THE COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD
ONE ASHBURTON PLACE, 20TH FLOOR
BOSTON, MASSACHUSETTS 02108

June 21, 2013

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Re: Brenton MacAloney v. Worcester Regional System, and Public Employee Retirement Administration Commission,
CR No. 11-19.

Dear Counsel:

Enclosed please find the Amended Decision of the Contributory Retirement Appeal Board. Any party aggrieved by the Decision may, within thirty (30) days of receipt of this notice and the enclosed decision, appeal to the Superior Court in accordance with the provisions of Massachusetts General Laws, Chapter 30A, § 14.

Very truly yours,
Catherine E Sullivan (db)

Catherine E. Sullivan
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Enclosure

cc: Richard Heidlage, Esquire, DALA (w/original)

COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

BRENTON MACALONEY,

Petitioner-Appellant,

v.

WORCESTER REGIONAL RETIREMENT SYSTEM AND PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION,

Respondents-Appellees.[1]

CR-11-19

AMENDED DECISION

Petitioner Brenton MacAloney and respondents Worcester Regional Retirement System (WRRS) and Public Employee Retirement Administration Commission (PERAC) appeal from a decision of the Chief Administrative Magistrate of the Division of Administrative Law Appeals (DALA), relating to the calculation of creditable service for MacAloney, Fire Chief of the Westminster, Massachusetts Fire Department and a former call firefighter in that town. The chief magistrate held a hearing on the WRRB's motion to

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[1] We have received objections from all three parties. We designate the petitioner as the appellant and the respondents as appellees for purposes of this decision. For ease of reference we include the Public Employee Retirement Administration Commission (PERAC) as a respondent although it was named below as a third party.

dismiss, which he treated as a motion for summary decision, on September 8, 2011 and admitted 36 exhibits.[2] His decision is dated October 7, 2011.

All three parties filed timely appeals with us. After the parties' submissions to us were completed, we requested supplemental memoranda, which were filed and for which we thank the parties. We adopt the chief magistrate's Findings of Fact 1-23 as our own.

For the following reasons, we hold that the 1964 amendments to G.L. c. 32, § 4(2)(b) did not preempt the WRRB's local rules as applied to MacAloney's case. Thus, MacAloney is entitled to both five years' creditable service for his call firefighting pursuant to G.L. c. 32, § 4(2)(b) and creditable service pursuant to WRRB's local rules for his call firefighter service following his initial five years in the manner described below. We conclude, however, that MacAloney's receipt of prior, non-membership service credit under § 4(2) and under local retirement board rules is subject to the provisions of §§ 3(2)(c), 3(3), 3(5), and 4(2)(c), which require make-up payments. We express no opinion as to MacAloney's creditable service arising from his positions other than call firefighter, as there does not appear to be any dispute concerning that calculation.

Background. MacAloney held various part-time positions for the Town of Westminster from June 26, 1967 until he was appointed to the full-time

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[2] The chief magistrate also accepted memoranda of law, some with attached documents, which were marked as Exhibits A through R. We accept copies of those exhibits as an exception to our rule that memoranda should not be filed with us. *See* CRAB Standing Order 2008-1, ¶ 4.a.(5).

position of Fire Chief as of July 1, 1998.[3] His part-time positions for the first ten years of his employment included elections and registration worker, school custodian, monument caretaker, dispatcher, and special police officer. In addition, throughout this thirty-one year period, MacAloney served as a call firefighter.[4]

At the time MacAloney began his employment with the town, under the rules of the Worcester County Retirement Board (now the WRRS), he could become eligible to join the retirement system in either of two ways: (1) he could join if, in any calendar year, he worked the equivalent of 130 days or more in any position other than as a firefighter (or other positions not applicable here) or (2) he could join if he earned $200 or more per year as a call firefighter (or certain other positions).[5] Although he reached both these thresholds earlier,[6] MacAloney joined the retirement system in 1974, and the town then began deducting retirement contributions from MacAloney's pay.[7]

Under the retirement system's rules prior to 1984, part-time workers other than firefighters earned creditable service "based on actual service

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[3] We agree with MacAloney that July 1, 1998 is the date when he assumed the position of full-time Fire Chief for the Town of Westminster. Finding 9; Exs. 19, 28, 29.

