THE COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD
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November 18, 2016

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Re: George Grimes v. Malden Retirement Bd. and PERAC, CR-15-5

Dear Counsel:

Enclosed please find the 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
Assistant Attorney General, Chair
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Enclosure, CES/db
cc: Edward McGrath, Esq. (DALA/original)

COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

GEORGE GRIMES,

Petitioner-Appellee

v.

MALDEN RETIREMENT BOARD AND PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION,[1]

Respondents-Appellants.

CR-15-5

DECISION[2]

Respondent Malden Retirement Board (MRB) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), reversing the MRB's denial of creditable service to petitioner George Grimes under G.L. c. 32, § 4(2)(b) for time during which he was a reserve police officer, but received no regular compensation. The MRB also challenges the assumed annual rates of compensation adopted by the magistrate and by the respondent Public Employee Retirement Administration Commission (PERAC)

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[1] The Public Employee Retirement Administration Commission (PERAC) was joined as a necessary party before the Division of Administrative Law Appeals. PERAC supports the position of the petitioner; it is designated a Respondent-Appellant for convenience.

[2] We note that we issue a decision in a related case today, *Gomes v. Plymouth Retirement Bd.*, CR-14-127 (officer may purchase creditable service based on actual compensation).

for purposes of calculating Grimes' payment for the purchase of this prior service. The magistrate considered the case based on the parties' written submissions pursuant to 801 C.M.R. 1.01(7)(g)(3). The DALA decision is dated August 14, 2015. The MRB filed a timely appeal to us.

We adopt as our own the DALA magistrate's Findings of Fact 1-12. We affirm the magistrate's conclusion that Grimes is entitled to purchase up to five years' creditable service under G.L. c. 32, § 4(2)(b), but reverse both the magistrate's and PERAC's adoption of an assumed rate of compensation. We conclude that, although both rates appear fair and bear a reasonable relation to the benefit provided by call and reserve officers and firefighters, in the absence of a legislative directive that an assumed rate be adopted, it is beyond both our powers and those of PERAC to adopt an assumed rate of compensation.

As to the process for purchase of prior non-membership service under G.L. c. 32, § 4(2)(c), where the member received no regular compensation for the prior service, the creditable service must be provided at no cost. This is because the formula provided by the Legislature requires payment of the applicable percentage of regular compensation, which results in a cost of zero where no regular compensation has been earned. While we agree with both PERAC and the DALA magistrate that imposition of an assumed rate of compensation results in a more equitable and sound process for such purchases, we are constrained to follow the statutory mandate and leave to the Legislature to consider whether to adopt an assumed rate of compensation.

Background

Grimes retired on January 2, 2015 as a lieutenant in the Malden Police Department. Prior to his retirement, Grimes applied to purchase one year and one month of creditable service based on his time as a reserve police officer before he was appointed a full-time member of the police department, based on G.L. c. 32, § 4(2)(b), which allows full-time credit for up to five years of time spent on a reserve list. During his time on the reserve list, Grimes was never called to perform any duties for which regular compensation was paid, so he received no regular compensation resulting from that service.[3]

On December 8, 2014, the executive director of PERAC sent a letter to the chairman of the MRB, noting that he had received complaints from police officers and firefighters in Malden, including the petitioner in this case, George Grimes, that the MRB was not processing applications to purchase creditable service for time spent on the reserve list. The PERAC executive director informed the MRB that Grimes was entitled to purchase "up to [five] years of reserve time regardless of whether or not [he] actually performed services while on that list."[4]

On December 23, 2014, Grimes wrote to the MRB noting his belief that the MRB had denied his request to purchase his reserve time and requesting a written ruling from which he could appeal.[5]

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[3] Exhibit 1; Findings of Fact 1, 2.

[4] Ex. 5; Finding 8.

[5] Ex. 6; Finding 9.

