

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

WINTHROP RETIREMENT BOARD

)
IN THE MATTER OF:)

ANGELO LAMONICA)
_____)

FINDINGS AND RECOMMENDED DECISION

Appearance for Angelo LaMonica:

James J. Cipoletta, Esquire
Citizen's Bank Building
385 Broadway – Suite 307
Revere, Massachusetts 01845

Hearing Conducted By:

Winthrop Retirement Board
Francis Carberry, Chair
Town Hall, One Metcalf Square
Winthrop, Massachusetts 01845

Hearing Officer:

Michael Sacco, Esquire
Law Offices of Michael Sacco
P.O. Box 479
Southampton, Massachusetts 01073

PROCEDURAL HISTORY

Angelo LaMonica ("LaMonica") is a former Town of Winthrop police officer who last served as Chief and who retired for superannuation from the Winthrop Retirement System ("System") on January 31, 1995 pursuant to M.G.L. c. 32, § 5. On November 13, 1995, LaMonica was convicted of six (6) counts of filing false tax returns in violation of 26 U.S.C. § 7206(1). Following LaMonica's convictions, the Winthrop Retirement Board ("Board") sought the advice of its then counsel whether any action need be taken as a consequence of LaMonica's convictions. On January 12, 1996, counsel opined that the Board need not take any action, and the Board took no action nor was any hearing conducted.

On December 9, 2002, this Hearing Officer in his capacity as Board counsel was asked to review prior counsel's opinion and to further opine based solely on counsel's opinion whether LaMonica's criminal convictions implicated M.G.L. c. 32, § 15(4). Based on the information contained in prior counsel's opinion, Board counsel concurred that it did not appear that any action needed to be taken with respect to LaMonica's continued eligibility to receive his retirement allowance. The Board took no action at that time.

In or around November 2015 the Board received a media inquiry regarding LaMonica's continued receipt of his retirement allowance despite his criminal convictions, suggesting that there was a connection between his convictions and his prior employment, and the Board conducted a review of the matter. Upon doing so, the Board determined that it would be necessary to review LaMonica's criminal convictions based on the evidence provided, and on January 12, 2016 LaMonica was notified that a Board agenda item for its regularly scheduled January 26, 2016 meeting would be to determine whether sufficient evidence exists to conduct a hearing pursuant to M.G.L. c. 32, § 15(4). On January 26, 2016, the Board reviewed the evidence it had gathered, which for the first time included an actual review of records the United States Court, District of Massachusetts provided, and the Board determined that sufficient evidence existed to proceed with a hearing.

On February 23, 2016 the Board conducted the hearing.¹ LaMonica appeared at the hearing with counsel. The Board marked the following documents as exhibits: Exhibit 1 – the January 12, 2016 notice of the January 26, 2016 hearing to LaMonica; Exhibit 2 – the February 2, 2016 certified notice of hearing sent to LaMonica through his counsel, which included copies of M.G.L. c. 32, §§ 15 and 16 and the domestic return receipt of delivery; Exhibit 3 –

¹ At the January 26, 2016 meeting, the Board appointed its counsel as the hearing officer for the purpose of conducting the hearing.

