerbated, but had not aggravated, his pre-existing chronic symptomatic degenerative condition of his lumbar spine, meaning the injury had caused a temporary increase in the degenerative conditions's symptoms without causing any structural damage - Accidental disability retirement application filed July 20, 2015 based upon disabling low back pain with injury radiating into both legs, and inability to perform essential job duties as of December 14, 2014, as result of September 10, 2014 injury in school cafeteria - Orthopedic surgeon examining custodian in July 2015 opined that September 2014 injury was major contributing cause to his disability based upon 2014 MRI showing edema at end plates of lower lumbar discs between L4 and S1, consistent with worsening axial back pain - Medical panel comprising three orthopedists issued certificate that was unanimously affirmative as to disability, majority affirmative as to the disability's permanence, and unanimously negative as to whether disability was job-related - Negative certificate as to causation based upon opinion that September 2014 incident superimposed injury upon pre-existing degenerative disc disease without causing permanent changes and that would resolve with surgical treatment, and that disability was due to progression of underlying disc disease rather than to September 2014 injury - Custodian failed to prove causal nexus between September 2014 injury and his disability, or an exacerbation of his underlying condition as a result of the injury - No showing that in issuing unanimous negative certificate as to job-related causation, medical panel employed erroneous standard, lacked knowledge of custodian's job description or medical treatment history, or was improperly comprised - Panel members answered the question of causation they were called upon to address, and in doing so noted custodian's history of degenerative disc disease and stenosis throughout his cervical and lumbar spines as shown on MRI studies from as early as 2010, the discomfort and functional limitations he was experiencing in August 2014, immediately prior to the school cafeteria injury, and that he was able to perform all of his duties following the injury - All three panel members diagnosed multi-level degenerative disc disease with stenosis, and none believed that the September 2014 injury aggravated his pre-existing condition to the point of rendering him totally and permanently disabled - Rationales of medical panel physicians in reaching conclusion they did were well-documented and supported by the medical records - Other medical evidence in record supported medical panel members's analyses - Custodian's return to duty at school and resumption of farming activities, as well as surveillance video showing him shoveling snow during the winter following the September 2014 injury, undercut credibility of his claim that the injury rendered him totally and permanently disabled -

Retirement system decision denying accidental disability retirement affirmed.

> *Strong v. Worcester Regional Retirement System*, Docket No. CR-15-597, Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Insufficient evidence of disability - Former first-grade public school teacher - Emotional disability (post-traumatic stress disorder, anxiety and panic attacks) based on single incident at school where teacher worked on March 13, 2012—Alleged verbal abuse by school janitor during “code blue” at school (emergency or potential emergency of a medical nature requiring students and faculty to clear the hallways and retreat to classrooms or offices so paramedics could respond without obstruction and so that circumstances surrounding the medical condition were not revealed) - Janitor responsible for assuring that hallways were clear when code blue was called - Upon encountering teacher leading pupils through hallway to classroom, a departure from school’s code blue procedure, janitor ordered her to get her students out of the hallway, allegedly while screaming loudly and calling her “moron” - Immediately following incident, teacher experienced shortness of breath, racing heart, nausea, development of body rash and elevated blood pressure, and was taken by wheelchair to school nurse, after which she was taken home by daughter - Teacher unable to work for five weeks - PTSD diagnosis by primary care physician, who prescribed anti-anxiety medications - Workers’ Compensation benefits denied, but teacher received compensation for 29 sick days per M.G.L. c. 152, § 29 agreement - Following return to work, teacher felt school minimized event and that she was being called a liar and described as having “freaked out” and taken a leave of absence - Encountered janitor at school several times without experiencing “major inner feelings” - Positive attendance record through end of school year without suffering panic attack - Per teacher’s licensed mental health counselor, all symptoms had resolved and no follow-up counseling sessions were requested - Primary care physician recorded that teacher was disabled at time of incident during “Code Blue” at school but that disability did not appear to be permanent and that teacher could return to school - Teacher opted to retire after school year ended and apply for accidental disability benefits based upon PTSD as a result of verbal assault in workplace, and asserted that after returning to work, seeing the janitor had resulted in further panic attacks and that school principal had harassed her and attempted to intimidate her, and that she was unable to perform any job because she was required to take “serious medicine” to treat her condition - Medical panel comprising two psychiatrists and a neurologist issued unanimous affirmative certificate as to disability, its work-related causation and its likely permanence, based primarily upon teacher’s assertions during examination by panel members, and panel members’ impression that being around children or in a school situation triggered unmanageable anxiety to the point that the teacher would be unable to concentrate on her work and her interactions with students and other school personnel, that she could not even approach the school without incapacitating anxiety, and that there was no likelihood of significant improvement of her condition in the foreseeable future despite appropriate treatment for over a year - Upon questions posed by Massachusetts Teachers' Retirement System, medical panel responded that it had no evidence as to whether teacher was disabled on last day of employment, and that in view of teacher's confusing accounts, it was impossible to opine as to any possible connection between her encounter with janitor during "code blue"and her condition following the incident- Panel also responded that although medical history showed teacher had experienced stress and stress-caused physical symptoms as far back as 1995, when she was raising her own children, and the stress had continued intermittently, her anxiety had not abated to point where she could perform her job as of June 2012, and that members panel stood by their original unanimous affirmative certificate - Notwithstanding unanimous affirmative medical panel certificate, teacher failed to prove that she was totally and permanently disabled on last date of her employment, based upon (a) return to work and ability to face janitor without major negative inner feelings, (b) voluntary cessation of visits to her social worker who reported that teacher's symptoms had resolved, (c) no request by teacher to employer for accommodations in order to carry out duties through remainder of school year, (d) no evidence of inability to perform essential duties of position through school year's end, and (e) report by teacher's primary care physician after school year ended that while she was disabled after the code blue incident in March 2012, she was not permanently disabled and would be returning to work - Janitor performed delegated code blue responsibilities in directing teacher and her pupils to clear hallway, albeit forcefully - No evidence that teacher was justified in leading students through hallway after code blue was called - No evidence that janitor knew or should have known that his conduct would likely cause emotional distress - Conduct not extreme, outrageous or beyond all possible bounds of decency - No evidence that workplace hostility teacher perceived upon returning to work after incident went beyond degree of workplace friction and ill will common to many occupations and rose to level of injury sustained in workplace - That teacher felt startled, embarrassed or disrespected by janitor during code blue incident did not suffice to show that she had sustained compensable personal injury at the time or was disabled on last day of work.

Perez v. Massachusetts Teachers' Retirement System, Docket No. CR-15-155, Decision (Mass. Div. of Admin. Law App., Jun. 30, 2017).

Registry of Motor Vehicles (RMV) Clerk IV - Alleged harassment and retaliation by RMV branch office staff from 1996 through 2010 - Claim of permanent disability based upon exposure to identifiable condition (constant workplace hostility and harassment) - Conflicts with co-workers and state trooper assigned to branch office - One-day suspension in 2000 for unprofessional conduct toward customer - Discipline overturned following grievance through union - Second suspension, for three-days, issued for directing customer to return unnecessarily to automobile insurer to correct registration error made by another RMV clerk - Loud, harsh and public verbal reprimand by supervisor heard by fellow employees and by customers - Suspension overturned following grievance - One-day suspension in 2001 for allegedly failing to assist another staff member while on shift - Perception of being targeted for discipline not meted out to other staff - Employee entered comments about years of harassment, rude treatment and interference with job performance other staff and by management in response to FY 2002 employee performance review form - Management failure in late 2002 to respond to request to take personal day, and marked off-payroll, followed by grievance and attendance correction and reinstatement of pay - 2005 transfer to another RMV branch office, followed by three-day suspension for refusal to assist customers, refusal to process transaction for drive-up customer, damage to customer's car caused by opening emergency exit into customer drive-through area, a violation of branch rules, and other violations - Suspension rescinded following hearing - Transferred to another RMV branch in 2005, along with former supervisor - Perception that work environment at new branch was hostile - In March 2009, after questioning elderly customer about identification and medical support for handicap placard application, conflict with co-worker as to why she did not simply give the customer the placard, in view of her age - Manager sided with co-worker, prompting employee to complain of hostile treatment and working conditions - Subsequent verbal altercation, in July 2009, with co-worker upset about her work load, who told employee to mind her own business, called employee "stupid and crazy" and threatened to "kick [her] ass" - Co-worker not disciplined - Employee's request for transfer to a different RMV branch office based on hostile work environment denied - Continued hostility by same co-worker, this time with racial overtones - Employee fainted at work in July 2009, believed she was kicked when she was on floor, and was taken to hospital - After returning to work several days later, perception that other workers were trying to get rid of her - Employee filed complaint with union about workplace hostility in August 2009 - Conclusion by RMV counsel that employee had provoked the initial bickering with co-worker - Employee given written warning about her confrontational and volatile behavior, and then, in January 2010, after being overheard making comments about wanting to punch co-worker and give others what they deserved, placed on paid administrative leave pending determination as to whether she posed a danger to herself and others in workplace - Subsequent negative psychological fitness-for-duty evaluation, with examining physician's recommendation of intensive psychopharmacological and psychotherapeutic treatment prior to returning to work and re-evaluation, along with recommendation of occupational therapy to assist employee with workplace relations and working cooperatively with co-workers - Subsequent counseling and treatment generated diagnosis of serious mental illness including major depression, insomnia, low energy and anxiety - Dismissal from behavioral health treatment program due to conflict with another patient - Accidental disability retirement application filed in March 2011 based upon permanent disability due to severe depression, stress, anxiety and PTSD due to workplace harassment and retaliation - Unanimous affirmative medical panel certificate as to disability, permanence and work-related causation (identified by all three panel members as a series of work-related events) - Retirement Board approved ordinary disability retirement but denied accidental disability retirement application, despite unanimous affirmative panel certificate - Denial sustained - Neither employee nor her superiors filed any notice of injury between 1997 and 2010 despite allegations of continuing harassment - Employee's credibility as to continuing nature of alleged harassment, and reliability of her recollection of events suspect, on account of perceived constant fabrications and "set-ups" in five RMV branches over 13 years, with almost no supporting contemporaneous entries in medical records, and without any witness corroboration of employee's self-serving testimony - No evidence supporting claim of career-long exposure to workplace hazards - No identifiable condition not common and necessary to all or a great many occupations - No showing that alleged injury amounted to more than personal feelings of persecution and perpetual victimization.

O'Connor v. State Bd. of Retirement, Docket No. CR-13-372, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Probation case specialist with clerical and secretarial duties - Post-traumatic stress disorder (PTSD) allegedly caused by humiliation of having to meet with supervisors regarding unfair accusations against her, unfair targeting and discipline, and unkind and unequal treatment by supervisors and co-workers - Termination following alleged sick leave abuse, excessive personal use of work email, and conflicts with supervisor and co-workers - Insufficient evidence of causation - Unanimous affirmative certificate by medical panel (2 psychiatrists and 1 neurologist) as to disability (extreme anxiety), permanence and causation that alleged incidents in workplace caused PTSD not dispositive as to causation - No showing that supervisors did not engage in bona fide personnel actions - No showing that alleged workplace ill will, job conflicts and arguments with superiors and co-workers that generated feelings of persecution and unfair treatment was an identifiable condition not common or necessary to a great many occupations.

Sinopoli v. State Bd. of Retirement, Docket No. CR-15-223, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Group 4 police officer - Alleged post-traumatic stress disorder, major depression and panic disorder - Notice of Injury and tolling of notice period - Untimely notice - No workers' compensation-related tolling - Group 4 police officers ineligible for workers' compensation - No evidence of mental health problems within two years preceding accidental disability retirement application - Failure to get along with co-workers and superiors not so uncommon as to be "identifiable condition" leading to disability -Accidental disability retirement benefits denial affirmed.

Rosario v. Fall River Retirement Bd., Docket No. CR-13-233, Decision (Mass. Div. of Admin. Law App., Apr. 15, 2016).

Accountant IV/Financial Analyst - Alleged stress and anxiety due to workplace environment and staff retaliation for "whistleblowing" - Denial without convening medical panel - Failure to articulate mental or emotional injury arising out of bona fide personnel action, or intentional infliction of emotional harm - Independent medical review for workmen's compensation review performed by psychiatrist negative as to psychiatric condition causally-related to event or events at workplace - No medical record support for work-related emotional injury claimed.

Manning v. State Bd. of Retirement, Docket No. CR-12-325, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Special education and bilingual teacher - Aggravation of pre-existing mental condition (bipolar affective disorder) by work stress, to point of disability - Ongoing harassment by staff and administration (demotion from educational team facilitator position, assignment of additional work duties, required overtime, unfavorable evaluation, reprimands, disciplinary hearing) - Insufficient evidence - Unanimous certificate of medical panel (2 psychiatrists, 1 neurologist), erroneously checked off on certificate as "yes" answer as to work-related causation, actually negative based upon opinion that natural progression of pre-existing bipolar affective disorder, rather than work-related aggravation of pre-existing condition, more likely made the teacher unable to perform job duties (due to inability to organize thoughts, leading to inability to plan, organize, and assimilate evaluations) - Teacher's testimony lacked organization or specificity as to details and dates of alleged harassment, despite representation by experienced counsel and magistrate's direction to better organize the testimony - Inference from teacher's disorganized, rambling testimony that opinions of treating physicians who opined favorably as to work-related causation, none of whom testified, were based upon similarly disorganized statements to them by teacher, and that opinions therefore lacked sufficient factual foundation to be reliable.

Ibanez v. Boston Retirement Bd., Docket No. CR-13-386, Decision (Mass. Div. of Admin. Law App., May 13, 2016).

Sufficient Proof; Accidental Disability Retirement Benefits Denial Reversed

Sufficient evidence of work-related causation - Emotional or psychological injury - Unanimous affirmative medical panel as to disability, its likely permanence, and job-related causation - Alcohol and Drug Addiction Counselor I and (during last two years of employment, from 2010 to 2012) Director of Residential and Addictive Services at Chelsea Soldiers' Home - Series of work-related events leading to injury - Following promotion to director position in 2010, increased depression, feeling of increased stress, increased and uncharacteristic uncertainty in determining correct treatment for residents who relapsed into substance abuse - After recommending that one resident who had relapsed be placed on restrictions at the Home, resident disagreed and went over his head, and director was told to leave the resident alone, causing him stress and more self second-guessing - Director wanted resident to enter a detox program but resident disagreed - Against his usual practice and for fear of being overruled, Director decided to send resident to a doctor for another opinion, but doctor told him that the resident did not need detox, and Director placed resident on restriction rather than send him to detox - Resident found dead in his room at Home the next morning (cause of death not in record). - Director learned of this while driving to work in telephone call from another resident he was counseling (as per his duties), who was emotionally upset about the death- After Director arrived at Home, his immediate supervisor confirmed the resident's death, told Director it was not his fault, and sent Director home because he was devastated, beside himself and unable to function as a result of this development - Director felt that if resident had been admitted to detox facility, he would not have been able to continue his drug use, or he could have received medical treatment if his death was due to other causes - Director felt guilty for not having sent resident to detox facility - After staying out of work for a week and then returning, Director could not stop thinking that if he had sent resident to detox the outcome might have been different, and continued to feel he was being second-guessed about his counseling and treatment of residents - Director continued counseling with psychiatrist who had treated him previously for depression, attention deficit disorder and anxiety, and continued working for ten weeks before going on medical leave, and never returning to work afterward - Ordinary and Accidental disability retirement applications filed subsequently based upon generalized anxiety disorder, recurrent major depressive disorder, and attention deficit/hyperactivity disorder, as well as for cardiac and orthopedic-related issues, and identified resident's death as both personal injury and hazard undergone that had caused his emotional and psychological disability - Regional psychiatric medical panel unanimously affirmative as to disability, its likely permanence and work-related causation - Panel members viewed new responsibilities Director undertook following his 2010 promotion as having overwhelmed him, and as primary stressor predisposing him to post-traumatic stress disorder as a result of resident's death, along with worsening depressive and anxiety symptoms - Ordinary disability retirement granted by retirement board based upon emotional injury, leaving only the issue of work-related causation to be determined - Retirement board denied accidental disability application despite unanimous affirmative panel certificate based upon conclusion that Director's condition was not caused or aggravated by a personal injury he sustained or a hazard he underwent as a result of, and while performing, his work related duties - Denial reversed - Director filed accidental disability retirement application within two years of events upon which he relied, *see* M.G.L. c. 32, § 7(1) - Director sustained burden of proving emotional injury's work-related causation, by showing a series of events leading to his injury (increasing uncertainty as to his own decisions on counseling and consequences for residents, reliance upon doctor's opinion rather than his own judgment in assigning resident to restriction rather than sending him to detox, telephone call from upset resident he received while driving to work informing him of resident's death, and supervisor's confirmation of resident's death) - Whether emotional injury is considered to have been result of series of events or any one of them, the events occurred while Director was at work and in performance of his duties, haunted him after the resident's death, and caused remorse over his decision not to assign resident to detox, all of which left him emotionally unable to perform his counseling duties and left him disabled - Important to note that Director was in the performance of his duties when he learned of resident's death - Taking phone call from distraught resident fell within scope of his duties regarding prevention of resident relapse into substance abuse - Retirement board directed to grant Director's accidental disability retirement application.