[4] Findings of Fact 8-9; Ex. 9.

[5] Finding 1.

[6] In 1970 MacAloney earned at least $200 for his call firefighter work ($205) and in 1972 he worked the equivalent of 130 days, or 1,040 hours (1,167.5 hours) in non-call-firefighting positions. Ex. 6.

[7] Findings 8-9; Exs. 6, 9, 24. It appears that deductions were made, starting on April 16, 1974, from MacAloney's pay for both his regular part-time work and his work as a call firefighter.

rendered" (Board Rule 2). Call firefighters (and reserve police officers) earned one month of creditable service for each year of service (Board Rule 4).[8] These rules had been approved in 1957 by an actuary with the Division of Insurance[9] pursuant to the version of G.L. c. 32, § 4(2)(b) then in effect.[10] Thus, member call firefighters and reserve police officers paid into their retirement system's annuity fund via deductions from their pay at the applicable statutory rate, but they received creditable service based on the Board's Rule 4.

Seven years later, in 1964, the Legislature twice amended § 4(2)(b). The first amendment added the following language:

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[8] Finding 1. A 1976 rule requiring employees to work at least twenty hours per week within a calendar year to be eligible for membership was limited to persons hired after September 1, 1976 and so had no application to MacAloney. Finding 3.

[9] Finding 2; Exs. 14-15. *See* St. 1982, c. 630, § 50 (transferring retirement functions from Division of Insurance to Public Employee Retirement Administration).

[10] G.L. c. 32, § 4(2)(b), as amended through St. 1946, c. 403, § 4, provided in relevant part that:

> The board shall fix and determine how much service in any calendar year is equivalent to a year of service. In all cases involving part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service of any employee in any governmental unit . . . the board, under appropriate rules and regulations which shall be subject to the approval of the actuary, shall fix and determine the amount of creditable prior service, if any, and the amount of credit for membership service of any such employee who becomes a member . . . .

> and, provided, further, that the board shall credit service as a reserve police officer or as a reserve fire fighter as full-time service, said credited service not to exceed a maximum of five years.[11]

This amendment imposed no requirement that reserve police officers or reserve firefighters become permanent members of their department in order to receive full-time credit of up to five years. Four months later, however, the Legislature passed a second amendment, bringing call firefighters within this "five-year rule" – but only if they later became permanent members of their department:

> and, provided, further, that the board shall credit service as a reserve police officer or as a reserve *or call* fire fighter as full-time service, said credited service not to exceed a maximum of five years; *and, provided further, that such service as a call fire fighter shall be credited only if such call fire fighter was later appointed as a permanent member of the fire department.*[12]

In 1965, "permanent intermittent" police officers were added to those benefitting from the five-year rule.[13]

In 1966, the Legislature rewrote the section to clarify what was meant by "service" in the included positions and to add "permanent-intermittent" firefighters. As amended, the section read:

> and, provided, further, that the board shall credit *as full-time service not to exceed a maximum of five years that period of time during which a reserve or permanent-intermittent police officer or a reserve, permanent-intermittent or call fire fighter was on his respective list and was eligible for assignment to duty subsequent to his appointment*; and, provided, further, that such

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[11] St. 1964, c. 125 (approved March 2, 1964).

[12] St. 1964, c. 738 (approved July 9, 1964) (added provisions emphasized).

[13] St. 1965, c. 73 (approved Feb. 25, 1965).

> service as a *permanent-intermittent or* call fire fighter shall be credited only if such *permanent-intermittent or* call fire fighter was later appointed as a permanent member of the fire department.[14]

Thus, as of 1974, when MacAloney first joined the retirement system, two sets of rules were extant that related to his creditable service: the Board's Rule 4, issued under § 4(2)(b), and the "five-year rule" provided by the 1964-1966 amendments to § 4(2)(b).