LaMonica's October 26, 1967 New Entrant Enrollment Blank; Exhibit 4 – LaMonica's January 31, 1995 Application By Member For Voluntary Retirement Allowance; Exhibit 5 – the Division of Public Employee Retirement Administration's March 15, 1995 approval of LaMonica's superannuation retirement; Exhibit 6 – the November 24, 1995 Board minutes; Exhibit 7 – the Board's November 30, 1995 letter to LaMonica notifying him the matter had been referred to counsel; Exhibit 8 – the Board's December 26, 1995 letter to LaMonica notifying him that his criminal convictions will be discussed at an upcoming meeting; Exhibit 9 – the Board's January 31, 1996 minutes; Exhibit 10 – Michelle Allaire McNulty's January 12, 1996 letter to the Board regarding LaMonica; Exhibit 11 – Joseph Connarton, Public Employee Retirement Administration Commission ("PERAC") Executive Director's December 21, 2015 letter to the Board regarding LaMonica; Exhibit 12 – Sixty-one (61) pages of documents produced by the United States District Court, District of Massachusetts, relating to United States of America v. Angelo A. LaMonica, Docket No. 95CR10225-NG; Exhibit 13 – LaMonica's Retirement Allowance Paid Card indicating the amount paid to LaMonica from January 31, 1995 through January 31, 2016; Exhibit 14 – Criminal Docket Sheet for United States of America v. Angelo A. LaMonica, Docket No. 95CR10225-NG; Exhibit 15 – the United States Attorney District of Massachusetts' July 17, 1995 letter to Attorney Frank Mondano on LaMonica; Exhibit 16 – the Board's November 29, 1995 letter to Attorney McNulty; Exhibit 17 – the Board's January 16, 2003 letter to PERAC; Exhibit 18 – PERAC's December 21, 2015 letter to the Board on LaMonica (previously marked as Exhibit 11); Exhibit 19 – the Board's November 17, 2015 minutes; Exhibit 20 – the Board's draft January 26, 2016 minutes; Exhibit 21 – Attorney Cipoletta's February 23, 2016 letter to Attorney Sacco requesting a copy of an opinion letter to the Board; Exhibit 22 – Hill & Barlow's December 9, 2002 letter to the Board.

The hearing was recorded by a court reporter and the transcript of the proceeding is incorporated herein as part of the administrative record. LaMonica appeared with counsel at the February 23, 2016 hearing, but refused to testify. There was no other testimony offered or received. LaMonica's counsel offered oral argument, and the record was left open until April 8, 2016² for the submission of a post-hearing memorandum of law, which was submitted and considered by the Hearing Officer, as well as provided to the Board for its review and consideration.

FINDINGS OF FACT

Based on the documents in evidence, I make the following findings of fact:

1. LaMonica (DOB 12/16/38) was employed as a police officer in the Town of Winthrop from October 26, 1967 until his superannuation retirement on January 31, 1995. At the time of his retirement, LaMonica was serving as the Chief of the Winthrop Police Department. (Exhibits 3,4)
2. On July 25, 1995, LaMonica pled guilty in the United States District Court, District of Massachusetts in the matter of United States of America v. Angelo A. LaMonica, Case No. 1:95-CR-10225-NG to six (6) counts of filing false tax returns in violation of 26 U.S.C. § 7206(1). Count I alleged that on or about April 15, 1989, LaMonica filed a false tax return by failing to disclose approximately \$3,000 he received from Telco Communications, Inc., and failed to report income payments he received from Raymond McGee; Count II alleged that on or about April 15, 1990, LaMonica filed a false tax return by failing to report income payments he received from Raymond McGee; Count III alleged that on or about April 15, 1991, LaMonica filed a false tax return by failing to disclose

² The Hearing Officer granted LaMonica's request to file his written submission no later than April 11, 2016.

approximately \$2,000 he received from Telco Communications, Inc., and failed to report income payments he received from Raymond McGee; Count IV alleged that on or about April 15, 1992, LaMonica filed a false tax return by failing to report income payments he received from Raymond McGee; Count V alleged that on or about April 15, 1993, LaMonica filed a false tax return by failing to report income payments he received from Raymond McGee; and Count VI alleged that on or about April 15, 1994, LaMonica filed a false tax return by failing to report income payments he received from Raymond McGee. As set forth in the Sentencing Recommendation, first as Lieutenant, then as Chief of the Winthrop Police Department, LaMonica received illegal payments including an initial payment of \$1,000, then \$100 per week for the next fourteen (14) years, from Mr. McGee to “cover-up” video poker machines in the Town of Winthrop. LaMonica became aware of the video poker machines during an East Boston District Court proceeding, in which LaMonica was the prosecuting officer, and used this opportunity to enter into the aforementioned illegal financial arrangement with Mr. McGee. (Exhibits 12, 14)

3. At its November 24, 1995 meeting, the Board vote to appoint outside counsel for the purpose of addressing two questions: (1) “Is the retirement board required to withhold the retirement of Mr. LaMonica based upon his recent conviction?;” and (2) “Can the retirement board withhold the retirement benefits of Mr. LaMonica based upon his recent conviction?” (Exhibit 6)