McDonough v. State Bd. of Retirement, Docket No. CR-15-98, Decision (Mass. Div. of Admin. Law App., Sept. 8, 2017).

Corrections officer - Job description required ability to make decisions and act quickly in emergency and dangerous situations - 2012 application for accidental disability retirement based upon disabling post-traumatic stress disorder (PTSD) sustained as a result of being assaulted and stabbed on July 1, 2002 while transferring inmate for medical treatment - Stab wound penetrated to ribs, but surgery proved unnecessary - Returned to work in 2002 following counseling with social worker - Deployed to Kuwait with Massachusetts National Guard unit in June 2003 without direct combat but under heavy missile fire for three weeks - Released from active duty due to wife's auto accident and serious injuries - After returning to work, attributed difficulty thinking and "falling apart" to wife's auto accident but returned to counseling with social worker he had seen in 2002 - Social worker diagnosed PTSD relating back to 2002 stabbing incident - Transferred to another correctional facility in attempt to alleviate PTSD - Psychiatric treatment between 2006 and 2008 - Psychiatrist noted increased PTSD symptoms as March 2008 trial of inmate who stabbed him approached, with expectation that corrections officer would testify as key witness - Told co-worker min March 2008 he wanted to blow [his] braines out" - Treated at hospital for suicidal thoughts, which were attributed to stress from upcoming trial of inmate who stabbed him and wanting to leave his wife, but letter to employer stated he was being treated for PTSD flare-ups related to 2002 stabbing incident - Separated from wife in 2008 and divorced in 2010 - Promoted to rank of sergeant in early 2009 and transferred to work at state hospital - Present when another corrections officer was assaulted by inmate on April 30, 2009 but video footage shows he stood there and did nothing - Terminated, following Department of Corrections hearing, for dereliction of duties during April 30, 2009 incident, but termination later vacated due to corrections officer's history of PTSD, with instructions that corrections officer move forward with workers' compensation and accidental disability retirement claims based upon 2002 stabbing incident - October 2010 medical report mentioned that corrections officer did not act during 2009 incident due to disassociation resulting from extreme PTSD - Two psychiatrists who performed independent medical examinations to determine workers' compensation eligibility each concluded that corrections officer suffered PTSD as a result of 2002 stabbing incident, with one also concluding that PTSD did not prevent him from taking action during the April 2009 assault of other corrections officer, and the other concluding that his PTSD was responsible for his inaction and that his service in Kuwait did not cause or contribute to his PTSD or its symptomatology - Awarded workers' compensation benefits -Application for accidental disability retirement based upon inability to perform required care, custody and control of inmates after the April 2009 event due to PTSD, and disability dates listed as July 1, 2002 and April 30, 2009 - Examination in 2013 by medical panel comprising three psychiatrists - Panel noted no psychiatric history prior to 2002 stabbing, and concluded that there was a connection between the stabbing and corrections officer's behavior change, as noted by prior clinicians - Unanimous conclusion by panel members that corrections officer was injured while engaged in his employment duties, and was permanently disabled from continuing to work because of this injury and the chronic PTSD it caused - State Board of Retirement denied accidental disability retirement application, which corrections officer timely appealed - Continuing receipt by former corrections officer of PTSD counseling and prescription medication that is helpful, but current symptoms include trouble with daily functions, difficulty making decisions, and flashbacks to 2002 stabbing, and belief that he is incapable of making a "snap decision" - Sufficient proof of permanent disability as a result of PTSD caused by stabbing incident while employed as corrections officer - Proof includes social worker's diagnosis in 2004; transfer to another correctional facility to alleviate PTSD; hospitalization in 2008 with suicidal thoughts prompted by oncoming trial of inmate who had stabbed him; inability to assist assaulted co-worker in 2009 due to disassociation from incident caused by PTSD that was noted in subsequent medical record; opinion of one of two independent examining psychiatrists that PTSD prevented corrections officer from acting during 2009 incident; unanimous conclusion of medical panel members as to permanently-disabling PTSD resulting from 2002 stabbing; and preponderance of this evidence as to persisting PTSD-related disability over other factors that arguably showed ability to complete job duties of corrections officer (promotion to sergeant in 2009, and opinion of one of the independent examining psychiatrists that PTSD did not prevent corrections officer from acting during 2009 incident) - Nature of corrections officer's PTSD showed that although he might appear capable of completing routine job duties, he could not be relied upon to act appropriately during emergency situation, as was the case during 2009 incident - Persistence of PTSD over 14-year period following 2002 stabbing showed this condition, and the related disability, to be chronic and permanent, as medical panel concluded - No attribution of PTSD by anyone who treated and/or examined corrections officer to any event prior to 2002 stabbing, or to any cause other than that incident - Although application for accidental disability was not filed within two years of injury that caused it (*see* M.G.L. c. 32, § 7(1)), corrections officer qualified for "official record" exception for retirement Group 2, 3 and 4 members (*see* M.G.L. c. 32, § 7(3)(a)) because he was member of Group 4, and official report was filed at the time of the 2002 stabbing incident - No medical evidence or opinion that PTSD was caused or exacerbated by military service in Kuwait or wife's auto accident, or that anything other than the 2002 stabbing (including his termination for dereliction of duty during the 2009 incident, as the Board argued) was the proximate cause of the PTSD - Denial of accidental disability retirement application reversed.

Andrade v. State Bd. of Retirement, Docket No. CR-13-104, Decision (Mass. Div. of Admin. Law App., Aug. 4, 2017).

—Statutory Presumptions

Cancer Presumption

[no entries]

Heart Law Presumption

Retired firefighter - Accidental disability retirement application filed October 21, 2013, subsequent to superannuation retirement in April 2009 - Claimed "heart presumption" for firefighters (M.G.L. c. 32, § 94) and history of atrial fibrillation as "hazard undergone" - No notice of injury filed with retirement board as to asserted heart-related injury (palpitations and chest pain experienced while climbing stairs during response to house fire in 2006, five years prior to filing of accidental disability retirement application) - No mention of these symptoms or of firefighters' on-site evaluation by EMTs in incident report regarding this fire - No notice of injury filed regarding cardiac event in May 2007 - Hospital records reported history of hypertension, but electrocardiogram following 2007 event showed no atrial fibrillation - Firefighter declined hospitalization and signed himself out of hospital against medical advice - No workers' compensation-related exception to failure to file written notice of injury because firefighters, as Group 4 members, are not eligible to receive workers' compensation - Exception to notice of injury requirement based upon record of injury sustained on file in fire department's official records inapplicable as claimant produced no such record - Atrial fibrillation diagnosed on January 9, 2009 (prior to superannuation retirement), but followup EKG on January 29, 2009 showed regular heart rate and no atrial fibrillation, and firefighter was cleared to return to work - No treatment for atrial fibrillation until May 2010, subsequent to retirement, when attempt to correct this condition failed - Heart condition was, per the record, a disability that matured subsequent to retirement in 2009 - Application for accidental disability retirement properly denied without convening medical panel.

Benoit v. Everett Retirement Bd., Docket No. CR-14-821, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Heart law (M.G.L. c. 32, § 94) creates presumption that when full-time police officer or firefighter is disabled as a result of a heart condition or hypertension, disability is related causally to firefighter's job - Presumption reflects view of heart disease and hypertension as long-term illnesses that can be exacerbated by the stress of working as a police officer or firefighter - If applicable, heart law presumption satisfies one of the three prerequisites for accidental disability retirement—a proximate, work-related cause for a retirement system member's incapacity—and makes it unnecessary for the retirement system member to prove the causal connection any further.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Heart law presumption is not conclusive and may be rebutted by competent evidence that (1) the disabling heart disease or heart condition was not suffered in the line of duty; or (2) although he suffered from hypertension, a police officer or firefighter was not retired on account of a hypertension-related disability, or was not totally incapacitated from performing the essential duties of his job when he retired.

Foley v. Milton Retirement System, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Competent evidence rebutting heart law presumption may include finding of majority of medical panel members that hypertension or heart disease was not incapacitating.

> *Foley v. Milton Retirement System*, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Former deputy fire chief applying for accidental disability retirement based upon job-related hypertension - Heart law presumption - Applicability - Required showing: (a) Successfully passing physical examination upon entry into fire department or subsequently, with examination revealing no evidence of condition of health impairment caused by hypertension; and (b) Disability as a result of hypertension before retiring.

> *Foley v. Milton Retirement System*, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Retired deputy fire chief - Application for accidental disability retirement based upon job-related hypertension - Denial of application sustained - Heart law presumption inapplicable even though deputy fire chief suffered from hypertension exacerbated by stress - Failure to report any hypertension-related injury or request leave on account of hypertension before retiring - Majority of the three-cardiologist medical panel opinion, after examining deputy fire chief, that he was not physically incapable of performing his essential job duties - No dispute that the panel's composition was proper or that panel members reviewed official description of the deputy fire chief's essential job duties or his medical records - No evidence that panel majority employed incorrect standard in determining that he was not disabled.

> *Foley v. Milton Retirement System*, Docket No. CR-15-118, Decision (Mass. Div. of Admin. Law App., May 27, 2016).

Beneficiaries of Retirement Contributions

—Benefits

Limitations, Overpayments, and Discretionary Waiver of Recoupment or Repayment

Member-survivor benefits (M.G.L. c. 32, § 12(2)(d)) - Statutory limitation of initial annual benefit amount to deceased retirement system member's actual salary at time of death (M.G.L. c. 32, § 12(2)(d), last para.) - Exception to statute's general rule that monthly survivor benefits to spouse of deceased retirement system member not be less than \$250 or \$500, whichever applied - Town clerk receiving \$1,550 annual salary upon death in April 2000 - Surviving spouse's annual benefit amount erroneously based upon \$3,000 statutory minimum retirement amount (\$250 per month) rather than decedent's \$1,550 annual salary - Resulting overpayment of member-survivor benefits over ten-year period (\$20,310.71) subject to recoupment absent waiver pursuant to M.G.L. c. 32, § 20(5)(c)(3) - Discretionary denial of waiver request - No abuse of retirement board's discretion, even though overpayment resulted from retirement board error in calculating surviving spouse's annual member-survivor benefit amount - Board's benefit reduction and/or request for repayment based solely upon statutory limitation - No allegation or evidence of arbitrary or capricious action by retirement board in denying waiver.

Randall v. Franklin County Retirement Bd., Docket No. CR-12-277, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017)

—Designation of Beneficiary

Former Spouse

Defective designation of retirement contributions beneficiary by deceased retiree - No witness signature - Proportion of benefits payable to beneficiary left blank - Omissions fatal to beneficiary designation - Entire retirement account payable to decedent's estate.

Fritz-Elliot v. State Bd. of Retirement, Docket No. CR-14-368, Decision (Mass. Div. of Admin. Law App., Apr. 22, 2016).

Buyback of Previously-Refunded Retirement Contributions

Restoration to state service after leaving prior state position - Purchase of previously-refunded retirement contributions - Failure to timely exercise buyback option at lower interest rate - Higher actuarially-assumed interest rate applies.

England v. State Bd. of Retirement, Docket No. CR-14-18, Decision (Mass. Div. of Admin. Law App., Dec. 2, 2016).

Restoration to state service after leaving prior state position - Installment agreement - Default (failure to make buyback installment payments) - Prevailing actuarial interest rate applicable to new buyback arrangement.

Maddox v. Massachusetts Teachers' Retirement System, Docket No. CR-15-301, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

<u>Computation of Retirement Benefits</u>

—Benefits to Former Spouse Under Domestic Relations Order (DRO) or Qualified Domestic Relations Order (QDRO)

Retired teacher divorced before retirement - Former husband's marital portion of teacher's pension - Marital settlement agreement incorporated but not merged into court's divorce decree, and confirmed by Qualified Domestic Relations Order issued by Kent County (Rhode Island) Family Court - Provision requiring that teacher receive pension benefits under retirement Option C, with option to select benefits under retirement Option B if former husband "has not remarried" at time of teacher's retirement, with balance of former husband's interest in net equity of marital home to be paid through equitable allocation of her pension - Before teacher retired, former husband remarried and later divorced his second wife - Retirement System denied teacher's election of Option B based upon former husband's remarriage - Phrase "has not remarried" in marital settlement agreement and QDRO not equivalent of "has never remarried" - Per plain language of QDRO, teacher's obligation to select retirement Option C, and ability to select Option B instead, was based upon former husband's marital status when she retired (which was "divorced"), and not before her retirement - Relief from obligation to select retirement option C based upon former husband's "remarried" status before, but not when, she retired, needed to be sought by petitioning the Rhode Island Family Court, which retained jurisdiction over the QDRO - Retirement System's decision requiring that teacher select Option C upon retiring affirmed.

Mason v. Massachusetts Teachers' Retirement System, Docket No. CR-16-200, Decision (Mass. Div. of Admin. Law App., May 26, 2017).

Monthly retirement benefit allocation payment to former spouse under DRO - Subsequent DRO reducing payment amount - Retirement Board bound by DRO - Board's refusal to reinstate higher retirement benefit allocation under prior DRO was decision or action appealable to DALA under M.G.L. c. 32, § 16(4), if only for determination that latest DRO bound the Board to reduce former spouse's benefit payment and confirm exhaustion of remedies under retirement statute - Relief regarding reduced benefit amount ordered by DRO, if available, must be sought from Probate and Family Court.

Creedon v. Lexington Retirement Bd., Docket No. CR-15-662, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2016).

QDRO directing computation of ex-spouse's retirement benefit share as if employment ended at time of divorce - Employment group classification at time of divorce, not at later time of statutory group classification change, applies during computation of ex-spouse's retirement benefit share.

Holland v. Boston Retirement Bd., Docket No. CR-13-13, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

—Retirement Allowance Computation

Superannuation Retirement Allowance

Retirement benefit - Applicable option under which benefit is paid to retired member of contributory retirement system - Failure to elect any option upon becoming retirement system member late, or to elect option upon retiring - No option in effect upon retirement - Retirement benefit payment under option B required by statute (M.G.L. c. 32, § 12(1)).

Clement v. Essex County Regional Retirement System, Docket Nos. CR-14-184, CR-13-294, Decision (Mass. Div. of Admin. Law App., Oct. 20, 2017), *reconsideration denied* (Mass. Div. of Admin. Law App., Nov. 21, 2017).

M.G.L. c. 32, § 5(2) mandates how state retirement system member's superannuation retirement allowance should be calculated, and State Board of Retirement is bound to utilize this methodology in making this calculation—Member's age factor (as of last birthday) is multiplied by the amount of creditable service the member accrued, and the product is then multiplied by the "average annual rate of regular compensation received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest"—Subject to a limitation the statute prescribes, the state retirement system member's superannuation retirement allowance "shall not exceed four fifths of the average rate of regular compensation received during any pay period of three consecutive years of creditable service during for which such rate of compensation was the highest or on the average annual rate of regular compensation received by such member during the period or periods, whether or not consecutive, constituting the last three years of creditable service preceding retirement, whichever is the greater."

Berman v. State Bd. of Retirement, Docket No. CR-13-549, Decision (Mass. Div.

of Admin. Law App., July 28, 2017).

State retirement system member could not prevail upon claim that calculation of her superannuation retirement allowance was improper because it did not take into account her actual earnings or the number of business days she actually worked, and did not credit her for pay raises she had earned or for an extra day during 2012, a leap year - No reference to any of these factors by the statute prescribing how a state retirement member's superannuation retirement allowance should be calculated (M.G.L. c. 32, § 5(2)) - Statute does not contemplate use of member's actual earnings, and instead requires taking into account her average annual *rate* of regular compensation for the final three years of her employment in state service, without regard to pay periods, leap years, or the number of business days in a year - State Board of Retirement was bound to follow this methodology, which it did - However, the Board was required to adjust its calculation of the member's superannuation retirement allowance by using her weighted average annual rate of regular compensation during the years of service for which such rate of compensation was the highest (resulting in an average annual rate of regular compensation of $69,955.50), rather than the average annual rates provided by her employer (the University of Massachusetts), which resulted in an average annual rate of regular compensation of $69,922.44) - Adjustment was retroactive to July 1, 2013, the day following the date on which the member's retirement became effective.

Berman v. State Bd. of Retirement, Docket No. CR-13-549, Decision (Mass. Div. of Admin. Law App., July 28, 2017).

—Regular Compensation - Generally

Regular compensation is defined by M.G.L. c. 32, § 1 as "compensation received exclusively as wages by an employee for services performed in the course of employment for the employer," and to be considered "regular compensation" under the Public Employee Retirement Administration Commission (PERAC) regulations, compensation must be "ordinary, normal, recurrent, repeated, and of indefinite duration," must "be made on a non-discriminatory basis and be generally available for employees who are similarly situated relative to the purpose of the payment (e.g. a longevity payment made recurrently to all employees in a bargaining unit have attained a specific length of service)," (*see* 840 C.M.R. § 15.01(a)(3) and (5); in addition, the PERAC regulations specifically exclude from regular compensation "any amounts paid as bonuses," which include "any payment to an employee or group of employees which will not recur or which will recur for only a lmited or definite term," unless the payment is "made under a salary augmentation plan or salary enhancement program provided for in a collective bargaining agreement (*id.*).

Stevens v. Massachusetts Teachers' Retirement System, Docket No. CR-13-332, Decision (Mass. Div. of Admin. Law App., Sept. 1, 2017).