In 1984, the Worcester County Retirement Board adopted a new supplementary regulation (the "four-month regulation"), which, as approved by the Public Employee Retirement Administration (the predecessor agency to PERAC), provided that call firefighters who earned $225 or more in a calendar year were to be credited with four months of creditable service for that year, "but only if such firefighter is later appointed a permanent member of the fire department." The DALA magistrate found that this regulation replaced the previous rule, Board Rule 4, concerning creditable service for call firefighters. The new regulation was approved by letter dated December 28, 1984.[15]

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[14] St. 1966, c. 509, § 1 (approved Aug. 15, 1966) (in pertinent part; amended portions in italics).

[15] The regulation read:

> Call firefighters – when earnings are $225 per year or more, then 4 months of creditable service is allowed for each calendar year, but only if such firefighter is later appointed as a permanent member of the fire department pursuant to G.L. c. 32, s. 4(2)(b).

Findings 4, 21; Exs. 11, 20.

Two subsequent amendments to G.L. c. 32, § 4(2) affecting creditable service for call firefighters were passed by the Legislature, neither of which has direct application here. In 1988, the Legislature enacted a local option under § 4(2)(b) which, if adopted by a town, city, county, or district, entitled call firefighters who later became permanent members of their department to be credited with additional service, beyond the five years already provided for in the statute, of one full day of service for each day beyond the five years on which the call firefighter actually performed duties.[16] The Town of Westminster did not adopt this local option. In 1995, the Legislature passed a local option, codified at G.L. c. 32, § 4(2)(b½), which, if adopted, entitled call firefighters to full-time credit under § 4(2)(b) regardless of whether they later became permanent members of their department.[17] The Town of

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[16] The amendment added the following, in pertinent part, to § 4(2)(b):

> For a . . . call fire fighter retiring from a governmental unit accepting the provisions of this sentence, the board shall credit, in addition to the five years of credit allowed pursuant to the preceding sentence, as one day of full-time service each day in any year which is subsequent to the fifth year following said appointment and on which a . . . call fire fighter was assigned to and actually performed duty as a . . . call fire fighter; provided, however, that such service as a . . . call fire fighter shall be credited only if such fire fighter was later appointed as a permanent member of the fire department . . . .

St. 1988, c. 172 (approved July 25, 1988).

[17] This amendment stated in pertinent part:

> In any city, town, or fire district, which accepts the provisions of this paragraph, service as a . . . call firefighter shall be credited as full-time service as provided in paragraph (b), except that credit for such service shall not be conditioned upon the

Westminster also did not adopt this local option (which, in any event, would not have affected MacAloney, who became a permanent member of his department).

The parties' positions. The parties, in general, do not dispute the portion of MacAloney's creditable service that is attributable to his various part-time positions with the town from June 26, 1967 through December 31, 1977,[18] other than as a call firefighter. Nor do they dispute the creditable service arising from MacAloney's position as full-time Fire Chief from July 1, 1998 to the present time.[19] Thus, the primary issue is how to calculate that portion of MacAloney's creditable service arising from his call firefighting from June 26, 1967 through June 30, 1998.

MacAloney requests that he receive five years' full-time credit for his call firefighter service under the "five-year" rule of G.L. c. 32, § 4(2)(b) (June 26, 1967 through June 25, 1972). In addition, MacAloney requests that he receive creditable service under the appropriate local rule of the retirement board, now the WRRB, for the remaining years that he worked as a call firefighter (June 26, 1972 through June 30, 1998).

> appointment of said . . . call firefighter as a permanent member of the fire department . . . .

St. 1995, c. 171, § 1 (approved Oct. 19, 1995).

[18] The parties have stipulated that the last year in which MacAloney held such a position was 1977. *See* DALA decision at 25.

[19] The record does not show MacAloney's retirement status. The parties calculated creditable service through December 31, 2011.