4. On November 30, 1995, the Board notified LaMonica that outside counsel would be reviewing his recent conviction to determine whether it would have any impact on his retirement benefits. (Exhibit 7)
5. On December 26, 1995, the Board notified LaMonica that outside counsel would be addressing the Board at its January 31, 1995³ meeting regarding her findings with respect to his criminal conviction. (Exhibit 8)
6. At its January 31, 1996 meeting, the Board was advised by counsel that it had no right to withhold LaMonica's retirement allowance, and as such the Board took no further action with respect to LaMonica's allowance.
7. On January 16, 2003, apparently in response to the Public Employee Retirement Administration Commission's ("PERAC") request for information, the Board provided to PERAC a copy of successor counsel's opinion regarding LaMonica's 1995 criminal conviction and its impact on his ability to receive his retirement allowance. In Board counsel's December 9, 2002, he opined that based on the facts provided, there did not appear to be any direct correlation between LaMonica's criminal convictions and his official duties. (Exhibits 17, 22)
8. On January 12, 2016, the Board notified LaMonica that it would be reviewing LaMonica's criminal convictions at its January 26, 2016 meeting to determine whether it should institute proceedings pursuant to M.G.L. c. 32, § 15(2) to determine whether his criminal convictions were violations of the laws applicable to his office or position pursuant to M.G.L. c. 32, § 15(4). (Exhibit 1)
9. On January 26, 2016 the Board consulted with its counsel, who recommended that the Board institute proceedings to formally review the entire documentary record

³ This clearly was a typographical error – the meeting was scheduled for January 31, 1996.

relating to LaMonica's criminal convictions. The Board voted to institute proceedings, and to appoint its counsel as the Hearing Officer for the proceedings. (Exhibit 20)

10. On February 2, 2016, having previously been advised that LaMonica was represented by counsel, the Board notified LaMonica's counsel pursuant to M.G.L. c. 32, §§ 15(2) and 16(1) that it had voted to institute proceedings pursuant to M.G.L. c. 32, § 15(4) to determine whether LaMonica's criminal convictions were violations of the laws applicable to his office or position pursuant to M.G.L. c. 32, § 15(4).

DECISION

The sole issue in this case is whether any of the offenses of which LaMonica was convicted, and the underlying facts and circumstances giving rise to those convictions violate the provisions of M.G.L. c. 32, § 15(4).⁴ As a procedural and preliminary matter, the Hearing Officer will also address whether any prior Board review of this matter bars this current proceeding.

The Board's Prior Review

LaMonica implicitly challenges the Board's jurisdiction to reconsider its prior "review" of this matter, suggesting that the reviews it undertook between November 1995 and culminating with taking no action on January 31, 1996 based on the advice of its prior counsel that the Board was neither required nor permitted to take any action with respect to LaMonica's pension,⁵ and

⁴ In his brief, LaMonica also suggests that the Board is required to find whether the imposition of a pension forfeiture is an excessive fine pursuant to the 8th Amendment to the United States Constitution. As the Board has no jurisdiction to decide Constitutional questions, this decision does not contemplate or decide that question. Maher v. Justices of the Quincy Division of the District Court Department, 67 Mass. App. Ct. 612, 619 (2006).

⁵ The Hearing Officer is aware that LaMonica receives a retirement allowance, which is comprised of both a system-funded pension and a portion of his annuity savings account, but for the ease of the reader his retirement allowance shall be referred to as his "pension."

the review undertaken in December 2002 bars this current proceeding. For several reasons, this position is unavailing and erroneous as a matter of law.

While the substance of prior Board counsel's opinion will be addressed later in this recommended decision, from a procedural standpoint it is important to point out that the Board never previously conducted a hearing, nor did it make any formal determination after a full review of the facts of this case. Essentially, LaMonica is arguing that pursuant to the principles of "res judicata" the Board should be estopped from further consideration of this case. The term "res judicata" includes both claim preclusion and issue preclusion. Kobrin v. Board of Registration of Medicine, 444 Mass. 837 (2005); See Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). "Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." O'Neill v. City Manager of Cambridge, 428 Mass. 257, 259 (1998), quoting Blanchette v. School Committee of Westwood, 427 Mass. 176, 179 n.3 (1998). This "is 'based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit.'" O'Neill v. City Manager of Cambridge, supra, quoting Heacock v. Heacock, supra at 24. The invocation of claim preclusion requires three elements: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001), quoting Franklin v. North Weymouth Cooperative Bank, 283 Mass. 275, 280 (1933).