—Regular Compensation - Service or Amounts Included

Teachers, generally - Per M.G.L. c. 32, § 1, regular compensation includes "salary, wages or other compensation in whatever form" paid for a retirement system member's service by the employer, with two exceptions with regard to teachers: (1) Per M.G.L. c. 32, § 1, for teacher employed in public day school who is a member of teacher's retirement system, salary payable under terms of annual contract for additional services in the school is regarded as regular compensation rather than as bonus or overtime, and, per Massachusetts Teachers' Retirement System regulations, annual contract for a teacher means the collective bargaining agreement governing the rights of MTRS members, whether a one-year or multi-year agreement (807 C.M.R. § 6.01); and (2) Per the MTRS regulations, salary payable under terms of annual contract for additional services are counted as regular compensation so long as additional services are educational in nature, remuneration for these services is provided in the annual contract, and the additional services are performed during the school year (807 C.M.R, § 6.02(1)).

Brunell v. Massachusetts Teachers' Retirement System, Docket No. CR-15-764, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Teachers - Payment for work performed as summer school director - summer program "meaningfully related to the regular school experience" - Payments qualify as "regular compensation" - Retirement System's refusal to count payments in calculating retirement benefits reversed.

Fay v. Massachusetts Teachers' Retirement System, Docket No. CR-11-770, Decision (Mass. Div. of Admin. Law App., Nov. 25, 2016).

Prior periods of contract service to state agencies purchased pursuant to M.G.L. c. 32, § 4(1) - Sufficiently permanent and regular service not paid out of "03" subsidiary account - Retirement board policy precluding inclusion of purchased "section 4(1)" contract service from inclusion in computing regular compensation - Policy invalid as exceeding scope of Board's Chapter 32 authority.

Young v. State Bd. of Retirement, Docket No. CR-10-749, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

—Regular Compensation - Service or Amounts Not Included

Teachers - One-time longevity payment under collective bargaining agreement (CBA) between teacher's union and school district - Bonus payment not included in regular compensation - Public school teacher with 25 years of service - $1,000 payment for academic year 2010-11 paid to all CBA unit members who had reached top salary step prior to July 1, 2010 - CBA described payment as "bonus" - Retirement contributions taken from this payment - Intention of payment, per school system human resources director, was compensation for lack of contractual pay increases for several years, rather than award of bonus for performance of service - Payment was bonus rather than longevity payment treated as regular compensation, as it was extraordinary, ad hoc, one-time and of finite duration, rather than "ordinary, normal, recurrent, repeated, and of indefinite duration," as required by statutory definition of regular compensation (M.G.L. c. 32, § 1) and by PERAC regulations (840 C.M.R. § 15.03(1)(a)(3)) - Teacher received separate longevity pay of $1,200 during 2010-11 and 2011-12 years under CBA, as did all teachers with 25 years of service - Because payment was not regular compensation under retirement law, parties to CBA could not agree to treat the one-time bonus payment as regular compensation, and decision as to whether payment was regular compensation was one for the retirement board to make pursuant to law defining regular compensation - Retirement Board's decision to treat one-time payment as bonus rather than regular compensation affirmed, with any retirement deductions taken from this payment to be refunded to the teacher.

Stevens v. Massachusetts Teachers' Retirement System, Docket No. CR-13-332, Decision (Mass. Div. of Admin. Law App., Sept. 1, 2017).

Public high school family/consumer science teacher in Shrewsbury Public Schools- Member of collective bargaining unit represented by Shrewsbury Education Association - Stipend payments received for additional services provided as "Coordinator of Elementary Enrichment" during school years included in regular compensation - Coordinator responsible for overseeing approximately 16-day summer program for in science, art, mathematics and language arts serving 600 public school students, not all from Shrewsbury, who paid tuition to attend program - No academic credit granted for attending program - Program not related to curriculum framework of Shrewsbury Public School - Performance as Coordinator not overseen by school committee or school superintendent - Separate side agreement on amount of Coordinator's "extra duty stipend" between subcommittee of Shrewsbury Education Association members and Shrewsbury Public Schools ratified by School Committee, but position and remuneration not listed in collective bargaining agreement - Side agreement did not state that it added position to collective bargaining agreement or that it was part of, or modified, collective bargaining agreement - Contrary provisions regarding stipends contained in side letters executed by union and public schools do not bind Massachusetts Teachers' Retirement System in determining service or amounts included as teacher's regular compensation - Coordinator's stipends also were not regular compensation because summer program she directed did not take place in a public school and was not tied to any public school curriculum or to public school grading or academic credit - Decision of MTRS excluding payments to teacher for her service as Coordinator of Elementary Enrichment from her regular compensation for retirement purposes affirmed.

Brunell v. Massachusetts Teachers' Retirement System, Docket No. CR-15-764, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Public school superintendent - Retirement agreement following superintendent's complaint against school committee chairperson, and conflict between committee and superintendent - Retroactive pay raises for last three school years in superintendent's position specified in agreement - Raises not performance-based increases to base salary that superintendent would have likely received following positive evaluations - Raises not intended to correct salary-payment error - Raises would not have been paid by school committee if superintendent had not agreed to retire before her contract term ended, and were thus in exchange for agreement to retire - Retroactive increases based upon employer's knowledge of superintendent's retirement, and contingent upon retirement excluded from calculation of retirement benefits - Increases properly excluded by Massachusetts Teachers' retirement system in calculating superintendent's three-year average salary for retirement purposes.

Kane v. Massachusetts Teachers' Retirement System, Docket No. CR-12-80, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

College Hockey Coach - Compensation from Season Ticket Sales and Summer Hockey Camp Revenue properly excluded from computation of salary for retirement purposes.

Mallen v. State Bd. of Retirement, Docket No. CR-10-460, Decision (Mass. Div. of Admin. Law App., Apr. 29, 2016).

Teachers and School District Administrators - Duties performed in addition to regular duties - Minuteman Regional School District - Outreach Coordinator - Payment of specific amount for additional duty provided in employment agreement - Position and payment for it not included in collective bargaining agreement between school district committee and Minuteman Faculty Association during time period in question - Payments for additional duties regular, ordinary and normal, occurring in multiple years, but not regular compensation - Additional duties were not chief responsibilities and payment for them were in accordance with employment side agreements, not per collective bargaining agreements - Exclusion of stipend for additional duties as outreach coordinator properly excluded from regular compensation used to compute retirement benefits.

Taliadouros v. Massachusetts Teachers' Retirement System, Docket No. CR-11-660, Decision ((Mass. Div. of Admin. Law App., July 8, 2016).

Teachers - Enhanced Longevity Payments Due After Collective Bargaining Agreement Expired properly excluded from computation of salary for retirement purposes.

Mulcahy v. Mass. Teachers Retirement System, Docket No. CR-09-441, Summary Decision (Mass. Div. of Admin. Law App., May 6, 2016).

Teachers - Stipends paid to dean of specialized high school academy - Position and stipend not listed in collective bargaining agreement - Properly excluded from computation of salary for retirement purposes.

Siebecker v. Mass. Teachers Retirement System, Docket No. CR-14-773, Decision (Mass. Div. of Admin. Law App., May 6, 2016).

Public charter school teacher - Annual career incentive payments, in addition to base salary, for performing contract duties and remaining employed by school system - Properly excluded from computation of salary for retirement purposes.

Burke v. Teachers Retirement Bd., Docket No. CR-15-428, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

Creditable Service

—Discovery Related to Creditable Service Purchase Denial Appeal

Document Requests

Motion to compel production of documents denied - Retirement appeal - Creditable service purchase request by retired public school teacher for prior teaching at nonpublic school (Boston School for the Deaf operated by Sisters of St. Joseph) - Denial by retirement system - Teacher's eligibility to receive retirement allowance from "any source" precluding retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Request by teacher to retirement system for documents regarding other system members allowed retirement credit for prior service at Boston School for the Deaf - Information beyond scope of material factual issues, notwithstanding retirement system's production of limited, redacted documents regarding members who taught previously at the School but had not worked there for ten years and did not qualify for retirement benefit from Sisters of St. Joseph Retirement Plan - No discretion under statute to allow retirement credit for prior service at School if retirement system member qualified for benefit under Retirement Plan - Order to compel production of other documents unnecessary - Retirement system produced documents and remained under continuing obligation to supplement production if it found other relevant documents.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Compel Production of Documents (Mass. Div. of Admin. Law App., May 24, 2017).

Interrogatories

Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluded retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Proposed interrogatories related to denial of creditable service based upon eligibility to receive retirement allowance from any source allowed as seeking relevant information - Proposed interrogatories asking whether tuition of students that teacher taught at Boston School for the Deaf was publicly funded in whole or part denied as seeking irrelevant information - Retirement credit not denied on this ground, and no claim on appeal that it was - Proposed interrogatories seeking information regarding other public school teachers allowed retirement credit for prior teaching service at Boston School for Deaf denied as seeking irrelevant information - Denial of credit for prior teaching service at nonpublic school pursuant to based upon eligibility for retirement benefit from "any source" not discretionary - Teacher allowed to pursue discovery via allowed interrogatories, and via subpoenas to successor to Retirement Plan administrator and actuary, regarding factual issues relevant to inquiry under M.G.L. c. 32, § 4(1)(p): whether she was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017).

Record-Keeper Subpoenas

Retired public school teacher - Prior teaching at nonpublic school - Health and physical education teacher - Boston School for the Deaf operated by Sisters of St. Joseph - Eligibility to receive retirement allowance from "any source" precluded retirement credit for prior nonpublic school teaching service under M.G.L. c. 32, § 4(1)(p) - Sisters of St. Joseph Retirement Plan - Receipt of payment from Plan after employment at nonpublic school ended - Discovery - Proposed record-keeper subpoenas to successors to Plan administrator and actuary - Records sought regarding contributions to Plan, and payment by Plan to former teacher - Relevance to factual inquiry under M.G.L. c. 32, § 4(1)(p): whether teacher was eligible to receive retirement benefits under Sisters of St. Joseph Retirement Plan, and whether payment she received from Plan after her employment at Boston School for the Deaf ended was retirement allowance - Subpoenas allowed.

Volpe v. Mass. Teachers' Retirement System, Docket No. CR-13-147, Decision and Order on Motion to Conduct Prehearing Discovery (Mass. Div. of Admin. Law App., May 11, 2017)

—Interest on Purchase (Buyback) of Creditable Service

Interest on creditable service purchases - Public school teacher - Special buyback interest rate offered by Massachusetts Teachers' Retirement System before statutory interest rate on creditable service purchases increased, on April 2, 2013, from 4.25% to 8.25% - Sufficiency of notice and failure to make buyback payment before due date - Teacher's application to purchase her prior service as a parochial school teacher postmarked, and filed with MTRS, before April 2, 2013 - MTRS confirmed receipt of application, and stated that because it was filed prior to April 2, 2013, teacher reserved her right to initial invoice at the lower buyback interest rate - Confirmation also estimated time to process her application to purchase creditable service at lower interest rate to be 12 months or more (due to overwhelming number of service purchase applications at lower interest rate that MTRS anticipated) - Confirmation stated that teacher would have 60 days from date MTRS issued her an invoice to either pay for the creditable service purchase in full, or to submit signed installment plan and first annual installment payment - Confirmation also noted that if teacher failed to take either of these steps by the invoice due date, or defaulted on the installment purchase agreement, subsequent purchase of her creditable service would be subject to the statutory interest rate in effect at that time - Invoice mailed to teacher on February 21, 2014 in windowed envelope contained bright, hot pink inserts stating need to select payment plan and make payment in full for creditable service or submit first payment under installment purchase payment plan by stated date to take advantage of lower interest rate, and that failure to do so would result higher interest rate applying if creditable service purchase payment was made afterward - Teacher had unlocked mailbox at end of her driveway, and checked it daily, as did her retired husband, with any mail received placed on counter inside house - Teacher first called MTRS about status of invoice for her creditable service purchase in October 2014, and was told to be patient and wait - During next telephone inquiry to MTRS, on January 6, 2015, teacher was told that invoice was sent to her on February 21, 2014, invoice payment due date was April 20, 2014, and since there was no response by the deadline, teacher was no longer entitled to lower buyback interest date - MTRS sent teacher written denial of her request to purchase prior service at lower buyback interest rate, and new invoice for creditable service purchase at higher statutory interest rate - Denial of request to purchase prior service at lower interest rate affirmed - Claim by teacher that she did not receive February 21, 2014 invoice and would have seen it if it had arrived in her mailbox rejected - Delivery in regular course of mails is presumed - MTRS presumed to have followed standard business practice of mailing invoices for creditable service purchases as soon as they were generated - No evidence to rebut either presumption - Teacher received other MTRS mailings sent to her home address before February 21, 2014 - MTRS had no duty to confirm receipt of mailed invoice - No general fiduciary duty in administering retirement system imposed by M.G.L. c. 32 upon retirement board - Sole duty was not to mislead retirement system member - Even if advice teacher received during her October 2014 call to MTRS is considered to have been misleading, however, it had no tangible effect upon her rights, as she had already missed the invoice deadline and forfeited the lower buyback interest rate, and her purchase had become subject to higher statutory interest rate on creditable service purchases - Argument that lower interest rate applied despite her failure to pay within 60 days of MTRS invoice because it was in effect when teacher filed creditable service purchase application before April 2, 2013, as MTRS regulations appeared to suggest (*see* 807 C.M.R. § 23.02) rejected as contrary to M.G.L. c. 32, § 3(8)(b), which required payment of prior service purchase in lump sum either within one year of reinstatement or in installment payments by April 2, 2013, whichever was later, and did not provide that applicable interest rate was based on date of application to purchase prior service - Allowing MTRS member to secure lower buyback interest rate by filing purchase application and then delay payment would frustrate statute and underfund her retirement allowance - MTRS reconciled members' right to confirm prior service buyback at lower interest rate and statutory requirements regarding buyback payment in view of anticipated buyback application backlog by requiring payment within 60 days of invoicing at lower interest rate - DALA lacked authority to employ equitable remedy relieving teacher of invoice payment deadline based upon her alleged failure to receive the invoice.

Perrault v. Massachusetts Teachers' Retirement System, Docket No. CR-15-32, Decision (Mass. Div. of Admin. Law App., Jul. 21, 2017)

Interest on creditable service purchases - Statutory interest rate - St. 2011, c. 176, amending M.G.L. c. 32, § 3(8)(b) - Interest rate changed from "buyback" rate of 4.25% to "actuarial assumed interest" rate of 8.25% - retirement system members wishing to preserve right to buyback certain types of service at "buyback" interest rate required to pay that rate, or enter into installment agreement to do so, before April 2, 2013 - Public school teacher - September 2004 application to purchase prior employment in school district as substitute teacher from September 1989 through June 1993- Invoice paid through rollover and installment plan, and purchase completed by February 2008 - Subsequent application in February 2013 to purchase substitute teacher service in school district from September 1993 through June 1994 - Retirement system mailed, to teacher's home address, invoice for buyback, together with alert on the increased buyback interest rate unless she paid for buyback in full or entered into installment plan and made first payment by invoice due date (August 16, 2014) - Teacher did not receive invoice and did not pay by due date - After several inquiries, teacher received new invoice in May 2015 applying new, actuarial interest to the service buyback purchase - Retirement system denied teacher's request to have lower buyback interest rate apply - Teacher retired October 11, 2015 - retirement system fulfilled obligations as to purchase by mailing invoice to teacher's residential address - No obligation to confirm its receipt - Teacher failed to purchase prior service in question prior to August 16, 2014, per statutory requirement - No equitable remedy provided by M.G.L. c. 32, § 3(8)(b) or by statute amending service buyback interest rate, St. 2011, c. 176 - Denial of request to apply lower buyback interest rate provided by statute affirmed.

Lauder v. Massachusetts Teachers' Retirement System, Docket No. CR-15-303, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Waiver of interest charges - Denial of waiver - School bus driver - Part-time field trip bus driver service rendered while not a retirement system member.

McDonough v. Quincy Retirement Bd., Docket No. CR-13-357, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

—Prior Service Eligible for Creditable Service Purchase

Late entry into retirement system membership - Eligibility to purchase creditable service - Town fire chief - Work performed as town fire chief prior to becoming retirement system member in 2009 - Issue was whether retiree was eligible for membership in retirement system during time period in question (*see* M.G.L. c. 32, § 3(3), "Late Entry Into membership") - Retirement system adopted policy in 2012 requiring that permanent work schedule requiring at least 20 hours per week of work was required to become retirement system member - Retired fire chief had burden of proving that during the period for which he wished to purchase service as fire chief prior to becoming retirement system member, he worked a permanent 20 hour per week work schedule - Burden of proof on this issue remains with retiree even if municipality's records are inadequate to show hours worked - Retiree testified during hearing that he had copies of time sheets showing he worked 40 hours per week as town fire chief starting in 2007, but he failed to produce them, and testimony that he worked those hours and that the time sheets showed them was therefore given no weight - Fact that town provided health insurance to fire chief even before he joined retirement system was not alterative proof of full-time work - Neither M.G.L. c. 32B nor town's policy and procedures manual prohibited town from providing medical insurance to employees who worked less than 20 hours per week - That town policy and procedures manual required retirement system membership for employees who worked 20 hours per week suggested that fire chief did not work 20 hours per week before his late entry into retirement system membership in 2009 - Statements that retirement system employees may have made in internal emails to effect that fire chief should have been member of retirement system prior to 2009 did not establish that, before 2009, he was working at least 20 hours per week - Statement by selectmen in 2011 during Board of Selectmen meetings regarding retiree's duties as fire chief did not support fire chief's claim that he worked those hours, and showed concern, instead, with fiscal soundness of providing fire chief with medical benefits when it was unclear how many hours he was working - Failure of town to comply with state law and its own personnel policy regarding retirement system membership of employees working at least 20 hours per week did not bind retirement board in determining whether to grant retiree creditable service for work as fire chief prior to becoming retirement system member.