The WRRB argues that the "five-year rule" pursuant to G.L. c. 32, § 4(2)(b) applies only to call firefighters whose departments are covered by the civil service laws and so is not applicable to MacAloney. Under the WRRB's local rules, the WRRB requests that MacAloney receive credit pursuant to Board Rule 4 for his service from June 26, 1967 through December 31, 1983, and receive credit pursuant to the WRRB's four-month regulation for his service from January 1, 1984 through June 30, 1998.[20]

PERAC argues, similarly to MacAloney, that MacAloney may receive credit for his call firefighting service under both the "five-year" rule and, for the period of time following his initial five years, under the WRRB's local rules. Thus, under PERAC's calculations, MacAloney would receive five years of call-firefighter service from June 26, 1967[21] through June 25, 1972. From January 1, 1973[22] through December 31, 1983, PERAC would apply

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[20] Although the "four-month" regulation did not take effect until December 28, 1984, the parties appear to agree that it supplanted Board Rule 4 for the entire calendar year of 1984.

[21] PERAC's chart begins on June 27, 1967 rather than June 26, 1967. (Appendix to PERAC memorandum dated Nov. 14, 2011). This may be a typographical error; the disparity in any event does not alter PERAC's calculations or our conclusions.

[22] PERAC applied one-half year of call firefighter creditable service to calendar year 1972 and applied another half year of creditable service from MacAloney's regular, non-call-firefighter, part-time work in calendar year 1972, so that the total credit for 1972 was one year. *See* G.L. c. 32, § 4(1)(a) (members may receive no more than one year of creditable service in any calendar year). Thus, there was no need to consider whether MacAloney was entitled to any further credit for his call firefighter service during the remainder of calendar year 1972, as he had already earned a full year's credit for that year.

Board Rule 4. Starting on January 1, 1984 through June 30, 1998, PERAC agrees with the WRRB that the "four-month" regulation should apply.

1. *Preemption of WRRB local rules by the "five-year" rule under G.L. c. 32, § 4(2)(b).* We conclude that rules of local retirement boards concerning creditable service for call firefighters, including those of the WRRB, were not categorically preempted by the 1964-1966 enactment of the "five-year rule" for call firefighters who later become permanent members of their department under G.L. c. 32, § 4(2)(b). For clarity, we begin with the situation presented here, where the member's town has adopted neither of the local options under the 1988 and 1995 amendments to § 4(2)(b). In such a case, the statute provides call firefighters only full-time credit of up to five years, and only where the call firefighter later becomes a permanent member of his department. We refer to the latter provision, as amended through 1995, as the "five-year rule." Under this "five-year rule," local regulations that relate only to circumstances not addressed by the legislation – such as periods of time beyond the five years, or credit for call firefighters who never become permanent firefighters in their town – are not preempted.

In considering whether a statute preempts local – or in this case retirement board – regulations, we consider whether the statute contains an express prohibition against local rules, whether the local rules frustrate the legislative purpose, and whether the legislation so completely occupies the

area that no room is left for local regulation.[23] Certainly, no language in G.L. c. 32, § 4(2)(b)'s "five-year" rule expressly states that retirement boards are prohibited from adopting local rules providing creditable service in situations other than those addressed by the statute. To the contrary, § 4(2)(b) begins by providing that "[t]he board shall fix and determine how much service in any calendar year is equivalent to a year of service" and that "the board, under appropriate rules . . . [as approved by the actuary], shall fix and determine" the amount of credit to apply for part-time and similar service. Where the clause containing the "five-year" rule modifies this provision, it restricts retirement boards' power to regulate only to the extent specifically addressed by the "five-year" rule.[24]

Nor can we conclude that local retirement board rules providing creditable service to call firefighters in addition to, or in different circumstances from, § 4(2)(b)'s "five-year" rule "would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject."[25] The legislative intent of the original "five-year" rule, as enacted in March of 1964, appears to have been to ensure

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[23] *See Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 200-204 (2000).

[24] We do not imply that retirement boards may issue regulations that alter the provisions of the retirement law, G.L. c. 32. Here the WRRB and its predecessor board had power to regulate by the explicit authority given under G.L. c. 32, § 4(2)(b). In most areas of retirement law, however, c. 32 controls and boards have no power to adopt rules that alter or extend the law's provisions.