Similarly, issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Heacock v. Heacock, supra at 23 n.2. Before precluding a party from relitigating an issue, "a court must determine that (1) there was a final judgment on the merits in

the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication.” Tuper v. North Adams Ambulance Service, Inc., 428 Mass. 132, 134 (1998), and cases cited. “Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment.” *Id.* at 134-135, and cases cited. Issue preclusion can be used only to prevent relitigation of issues actually litigated in the prior action. See Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 199 (1996). Accordingly, we look to the record to see what was actually litigated. See Gleason v. Hardware Mutual Casualty Co., 324 Mass. 695, 699 (1949).

It is clear from the record that the Board never undertook any meaningful review in 1995 and 1996 that could in any way be remotely construed as a “final judgment” or “adjudication.” The extent of the Board’s prior review of this matter was a request for guidance from its prior counsel as to whether any remedial action could or should be taken, and counsel’s opinion – which in this Hearing Officer’s review was erroneous having now been provided with all the relevant court documents – was that the Board could not take any action as a result of LaMonica’s convictions, and based on that advice, the Board never conducted a formal hearing to review all the relevant evidence to determine whether LaMonica’s criminal convictions were violations of the law applicable to his office or position. Similarly, in 2002 when the Board requested a review of prior counsel’s opinion, current Board counsel opined that *based on the information provided* regarding the criminal convictions, no further action need to be taken. It was not until this proceeding that the Board was provided with and actually reviewed available court documents relating to the criminal proceeding, and conducted a hearing to properly review the evidence and give LaMonica the right to appear and testify if he elected to do so.

Moreover, it is not necessary that the prior adjudication have been before a court. Rather, if the proponent for preclusion proves that the elements for preclusion are met, “[a] final order of an administrative agency in an adjudicatory proceeding . . . precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction.” Tuper v. North Adams Ambulance Service, Inc., supra at 135, quoting Stowe v. Bologna, 415 Mass. 20, 22 (1993). It is also worth noting that a pension forfeiture pursuant to M.G.L. c. 32, §15(4), is “mandatory and occurs by operation of law . . . [It] is an automatic legal consequence of conviction of certain offenses.” State Board of Retirement v. Woodward, 446 Mass. 698, 705 (2006), quoting MacLean v. State Board of Retirement, 432 Mass. 339, 342-343 (2000). The Board’s implementation of Section 15(4) is not an “action in contract” subject to the six-year contract statute of limitations, but a ministerial step to effectuate formally what already has occurred by operation of law. State Board of Retirement v. Woodward, 446 Mass. at 705. Even where the Board’s 1996 review could be viewed as a “proceeding,” “agencies have inherent power to reopen their concluded proceedings in compelling situations as justice may require.” Covell v. DSS, 42 Mass App. Ct. 427, 433 (1997). Here, given Section 15(4)’s mandatory application as an automatic consequence of the conviction of certain offenses and the important public purposes it serves, the Board has sufficient grounds to revisit its 1995 and 2002 reviews. Cf. Ramponi v Board of Selectmen of Weymouth, 26 Mass. App. Ct. 826, 829-30 (1989) Shea v. Board of Selectmen of Ware, 34 Mass. App. Ct. 333, 336-37 (1993).

Based on the foregoing, I conclude the Board has jurisdiction to conduct the hearing and review this matter, as there has been no prior adjudication and/or final judgment on the merits, and there is no statute of limitations that would preclude such a current review.