> *Clement v. Essex County Regional Retirement System*, Docket Nos. CR-14-184, CR-13-294, Decision (Mass. Div. of Admin. Law App., Oct. 20, 2017), *reconsideration denied* (Mass. Div. of Admin. Law App., Nov. 21, 2017)

Denial of request to purchase service as part-time municipal employee prior to membership in retirement system, *see* M.G.L. c. 32, § 4(2)(c), reversed - Revere Police Department employee - Grant administrator - Part-time work for police department as grant administrator from October 1995 to February 2012, when she became full-time city employee and member of Revere Retirement System - No work contract, with payment upon submitting invoices to police chief or through grants she obtained for Department - Payment only for hours worked, 70-90 hours each month - No vacation or sick time accrued, and not paid when she did not come to work, regardless of reason - No retirement contributions made as part-time employee - Change to full-time employee status in 2012 due to increase in number of grants she administered and time needed to perform this work - Method of payment and number of hours worked changed after becoming full-time employee: regular daily work hours, vacation and sick time accrued, retirement system contributions made - No change in work responsibilities (writing grants, administering grant funds, and filing required reports) or daily activities - No change in direct supervision and control of work by police chiefs - No change in job or job title upon becoming full-time city employee - Request for creditable service for 1995-2012 part-time grant administration work denied by retirement board based upon conclusion that employee had been "vendor" rather than employee during that time - Part-time service was, however, that of "employee" as defined at M.G.L. c. 32, § 1- Payment by political subdivision of Commonwealth while part-time employee - Direct work for municipal police department - Work assigned and supervised by police chiefs - Grant funds from which she was paid for part-time work belonged to city - Full-time police officers employed by Revere Police Department were paid from grant funds as well - Police department also controlled place of work (worked in police department office as both part-time and full-time employee) - Part-time employment was "regular," as opposed to sporadic, intermittent or temporary, because work that grant administrator performed was continuous, even though it was part-time and the number of hours worked each week varied - Proof sufficed to show that petitioner was full-time police department employee eligible to purchase prior part-time service in department as creditable service.

Callahan v. Revere Retirement Bd., Docket No. CR-12-523, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Purchase of up to four years of compensated state contract employee service in substantially-similar position prior to membership in State Employees Retirement System - Part-time contract employment - Bunker Hill Community College Learning Center monitor - Substantial similarity with permanent position to which she transferred (Bunker Hill Community College Learning Center Testing Room Coordinator) and in which position she became State Employees Retirement System Member - Eligibility to purchase prior service established by evidence - More than ten years of creditable service while retirement system member- Retirement system membership as active member in service at time of creditable service purchase request - Sufficiency of information to determine dates of prior contract service, compensation rates and hours worked despite loss or destruction of facility's employment records - W2 forms, employment request form listing pay rate, and credible testimony by applicant and co-worker.

Niven-Blowers v. State Bd. of Retirement, Docket No. CR-15-61, Decision (Mass. Div. of Admin. Law App., Aug. 5, 2016).

—Prior Service Ineligible for Creditable Service Purchase

Employer Funded by Federal Job-Training Programs

Service with employers funded by federal job-training programs - Insufficient proof - Employment dates and salary - Employment with Commonwealth government unit or political subdivision.

Filkins v. State Bd. of Retirement, Docket No. CR-11-715, Decision (Mass. Div. of Admin. Law App., June 10, 2016).

Full-Time Prior Contract Service (M.G.L. c. 32, § 4(1)(s))

Retired Department of Mental Health (DMH) case worker, case manager and case coordinator - Application to purchase contract service at DMH between June 7, 1988 and June 24, 1989, pursuant to M.G.L. c. 32, § 4(1)(s), as employee of private contractor (Franklin/Hampshire County Community Mental Health Center, Inc.) providing mental health-related services to DMH - Payment exclusively by private contractor, before retiree and fellow Franklin/Hampshire team members became DMH employees - Not employed by DMH or by Commonwealth, and not a contract employer of DMH, during period of contract service - Not employed by "vendor functioning as instrumentality of Commonwealth," per State Board of Retirement regulations, *see* 941 C.M.R. § 2.09(3)(c) - Vendor not a public entity established by legislature and placed within state government - Denial of application to purchase contract service affirmed.

Hogan (Jonathan) v. State Bd. of Retirement, Docket No. CR-16-243, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017).

Juvenile Court Assistant Chief Probation Officer - Application to purchase up to four years of contract service, pursuant to M.G.L. c. 32, § 4(1)(s), with Robert F. Kennedy Children's Action Corps (RFK), where applicant worked for eleven years prior to becoming probation officer - Private, non-profit agency that contracted with Massachusetts Department of Youth Services - Work with juvenile offenders and their families - Regular contact with juvenile probation officers in state courts - RFK employee profile showing dates of employment, full-time work throughout tenure of employment, and dates of hourly pay rate increases did not show accounts from which employee was paid or that applicant was considered to be employee of Commonwealth - Employment by third party that contracted with Commonwealth, not by department, agency, board or commission of Commonwealth, as statute requires - Retirement Board's denial of request to purchase up to four years of contract service at RFK as creditable service affirmed.

Gibbings v. State Bd. of Retirement, Docket No. CR-14-108, Decision (Mass. Div. of Admin. Law App., May 12, 2017).

Part-Time Prior Contract Service

Part time contract service prior to full-time service - community college - ineligible for purchase for retirement purposes - service not performed "immediately preceding" (within 180 days of) membership in state employees retirement system or re-entry into active service in that system - previous service as "staff assistant" not shown to be substantially service to full-time position as "associate coordinator - insufficient documentation of part-time hours worked.

Freeman v. State Bd. of Retirement, Docket No. CR-13-531, Decision (Mass. Div. of Admin. Law App., Jan. 27, 2017).

Prior Non-Teaching Service in Charter School (M.G.L. c. 71, § 89(y) and M.G.L. c. 32, § 3(5)).

Public school teacher - Application to purchase service performed, prior to becoming member of Massachusetts Teachers' Retirement System, as "user support technician" at Worcester charter public school - Charter school statute provides that only teachers will be members of state teacher retirement system and earn creditable service for service in charter school, *see* M.G.L. c. 71, § 89(y) - User support technician provided technical support to teachers, administrators, students and parents which included maintaining computer repair services, troubleshooting, inventorying equipment, and training other tech personnel, but job was not fundamentally to provide classroom instruction in academic or vocational subjects - Teaching, if any was performed, was ancillary, not fundamental, to provision of technology support and services to students, their families, teacher and administrators - That applicant obtained, from state Department of Education, certification as an instructional technology specialist at all levels (provisional with advanced standing), and then licensing in this field, was not determinative as to whether she had been a teacher at the charter school - Not certified as a teacher while she worked as user support technician - None of the documents in the record regarding her state certification and licensing as instructional technology specialist contained the word "teacher" - Denial of application to purchase prior service at charter school affirmed.

Flanagan v. Massachusetts Teachers' Retirement System, Docket No. CR-15-650, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Prior Service in Non-Public School, But Not Engaged in Teaching Pupils (M.G.L. c. 32, § 4(1)(p))

Generally - Statutory definition of "teacher" as including school psychologist (*see* M.G.L. c. 32, § 1) does not make prior non-public school service involving performance of duties similar to those of public school psychologist purchasable for retirement purposes as creditable service pursuant to M.G.L. c. 32, § 4(1)(p), particularly where the prior service was primarily therapeutic in nature and did not involve teaching pupils - Purpose of including school psychologist (and other listed positions) in the statutory definition of "teacher" was to allow these public school employees to join the Commonwealth's teacher retirement system and have the right to purchase former public service, provided that it involved the direct teaching of academic or vocational subjects to pupils.

Loomis v. Massachusetts Teachers' Retirement System, Docket No. CR-15-269, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

School psychologist - Massachusetts Teachers' Retirement System Member - Application to purchase, for retirement credit, approximately 13 months of prior work as "parent worker" at Farr Academy (Chapter 766 school in Cambridge, Massachusetts) - Primary duties involved clinical family contacts, such as meetings with parents in groups and individually, assisting in student intake process and assisting staff in planning effective therapeutic strategies for each student, initiating and developing other resource placements to benefit students such as psychiatric evaluations, alcoholic groups and summer camp placements, developing fund-raising proposals, and observing classes and consulting with staff regarding students who may have had problems at home - "Minimal and moderate" direct interaction with students - Did not teach students in a classroom - No evidence that duties included teaching pupils or, thus, that applicant was previously engaged in teaching pupils at the school and met requirements of M.G.L. c. 32, § 4(1)(p) - Denial of creditable service purchase application affirmed.

Loomis v. Massachusetts Teachers' Retirement System, Docket No. CR-15-269, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Massachusetts Teachers' Retirement System member - Prior caseworker service at non-public school - Application to purchase creditable service for prior employment as (1) caseworker or head caseworker at Compass, Inc. (Chapter 766 non-public school) managing caseload of adolescents referred through Boston Juvenile Court, as well as providing individual and group counseling. Home visits, behavior management plans, classroom assistance and tutoring, and recreational activities; and (2) child care worker at Walker Home School and at Italian Home for Children (Chapter 766 non-public schools) providing group activities and behavioral management support for emotionally and behaviorally disordered boys - Although prior service undoubtedly contributed to overall education of children in these non-public schools, applicant was not engaged in teaching pupils, as required by M.G.L. c. 32, § 4(1)(p) - Essential job duties did not include directly teaching students any academic subjects or vocational skills, or creating any academic or vocational learning curricula - Developing and creating behavior management plans was administrative duty rather than teaching pupils.

Rose v. Massachusetts Teachers' Retirement System, Docket No. CR-16-43, Decision (Mass. Div. of Admin. Law App., Jul. 21, 2017).

Generally - M.G.L. c. 32, § 4(1)(p) permits any member of a contributory retirement system who is engaged in a teaching position and holds a certificate issued by the Massachusetts Department of Education or who is exempted from the teacher certification requirement, and who was previously engaged in teaching pupils in any Massachusetts non-public school, to purchase up to ten years of creditable service if the tuition of all pupils taught at the non-public school was financed fully or partially by the Commonwealth.

Romano v. Massachusetts Teachers' Retirement System, Docket No. CR-15-260 Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Generally - Although school administrators, school adjustment counselors or guidance counselors are entitled to membership in the Massachusetts Teachers' Association, the requirement of M.G.L. c. 32, § 4(1)(p) for the purchase of non-public teaching service are more stringent, and both DALA and the Contributory Retirement Appeals Board have interpreted the statutory requirement that the teacher seeking to purchase prior Massachusetts non-public school service for retirement purposes have been "engaged in teaching pupils" as pertaining to whether an essential job duty at the non-public school was to directly teach the students academic subjects or vocational skills or, stated another way, whether the primary goal of the non-public school position was fundamentally education or some other purpose; applying this analysis, DALA has held, for example, that a director of social services who performed one-on-one and group therapy and provided oversight to staff at a non-public school was not engaged in teaching pupils, and neither was a specialist whose primary goal was career development and not education involving traditional school subjects, and DALA has also held consistently that providing therapeutic services to students through individual, group and family therapy falls short of the statutory requirement that the teacher seeking to purchase prior non-public school service must have been engaged in teaching pupils.

Romano v. Massachusetts Teachers' Retirement System, Docket No. CR-15-260 Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Massachusetts Teachers' Retirement System member - Prior family therapist service at non-public school - Application to purchase approximately 13 months of creditable service for her prior work as a family therapist at the Lighthouse School (private, non-profit school for students with severe learning disabilities that prevented them from being able to learn adequately in conventional school settings or participate in regular academic programs offered in their public school districts) - No evidence that applicant directly taught any academic or vocational curriculum to Lighthouse School students or, thus, that applicant was previously engaged in teaching pupils at the school and met requirements of M.G.L. c. 32, § 4(1)(p) - Denial of creditable service purchase application affirmed.

Romano v. Massachusetts Teachers' Retirement System, Docket No. CR-15-260 Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Public school teacher - Prior service as special education head teacher and language arts teacher at nonpublic school serving emotionally disturbed pupils aged 8-12 years - Lack of credible evidence that all of teacher's students at private school were funded partially or fully by the Commonwealth - Denial of creditable service purchase application affirmed.

Wolfson v. Massachusetts Teachers' Retirement System, Docket No. CR-12-109, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017).

Massachusetts Teachers' Retirement System member - Application to purchase, as creditable service for retirement purposes, prior service from 1991-1993 as "Head Teacher/Supervisor" of Network High School in Brockton, a non-public school whose students were residential clients of Massachusetts Department of Children and Families - Appeal to DALA from denial, by MTRS, of application pursuant to M.G.L. c. 32, § 4(1)(p) because member was not engaged in teaching pupils at non-public school - Duties at Network High School comprised working with teachers, teaching assistants and counselors to help educate students, writing and implementing the school's English and remedial mathematics curriculum, and implementing the school's technology curriculum - Worked in classrooms five hours each day, but was not assigned a classroom and was not a classroom teacher - Classroom work consisted of assisting classroom teachers and managing students, helping students to pay attention and stay on task, intervening with anxious students or those whose behavior was "escalating," presumably into problematic behavior, and helping students with social skills and English, although there was no evidence that he stood in front of students and taught English or English arts - Occasionally took students out of classroom to engage in one-on-one or small group work - Only classroom teaching was episodic (lasting a day, a week or a month), as a "substitute" in school that had no substitute teachers, and also had residential duties - Documentary evidence did not show that applicant was engaged in teaching pupils at Network High School - DALA magistrate so informed member prior to hearing, and advised that it was his burden to demonstrate his classroom activities and prove that he was engaged in teaching pupils - Despite this instruction, member's direct testimony omitted details about his teaching - No testimony that he taught academic subjects while working with students one-on-one or outside the classroom, that "English arts" was an academic subject similar or equivalent to English, or that he taught academics when he was a substitute teacher, and no testimony as to how much time he spent as substitute teacher from 1991-1993 - Questions to member by magistrate about teaching duties not answered forthrightly, or else answers veered off-topic - As valuable as they were, applicant's work as supervisor, helping classroom teachers, and helping students master social skills and control their behavior was not teaching academics - Statutory phrase "teaching pupils" is given narrow interpretation and means teaching academics - Failure of member to prove that he was engaged in teaching pupils was failure to meet prerequisite for purchasing prior non-public school teaching as creditable service under M.G.L. c. 32, § 4(1)(p) - Denial of application to purchase creditable service affirmed.

Carroll v. Massachusetts Teachers' Retirement System, Docket No. CR-15-08, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2016).

Unpaid Leave

Public school teacher - Unpaid maternity leave following paid family leave - Ineligible for credit purchase except for one month discretionary credit exception that retirement board may award.

Hackenson v. Massachusetts Teachers' Retirement System, Docket No. CR-14-94 (Mass. Div. of Admin. Law App., July 1, 2016).

Early Retirement Incentive Program (ERIP)

—Eligibility for ERIP, Generally

To be eligible to participate in the Early Retirement Incentive Program established by St. 2015, c. 19, an employee must be employed by an executive department of the Commonwealth, be a member of the State Employee Retirement System, and be classified in Group 1 for retirement purposes pursuant to M.G.L. c. 32, § 32(2)(g) - Per M.G.L. c. 32, § 3(2)(g), Group 1 includes "[o]fficials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified, while Group 2 includes "employees of the Commonwealth or of any county, regardless of any official classification, except the sheriff, superintendent, deputy superintendent, assistant deputy superintendent and correction officers of county correctional facilities, whose regular and major duties require them to have the care, custody, instruction or other supervision of prisoners" - Employee's "regular and major duties" are those that the employee must spend more than half his time doing - "Care" means direct care, and not all direct contact is direct care.

Clement v. State Bd. of Retirement, Docket No. CR-15-299, Decision (Mass. Div. of

Admin. Law App., Dec. 8, 2017).

To be eligible to participate in the Early Retirement Incentive Program established by St. 2015, c. 19, which allows certain eligible Group 1 employees to receive enhanced retirement benefits (including the addition of five years of creditable service to years of total service), an employee must be employed by an executive department of the Commonwealth, be a member of the State Employee Retirement System, and be classified in Group 1 for retirement purposes pursuant to M.G.L. c. 32, § 32(2)(g).

Costello-Gordon v. State Bd. of Retirement, Docket No. CR-15-331, Decision (Mass. Div. of Admin. Law App., Jul. 12, 2017)

Per M.G.L. c. 32, § 32(2)(g), Group 1 includes "officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all other not otherwise classified," and, per this section's 2012 amendment, which became effective on July 1, 2012, Group 2 includes "employees of the department of children and families holding the title of social worker A/B, C or D or successive titles who have been employed in such titles for 10 years or more," which reflected the legislature's view that all social worker positions involved the direct care, custody, control, instruction or other supervision over children in their Department of Children and Family Services caseloads. The amendment was not retroactive and did not apply, therefore, to social workers who retired before July 1, 2012.