On December 29, 2014, counsel for the MRB responded to Grimes, stating that the position of the MRB was that, for members who did not perform any duties while on their reserve list, the MRB would accept payment for the purchase of such prior service based on PERAC's assumed annual rate of compensation of $3,000, but would not grant any creditable service until an administrative or judicial decision was rendered upholding PERAC's position concerning the purchase of such service. Grimes was provided his right of appeal, which he exercised on January 7, 2015. The following day he submitted his application for superannuation retirement.[6]

Discussion

1. *"Five-year" credit for reserve officers who did not perform any actual duties.* We have no difficulty in concluding that up to five years of service as a reserve police officer must be credited as full-time service, regardless of whether the reserve officer was called to perform work. The applicable wording of G.L. c. 32, § 4(2)(b) makes this clear:

> . . . 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; . . . .

Id. (in pertinent part, emphasis added). That the Legislature provided for creditable service for merely being on a list and eligible for assignment leaves no

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[6] Exs. 1, 2, 7; Findings 10, 11, 12.

doubt that *actual* performance of duties is not required.[7] Grimes is entitled to this credit.

2. *Payment for the purchase of prior service as a reserve officer.* As we have held previously,[8] the language quoted above cannot properly be read to waive payment for all purchases of prior service involving reserve, permanent-intermittent, or call police officers or firefighters. Unlike section 4(1), which lists numerous types of service that may (or may not) be counted or purchased as creditable service,[9] section 4(2)(b) addresses *only* how to calculate the creditable service of part-time and similar employees. Thus, the absence of explicit

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[7] That the Legislature also so viewed this provision is suggested by its enactment in 1988 of a local option within § 4(2)(b) that allows additional credit on a day-for-day basis for time reserve officers and others were assigned to a list "and *actually performed duty*." St. 1988, c. 172 (approved July 25, 1988, emphasis added).

[8] *See MacAloney v. Worcester Regional Retirement System*, CR-11-19 (CRAB June 21, 2013) (fire chief with previous actual duty as call firefighter entitled to five-year credit, but must purchase the portion of his service that occurred prior to becoming a member).

[9] *E.g.*, G.L. c. 32, §§ 4(1)(a) (service as member, deductions); 4(1)(b) (service prior to date system operational, free); 4(1)(c) (unpaid leave over one month, no credit); 4(1)(d) (service prior to public takeover, free); 4(1)(e) (if previously eligible, must pay); 4(1)(f) (teacher out of state, must pay under § 3); 4(1)(f) (teacher non-public school before 1973, must pay under § 3); 4(1)(g½) (teacher maternity leave prior to 1975, must pay by 2001); 4(1)(g¾) (teacher maternity leave prior to 1975, current retiree); 4(1)(h) (veteran leave of absence, free); 4(1)(h) (veteran active duty, must pay); 4(1)(h½) (teacher vocational service, must pay); 4(1)(i) (bank liquidation service, must pay); 4(1)(j) (pre-1946 service, deductions); 4(1)(k) (State Department service, must pay); 4(1)(l) (pre-1988 department of education, federal funds, must pay); 4(1)(l½) (same, 1988 and later); 4(1)(l¾) (educational collaborative, must pay); 4(1)(m) (workers' compensation total incapacity, no deductions under §14); 4(1)(n) (pre-1988 Veterans' Employment Service, must pay); 4(1)(n½) (same, 1988 and later); 4(1)(o) (no credit after July 1, 2009 if salary under $5,000); 4(1)(p) (teacher non-public school, state financing, must pay); 4(1)(q) (leave to command veteran organization, must pay); 4(1)(q) (judge who did not vest, must pay); 4(1)(r) (Peace Corps, must pay); 4(1)(s) (contract employee, must pay).

language in section 4(2)(b) regarding payment for the purchase of prior service does not create an inference that prior service may be credited without payment.[10] Section 4(2)(b) states that retirement boards, subject to approval by the actuary, may "fix and determine how much service in any calendar year is equivalent to a year of service." In particular, for "part-time, provisional, temporary, temporary provisional, seasonal or intermittent" employees, the section allows retirement boards to "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 . . . ."[11]

Section 4(2)(b), however, goes on to impose two limitations on the power of retirement boards to set rules concerning credit for part-time work. The first limitation requires that boards credit seasonal employees with one year of full-time service if the employee works full-time for at least seven months:

> 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 . . . .