Role of the Hearing Officer and the Process
Afforded Pursuant to M.G.L. c. 32, §§ 15(2) and 16(1)(b)

The statutory scheme is relatively silent with respect to procedural and substantive aspects of the actual Board hearing to be conducted in pension forfeiture proceedings. M.G.L. c. 32, § 15(2) requires retirement boards to follow the service and process requirements set forth in M.G.L. c. 32, § 16(1), and Section 16(1)(b) specifically reference the “hearing” to be conducted by the retirement board. Notably, Section 16(1) pertains to the filing of an involuntary retirement application for superannuation (Section 5), ordinary disability (Section 6) or accidental disability (Section 7). Implicit in its reference to Section 16(1) in Section 15(2) is that a retirement board is to conduct a hearing in the same manner in which it would conduct a hearing for a disability retirement application. The Board’s oversight authority, PERAC, has promulgated regulations with respect to the manner in which a hearing is to be conducted in disability proceedings. See 840 CMR 10.12. Accordingly, and in the absence of any statutory or regulatory guidance or case law to the contrary, it logically follows that the controlling statute requires that retirement boards conduct hearings pursuant to Section 15 in the same manner as a disability hearing.⁶

Having established that 840 CMR 10.12 governs in this case, the Hearing Officer wishes to address his prior limited involvement with this case, particularly the cursory review conducted and referenced in Exhibit 22. The Board clearly has the discretion to appoint its legal counsel as the Hearing Officer for LaMonica’s forfeiture proceeding. 840 CMR 10.12(3)(a) states:

The chairperson of the retirement board, any other member of the board acting as chairperson, *or any individual designated by the board*, shall be the presiding officer and shall assure parties the right to call and question witnesses and

⁶ The hearing provisions of Section 15 afford the member due process rights, including the opportunity to respond to evidence that he is the same person who was “convict[ed] of a criminal offense involving violation of the laws applicable to his office or position.” State Board of Retirement v. Woodward, supra.

introduce exhibits, and to present argument, relevant to the proceeding. The presiding officer shall assure an orderly presentation of the evidence and argument and that a record is made of the hearing.

(Emphasis added)

Accordingly, the Board's appointment of its counsel as the Hearing Officer for this Section 15 forfeiture proceeding was entirely permissible pursuant to 840 CMR 10.12, and certainly appropriate given that the Board's counsel possesses the expertise and experience to conduct such a hearing, evaluate the evidence and draft a recommended decision for the Board's review and consideration in an area of the law the Supreme Judicial Court has recognized is "notoriously complex." Murphy v. Contributory Retirement Appeal Board, 463 Mass. 333, 345 (2012); Namay v. Contributory Retirement Appeal Board, 19 Mass. App. Ct. 456, 463 (1985). See Adams v. Contributory Retirement Appeal Board, 414 Mass. 360, 367 (1993).

In more general terms, a public entity appointing its legal counsel as a hearing officer for a disciplinary or other proceeding is not without precedent. McSweeney v. Town of Lexington, 379 Mass. 794, 795 (1980) (town counsel acted as hearing officer for his employing authority in termination proceeding against an employee of the employing authority). In Scully v. Retirement Board of Beverly, 80 Mass. App. Ct. 538 (2011), the Appeals Court noted that the hearing officer in that case was also the retirement board's attorney, and while the Court ultimately disagreed with the retirement board's decision (which accepted the hearing officer's recommended decision that was subsequently upheld by both the District and Superior Courts) as being too tenuous, the Court did not take any issue with the fact that the hearing officer was also the retirement board's counsel. Similarly, although not discussed in the decisions rendered in Flaherty v. Justices of the Haverhill Division of the District Court Department of the Trial Court, 83 Mass. App. Ct. 120 (2013), Maher v. Justices of the Quincy Division of the District Court Department, 67 Mass. App. Ct. 612 (2006) and Maher v. Retirement Board of Quincy, 452 Mass.

517 (2008), the record appendices filed reflect that in both cases, the hearing officer was also the retirement board's counsel, and neither the Appeals Court nor the Supreme Judicial Court voiced any concern about the hearing officer being board counsel. The Hearing Officer is unaware of any reported appellate decisions that stand for the proposition that a public entity that assigns its legal counsel to perform the role of a hearing officer renders the process null and void on the basis of bias, prejudice or interest, or as a violation of the due process rights of the individual who is the subject of the hearing.