[25] *Id.*

that certain part-time public safety employees – at that point just "reserve" police officers and firefighters – received more than actual service rendered in light of the hazardous nature of their work and the time during which they may be available for work but not actually called out. The full-time credit for less than full-time work, however, was limited to five years. Similarly, when call firefighters were added in July of 1964 (with the additional requirement that, to receive credit under the "five-year" rule, they must become permanent members of their department), the same result appears to have been intended – that these persons performing hazardous duties and making themselves available for such duties when not actually called should receive more than actual service rendered, again with the full-time credit for less than full-time work limited to five years. Where these amendments evince an intent to provide greater creditable service to certain call firefighters and other part-time public safety personnel, we see no frustration of that purpose in allowing retirement boards to adopt or retain local rules that govern creditable service for employees to whom the "five-year" rule does not apply, or that govern periods of time beyond that covered by the "five-year" rule.

Finally, it cannot be suggested that the "five-year" rule preempted all local regulation because it "deal[t] comprehensively with the subject" of creditable service for part-time public safety officers.[26] The rule by its terms applies only to call firefighters who become permanent, and only applies to

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[26] *See Boston Police Patrolmen's Ass'n v. City of Boston*, 367 Mass. 368, 372 (1975).

the first five years of their service. Other public safety officers are also only covered by the rule for the first five years of their service. The rule is set forth in two phrases within a sentence addressing several separate issues relating to retirement boards' determination of credit for part-time employees. The two phrases allocated to this rule are hardly "comprehensive legislation" such as the Education Reform Act's "radical[] restructur[ing of] the funding of public education across the Commonwealth," which was held to have preempted an earlier funding scheme set out in special legislation.[27] Under none of these tests can we conclude that the "five-year" rule preempts local board regulations that apply in other circumstances.

2. *The Colo decision.* In reaching this conclusion, we are aware that the opposite result was "assume[d], for purposes of this case at least," as to the version of § 4(2)(b) as amended through 1964, by the Appeals Court in dictum in *Colo v. Contributory Retirement Appeal Bd.*, 37 Mass. App. Ct. 185, 187-188 (1994). The reasoning behind the Appeals Court's assumption in *Colo* is not persuasive here for several reasons. First, the Court did not address whether the "five-year" rule preempted local regulation; instead, the Court concluded that the limitation to five years for "such credited service"

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[27] *See Town of Dartmouth v. Greater New Bedford Reg'l Vocational Technical High School Dist.*, 461 Mass. 366, 375-376 (2012) (former school funding process under special act preempted by Education Reform Act); *cf. St. George Greek Orthodox Cathedral of Western Massachusetts v. Fire Dep't of Springfield*, 462 Mass. 120, 133 & n. 13 (2012) (where State Building Code explicitly allowed certain fire protection devices, local ordinance prohibiting them was preempted).

(under the 1964 amendments) referred not to the five years of service, but to *any* service. We note that, in reaching this assumption, the Court placed reliance on, and gave deference to, the then-positions of both the Contributory Retirement Appeal Board and PERA. Both we and PERA's successor PERAC, now faced with a case that directly presents this issue and having carefully reviewed the matter, agree that the phrase "such credited service" refers, as is normally the case, to its immediate antecedent: the crediting of service as full-time service.[28]

Moreover, the assumption in *Colo* rested only upon analysis of § 4(2)(b)'s "five-year" rule as amended through 1964. The statute as amended through 1966 uses somewhat different language. The amended version, "full-time service not to exceed a maximum of five years," makes it clearer that the five-year limitation applies only to *full-time* service, and not to *any* service. Thus, local retirement board rules concerning creditable service for call firefighters beyond the five years or in circumstances where the call firefighter does not later become a permanent member of his department are not preempted by the language of the "five-year" rule at issue here.[29]

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[28] *See, e.g., Herrick v. Essex Reg'l Retirement Bd.*, 77 Mass. App. Ct. 645, 671-672 (2010) (phrase "without moral turpitude" in forfeiture provisions of G.L. c. 32, § 10(1) referred only to its last antecedent, removal or discharge from office).