Id. (in pertinent part). The second limitation is that quoted above, which requires boards to credit reserve and permanent-intermittent police officers and

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[10] *Contrast Lawrence Retirement Bd. v. Contributory Retirement Appeal Bd.*, 87 Mass. App. Ct. 1124 at *1-2 (2015) (Rule 1:28 unpublished decision) (upholding CRAB's determination that, because most of the subsections of G.L. c. 32, § 4(1) expressly require payment for purchase of prior service, the several subsections within § 4(1) that do not must be read as allowing credit without payment).

[11] *Id.*

firefighters, as well as call firefighters, with up to five years of full-time service for every year in which they were on their list and available for work.

Because section 4(2)(b) is concerned with translating part-time and similar employment into creditable service, and because it applies not only to *prior* creditable service but also to the calculation of membership service for *current* employees, it does not explicitly address the payment for a purchase of prior service. This is in contrast to many of the provisions in the previous section, G.L. c. 32, § 4(1), which apply specifically to credit for prior non-membership service, and which are subject to explicit conditions of payment, such as that "[n]o credit shall be allowed until the member has paid into the Annuity Savings Fund . . . makeup payments of an amount equal to that which would have been withheld as regular deductions for the service . . ."[12] In section 4(2)(b), however, which sets rules for crediting part-time employment, it would make no sense to include an explicit condition concerning payment for purchase of such credit, since the provision applies equally to current employees who have already paid for their service credit via payroll deductions. Instead, payment for the purchase of prior part-time service is addressed in section 4(2)(c):

> (c) In the case of any . . . member . . ., the board may allow credit . . . for any previous period of part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service . . .; provided, that . . . he pays into the annuity savings fund of the system . . . make-up payments of an amount equal to that which would have been withheld as regular deductions from his regular compensation had he been eligible for membership and been

[12] *See, e.g.*, G.L. c. 32, § 4(1)(s) (contract service).

> a member of such system during such previous period, together with buyback interest.

Id. (in pertinent part).[13]

For these reasons, we do not view the absence of an explicit payment provision in section 4(2)(b) as suggesting that prior part-time service must be credited without the payment required by section 4(2)(c). Indeed, if that were the case, it would apply not only to the five-year credit for being on a police or firefighter list, but also to seasonal employment of seven months or longer and, arguably, to any part-time or similar employment. Moreover, to provide such credit without cost only to those who purchase their service after the fact would have the anomalous effect of creating a disincentive to membership, since members would still be required to pay for their service via payroll deductions pursuant to G.L. c. 32, § 22(1)(b). Hence, as we held in the *MacAloney* case,[14] section 4(2)(b) does not, by virtue of omitting language requiring payment for prior non-membership service, provide that such credit must be provided without payment.

3. *Payment for the purchase of prior service as a reserve officer where no duties were performed.* We now come to Grimes' situation. As we have said, Grimes received no regular compensation as a result of being on the Malden Police Department's reserve officer list for one year and one month.

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[13] Other sections in the retirement law also provide for purchase of prior service and may also apply to purchase of part-time service. *E.g.*, G.L. c. 32, §§ 3(2)(c), 3(3), 3(5).

[14] *MacAloney v. Worcester Regional Retirement System*, CR-11-19 (CRAB June 21, 2013).

Nevertheless, also as we have said, he is entitled to full-time credit for that service under the plain words of G.L. c. 32, § 4(2)(b). Normally, Grimes would be required to purchase his prior service under § 4(2)(c). The Legislature, however, has not provided any method of calculating a payment for such prior service other than the formula quoted above, requiring him to "pay[] into the annuity savings fund . . . make-up payments of an amount equal to that which would have been withheld as regular deductions from his regular compensation had he been eligible for membership and been a member . . ., together with buyback interest."[15] As we have said, application of that formula to Grimes results in a payment cost of zero – had Grimes been admitted to membership in the MRB prior to the time when he was on the reserve list, and had he then remained on the list without being called for duty and without receiving compensation, no deductions would have been made for his unpaid service.