While it is clear that the Board has the authority to appoint its counsel as the Hearing Officer for the case, it is worth spending a few moments discussing any perceived bias or predisposition based on the Hearing Officer's prior review of this matter and/or the role of Board counsel. As a threshold matter, despite the serious nature of the proceeding and what is potentially at stake, the proceeding before the Board is not adversarial in nature. Neither the Board nor the Hearing Officer is acting as prosecutor; rather, the Board's role is to review the facts and the law and render a decision whether any provision of M.G.L. c. 32, § 15 has been violated, and if so to follow the consequences determined by the Legislature when any such violation occurs. The Hearing Officer's role is to issue findings of fact and rulings of law on the relevant issues before the Board and to submit a recommended decision for the Board's review and consideration. LaMonica's case is not dissimilar to any benefit or disputed claim that comes before the Board; in each and every case, the Board must review the facts and the law, and determine whether a System member qualifies for the benefit he or she seeks. Given the statute's acknowledged complexity, the multiple legislative amendments and the decades of administrative and appellate decisions interpreting the statute's proper administration and application, the Board from time to time must seek the guidance of its legal counsel to assist it in

rendering a decision based on the facts and the law. In these circumstances, the Hearing Officer's role is no different than it would be as Board counsel – to evaluate the evidence and offer an opinion to the Board in the form of a recommended decision.

With respect to the Hearing Officer's prior review of the matter, a prior opinion based on limited facts does not in anyway preclude the Board from proceeding on this matter as previously discussed, nor disqualify the Hearing Officer from reviewing the additional facts and documents and rendering a recommended decision. This Hearing Officer harbors no bias or prejudice against LaMonica.

M.G.L. c. 32, § 15 – Dereliction of Duty – LaMonica's Criminal Convictions

Section 15(4)

As noted at the outset, the sole substantive issue in this case is whether LaMonica's criminal convictions for filing a false tax return in violation of 26 U.S.C. § 7206(1) is a violation of Section 15(4), which states:

In no event shall any member after final conviction of a criminal offense involving the violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

In Garney v. Massachusetts Teachers' Retirement System, 469 Mass. 384 (2014), the Supreme Judicial Court discussed the scope of review when determining whether Section 15(4) is triggered. Citing to Gaffney v. Contributory Retirement Appeal Board, 423 Mass. 1 (1996), the Court noted, "[b]ecause G.L. c. 32, § 15, involves the forfeiture of property, it is penal in nature, and we must draw its limits narrowly, so as not to exceed the scope or reach of the penalty as

contemplated by the Legislature.” See also State Board of Retirement v. Bulger, 446 Mass. 169, 174-175 (2006).

“The substantive touchstone [of G. L. c. 32, § 15 (4),] intended by the General Court is criminal activity connected with the office or position. . . . [T]he General Court did not intend pension forfeiture to follow as [an automatic consequence] of any and all criminal convictions. Only those violations related to the member’s official capacity were targeted. Looking to the facts of each case for a direct link between the criminal offense and the member’s office or position best effectuates the legislative intent of § 15 (4)” (emphasis added). Gaffney, 423 Mass. at 4-5. This “direct link” requirement “does not mean that the crime itself must reference public employment or the employee’s particular position or responsibilities,” Maier v. Justices of the Quincy Div. of the Dist. Court Dep’t, 67 Mass. App. Ct. 612, 616 (2006), S.C., Maier v. Retirement Board of Quincy, 452 Mass. 517 (2008), cert. denied, 556 U.S. 1166 (2009), or that the crime necessarily must have been committed at or during work hours. Durkin v. Boston Retirement Board, 83 Mass. App. Ct. 116, 119 (2013); Maier supra. However, where the crime itself does not reference public employment or bear a direct factual link through use of the position’s resources, there must be some direct connection between the criminal offense and the employee’s official capacity by way of the laws directly applicable to the public position. Garney, supra at 389.

In this case, LaMonica plead guilty to six (6) counts of filing false tax returns pursuant to 26 U.S.C. § 7206(1) that, on its face, does not reference LaMonica’s position or duties as a police officer. Accordingly, to conclude that Section 15(4) has been violated, there must be a direct factual link through use of the position’s resources or there must be some direct connection between the criminal offense and the employee’s official capacity by way of the laws

directly applicable to the public position. LaMonica posits there is no nexus between the filing of false tax returns and his position as police officer, and as such his criminal convictions did not violate the laws applicable to his office or position. I disagree. As noted in the documents the District Court produced, the underlying facts giving rise to LaMonica's criminal conviction for filing false tax returns create a clear and direct nexus to his duties as a police officer.