Costello-Gordon v. State Bd. of Retirement, Docket No. CR-15-331, Decision (Mass. Div. of Admin. Law App., Jul. 12, 2017).

Social worker who retired before July 1, 2012 (the effective date of an amendment of M.G.L. c. 32, § 32(2)(g) that classified Department of Children and Families social workers employed for 10 years or more in Group 2 for retirement purpose)was properly classified in Group1 absent a showing that his or her regular and major duties required (as the statute required before its 2012 amendment) the "care, custody, instruction or other supervision of parolees or other persons who were mentally ill or mentally defective or defective children or wayward delinquents," and that these regular and major duties comprised at least 51 percent of his or her duties.

Costello-Gordon v. State Bd. of Retirement, Docket No. CR-15-331, Decision (Mass. Div. of Admin. Law App., Jul. 12, 2017).

—Eligible to Participate in ERIP

Department of Developmental Services (DDS) Human Service Coordinator A/B employed at Fernald School (a residence for mentally challenged individuals in DDS care) - Classification in Group 2 for retirement purposes, which made petitioner ineligible for the Early Retirement Incentive Program (ERIP), reversed - Petitioner, the sole hearing witness, testified credibly that she spent majority of her time coordinating and supervising vendors who provided Fernald residents with direct care, doing paper work including preparing monthly reports, individual service plans for residents and developing field packets, traveling, and conducting team meetings, that she visited individual residents' residences and met with guardians and held team meetings of care personnel as needed but spent 30 percent of her time dealing with individuals, did not supervise any DDS employees, did not see Fernald residents on a daily basis, did not assist with residents' daily activities including dressing, bathing and medication (which vendors performed), never transported Fernald residences, did not provide hands-on crisis intervention, and spent 40-50 percent of her time in her office each week - petitioner's Form 30 confirmed that her job duties involved coordinating, monitoring and supervising care - Petitioner's job duties and actual duties performed showed that she did not provide direct care to Fernald residents, and that her regular and major duties did not require her to have the care, custody, instruction or other supervision of the residents - Retirement board directed to reclassify petitioner in group 1 and process her ERIP application.

Clement v. State Bd. of Retirement, Docket No. CR-15-299, Decision (Mass. Div. of Admin. Law App., Dec. 8, 2017).

Incorrect Group 2 classification for retirement purposes - Eligibility to participate in St. 2015, c. 19 Early Retirement Incentive Program - Department of Developmental Services (DDS) Psychologist III - As Psychologist III at DDS's Arlington Office, had no caseload, rarely met with individuals receiving care from DDS, and any such meetings occupied approximately two hours of psychologist's 40-hour work week - 95 percent of time prior to retirement devoted to work with DDS's "positive behavioral supports initiative," which met with an advisory board and a subcommittee to implement statewide changes promoting positive behavior in every program and home that DDS funded throughout Massachusetts - As Psychologist III at DDS's Central Middlesex Area office (from 2014 until retirement in June 2015), general job duties and responsibilities were supervising and/or coordinating and providing program direction for provision of professional psychological services including diagnostic evaluations, counseling, therapy or testing, as well as planning programs for individual client treatment recommending suitable referrals for treatment, organizing and coordinating the provision of clinical services, and developing programs - Most recent employee performance review form described duties as including provision of behavioral, psychological and therapeutic support to individuals, providing behavioral support and consultation to families for individuals living in their homes, providing consultation and facilitation to groups, provider agencies and area office staff to address behavioral and psychological issues, managing and facilitating risk management processes, and addressing requests for DDS-funded supports - Helped support individuals who were "mentally defective," but did not have the care, custody, instruction or control of individuals residing in DDS's group homes - Had primarily administrative, consultative, advisory and management duties and minimal contact with individuals supported by DDS - Despite suggestions to contrary in employee performance review form description of duties, rarely provided any direct services to individuals, which is required for Group 2 classification - No evidence that ERIP applicant was engaged in care, custody, instruction or control of individuals even when she met with DDS individuals - Instead, she supported those who provided direct care to them - More than half of her time was occupied with committee work and office management, and official description of job duties (Form 30) recognized this - Evidence clearly supported classification in Group 1 for retirement purposes - Proper classification for retirement purposes was Group 1 rather than Group 2 - Group 2 classification reversed - Remanded to state Board of Retirement to classify in Group 1 and approve ERIP application, and make any necessary adjustments to retirement allowance.

Roberts v. State Bd. of Retirement, Docket No. CR-15-297, Decision (Mass. Div. of Admin. Law App., September 1, 2017).

Incorrect Group 2 classification for retirement purposes - Eligibility to participate in St. 2015, c. 19 Early Retirement Incentive Program - Department of Public Health Registered Nurse III - Massachusetts Hospital School (Pappas Rehabilitation Hospital for Children) - Supervision by nurse manager and assistant nursing director - Work as day shift charge nurse for pediatric patients in acute care units specializing in infectious diseases, cardiology, pulmonology, neurology, physical medicine and rehabilitation, as well as dental, orthopedic, behavioral and mental health services and alternative medicine - Majority of patients in units dependent upon staff for personal care and mobility needs - Large portion of time spent consulting with hospital pharmacy staff, updating families and hospital staff as to status of patients, arranging patient transfers to other facilities, overseeing paperwork, and arranging pediatric followup - Minimal work as direct care nurse, once or twice per month - "Form 30" for position described general duties and responsibilities as supervising provision of direct nursing care and treatment to pediatric patients, assessing health and educational needs of patients and families, assisting with patient admission and discharge, and facilitating rehabilitation and supervising assigned staff, as well as supervision from registered nurse of higher grade - Regular and major duties concerned supervision, planning, and evaluating, and policy-related duties, rather than having care, custody, instruction or other supervision of mentally ill or mentally defective persons, the prerequisite for Group 2 classification - Proper classification of position for retirement purpose was Group I - Group 2 classification reversed - Board ordered to process employee's ERIP application.

Morreale v. State Bd. of Retirement, Docket No. CR-15-332, Decision (Mass. Div. of Admin. Law App., Mar. 10. 2017).

—Ineligible to Participate in ERIP

Group 2 classification of position by board for retirement purposes - Ineligibility to participate in St. 2015, c. 19 Early Retirement Incentive Program - Employment by Department of Children and Families for 10 years as Social Worker D, working at retirement in January 2016 as screening supervisor who assigned cases to social service staff - "Form 30" job description for Social Worker D stated that person holding position had responsibility of assigning cases to social service staff, supervising substitute case managers, supervising home-finding and adoption services provided by social workers, supervised and evaluated level and quality of intake, assessment, service planning and case management services, coordinated case reviews, approved major casework decisions and reviewed departmental reports, and provided orientation for new employees and identified employee training needs - Employee Performance Rating Form stated that five separate staff positions reported to a Social Worker D, and that applicant's supervisor evaluated her abilities to implement department policies, and supervise staff, new employees and interns - Duties at time of retirement showed that applicant may have been classified in Group 1 prior to July 1, 2012 (the effective date of an amendment of M.G.L. c. 32, § 3(2)(g) that classified Department of Children and Families social workers employed for 10 years or more in Group 2 for retirement purpose), but applicant retired after that amendment, in January 2016, and she had worked as a D.F. social worker for more than ten years - Statute as amended in 2012 applied - Applicant classified properly in Group 2 - Claims that she had been classified in Group 1 as a D.F. social worker and that her major duties did not involved care, custody or control of mentally ill children in D.F. care (a claim supported by her job description and supervisor's reviews) amounted to request for equitable relief through treatment as Group 1 employee contrary to statute, which DALA lacked authority to grant - Decision of Massachusetts State Board of Retirement classifying applicant in Group 2 and, therefore, as ineligible for ERIP affirmed.

Costello-Gordon v. State Bd. of Retirement, Docket No. CR-15-331, Decision (Mass. Div. of Admin. Law App., Jul. 12, 2017).

Massachusetts Department of Public Health (DPH) Healthcare Facility Specialist (Surveyor) surveying laboratories under DPH Clinical Laboratory Program monitoring compliance and providing certification and licensure under state and federal law, including Social Security Act section 1864, 42 U.S.C. § 1395aa (federal laboratory inspection program), and Clinical Laboratory Improvement Amendments of 1998 (CLIA) - Ineligibility of employee holding position to participate in Acts 2015, ch. 19 Early Retirement Incentive Program - Position funded by "federal grant monies" that were not "federal reimbursements," as defined at M.G.L. c. 29, § 1 - Money received by Massachusetts Department of Public Health from federal government to pay for cost of inspecting laboratories to determine whether they complied with federal standards.

Abdelahad v. State Bd. of Retirement, Docket No. CR-15-292, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Group 2 classification of position by board for retirement purposes - Ineligibility to participate in St. 2015, c. 19 Early Retirement Incentive Program - Massachusetts Department of Public Health Recreational Therapist I - Patient Care Unit of DPH's Tewksbury Hospital - Ineligibility to participate in Early Retirement Incentive Program - Regular and major duties involving direct patient care - "Form 30" job description for recreational Therapist I position showing no required management experience or supervision of subordinate employees, and listing duties requiring that employee have care, custody, instruction or other supervision of mentally ill or mentally defective persons - Working with patients, some from Department of Developmental Services, with physical and mental disabilities, and providing them with daily activities including bowling, cooking, games, crafts and music - Assessment of individual therapeutic recreational abilities and needs, and setting individual goals and objectives for patients according to assessment - No evidence of classification in Group 1 when employment began, or classification of co-workers in same position being classified in Group I - Denial of ERIP application affirmed.

Carpenter v. State Bd. of Retirement, Docket No. CR-15-530, Decision (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Group 2 classification for retirement purposes - Massachusetts Department of Mental Health Clinical Social Worker "C" - Ineligibility to participate in Early Retirement Incentive Program - Dismissal of appeal - Lack of prosecution - Failure to file prehearing memorandum and hearing exhibits, appear for hearing, or elect submission of appeal upon written filings - Statement of intention not to pursue appeal further.

Howard v. State Bd. of Retirement, Docket No. CR-15-322, Order of Dismissal (Mass. Div. of Admin. Law App., Feb. 13, 2017).

Employment by non-qualifying agency - University of Massachusetts - Appeals - Dismissal - Mootness - Withdrawal of ERIP application - Expiration of ERIP application deadline.

Jochim v. State Bd. of Retirement, Docket No. CR-15-328, Decision (Mass. Div. of Admin. Law App., Oct. 28, 2016).

Group Classification for Retirement Purposes

—Pro-Rating Group Classification

Generally - Until 2011, group classification for retirement purposes depended solely upon the retirement system member's position at the time of retirement - Legislation enacted in 2011 provides that any active retirement system member as of April 2, 2012 who has served in more than one group *may* elect to receive a retirement allowance consisting of pro-rated benefits based upon the percentage of total years of service that the member rendered in each group, but a public employee who became a retirement system member on or after April 2, 2012 is *required* to pro-rate his service (*see* St. 2011, c. 76, § 14 and M.G.L. c. 32, § 5(2)(a)), and pro-rated retirement benefits are calculated as the Public Employee Retirement Administration Commission (PERAC) prescribes (*see* PERAC Memorandum # 29, 2012).

Nelson v. State Bd. of Retirement, Docket No. CR-15-10, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017).

Denial of request to pro-rate retirement system member's years of service in Group 1 and 4 positions affirmed - Pre-retirement request by former firefighter to classify his prior call firefighter service in Group 4, as was his firefighter service, and to then pro-rate his retirement allowance benefits as between his years of service in Group 4 positions (call firefighter, firefighter and EMT) and his Group 1 service as an assistant professor position at a public community college, his position at the time of retirement - Denial of request sustained, but for reasons different than those asserted by the retirement board - Applicant was no longer a public employee, having left his assistant professor position in 2014 to work for a private hospital as an emergency room diagnostic technician - No retirement application yet filed with retirement board, meaning that when he retired he would be a retirement system member who entered service before April 2, 2012 but would no longer be a public employee at the time of his retirement, and would therefore be ineligible to pro-rate his service as between his years of service in different retirement groups and would have to be classified based upon the Group 1 assistant professor position in which he was last employed, *see* M.G.L. c. 32, § 5(2)(a) - As a result of the statutory requirement, issue of group classification for prior call firefighter service was moot - Re-entry into public employment, and would allow applicant to again request that retirement system to which he belonged at time of retirement pro-rate his past service under Chapter 32, section 5(2)(a).

Nelson v. State Bd. of Retirement, Docket No. CR-15-10, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017)

Employee's group classification for retirement purposes generally depends on his or her duties upon retiring - In some circumstances, employee who has served in more than one group may receive retirement benefits pro-rated among groups.

Forbes v. State Bd. of Retirement, Docket No. CR-13-146, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

—Reclassification from Group 1 to Group 2

Generally

Types of service listed in "Group 2" definition - Having care, custody, instruction or other supervision of "defective delinquents or wayward children"- Department of youth Services (DYS) Casework Manager - Regular and major duties alleged to have required such care, custody, instruction or other supervision - No definition of "defective delinquents" or "wayward children" at M.G.L. c. 32, § 3((2)(g) - Definitions of phrases removed from General Laws in 1970s - As a matter of law, it appears no longer possible for a state employee to have regular and major duties requiring him to have "the care, custody, instruction or other supervision of . . . defective delinquents or wayward children" or, on that basis, to be classified in Group 2 or receive pro-rated retirement benefits for Group 2 service.

Curtin v. State Bd. of Retirement, Docket No. CR-13-317, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

What others may have told petitioner seeking reclassification of service from Group 1 to Group 2 about same work being so reclassified by retirement board was hearsay and did not show any such reclassification reliably - Even if it occurred, previous reclassification of service in question would not have precluded retirement board from changing its mind, particularly if board could no longer reconcile reclassification with M.G.L. c. 32, § 3(2)(g)'s Group 2 definition - Even if the Board did not do so, correction could be made on appeal by DALA and Contributory Retirement Appeal Board.

Curtin v. State Bd. of Retirement, Docket No. CR-13-317, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Per M.G.L. c. 32, § 3(2)(g), Group 2 includes "employees of the Commonwealth or of any county, regardless of any official classification, except the sheriff, superintendent, deputy superintendent, assistant deputy superintendent and correction officers of county correctional facilities, whose regular and major duties require them to have the care, custody, instruction or other supervision of prisoners," while Group 1 has been recognized as the "catch-all" category that includes "[o]fficials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified."

Mendonsa v. State Bd. of Retirement, Docket No. CR-11-424, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Determination of proper group classification of employee for retirement purposes is based on job the employee held and the duties he performed at the time of retirement - Petitioner challenging denial of group 2 classification based upon claim that he had the care, custody, instruction or other supervision of prisoners at a Massachusetts Department of Corrections minimum security prison was required to prove by a preponderance of the evidence that his regular and major duties, or at least 51 percent of his duties, embodied such care, custody, instruction or other supervision of prisoners at the facility, and that when he rendered such care, custody, instruction or other supervision to individual prisoners to any individual inmate or in group sessions, it was not merely incidental to or in the context of some greater administrative function, and whether he did so or not depends upon what his regular and major duties were, as to which his job description and actual duties performed are important factors.

Mendonsa v. State Bd. of Retirement, Docket No. CR-11-424, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Types of service listed in "Group 2" definition - Having care, custody, instruction or other supervision of persons who are mentally ill - Having contact and interactions with mentally ill people does not constitute having care, custody, instruction or supervision of them - Supervising staff members who have care, custody, instruction or supervision of mentally ill people does not constitute having such care, custody, instruction or supervision.

Sprague v. State Bd. of Retirement, Docket No. CR-10-790, Decision (Mass. Div. of Admin. Law App., Jun. 16, 2017)

Classification of Commonwealth employees into Groups for retirement purposes under M.G.L. c. 32, §3(2)(g) - Classification based upon job that retirement system members has at time of retirement - Job title and job description are key information used to determine appropriate Group classification - Group 2 includes commonwealth employees “whose regular and major duties require them to have care, custody, instruction or other supervision of . . . persons who are mentally ill or mentally defective delinquents” - Reclassification - Burden of proof - Retirement system member seeking reclassification from Group 1 to Group 2 based upon direct care, custody, instruction or supervision of mentally ill or mentally retarded persons has burden of proving that her regular and major duties, or at least 51 percent of duties, during her last year of work in position in question comprised this type of work and responsibility, and cannot have been merely incidental to, or in the context of, performing some greater administrative function.

Williams v. State Bd. of Retirement, Docket No. CR-12-229, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

Department of Youth Services (DYS) Casework Manager - Regular and major duties alleged to have required having care, custody, instruction or other supervision of “defective delinquents or wayward children,” a type of service listed in the Group 2 definition, *see* M.G.L. c. 32, § 3(2)(g) - No definition of “defective delinquents” or “wayward children” at M.G.L. c. 32, § 3((2)(g) - Definitions of phrases removed from General Laws in 1970s - Chapter 32 was not amended to reflect the elimination of these terms - No statute, specific court decision, or general principle of statutory construction provides that references to “defective delinquents” or “wayward children” now mean youth under DYS’s care - Elimination of “defective delinquents” and “wayward children” from General Laws means it is no longer possible for state employee to have “the care, custody, instruction or other supervision of . . . defective delinquents or wayward children,” or to have regular and major duties involving “defective delinquents or wayward children,” and having care, custody, control or other supervision of “youth in DYS’s care” therefore cannot be classified in Group 2 or receive pro-rated retirement benefits for Group 2 service on the basis of having “the care, custody, instruction or other supervision of . . . defective delinquents or wayward children.”