We agree with the evident views of PERAC, the DALA magistrate, and the MRB that the provision of service credit at no cost to those who did not actually perform any duties while on a reserve list, while requiring payment for those who did perform duties, is not the most equitable result. Such a system is not entirely illogical, however, because those who are required to pay, whether via retirement deductions or make-up payments, have received compensation for their service, whereas those who are not required to pay have received none. Moreover, no matter how much (or how little) members are charged for purchase of such prior

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[15] G.L. c. 32, § 4(2)(c) (in pertinent part).

service, there will always be inequity when full years of service credit are being provided for part-time work – which may range from a few hours to nearly full-time. In particular, reserve officers who are already members of their retirement system, and who perform actual duties, potentially may pay widely varying amounts for the same service credit, according to the number of hours they worked. Their payments will depend solely on their compensation and the deduction percentage in effect for them – the rules for purchase of prior service credit will not apply. Thus, while the result in cases such as Grimes' may not be entirely equitable, it is not so illogical as to require deviation from the plain words of the statute.[16]

Although for these reasons we cannot uphold the use of an assumed minimum annual rate of regular compensation, we do not view the amounts chosen by either PERAC or the DALA magistrate as unreasonable. An assumed annual compensation of $3,000 per year, as PERAC has adopted,[17] is a fair approximation of the value of being on a reserve or similar list, trained and ready to be called to serve if needed. Moreover, PERAC's reference to G.L. c. 32, § 85H, which provides for a minimum municipal pension of $3,000 per year, is a

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[16] *See Herrick v. Essex Reg'l Retirement Bd.*, 77 Mass. App. Ct. 645, 649 (2010) (if a statute omits to provide for an eventuality, an agency or court may not supply it, even if such an addition would be consistent with perceived statutory objectives); *Commonwealth v. Ventura*, 465 Mass. 202, 212-213 (2013) (same). *Contrast Commonwealth v. Parent*, 465 Mass. 395, 409-410 (2103) (statutory exemption inferred where to do otherwise would render meaningless exemptions that allow parents to provide alcohol to their children).

[17] *See* Exs. 3-4, PERAC Memorandum #33/2013 (Nov. 20, 2013) (assumed annual salary of $3,000 for buy-back under § 4(2)(b) where no actual pay); PERAC Memorandum #19/2014 (May 30, 2014) (same).

reasonable analogy to an amount of nominal compensation, despite the obvious difference that it is a pension rather than a salary. Thus, it is not the amount chosen by PERAC that we cannot uphold, but the adoption of any assumed compensation rate in the absence of a legislative directive.[18] Similarly, an assumed annual rate of compensation of $5,000, as adopted by the DALA magistrate, based on the 2009 amendment to G.L. c. 32, § 4(1)(o), making $5,000 the minimal annual compensation for entitlement to creditable service, would also provide a reasonable approximation of the value of being on a reserve list. As stated above, however, we cannot uphold either of these methods of calculating the payment required for purchase of prior part-time non-membership service under § 4(2)(b) because the Legislature has not so provided. Similar legislation, enacted in 1971 for certain elected officials serving without pay and in 1998 for library trustees serving without pay, provided an assumed annual rate of compensation of $2,500.[19] Those provisions were repealed in 2009 and replaced by the current version of G.L. c. 32, § 4(1)(o), limiting creditable service to positions for which the annual compensation is $5,000 or more.[20] We consider it up to the Legislature to determine whether to provide an assumed

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[18] *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944) (agency's informal or interpretive rules are accorded weight to the extent that the interpretation has "power to persuade"); *Rent Control Bd. v. Cambridge Tower Co.*, 394 Mass. 809, 814 (1985) (same).

[19] G.L. c. 32, §§ 4(1)(o), 4(1)(o½) (as in effect prior to St. 2009, c. 21, § 25).