As the Supreme Judicial Court wrote in Attorney General v. McHatton, 428 Mass. 790, 793-794 (1999), quoting from Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986):

“Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

See Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801-802 (2004) (“[p]olice officers must . . . behave in a manner that brings honor and respect rather than public distrust of law enforcement personnel. This applies to off-duty as well as on-duty officers” [citations omitted]). “The nature of [the member’s] particular crimes cannot be separated from the nature of his particular office when what is at stake is the integrity of [the] system.” State Board of Retirement v. Bulger, 446 Mass. 169, 180 (2006) Here, LaMonica not only engaged in the very type of criminal behavior he was required by law to prevent, but he used his position as a police officer to shield criminal activity occurring in his jurisdiction and under his watch, and in return he was compensated for looking the other way. Despite the unavailability of a plea colloquy, the reasonable inference to be drawn from the documents produced in this case is that money Mr.

McGee paid LaMonica were the funds that LaMonica failed to disclose on his tax returns for the years 1989 to 1994, and thus formed the basis of his criminal convictions.

At the hearing, LaMonica was given the opportunity to testify, and other than acknowledge he is the same Angelo LaMonica who was convicted in Massachusetts District Court for the 6 counts of filing false tax returns, he declined to answer any questions. Nevertheless, it was brought to LaMonica's attention that documents in the record produced by the District Court relating to the criminal proceeding were such that a reasonable inference could be drawn that the filing of the false tax returns related to funds Mr. McGee and Telco paid him to allow the criminal activity to continue, thereby providing the link between his position and his criminal convictions. LaMonica argues post hearing that no adverse inference can be drawn from his refusal to testify because LaMonica was not invoking his 5th Amendment right against self-incrimination, but rather simply declining to answer questions. "In a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self-incrimination." Quintal v. Commissioner of the Department of Employment & Training, 418 Mass. 855, 861 (1994), quoting from Labor Relations Commission v. Fall River Educators' Association, 382 Mass. 465, 471 (1981). However, "the adverse inference drawn from the silence of a party is in-sufficient, 'by itself, to meet an opponent's burden of proof.'" Ibid., quoting from Custody of Two Minors, 396 Mass. 610, 616 (1986). "Instead, 'a case adverse to the interests of the party affected [must be] presented' before an adverse inference may be drawn." Ibid., quoting from Custody of Two Minors, supra. Although LaMonica did not invoke his 5th Amendment right in declining to testify, this does not mean that an adverse interest cannot be drawn from his refusal to testify that his testimony, if truthful, would be against his interest. See Maher v. Justices of the Quincy Division of the District Court

Department, 67 Mass. App. Ct. 612, 617 (2006)(substantial evidence relied upon by retirement board in concluding link between criminal offenses and member's position included reasonable inferences that could be drawn from the plaintiff's refusal to testify at the board hearing).

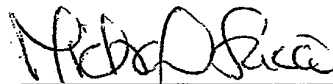
Unlike what occurred in Scully v. Retirement Board of Beverly, 80 Mass. App. Ct. 538 (2011), a case with which this Hearing Officer is very familiar, there is evidence that satisfies the necessary standard. As noted in Exhibit 12, there were originally two (2) cases pending against LaMonica, and one case (Docket No. 95-10105-NG) was dismissed as part of an agreement that LaMonica plead guilty to 6 counts of filing false tax returns in the second case. The Dismissal of Indictment filed by Assistant U.S. Attorney S. Theodore Merritt referenced "superseding information," which was attached to the dismissal, and in the pleading entitled Superseding Information paragraph 1 stated as follows: "At all times material to this information the defendant ANGELO A. LAMONICA was a sworn officer of the Winthrop Police Department, serving as a Sergeant from 1975 to 1980, a Lieutenant from 1980 to 1989, and then Chief of Police from November, 1989 to January 31, 1995." Paragraph 2 reads, in pertinent part: "At all times material to this information Raymond McGee and his associates engaged in and collected money from the operation of video poker gambling machines, ..." In all 6 counts of the indictment to which LaMonica plead guilty, it was alleged that he "failed to report as income payments of money he received from Raymond McGee." During the hearing, one of the questions LaMonica refused to answer was, "Who is Raymond McGee?" Unlike Scully, where the Court found that there was insufficient evidence to prove that the same child pornography the defendant was convicted of possessing was the same child pornography he showed to the child he met at the library while performing his official duties, LaMonica's case suffers from no such infirmity. The indictments specifically allege that the false information on his tax returns that