[29] Our conclusion does not conflict with the holding in *Samson v. Hampden County Retirement Bd.*, CR-95-060 (DALA Oct. 7, 1996; CRAB May 10, 1996), which held that the petitioner was not eligible for call firefighter service credit under G.L. c. 32, § 4(2)(b) because he never became a permanent member of his department. No retirement board rule providing additional

3. *Application of the local options enacted in 1988 and 1995.* Our conclusion as to the lack of blanket preemption of retirement board regulations by the provisions of the "five-year" rule for call firefighters is not altered by the enactment of the two local option provisions in 1988 and 1995. The 1988 provision allows municipalities (and districts) – but not retirement boards – to elect to provide a full day's credit for any day on which a call firefighter, who is a member of the retirement system, actually worked beyond five years, if the call firefighter later became a permanent employee of his department. The 1988 local option thus regulates the circumstances where the municipality has adopted the provision, where the call firefighter has become permanent, and where he or she worked longer than five years as a call firefighter. It allows a municipality to require the retirement board to provide such additional credit, and it defines the credit to be provided in the circumstances addressed. However, essentially for the reasons described above, the 1988 local option does not preempt retirement boards from applying their own rules in circumstances not addressed by the legislation – such as where the municipality has not adopted the local option, or where the call firefighter never becomes a permanent member of his or her department.

The 1995 local option allows municipalities (and districts) to elect to provide both the "five-year" credit and the additional "full-day" credit to all call firefighters regardless of whether they later become permanent members

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credit was at issue or discussed, and the question of preemption of local rules was not presented.

of their department. Where a municipality has adopted both the 1988 and the 1995 local options, they will govern the awarding of creditable service to call firefighters under nearly every circumstance.[30] They do not, however, apply where the municipality has not adopted them. Thus, and for the reasons addressed above, we do not find preemption where, as here, the local options have not been adopted.[31]

4. *The "five-year" rule is not limited to departments subject to the civil service laws.* We reject the argument of the WRRB that the wording of the 1966 amendment to the "five-year" rule indicated a legislative intent to repeal this provision's application to non-civil-service fire departments. No party has argued that, as originally enacted in 1964 and 1965, the "five-year" rule was limited to departments subject to the civil service laws. Thus, in order to accept this argument, we would have to conclude that, barely two years after its enactment and expansion to include call firefighters and "permanent intermittent" police officers, the provision was narrowed to

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[30] We do not address the circumstance where a call firefighter became a member of his retirement system before the effective date of the 1995 legislation and expected to receive greater creditable service under the retirement board's rules than that available to him under the 1995 legislation. *See generally Opinion of the Justices*, 364 Mass. 847, 860-867 (1973) (retirement system members generally protected in the "core" of their reasonable expectations, although reasonable changes may be justified by supervening circumstances).

[31] In light of the foregoing, we need not reach the issue of whether any reduction of MacAloney's retirement rights by the 1988 and 1995 amendments would be inapplicable to MacAloney by intruding on his "core" expectations as to his benefits at the time he entered the system in 1974. *See Opinion of the Justices*, 364 Mass. at 862.

exclude all 240 municipalities not covered by civil service laws – the majority of the 351 cities and towns in Massachusetts.[32] Further, we would have to accept that the Legislature accomplished this significant change not by explicitly excluding non-civil-service municipalities, but by inference from the use of the words "on his respective list" in describing when call firefighters are available for duty.[33]

We see nothing in the plain words of the 1966 amendment, nor in the Legislature's evident intent, to support the WRRB's argument. Starting in 1974 or earlier, MacAloney was a call firefighter listed on the Westminster Fire Department roster.[34] There is no material difference between being on a department's "roster" and being on its "list" – indeed, "roster" is a synonym for "list."[35] The evident purpose of the 1966 amendment was to clarify that "service as a" call firefighter (or other listed position) did not necessarily require actual performance of call firefighting duties, as long as the member was eligible and available for such duties. That, for civil service departments, the "respective list" is the actual list from which reserve/intermittent firefighters are called for duty – and not the civil service

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[32] *See* Finding 7.

[33] *See EMC Corp. v. Commissioner of Revenue*, 433 Mass. 568, 578 (2001) ("It is not to be lightly supposed that radical changes in the law were intended where not plainly expressed.") (citations omitted).

[34] Ex. 27.