Forbes v. State Bd. of Retirement, Docket No. CR-13-146, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

Group 2 is retirement classification group for various Commonwealth employees including those whose regular and major duties require them to have the care, custody, instruction or other supervision of prisoners, with exception of sheriff, superintendent, deputy superintendent, assistant deputy superintendent, and correction officers of county correctional facilities (*see* M.G.L. c. 32, § 3(2)(g)) - Exception did not apply to superintendent of Massachusetts Alcohol Substance Abuse Center, as this was a Commonwealth, rather than a county, facility - Group 2 is, in addition, for employees who work with prisoners, not detainees.

Martin v. State Bd. of Retirement, Docket No. CR-09-1065, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

Reclassification Denied - Group 1 to Group 2

Department of Youth Services (DYS) - Prior service as DYS Casework Manager - Reclassification of Casework Manager service from Group 1 to Group 2 sought based upon having regular and major duties required having care, custody, instruction or other supervision of "defective delinquents or wayward children," a type of service listed in the Group 2 definition, *see* M.G.L. c. 32, § 3(2)(g) - Denial of reclassification by retirement board affirmed - No definition of "defective delinquents" or "wayward children" at M.G.L. c. 32, § 3((2)(g) - Definitions of phrases removed from General Laws in 1970s - As a matter of law, it appears no longer possible for a state employee to have regular and major duties requiring him to have "the care, custody, instruction or other supervision of . . . defective delinquents or wayward children" or, on that basis, to be classified in Group 2 or receive pro-rated retirement benefits for Group 2 service - Reading phrase "defective delinquents or wayward children" broadly to include juveniles assigned to DYS by the courts *per se* would effectively amend statutory Group 2 definition, which DALA lacks authority to do - Even if phrase could be read properly as including juveniles assigned to DYS by the courts, petitioner did not show that time he spent performing regular and major duties of DYS Casework Manager was spent primarily in exercising direct custody of such juveniles, or in directly providing instruction or other supervision to them, despite his hands-on involvement in the work of one of DYS's community day reporting centers - "Form 30" for DYS Casework Manager did not assign him such responsibility - Casework manager did not carry a caseload as DYS caseworkers did - When casework manager exercised direct custody of, and provided direct instruction or other supervision to, DYS juveniles, it was incidental to or in the context of a greater administrative function he exercised as a Casework Manager.

Curtin v. State Bd. of Retirement, Docket No. CR-13-317, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

Tewksbury Hospital Manager and Licensed/Registered Dietician - Appeal challenging denial of request to reclassify position from Group 1 to Group 2 - Denial affirmed - Hospital had 550 patients, of whom 200-225 were chronically mentally ill, with the remainder medically-involved long-term care patients, 60-70 percent of whom had mental health issues - Although hospital manager covered for direct care providers when they were absent, manager had no caseload of patients for whom hospital manager provided direct care - Even when covering for absent caregiver, manager had no duty to put patients to bed or help them dress, and nutrition assessment was example of the type of duty she covered for - Involved in ethics consultations, which entailed talking to patients if they were conscious, talking to their families, and participating in decisions such as whether to withdraw feeding tubes - Manager held community meetings with patients, sometimes 25 at a time, to hear about issues with food service, and most of her patient contact was in community meetings - On management questionnaire she completed nearly two years before retiring, manager emphasized and described supervisory duties, discussed supervisory decisions she had made rather than decisions regarding direct care of patients, and did not describe any direct patient care - Most recent description of manager's objectives prepared by her supervisor before manager retired listed planning, organization, direction, supervision, evaluation and effective oversight of occupational therapy, physical therapy, speech/language pathology, food and nutrition services, and adaptive equipment departments; functioning as contract manager as to an annual hospital budget of nearly $3.6 million, and providing fiscal and operational oversight of vendor staff; functioning as project manager for conversion of hospital's current food service production and delivery system; and participating in implementation of an executive order requiring state agencies to follow nutrition standards when contracting to purchase food - On group classification questionnaire, manager wrote that she provided supervision and training to approximately 110 direct care employees, and providing care and treatment to medically and mentally ill patients who had behavioral issues and criminal backgrounds, attending patient-centered meetings and rounds, interviewed patients and families, investigating incidents and complain ts, provided ethics consultations, reviewed patient charts, audited inspections of patient care areas, did meal rounds, and interacted with patients on a daily basis - At the time of her retirement, and for not less than 12 months preceding it, manager's regular and major duties did not require her to have the care, custody, instruction or other supervision of mentally ill people, and record did not reveal when her duties last required this - Forms describing duties did not indicate that manager spent 51 percent of her time having the care, custody, instruction or supervision of patients - Manager's difficulty, during her hearing testimony, breaking down the percentages of her time spent on her various duties, including managing clinical and non-clinical services, providing leadership, direction and training to departments and programs, budgeting, serving on committees, and delivering direct care, revealed the ambiguity of her claim to have spent most of her time engaged in providing direct patient care to mentally ill patients, and was not enough to sustain her burden of proof on this point.

Nelson v. State Bd. of Retirement, Docket No. CR-15-10, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017).

Department of Developmental Services (DDS) Mental Retardation Worker IV -

Appeal challenging denial of request to reclassify position from Group 1 to Group 2 - Superannuation retirement at age 66 while appeal of group reclassification denial was pending - State Board of Retirement's motion to dismiss appeal as moot granted - Superannuation retirement allowance calculated, per M.G.L. c. 32, § 5(2), as product of retirement system member's creditable service, member's annual rate of regular compensation, and an age factor determined by member's age at retirement and group classification - Maximum age factor used in calculation is 2.5 - Maximum age factor of 2.5 reached in Group 1 at age 65, and in Group 2 at age 60 - Upon retirement at age 66, DDS employee reached maximum age factor of 2.5 for Group 1 employee, and would have reached it earlier, at age 60, had he been classified in Group 2 - Reclassification in Group 2 would not increase his retirement allowance, as he was already receiving the maximum retirement allowance - Reclassification appeal was therefore moot.

Pierre-Louis v. State Bd. of Retirement, Docket No. CR-10-20, Decision (Mass. Div. of Admin. Law App., Jul. 21, 2017).

Massachusetts Hospital School for disabled children - Retired Power Plant Supervisor - Position not among public safety-related jobs or others listed in statute describing group 2 (M.G.L. c. 32, § 3(2)(g))- No responsibility for custody and care of delinquents or wayward children, or of any children, at the school.

Kennefick v. State Bd. of Retirement, Docket No. CR-12-317, Decision (Mass. Div. of Admin. Law App., Feb. 17, 2017).

Department of Youth Services (DYS) - Prior service as DYS Casework Manager - Reclassification of Casework Manager service from Group 1 to Group 2 sought based upon having regular and major duties required having care, custody, instruction or other supervision of "defective delinquents or wayward children," a type of service listed in the Group 2 definition, *see* M.G.L. c. 32, § 3(2)(g) - Denial of reclassification by retirement board affirmed - Department of Youth Services (DYS) Casework Manager - Regular and major duties alleged to have required having care, custody, instruction or other supervision of "defective delinquents or wayward children," a type of service listed in the Group 2 definition, *see* M.G.L. c. 32, § 3(2)(g) - No definition of "defective delinquents" or "wayward children" at M.G.L. c. 32, § 3((2)(g) - Definitions of phrases removed from General Laws in 1970s - Chapter 32 was not amended to reflect the elimination of these terms - No statute, specific court decision, or general principle of statutory construction provides that references to "defective delinquents" or "wayward children" now mean youth under DYS's care - Elimination of "defective delinquents" and "wayward children" from General Laws means it is no longer possible for state employee to have "the care, custody, instruction or other supervision of . . . defective delinquents or wayward children," or to have regular and major duties involving "defective delinquents or wayward children," and having care, custody, control or other supervision of "youth in DYS's care" therefore cannot be classified in Group 2 or receive pro-rated retirement benefits for Group 2 service on the basis of having "the care, custody, instruction or other supervision of . . . defective delinquents or wayward children" - Petitioner also did not show that he spent at least 51 percent of his time as a Casework Manager engaged in care, custody, instruction or other supervision of youth assigned to DYS - Testimony showed that at most half of his duties were administrative and half entailed working directly with youth under DYS's care - Although evaluations of his performance as Casework Manager referred to his "caseload," Form 30 for Casework Manager did not mention maintaining a caseload, and "caseload" comprised filling in for case workers if they were on vacation, on leave, or had conflicting appointments.

Forbes v. State Bd. of Retirement, Docket No. CR-13-146, Decision (Mass. Div. of Admin. Law App., Dec. 23, 2016).

Superintendent of Massachusetts Alcohol Substance Abuse Center (MASAC) - Commonwealth (not county(facility for criminally-sentenced, minimum security male inmates and civilly-committed male detainees in 30-day detoxification and substance abuse program under M.G.L. c. 123, § 35, which does not refer to prisoners or otherwise indicate that persons committed under this statute are prisoners or inmates - Group 2 classification is for employees who work with prisoners, not detainees - MASAC Superintendent held supervisory position requiring management of $7 million budget, making personnel decisions including hiring, firing, promotions and discipline, and supervision of 172 employees - Conducted morning staff meeting regarding detainees (but not inmates) sent to facility by courts for detoxification, but detainees were not present during these meetings,- Office was inside facility perimeter - Observed, and sometimes was approached by, inmates, and was available to hear, and possibly resolve, inmate grievances - Supervised the care, custody, instruction, and other supervision of inmates and detainees by other facility staff, but did not herself engage in it - Denial of reclassification of position from Group 1 to Group 2 for retirement purposes affirmed.

Martin v. State Bd. of Retirement, Docket No. CR-09-1065, Decision (Mass. Div. of Admin. Law App., Nov. 2, 2016).

Department of Developmental Services Program Monitor/Program Coordinator III - Regular and major duties did not include direct care, custody, instruction or other supervision of persons who are mentally ill or defective.

Camara v. State Bd. of Retirement, Docket No. CR-15-460, Decision (Mass. Div. of Admin. Law App., Sept. 16, 2016).

Department of Children and Families (DCF) Social Worker "D" - Inapplicable statutory reclassification of DCF social workers in Group 2 - Retirement Prior to effective date of statutory reclassification.

Bombaci v. State Bd. of Retirement, Docket No. CR-11-324, Decision (Mass. Div. of Admin. Law App., June 24, 2016).

Massachusetts Hospital School - Staff Registered Nurse V and Staff Education Nurse - Regular and major duties not primarily care, custody, instruction or other supervision of mentally ill or defective persons.

Dewey v. State Bd. of Retirement, Docket No. CR-12-58, Decision (Mass. Div. of Admin. Law App., June 3, 2016).

Holyoke Soldier's Home - Registered Nurse II - Insufficient evidence that regular and major duties required care, custody, instruction or other supervision of mentally ill or mentally defective persons - Facility provided medical rather than psychiatric care - No quantification, in classification specifications for RN II position, of number of mentally ill patients required to be in care of RN II in any single shift - No reference to care of mentally ill patients in employee performance review form.

Borucki v. State Bd. of Retirement, Docket No. CR-12-683, Decision (Mass. Div. of Admin. Law App., Apr. 22, 2016).

Reclassification Granted - Group 1 to Group 2

Massachusetts Department of Corrections- Appeal challenging denial of request to classify in Group 2 petitioner's service at in various program manager positions at two state prison facilities (MCI Shirley Minimum Security Prison and South Middlesex Correctional Center) - Denial reversed, and retirement board directed to recalculate retirement benefits based upon group 2 classification - Petitioner, who was the only hearing witness, showed by preponderance of the evidence that his major duties in each position required him to have the care, custody, instruction or other supervision of prisoners - As Unit Manager/Program Manager 3 at MCI Shirley, he was in frequent communication with inmates, toured facility, performed checks within each housing unit, and was required to be familiar with the inmates, and handled all interactions with inmates by himself but carried a radio so he could call another employee for assistance if needed - As Director of Treatment/Program Manager 4 and 5 at MCI Shirley, he was in charge of developing, implementing and overseeing programs for inmates including library services, chapel, gym, recreation activities, education classrooms, and other programs he developed, had an office inside the facility near the programming areas, and conducted some administrative duties but spent a majority of his time supervising inmates during their participation in the facility's programs - As Deputy Superintendent/Program Manager 8 at South Middlesex Correctional Center, his duties included conducting searches of inmate sleeping quarters, and he was responsible for all inmate housing and activity, both of which showed he had responsibility to supervise the inmate population, and in addition his communication and contact with inmates was face-to-face, frequent, and not ancillary to his regular and major duties, incidental, or in the context of a greater administrative function.

Mendonsa v. State Bd. of Retirement, Docket No. CR-11-424, Decision (Mass. Div. of Admin. Law App., Nov. 17, 2017).

State Department of Mental Health - RN IV Infection Preventionist - Constant patient contact while providing nursing services and care to mentally ill and mentally retarded clients committed to state custody at Worcester State Hospital - No supervisory responsibility as to licensed practical nurses at facility - Work during last year of employment - 8:00 a.m. to 4:00 p.m. shift Monday through Friday included routine meeting with any patient at state hospital who presented with communicable disease or rash of unknown origin; meeting with any person prescribed anti-biotic medication, regardless of cause; assisting outside providers seeing state hospital clients including podiatrists, cardiologists and dentists, including administering EKGs and taking blood oxygen levels for cardiologists, clipping toenails and changing bandages for podiatrists, assisting with dental procedures, performing annual physicals; performing blood draws, acquiring respiration data and taking vitals; administering vaccinations during flu, pneumonia, meningitis and mumps clinics; assisting specialists with suturing in clinics, changing dressings and evacuating wounds; transporting state hospital patients to appointments with medical providers, and walking them back to their housing units after their appointments; attending one-hour, daily treatment team meetings during afternoons with individual client, facility psychiatrist, social worker, Registered Nurse, Mental Health worker and Rehabilitation Specialist; visiting 20-25 patients during remaining afternoon hours each day to perform tasks including lining space assessments, skin evaluations and assessment, and determination of patient antibiotic tolerance, with no other staff members present - First two duties listed in Form 30 general statement of duties and responsibilities were treating all patients with dignity and respect through interaction and by optimally integrating patient perspective into all aspects of care and advocating for patients, and obtaining appropriate diagnostic results and findings - Regular and major duties consisted of providing care, custody, instruction or other supervision to clients in state custody at Worcester state Hospital for at least 51 percent of the time - Administrative and supervisory duties of RN IV Infection Preventionist position were ancillary to client care, supervision and instructional functions - Denial of reclassification reversed - Remanded to state Board of Retirement to classify petitioner in Group 2 instead of Group 1.

Williams v. State Bd. of Retirement, Docket No. CR-12-229, Decision (Mass. Div. of Admin. Law App., Apr. 28, 2017).

—Reclassification from Group 1 to Group 4

Generally

Municipal utility's "energy supply manager" had burden to show that his position should properly be classified for retirement purposes in Group 4 rather than Group 1 - Determination of proper group classification of employee for retirement purposes is based upon job held and duties performed at time of retirement - M.G.L. c. 32, § 3(2)(g) defines Group 1 as including "[o]fficials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not classified" - Statute defines Group 4 as including "employees of a municipal gas or electric generating or distribution plant who are employed as linemen, electric switchboard operators, electric maintenance men, steam engineers, boiler operators, firemen, oilers, mechanical maintenance men, and supervisors of said employees who shall include managers and assistant managers" - 1994 addition of "managers and assistant managers" to Group 4 indicated legislature's intent to include municipal utility managers in Group 4 even if they only "supervised the supervisors" of Group 4 employees - For municipal utility managers and assistant managers, there is no requirement that they supervise Group 4 employees directly, but all other municipal utility supervisors must supervise Group 4 employees directly, and that supervision must be part of their required duties - Absent statutory language saying so directly, legislature did not intend that retirement boards sort out whether municipal utility's senior managers , who reported to the manager but were not titled "assistant managers," nonetheless performed jobs that might be considered at the level of an assistant manager and also had some responsibility for supervising Group 4 employees - Instead, legislature is presumed to have established category in Group 4 ("managers and assistant mangers" of municipal utility) that retirement board could apply easily) - "Assistant manager" therefore refers to assistant manager of entire utility who would necessarily have supervision of Group 4 employees, rather than to persons not titled as assistant manager and whose managerial responsibilities were within a particular utility department, such as its energy receipt stations, rather than within the entire utility.

Contrino v. Westfield Retirement Bd., Docket No. CR-15-212, Decision (Mass.

Div. of Admin. Law App., Jun. 19, 2017).