resulted in his guilty plea pertained to LaMonica's failure to report the funds Mr. McGee and/or Telco paid him. There is no other plausible inference to be drawn from LaMonica being identified as a police officer and Mr. McGee as an individual involved in the collection of money from illegal video poker machines in private clubs in Winthrop as set forth in the Superseding Information pleading, and then identifying LaMonica in the indictments as failing to report income payments from Mr. McGee and/or Telco, other than the payments were made to LaMonica in return for his turning a blind eye to the illegal operation of video poker machines in certain private establishments in Winthrop. If there was some other reason McGee and/or Telco paid LaMonica, LaMonica could have testified and offered an explanation or reason why he was paid the money, unrelated to his employment. LaMonica declined to offer any explanation, even after being informed of the inferences that could be drawn based on the evidence in the record, and I draw such an adverse interest in finding that the evidence in this case, and LaMonica's election to not offer any evidence to refute it, is sufficient to find the requisite causal nexus between his employment and his criminal convictions. Contrary to LaMonica's assertions, the Board is not relitigating the criminal case; rather as is required to conduct the proper analysis, the Board must review the underlying facts upon which the indictment and criminal convictions were based to determine whether there was a causal nexus between LaMonica's criminal convictions and his employment.

Finally, although the Board's prior review of this matter is not at issue in this case, it is worth noting that at the time the Board first sought guidance regarding the application of Section 15(4), there had been no appellate decisions rendered to provide the Board any guidance. The first reported appellate decision was Gaffney, which was not issued until June 13, 1996, and thus the Board relied upon the advice of counsel without the benefit of any appellate case law to

guide her in determining whether any action could or should be taken. There is a reason for the expression that "hindsight is 20/20" – while it is unclear to what extent the District Court records were reviewed in 1995 and whether or not prior counsel reviewed the documents available at that time, the matter is now before the Board for review and adjudication. LaMonica is correct that the facts have not changed in this case, and the facts demonstrate that LaMonica was convicted of criminal offenses that had a direct link to his employment as a police officer, and the offenses are all the more egregious as he was the Chief of the Winthrop Police Department. LaMonica has presented no evidence in this proceeding to refute the reasonable inferences to be drawn from the facts of this case, and thus I conclude that LaMonica's criminal convictions are violations of the laws applicable to his former position as a police officer, and as such his pension shall be revoked.

Finally, although the Board does not have jurisdiction to decide whether the imposition of a pension forfeiture is an excessive fine in violation of the 8th Amendment to the United States Constitution, if the Board adopts this recommended decision and LaMonica appeals, it will be necessary to determine, among other things, the amount of the forfeiture. Through March 31, 2016, LaMonica has received \$964,333.55 in retirement allowance payments, and pursuant to Sections 15(4) and 15(6), the Board will be required to seek recoupment of the \$964,333.55, less LaMonica's annuity balance at the time of his retirement, less any interest accrued thereon. As LaMonica's annuity balance, less accrued interest, is not part of this record, it will be necessary post decision, should the Board adopt this decision, to determine the exact amount for the Board to recover.



Michael Sacco, Esquire
Dated: April 14, 2016

CERTIFICATION

In my capacity as the Winthrop Retirement System's Administrator, I hereby certify that the above Recommended Decision is true and accurate, and on April 25, 2016 the Winthrop Retirement Board voted unanimously to accept the Recommended Decision ("Decision") as its own.

I further certify that I have directed the Board's Decision to be delivered via certified mail, with return receipt requested and regular mail, first class, postage prepaid to Angelo LaMonica, by and through his attorney of record, James J. Cipoletta, Esquire, Citizens Bank Building, 385 Broadway, Suite 307, Revere, Massachusetts 02151.

Signed under the pains and penalties of perjury this the 26th day of April 2016.

A handwritten signature in cursive script that reads "Barbara O'Brien". The signature is written in black ink and is positioned above a horizontal line.

Barbara O'Brien