[35] *See* Webster's Third New Int'l Dictionary 1526 (1961).

list used to create the reserve list[36] – in no way suggests that a call firefighter roster cannot also be a "list" under § 4(2)(b).

5. *The five-year credit under G.L. c. 32, § 4(2)(b) is subject to the retirement law's provisions requiring make-up payments to purchase prior, non-membership service.* We conclude that make-up payments are required for MacAloney to purchase prior, non-membership service for his part-time call firefighter work under the provisions of G.L. c. 32, § 4(2)(b), as well as for his other prior, non-membership part-time work under the WRRB's local rules. Whether or not such payments are due is governed by the applicable provisions of G.L. c. 32, § 4(1)(b)-(s), § 3(3)-(8), and § 4(2)(c). In particular, §§ 3(5) and 4(2)(c) require make-up payments for purchase of prior, non-membership service where an employee's governmental unit is covered by a retirement system, but the employee was not eligible to join the system.[37] Sections 3(2)(c) and 3(3) require make-up payments for purchase of such prior service where the employee was eligible for membership, but did not join.

In their supplemental briefs on this issue, the parties all agree with the DALA magistrate that, if MacAloney is entitled to credit under the "five-

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[36] *See Arena v. Natick Retirement Bd.*, CR-03-586 (DALA 2004).

[37] We need not decide whether the phrase "or was so excluded from membership" in the fourth phrase of § 3(5) refers to persons seeking creditable service for prior work in the same governmental unit who were excluded from membership for any reason, or whether the phrase is instead limited to those who were excluded based on legal rules that have since been changed to allow membership. Section 4(2)(c) applies in any event as it provides for purchase of prior part-time service in the same governmental unit without regard to the original reason for ineligibility.

year" rule under § 4(2)(b), such credit must be provided without requiring make-up payments. They arrive at this conclusion because § 4(2)(b) contains no language providing for such payments, whereas various other provisions, notably most of those within §§ 4(1)(b)-(s), 4(3), and 3(3)-(8), do condition the award of creditable service on specific payments into the retirement system. The error in this reasoning is that, unlike these other sections, which set out the requirements for awarding creditable service in a multiplicity of circumstances involving *prior service*, § 4(2)(b) addresses *both membership service and prior service*. It provides the rules for how creditable service is to be calculated for part-time and similar work regardless of whether the calculations relate to credit for the employee's work as a member, for which he has already made payments through payroll deductions, or whether they relate to credit for his prior service:

> (b) The board, subject to rules and regulations promulgated by the commission, shall fix and determine how much service in any calendar year is equivalent to a year of service. In all cases involving part-time . . . employment or service . . . , the board, under appropriate rules and regulations which shall be subject to the approval of the actuary, *shall fix and determine the amount of creditable prior service, if any*, and the amount of *credit for membership service* of any such employee who becomes a member . . . .

Id. (in pertinent part, emphasis added). The subsequent clauses are all provisos to this directive, limiting the board's discretion for calculating credit for part-time work in the cases of seasonal employees and certain police officers and firefighters. Thus, when the provisos go on to state:

> provided, that in the case of any such employee whose work is found by the board to be seasonal in its nature, the board shall credit as the equivalent of one year of service, actual full-time service of not less than seven months during any one calendar year; provided, further, that the board shall credit as full-time service not to exceed a maximum of five years that period of time during which a . . . call fire fighter was on his respective list and was eligible for assignment to duty . . .[,]

id. (in pertinent part), they are instructing the retirement board as to the formulas to apply in calculating creditable service in the cases of certain seasonal, police, and fire employees. These provisos do not purport to address the rules for when or how prior creditable service may be awarded – they simply provide the method for calculation of service based on part-time and similar work. Thus, it is not significant that the Legislature did not reiterate in this section the specific rules for make-up payments in the various circumstances when prior service may be credited (e.g., prior non-membership service where the employee was eligible to join and prior non-membership service where the employee was not eligible to join). Indeed, to do so in this section, which also covers membership credit, would have been confusing.[38]

6. *Calculation of MacAloney's creditable service for his work as a call firefighter.* Based on the foregoing, we calculate MacAloney's creditable