Reclassification Denied - Group 1 to Group 4

Denial by retirement board, in 2015, of request by "energy supply manager" of municipal utility (Westfield gas & electric Light Department) to be reclassified from Group 1 to Group 4 for retirement purposes - Denied because board found no supervision of other Group 4 employees by energy supply manager - Energy supply manager responsible for managing municipal utility's "energy receipt stations" under direction of utility's general manager - Energy receipt stations received gas or electricity from suppliers and, in case of electricity, transformed electricity received from 115,000 volts to 23,000 volts - Work on electric receipt stations was performed by electric linemen employed by utilities, while work on gas receipt stations was performed partly by utility maintenance personnel or by outside contractors - Energy supply manager supervised two analysts and also a utility supervisor who, in turn, supervised the linemen and other utility employees who worked on energy receipt stations - Utility supply supervisor job description listed duties as including scheduling and supervising construction and maintenance activities involved in electric and gas receipt and distribution, and managing construction, maintenance and reporting requirements regarding municipal utility's electric generation and storage facilities - Utility supervisor and linemen he supervised are in Group 4 - Utility study showed that linemen and electric station oeprators spent 67-100 percent of their time working outdoors and in hot, cold or wet surroundings, that utility supervisors spent up to one third of their time in similar circumstances, and that these conditions did not apply to energy supply manager's job - Energy supply manager went to energy supply stations to see how work was progressing, and estimated that he spent about 90 percent of his time in the office and ten percent in the field inspecting work of linemen or, when there is a storm, helping to coordinate work and estimating time repairs will take; in addition, he directly supervised linemen when utility supervisor was out of the office, and recalled doing so once during a storm in October 2011 - This direct supervision was not included in energy supply manager's job description - Occasional direct supervision of Group 4 employees therefore did not make energy supply manager eligible for Group 4 classification - Energy supply manager was also not "assistant manager," as phrase is used in statutory Group 4 definition, as he was not titled "assistant manager," was a manager within a particular department (the energy receipt stations) rather than the assistant manager of the entire municipal utility, and did not have supervision of Group 4 employees in the entire utility - Denial of request to reclassify energy supply manager in Group 4 therefore affirmed.

Contrino v. Westfield Retirement Bd., Docket No. CR-15-212, Decision (Mass. Div. of Admin. Law App., Jun. 19, 2017).

Chicopee Electric Light Department - Field engineer - Group 1 classification - Review of Light Department positions by Chicopee Retirement Board to determine whether positions were classified properly - Determination that Light Department field engineer and field engineer supervisor positions should be assigned in Group 1, not Group 4 - Specification of positions included in Group 4 by M.G.L. c. 32, § 3(2)(g) - "employees of a municipal gas or electric generating or distribution plant who are employed as linemen, electric switch board operators, electric maintenance men, steam engineers, boiler operators, firemen, oilers, mechanical or maintenance men, and supervisors of said employees who shall include managers and assistant managers" - "Field engineer" not one of positions specified by statute - Undisputed that petitioner did not supervise any Group 4 employees - Group 1 classification affirmed.

Swain v. Chicopee Retirement Bd., Docket No. CR-15-80, Decision (Mass. Div. of Admin. Law App., May 26, 2017).

Reclassification Granted - Group 1 to Group 4

State Department of Mental Retardation - Mental Retardation Specialist Supervisor - Regular and major duties required direct care to mentally ill patients - Direct care of mentally ill patients consumed 75 percent of typical regular eight-hour shift.

O'Brien v. State Bd. of Retirement, Docket No. CR-14-721, Decision (Mass. Div. of Admin. Law App., Mar. 25, 2016).

Pension Forfeiture

Constitutional claim - Dismissal - Lack of jurisdiction - Failure to state claim on which DALA could grant relief - Forfeiture of pension approved by retirement board pursuant to M.G.L. c. 32, § 15(4) following retirement system member's 2015 conviction in federal district court, pursuant to 18 U.S.C. § 371, for conspiring to defraud United States, and sentencing to three months' imprisonment and $100 fine - Potential pension loss as a result of forfeiture estimated to be $679,430 - Member's request to retirement board to reinstate pension following Supreme Judicial Court's 2016 decision that pension forfeiture under M.G.L. c. 32, § 15(4) qualified as "fine" under "excessive fines" clause of U.S. Const. Amend. VIII (*see Public Employee Retirement Administration Comm'n v. Bettencourt*, 47 N.E.3d 667 (2016) - Decision by retirement board not to act on request - Appeal of retirement board's no-action decision to DALA by member, based upon claim that pension forfeiture was excessive fine in violation of U.S. Const. Amend. VIII - DALA without jurisdiction to decide constitutional claim, and no specialized factfinding by DALA necessary to decide it - In addition, with member's challenge to retirement board action or decision "with reference to" his involuntary retirement or dereliction of duty already pending before Massachusetts district court, court was empowered to make required factfinding regarding constitutionality of pension forfeiture as part of its statutory jurisdiction to determine whether board's action was justified (*see* M.G.L. c. 32, §16(3)).

Fitzpatrick v. Chelsea Retirement System, Docket No. CR-16-216, Decision (Mass. Div. of Admin. Law App., Sept. 29, 2017).

Post-Retirement Earnings Limitations

—Exceptions

Retired teacher employed by school district based upon critical shortage of certified teachers - Boston public school headmaster - Lack of state education department waiver - Irrelevance - State Education Department regulatory waiver requirements not clearly applicable during time in question.

Kemp v. State Bd. of Retirement, Decision (Mass. Div. of Admin. Law App., Oct. 14, 2016).

Retirement Plus (Enhanced Alternative Superannuation Retirement) Program

—Eligibility

—Ineligibility

—Teachers Hired Before July 1, 2001

Failure to Elect Retirement Plus before Statutory Deadline

Statute establishing Retirement Plus (enhanced alternative superannuation retirement program, *see* M.G.L. c. 32, § 5(4)(I) and St. 2004, § 387), statutory deadline for enrolling in Retirement Plus, and Massachusetts Teachers' Retirement System procedures for electing enrollment in the program, including forms required to make election and manner of submitting them, are interpreted strictly by DALA administrative magistrates even when presented with the most sympathetic of circumstances.

Desiré v. Massachusetts Teachers' Retirement System, Docket No. CR-14-200, Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Late-filed election to participate in Retirement Plus program - Failure to elect program before July 1, 2001 statutory deadline prescribed by M.G.L. c. 32, § 5(4)(I) - Inapplicability of late Retirement Plus election provisions of St. 2004, § 387 or late Retirement Plus election exception provided by Massachusetts Teachers' Retirement System (MTRS) policy - Insufficiency of claims by public school teacher and MTRS member who missed statutory deadline for enrolling in Retirement Plus that she never received "Retirement Plus election package" that MTRS mailed out to its active and inactive members in February 2001, and that she and co-workers filled out forms they believed to be Retirement Plus election forms at school where she worked and a co-worker hand-delivered them to public school department payroll office, but payroll office did not mail them to MTRS - Late retirement plus election provisions of St. 2004, § 397 allowed teachers' retirement system member who filed retirement Plus election form prior to July 1, 2001 with city, town or school district in which teacher was employed by filing application with state teachers' retirement board no later than October 1, 2004 on form prescribed by MTRS, along with certificate of city, town or school district officer confirming that member had filed election form prior to July 1, 2001 - MTRS policy regarding late Retirement Plus Election exceptions provided that if payroll officer of school district who mailed Retirement Plus election form to state teachers' retirement board late acknowledged, in writing, that he or she had assumed responsibility for mailing in completed Retirement Plus election forms, the late form was considered timely - In 2004, MTRS advised members of Retirement Plus election exception for late-filed election forms by mail and email, sent a press release to Massachusetts Teachers Association, and posted information on MTRS website - Teacher did not fill out election form required by MTRS in instructions included with its February 2001 mailing or by MTRS's subsequent late Retirement Plus exceptions policy - Neither exception to Retirement Plus election filing deadline provided by St. 2004, § 397, nor MTRS late-filed election form exception, applied - No evidence that payroll officer mailed Retirement Plus election form completed by teacher to state teachers' retirement board late - Importance of election form was clear, as was requirement that it be submitted to retirement board - No followup by teacher until personal financial advisor informed her in 2012 that her payroll stubs showed no 11 percent rate deduction from her wages for Retirement Plus - After meeting with MTRS in July 2013 and being informed that she was not enrolled in Retirement Plus, teacher submitted completed Retirement Plus election form to MTRS in 2014, thirteen years after the original statutory deadline for doing so - With none of the late filing exceptions provided by St. 2004, § 397 and the MTRS policy applicable, neither MTRS nor DALA could act contrary to specific mandates of M.G.L. c. 32, § 5(40(I), including the original July 2001 deadline for electing Retirement Plus on the required form.

Desiré v. Massachusetts Teachers' Retirement System, Docket No. CR-14-200, Decision (Mass. Div. of Admin. Law App., Jul. 7, 2017).

Retirement Systems

—Membership

Local Retirement System

Improper termination of local retirement system membership - Termination for purpose of tabling accidental disability retirement application - Certified occupational therapist assistant employed by public school - Incorrect conclusion that employee should have been enrolled in Massachusetts Teachers' Retirement System - Employee's assistant position excluded from statutory definition of "teacher" and from membership in MTRS under that system's regulations and policy.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Massachusetts Teachers' Retirement System

Teacher - M.G.L. c. 32, § 1 definition - Positions excluded from definition - "Assistant" position that involves some teaching but is not a full-fledged teaching position licensed by state Department of Education (or successor Department of Elementary and Secondary Education), such as teaching assistant, research assistant, tutor, instructor, instructional aide, or certified occupational therapist assistant.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Massachusetts Teachers' Retirement System membership - Membership based upon criteria specified by MTRS regulation, 807 C.M.R. § 4.02(1) (contractual agreement with school committee or board requiring not less than half-time service, and holding certificate granted by board of education or granted waiver pending certification by board of education), or upon MTRS administrative policy accepting, as MTRS members, occupational therapists licensed by Board of Allied Health Professionals but not by state education department, and employed by Massachusetts public schools - Policy exception inapplicable to certified occupational therapist assistant who worked in public school but was not licensed or employed formally as occupational therapist, performed under occupational therapist's supervision, and performed work similar to that of teaching or research assistant, tutor, instructor, or other person who did not meet statutory definition of "teacher."

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

Prior erroneous enrollment of persons holding assistant positions in Massachusetts Teachers' Retirement System - MTRS not bound to continue erroneous enrollment - Correction of error mandated by M.G.L. c. 32, § 20(5) - MTRS not estopped from declining to enroll others holding assistant positions, such as certified occupational therapist assistants.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

—Rescission, Revocation or Termination of Membership

Improper termination of local retirement system membership - Termination for purpose of tabling accidental disability retirement application - Certified occupational therapist assistant employed by public school - Incorrect conclusion that employee should have been enrolled in Massachusetts Teachers' Retirement System - Employee's assistant position excluded from statutory definition of "teacher" and from membership in MTRS under that system's regulations and policy.

Delorme v. Shrewsbury Retirement Bd., Docket No. CR-14-540, Decision (Mass. Div. of Admin. Law App., Feb. 24, 2017).

—Retirement Board Regulations

Subject to approval by the Public Employee Retirement Administration Commission (PERAC), a local retirement board has authority, under M.G.L. c. 32, § 4(2)(b), to promulgate regulations fixing and determining how much service by a retirement system member in any calendar year is equivalent to a year of service, and in the case of service of any state official or any person elected by popular vote to a county or municipal office or position, the local retirement board "shall fix or determine the amount of creditable prior service, if any . . . ."

Stoneham Retirement Bd. v. Public Employee Retirement Administration Commission, Docket No. CR-12-548, Ruling on Motion for Reconsideration (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Because the Public Employee Retirement Administration Commission (PERAC) has general superintendence of public employee retirement systems, it has power to approve and disapprove regulations proposed by local retirement boards, and in determining whether to sustain PERAC's disapproval of parts of a proposed retirement board's regulations, PERAC's interpretations of the state retirement law must be given deference where they are reasonable and not contrary to M.G.L. c. 32.

Stoneham Retirement Bd. v. Public Employee Retirement Administration Commission, Docket No. CR-12-548, Ruling on Motion for Reconsideration (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Proposed local retirement board regulation regarding creditable service earned by retirement system members as local elected officials - Decision sustained PERAC's disapproval of proposed regulation that would grant no creditable service to local elected officials (including town moderator and members of Board of Assessors) for any service rendered after July 1, 2009 if annual regular compensation was less than $5,000 - Reconsideration sought by PERAC to clarify decision as to creditable service earned by local elected officials who earned $5,000 or more annually - Modification of decision that would result from clarification PERAC sought denied - Administrative Magistrate had understood PERAC's position to be that elected officials were entitled to creditable service only for the time they actually worked, which was consistent with M.G.L. c. 32, § 4(1)(a), as amended by St. 2009, c. 21, and was therefore entitled to deference - PERAC's clarified position that elected town officials should receive credit for each day they served in an elected office regardless of actual days worked was contrary to the 2009 amendment of M.G.L. c. 32, § 4(1)(a), and therefore not entitled to deference - No basis in amended statute for granting creditable service for "time served" by simply occupying elected office - Argument that it was impractical for elected official to keep track of work performed and time worked rejected - Local retirement board's argument that it had power to determine annual creditable service for town moderator or member of Board of Assessors paid less than $5,000 annually regardless of time that these officials actually worked also rejected, as contrary to M.G.L. c. 32, § 4(1)(b) - Rather than granting no credit for this service, Board was required to treat elected official paid less than $5,000 annually as part-time position for retirement purposes, and apply the same regulations on creditable service for part-time work that it applied to other retirement system members.

Stoneham Retirement Bd. v. Public Employee Retirement Administration Commission, Docket No. CR-12-548, Ruling on Motion for Reconsideration (Mass. Div. of Admin. Law App., Mar. 3, 2017).

Termination Retirement Benefits

—Ineligibility

Termination for violations of laws, rules and regulations pertaining to employee's position - Summary decision.

Belliveau v State Bd. of Retirement, Docket No. CR-13-456, Decision (Mass. Div. of Admin. Law App., Apr. 1, 2016).

VETERANS' BENEFITS

Benefits Under M.G.L. c. 115, Generally

Purpose and structure of Chapter 115 benefits - Needs-based form of public assistance to veterans - Financial assistance to indigent veterans and dependents to assist with expenses - Municipalities, through local veterans' services departments, process Chapter 115 veterans' benefits applications - Local veterans' services officer (VSO) for town or city in which veteran resides prepares "budget" showing veteran's financial needs in various categories such as shelter and fuel (108 C.M.R. § 5.01(3)), using standards prescribed by DVS regulations (at 108 C.M.R. § 5.02(2), Table 2) - Commonwealth, through Department of Veterans' Services (DVS), reviews applications and, once authorized, reimburses municipality for 75 percent of benefits paid (M.G.L. c. 115, § 6).

McConnell v. Dep't of Veterans' Services, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Determination of Benefits

—Calculating an Applicant's Needs-Based "Budget"

Applicant's Financial Need, Generally

[no entries]

Applicant Living Alone

[no entries]

Applicant and Spouse

[no entries]

Institutional and Transitional Housing Residents

Difference between institutional and transitional housing resident under DVS regulations is that an institutional resident receives shelter, food and other services at no cost from a facility such as a homeless shelter, hospital nursing home, Soldiers' Home or U.S. Department of Veterans' Affairs residential home, while a transitional housing resident must pay for shelter or food and return to the same bed every night, although other services may be provided at no cost (108 C.M.R. § 2.02, definitions of "institution" and "transitional housing").

McConnell v. Dep't of Veterans' Services, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Chelsea Soldiers' Home, Domiciliary Section, Transitional Unit resident for over seven and a half years - Classification as "institutional" resident, which entitled veteran to Chapter 115 benefits payments at $179 per month, rather than as "transitional housing" resident eligible to receive higher benefits payments of $667 per month, affirmed upon veteran's appeal challenging classification - Originally classified by Chelsea Soldier's Home as institutional resident - ten dollar daily care charge waived due to limited income, with $8,192 in daily care charges waived over course of her long-term residence - Incorrect reclassification as institutional resident by DVS based upon recommendation of local veterans' services officer, and payment of higher benefits rate for five months until local VSO advised DVS of error - Evidence showed that transitional residents of Chelsea Soldiers' Home were required to participate in highly-structured program (including independent living skill development, mental and substance abuse counseling, employment search assistance and housing search assistance) that returned them to community within two years, using VASH vouchers to obtain housing from local housing authority - No evidence that appealing veteran participated in this program - Evidence of intent to reside in institution for long-term, rather than transition to housing in local community - Veteran and now-deceased spouse she married while living at Chelsea Soldier's Home attempted, without success, to have Home create in-house married living accommodations, contrary to setup of buildings as separate men's and women's accommodations, residential domiciliary handbook provision prohibiting physical sexual contact in all areas of Home, Home's policy of moving transitional residents into local housing within two years, and Home's offer to locate couple in suitable local housing, which the couple declined based upon their preference not to relocate from Chelsea Soldier's Home and disrupt friendships with veteran friends at the

Home - Request for transitional housing residence classification based upon stated need for funds to improve living standard in what was in effect permanent housing rather than move into independent housing outside of Soldier's Home, the purpose of transitional residence and classification.