[20] St. 2009, c. 21, § 25 (effective July 1, 2009). We do not address the effect of § 4(1)(o) on the five-year credit provided by § 4(2)(b), as the parties have not addressed the issue. Although our record does not provide the years of Grimes' reserve service, they appear to have occurred prior to July 1, 2009.

annual rate of compensation for the purchase of prior service while on a reserve or similar list.[21]

4. *Obligation to comply with PERAC directives.* The Supreme Judicial Court has upheld the power of PERAC to issue memoranda to the retirement systems in the Commonwealth, in order to interpret and "fill in gaps" in the retirement law. *See Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 83-84 (2004) (upholding PERAC memorandum relating to the definition of "earned income" for purposes of excess earnings while on accidental disability retirement).[22] PERAC's power to do so arises from its "broad statutory authority to oversee the public employee retirement system" in the Commonwealth, *id.* at 84, as well as from its statutory duty to provide "training and legal and technical assistance to retirement boards." G.L. c. 7, § 50(f). Additionally, PERAC has the power under G.L. c. 32, § 21(4) to "approve any by-laws, rules, regulations, prescribed forms or determinations of any board" in order to effectuate the purposes of the retirement law, which includes the power to disapprove or reverse determinations made by local retirement boards. *See Boston Retirement Bd.* at 84. PERAC's enabling legislation states that it "shall

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[21] Legislative consideration of § 4(2)(b) would also provide an opportunity to clarify whether the Legislature intended that the five-year credit for reserve and similar service by police and firefighters on or after July 1, 2009 be subject to the $5,000 limit provided in § 4(1)(o).

[22] *Accord Barnstable County Retirement Bd., v. Contributory Retirement Appeal Bd.*, 43 Mass. App. Ct. 341, 347 (1997) (PERAC's predecessor agency, PERA, had power to issue memorandum requiring boards to use particular accounting method); *cf. Plymouth County Retirement Ass'n v. Commissioner of Public Employee Retirement*, 410 Mass. 307, 312 (1991) (PERA given "broad grant of review authority").

have general responsibility for the efficient administration of the public employee retirement system." G.L. c. 32, § 50.

For these reasons, we agree with the DALA magistrate, and with the positions of Grimes and PERAC, that the memoranda issued by PERAC to the retirement boards are binding on the boards. Thus, it was error for the MRB to refuse to provide Grimes with his creditable service pending appeal. Retirement boards must follow PERAC's directives because of the statutory grant of power to PERAC to issue such directives in order to ensure that the more than one hundred retirement systems in the Commonwealth operate efficiently and apply uniform rules and policies. It would be wholly impractical to require PERAC to interpret and administer the retirement law solely by issuing individual rulings regarding individual retirement board determinations. If a retirement board disagrees with the interpretation of the retirement law adopted in a PERAC memorandum as applied to a particular case, it may request a ruling from PERAC, which would be appealable by an aggrieved party under G.L. c. 32, § 16(4). On appeal to DALA, to CRAB, or to the courts, the position taken in a PERAC memorandum will be considered an "interpretive" rule, entitled to persuasive weight under the standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but not having the force of law of a statute or regulation.[23]

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[23] *See Niles v. Boston Rent Control Adm'r*, 6 Mass. App. Ct. 135, 149 (1978) (inconsistent interpretation of rent control rule not entitled to *Skidmore* deference); *Rivera v. H.B. Smith Co.*, 27 Mass. App. Ct. 1130, 1131 (1989) (informal rule relating to delivery of workers' compensation checks fulfilled requirements for *Skidmore* deference); *cf. Massachusetts Teachers' Retirement*

Conclusion.

We affirm the DALA magistrate's decision that the MRB must provide Grimes with full-time creditable service for the time he served as an uncompensated reserve police officer. We vacate the magistrate's order that Grimes must purchase that time based on an assumed annual rate of compensation. The MRB must provide such credit without charge based on the provisions of G.L. c. 32, § 4(2)(c).

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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Attorney General's Appointee

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Governor's Appointee

Did Not Participate
Joseph I. Martin
Public Employee Retirement Administration
Commission Appointee

Date: November 18, 2016

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SO ORDERED.

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Bd. v. Contributory Retirement Appeal Bd., 466 Mass. 292, 297 (2013) (properly promulgated regulations have the force of law).