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[38] We note that, in cases where the call firefighter was a member of his retirement system during the time covered by the five-year credit under § 4(2)(b), no make-up payments would be required because the member already would have contributed to the annuity fund via payroll deductions. That the amount of these payments may bear little relation to the amount of creditable service accorded under the "five-year" rule does not change this result.

service for his call firefighting duties as set out below. To the amounts below must be added any creditable service for other part-time work that is not call firefighting service, subject to the restriction of no more than one year of total creditable service within each calendar year:[39] Before crediting MacAloney with his prior, non-membership service, the WRRB shall require MacAloney to provide make-up payments under the applicable provisions of G.L. c. 32, §§ 3(2)(c), 3(3), 3(5), and 4(2)(c).[40]

June 26, 1967 through December 31, 1971: 4.5 years' creditable service for call firefighting pursuant to G.L. c. 32, § 4(2)(b).

January 1, 1972 through December 31, 1972: 0.5 years' creditable service for call firefighting pursuant to G.L. c. 32, § 4(2)(b).

January 1, 1973 through December 31, 1977: 5 months' creditable service for call firefighting pursuant to WRRB former Rule 4.

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[39] G.L. c. 32, § 4(1)(a). We interpret the WRRB's 1984 "four-month" regulation to apply only to those years in which "earnings are $225 per year or more." We apply the former WRRB Rule 4 to MacAloney for the period of time prior to the year in which the "four-month" regulation was adopted, limiting the "four-month" regulation to prospective application, noting that the parties appear to agree with this principle. We also apply the former WRRB Rule 4 to any period in which MacAloney would otherwise not receive any credit, so as not to apply a rule less favorable than that which was applicable to him at the time he joined the retirement system. *Cf. Opinion of the Justices*, 364 Mass. at 862.

[40] We note that MacAloney became eligible for membership after calendar year 1970 based on his call firefighting service, for which he was paid $205 in 1970, more than the $200 required for membership under WRRB former Rule 3, as approved by PERA. Thus, starting in 1971, MacAloney's purchase of prior non-membership service falls under G.L. c. 32, §§ 3(2)(c) and 3(3). We also note that the first membership deduction was made from MacAloney's pay on April 16, 1974.

January 1, 1978 through December 31, 1997: 1 month of creditable service for call firefighting per year pursuant to WRRB former Rule 4 for every calendar year in which MacAloney's pay for call firefighting was less than $225 and 4 months' creditable service for call firefighting per year pursuant to WRRB's regulation for every calendar year in which MacAloney's pay for call firefighting was $225 or more.

January 1, 1998 through June 30, 1998: 1 month of creditable service for call firefighting if MacAloney's pay for call firefighting during that period was less than $225 and 4 months' creditable service for call firefighting if his pay for call firefighting during that period was $225 or more.

Conclusion. The decision of the DALA magistrate is vacated and the case is remanded to the Worcester Regional Retirement Board, which shall calculate MacAloney's creditable service for call firefighting as described above, in addition to his other creditable service. Before crediting MacAloney for prior non-membership service, the WRRB shall require MacAloney to provide make-up payments pursuant to G.L. c. 32, §§ 3(3), 3(5), and 4(2)(c), to the extent such payments have not already been made. If there is a balance remaining from MacAloney's previous payments, it shall be refunded to him.[41]

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[41] We note that MacAloney has requested a ruling on whether, if he is entitled to a refund from the WRRS, he is also entitled to interest and, if so, at what rate. We do not reach this question because it was not considered by the DALA magistrate, has not been briefed, and may not arise. *See generally Hollstein v. Contributory Retirement Appeal Bd.*, 47 Mass. App. Ct. 109, 111-

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Catherine E. Sullivan
Assistant Attorney General
Chair
Attorney General's Appointee

Peter Sturges
Governor's Appointee

(Abstains)
Joseph I. Martin
Public Employee Retirement Administration
Commission Appointee

Date: June 24, 2013

112 (1999) (no interest against Commonwealth or municipality where not specifically provided by statute); *Reavey v. Teachers' Retirement Bd.*, No. CR-97-1851 (CRAB Aug. 3, 1999) (same).