McConnell v. Dep't of Veterans' Services, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

"Medical Only" Benefits

[no entries]

Dismissal of Appeals

Lack of Prosecution

Ordinary veterans' benefits under M.G.L. c. 115 - Veteran's adult dependent, not himself a veteran, and adjudicated incapacitated person with court-appointed guardians not including veteran - Denial based upon veteran's financial ineligibility for benefits, 108 C.M.R. § 5.06(3) - Appeal by veteran as representative of adult dependent and his mother - Failure by veteran to respond to order to clarify representational authority, or whether he intended to proceed with appeal or, instead, request that Department of Veterans' Services Commissioner issue him a waiver of his financial ineligibility for veterans' benefits - Failure to respond to Department's motion to dismiss for lack of prosecution - Dismissal without prejudice to request for financial ineligibility waiver that veteran might file, to his dependent's continued receipt of "medical only" Chapter 115 benefits he may be receiving, or to any future determination of dependent's eligibility for ordinary Chapter 115 benefits if veteran applies to Commissioner for, and is issued, a financial ineligibility waiver.

Murphy v. Dep't of Veterans' Services, Docket No. VS-17-056, Order of Dismissal (Mass. Div. of Admin. Law App., Oct. 20, 2017)

Eligibility for Veterans' Benefits

"Medical Only" Benefits

[no entries]

"Ordinary" Benefits

Ordinary veterans' benefits under M.G.L. c. 115 - Veteran's adult dependent, not himself a veteran, and adjudicated incapacitated person with court-appointed guardians not including veteran - Denial based upon veteran's financial ineligibility for benefits, 108 C.M.R. § 5.06(3) - Appeal by veteran as representative of adult dependent and his mother - Failure by veteran to respond to order to clarify representational authority, or whether he intended to proceed with appeal or, instead, request that Department of Veterans' Services Commissioner issue him a waiver of his financial ineligibility for veterans' benefits - Failure to respond to Department's motion to dismiss for lack of prosecution - Dismissal without prejudice to request for financial ineligibility waiver that veteran might file, to his dependent's continued receipt of "medical only" Chapter 115 benefits he may be receiving, or to any future determination of dependent's eligibility for ordinary Chapter 115 benefits if veteran applies to Commissioner for, and is issued, a financial ineligibility waiver.

Murphy v. Dep't of Veterans' Services, Docket No. VS-17-056, Order of Dismissal (Mass. Div. of Admin. Law App., Oct. 20, 2017).

Overpayment of Benefits - "Refund Status"

Overpayment and refund status raised for first time by Department of Veterans' Services during appeal by veteran resident of Chelsea Soldiers' Home challenging her classification as institutional resident rather than as transitional housing resident eligible for higher monthly Chapter 115 benefits payments - Five-month period during which veteran was mistakenly reclassified as transitional housing resident and paid benefits at higher rate - No notice given to veteran of placement into refund status for overpayment of Chapter 115 benefits, as required by 108 C.M.R. § 8.06(2) - No opportunity, as a result, for veteran to request a waiver of refund by local veteran's services officer based upon financial hardship (108 C.M.R. § 8.06(2)), or, if request were denied, to appeal further to DVS and then to DALA (108 C.M.R. §§ 8.07(2), (3)) - No evidence that DVS or local veteran's services officer ordered veteran placed in refund status for the overpayment in question - No reference by DVS hearing officer to refund status in decision of prior appeal to agency regarding institutional resident classification - DVS request that DALA order placement into refund status if it upheld institutional resident classification was therefore premature, and DALA was without jurisdiction to grant it.

McConnell v. Dep't of Veterans' Services, Docket No. VS-16-275, Decision (Mass. Div. of Admin. Law App., Aug. 11, 2017).

Failure of veteran receiving M.G.L. c. 115 state veterans' benefits to look for work - Placement into refund status for overpayment - Receipt of duplicative benefits - Rental assistance payments received while rent was being paid by another source - Summary decision.

Brelsford v. Dep't of Veterans' Services, Docket No. VS-15-594, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

Termination of Benefits

Termination of M.G.L. c. 115 veteran's benefits - Lack of cooperation by failure to document current residence (*e.g.*, with a current lease or rent receipt) or, thus, eligibility to receive benefits through local veterans' services department - Appeal to DVS (which sustained benefits termination but waived recoupment of benefits paid to veteran after notice of termination was issued) and then to Division of Administrative Law Appeals - Claim that benefits termination was void for improper mailing (to prior residential address that was no longer valid due to veteran's eviction, rather than to veteran's post office box number) and for issuance by a person allegedly without authority to do so (local DVS's manager of benefits and services rather than by local veterans' services officer, notwithstanding notice was issued on local DVS letterhead with veterans' services officer's name printed at top) - Forfeiture of defective benefits termination claim in circumstances presented and as a result of veteran's conduct, including degree to which he participated without objection in resolving the DALA appeal by agreement, failure to object to draft Order of Dismissal based upon agreement sent to parties by DALA Administrative Magistrate to parties for their review, belated reassertion of claim after Order of Dismissal was issued when none of the parties objected to the draft, and veteran's request, in seeking reconsideration, that Administrative Magistrate approve payment to him of additional Chapter 115 benefits to which he was not entitled under DVS regulations or under the agreement resolving the matter.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision on Motion for Reconsideration (Mass. Div. of Admin. Law App., Dec. 1, 2017).

Termination of M.G.L. c. 115 veterans' benefits payments for failure to document current residence - Agreement by parties resolving veteran's appeal, comprising handwritten, signed provisions and amplifications to which parties stipulated during prehearing conference -

Continued Cambridge, Massachusetts residence established sufficiently by veteran's temporary residence at Salvation Army men's shelter in Cambridge six days at a time, resumed after several days at a Watertown apartment maintained by another organization - Residence arrangement complied with number of consecutive days the Cambridge shelter allowed for being furnished with a bed, and was likely to improve veteran's chance of obtaining Cambridge inclusionary housing for which he had applied - Although not currently financially eligible to receive M.G.L. c. 115 veteran's benefits, veteran could reapply for them if he signed a lease and incurred rental expenses, or if he incurred medical expenses not reimbursed by other sources - Waiver of any obligation veteran may have had to refund benefits paid to him after local veterans' services department terminated Chapter 115 benefits payments remains in place and applies to benefit payment issued to him while his appeal was pending - No objection by parties to draft order of dismissal clarifying terms of agreement - Veteran's appeal dismissed as moot based upon agreement.

Welch v. Dep't of Veterans' Services, Docket No. VS-17-290, Decision (Mass. Div. of Admin. Law App., Aug. 31, 2017).

Termination of M.G.L. c. 115 veterans' benefits payments for failure to look for work - Duplicative benefits - Rental assistance payments received while rent was being paid by another source - Placement into refund status for overpayment - Summary decision.

Brelsford v. Dep't of Veterans' Services, Docket No. VS-15-594, Decision (Mass. Div. of Admin. Law App., Nov. 9, 2016).

WAGE AND HOUR LAWS

Civil Penalties

—Intentional Violations

Painting company - Intentional failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty ($7,500) affirmed - Summary decision - No response to Fair Labor Division's motion for sufficiently made and supported summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour violations ($25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016)

—Non-intentional Violations

Failure to pay wages timely - Failure to produce payroll records for inspection by Fair Labor Division - Landscaping business - Employees paid mostly by cash in envelopes - Failure to pay wages in timely manner - Checks drawn on company account made out to cash, or to one employee who cashed them and paid other employees - Employee claims for unpaid wages based upon personal recollection, with little or no written record backup - Employer payroll records not produced timely for inspection following Fair Labor Division demand - Fair Labor Division citations to landscaping business owner's now-defunct corporation for failure to pay wages timely ($12,089 restitution, and $2,500 civil penalty) and failure to furnish payroll records for inspection ($3,500 civil penalty) - Documents in response to payroll records request produced late, at prehearing conference of employer's appeal (ledger showing wage payments to employees not kept contemporaneously and prepared, instead, for DALA hearing; handwritten timesheets kept by owner with varying company names or name of employer omitted; check records with owner's notations reflecting source of cash used to pay employees, such as payment from homeowners and businesses for landscaping services) - Citations treated as issued to landscaping business owner, who was corporation's sole officer, consistent with proof at hearing, including employees' understanding of who employer was, responsibility for wage payments imposed by M.G.L. c. 149, § 148, and persons treated as employer by statute - Citation and civil penalty for failure to produce payroll records sustained, primarily because employer did not keep wage and hour records in good order that could have been timely produced upon demand by Fair Labor Division - Difficulty determining unpaid wages for each employee due to cash payments, some via another employer given cash to distribute to others - Total restitution amount modified from $12,089 to $7,144.25, reflecting DALA administrative magistrate's recalculation of wage payments based upon credibility evaluations of written evidence and testimony at hearing by employees and employer - Penalty for failure to pay wages timely modified - Absent evidence showing how it was calculated, penalty for nonpayment of wages modified from $2,500 to $1,477 in proportion with the modified restitution amount (59 percent of the amount demanded by the citation).

Nessralla v. Fair Labor Div., Docket Nos. LB-14-387, LB-14-388, Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-intentional violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).

Failure to Pay Wages Timely

Cleaning services business - Failure to pay wages timely to employees - Citation for $8,613 restitution and a $2,000 civil penalty - Petitioners (incorporated cleaning business, its president and its treasurer), the cleaning contractor for a supermarket, entered into sub-contract agreement with another cleaning company (PCM) in April 2014 to clean the supermarket, which included (a) monthly $20,000 service fee payment by contractor to subcontractor for previous month's cleaning service, with subcontractor responsible for payment of all applicable government taxes and income taxes, (b) no authority given to subcontractor to delegate subcontract the work in question unless contractor agreed, and (c) subcontractor's agreement not to induce employees, other subcontractors or cleaning specialists to leave the contractor's employment or entice them away from the contractor - Although petitioners issued checks to subcontractor between April and November 2014, only two checks were for $20,000 (for, respectively, May 2014 and June 2014), and others were for smaller amounts, which according to petitioners' hearing testimony were made so subcontractor could pay the employees in question, as was the $20,000 check paid on May 16, 2014 for work to be performed in June 2014 - Petitioners authorized subcontractor to hire one of the employees in question for several days in May 2014, and petitioner's treasurer paid this employee with a personal check - Petitioners authorized the subcontractor to employ two of the other employees in question to work in June and July 2014, and paid both with personal checks for work performed during that time period - Petitioner's treasurer denied hiring these employees and claimed that the subcontractor hired them - Cleaning services business experienced financial difficulties during summer of 2014 - Supermarket parent company was dissatisfied with PCM's work and discontinued the cleaning contract with the petitioners in late 2014, and the petitioners learned that the person with whom they had entered into the PCM subcontract did not own PCM and had absconded, possibly to Brazil - Five employees filed non-payment of wage coplaints with OAG Fair Labor Division in December 2014, and Division issued petitioners a citation seeking restitution for unpaid wages and a civil penalty in July 2016, which petitioners appealed - Petitioners failed to meet their burden of proving that the individuals in question were not employees or that citation was issued erroneously - Subcontract agreement between petitioners and PCM did not impose any duty on PCM to pay the employees in question or any of petitioners' employees, did not specify that the $20,000 per month fee the petitioners was to be used to pay any of the employees in question, specifically forbade PCM from enticing petitioners' employees away or interfering with their employment relationships with petitioners, and did not allow further subcontracting unless petitioners consented - Petitioners authorized PCM to employee several of the employees in question and paid them with personal checks - Evidence allowed reasonable inference that petitioners considered the employees in question to be their employees, rather than employees of PCM - Citation sustained as to both restitution amount (less partial restitution payment amounts already made under stipulation following prehearing conference), and civil penalty amount.

Santos v. Fair Labor Div., Docket No. LB-16-361, Decision (Mass. Div. of Admin. Law App., Sept. 15, 2017).

Landscaping business - Employees paid mostly by cash in envelopes - Failure to pay wages in timely manner - Checks drawn on company account made out to cash, or to one employee who cashed them and paid other employees - Employee claims for unpaid wages based upon personal recollection, with little or no written record backup - Employer payroll records not produced timely for inspection following Fair Labor Division demand - Fair Labor Division citations to landscaping business owner's now-defunct corporation for failure to pay wages timely ($12,089 restitution, and $2,500 civil penalty) and failure to furnish payroll records for inspection ($3,500 civil penalty) - Documents in response to payroll records request produced late, at prehearing conference of employer's appeal (ledger showing wage payments to employees not kept contemporaneously and prepared, instead, for DALA hearing; handwritten timesheets kept by owner with varying company names or name of employer omitted; check records with owner's notations reflecting source of cash used to pay employees, such as payment from homeowners and businesses for landscaping services) - Citations treated as issued to landscaping business owner, who was corporation's sole officer, consistent with proof at hearing, including employees' understanding of who employer was, responsibility for wage payments imposed by M.G.L. c. 149, § 148, and persons treated as employer by statute - Citation and civil penalty for failure to produce payroll records sustained, primarily because employer did not keep wage and hour records in good order that could have been timely produced upon demand by Fair Labor Division - Difficulty determining unpaid wages for each employee due to cash payments, some via another employer given cash to distribute to others - Total restitution amount modified from $12,089 to $7,144.25, reflecting DALA administrative magistrate's recalculation of wage payments based upon credibility evaluations of written evidence and testimony at hearing by employees and employer - Penalty for failure to pay wages timely modified - Absent evidence showing how it was calculated, penalty for nonpayment of wages modified from $2,500 to $1,477 in proportion with the modified restitution amount (59 percent of the amount demanded by the citation).

Nessralla v. Fair Labor Div., Docket Nos. LB-14-387, LB-14-388, Decision (Mass. Div. of Admin. Law App., Apr. 18, 2017).

Citation for unintentional failure to make timely wage payments to employee vacated as erroneously issued - Demand for restitution ($5,100) and civil penalty ($1,100) - Salesperson - Performance of business development and sales work at market research business services company, primarily through via email and telephone contacts - Same pay as business owner ($25 per hour), with owner proposing (but not committing) to phase in employee as partner, with increasing percentage of ownership as business achieved specified net revenue benchmarks and maintained that net revenue level for three consecutive months - Following last two paychecks ($3,000 for 120 hours of work, and $2,000 for 80 hours of work), no pay for two-month period when employee was absent from office, including one month for medical reasons, without notice of absence to owner, who was away at time - Termination of employment upon owner's return for failure to generate business - Complaint filed with

Fair Labor Division claimed $12,000 in unpaid wages for 10-week period without disclosing $2,000 payment - Unpaid wage restitution claim reduced by Division to $5,100, following audit of business payroll records, with eight hours of work per day at $25/hour rate credited for any day on which employee sent email from home on her business email account - Dispute as to whether employee could, or actually did, work from home, and whether employee was commission-only salesperson whose hourly pay rate was drawn against commissions earned, and whether employee was entitled to full day's pay credit for any day on which she sent email using business email account - Credibility issues regarding unpaid wage claim and computation not resolved by hearing testimony or exhibits - Emails not in evidence - Email log created by Fair Labor Division inspector not contemporaneous with alleged days of emailing - Employee's inability to recall with specificity what work she performed while away from office during two month period - Absence of telephone logs showing whether employee followed up emails from home with telephone calls to business clients and customers - Insufficient evidence that employee worked on days she was absent from office or, thus, that any particular amount of wages was unpaid and owed to employee, or that citation could be modified to demand different restitution or penalty amounts.

McNeil v. Fair Labor Div., Docket No. LB-16-211, Decision (Mass. Div. of Admin. Law App., Mar. 22, 2017).

Lack of prosecution dismissal of appeal challenging citation for failure to pay wages timely, following warnings of this sanction - Failure to appear for status conference scheduled by prior order - Ignoring several prior orders directing petitioners to specify grounds on which they challenged citation, identify their hearing witnesses and the subject of their expected direct testimony, and identify their hearing exhibits - Petitioners' failure to identify, on multiple occasions, their authorized representative or notify DALA or the Fair Labor Division of changes of address to which the petitioners were requesting that filings, or notices, orders and decisions issued, were to be mailed, and failure to respond to subsequent order to show cause why their appeal should not be dismissed - Appealed citation, including restitution amount and civil penalty, made final.

Chiles v. Fair Labor Div., Docket No. LB-14-439, Decision (Mass. Div. of Admin. Law App., Mar. 13, 2017).

Overtime Wages

Aircraft cleaning services company - Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-intentional violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).

Painting company - Willful failure to pay overtime wages - Second or subsequent offense - Citation demanding payment of restitution and civil penalty ($7,500) affirmed - Summary decision - No response to Fair Labor Division's motion for sufficiently made and supported summary decision motion showing no genuine dispute as to occurrence of violations, consideration of statutory penalty factors in determining whether to issue civil penalty, and applicable statutory maximum penalty amount for second or subsequent wage and hour violations ($25,000).

Farh v. Fair Labor Div., Docket No. LB-15-107, Decision (Mass. Div. of Admin. Law App., July 12, 2016)

Payroll Records Maintenance and Production

Aircraft cleaning services company - Failure to pay proper overtime rate - Failure to keep true and accurate payroll records - Restitution - Paycheck deductions for lunch breaks employees were denied or that did not occur - Civil penalties - Non-willful violations - Computation - Penalty amounts substantially lower than maximum allowed by statute.

Castellano v. Fair Labor Div., Docket Nos. LB-15-224, LB-15-225 and LB-15-226, Decision (Mass. Div. of Admin. Law App., Nov. 18, 2016).