

# PERAC

COMMONWEALTH OF MASSACHUSETTS | PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION

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## MEMORANDUM

TO: All Retirement Boards

FROM: John W. Parsons, Esq., Executive Director

RE: Payment Required for Service Credited under G.L. c. 32, § 4(2)(b)

DATE: February 11, 2020

### Introduction

In a decision affecting those members who served as reserve, permanent-intermittent or call firefighters or reserve or permanent-intermittent police officers prior to becoming members of a system, the Massachusetts Supreme Judicial Court (“SJC”) has determined that individuals who are to be credited with service pursuant to G.L. c. 32, § 4(2)(b) must pay for such service.<sup>1</sup>

Payment was first required for such service when the Contributory Retirement Appeal Board (“CRAB”) issued its decision in MacAloney v. Worcester Regional Retirement System and PERAC, CR-11-19 (as amended on June 21, 2013). The methodology for calculating such a payment will be discussed more fully below.

### Previous Memorandum

The SJC having issued a final directive in all matters related to the purchase and crediting of service under G.L. c. 32, §4(2)(b), this memorandum supersedes Memorandum No. 29 of 2016 (December 13, 2016).

### I. The SJC Decision

*Plymouth Retirement Board v. CRAB, and PERAC*  
483 Mass. 600 (December 3, 2019)<sup>2</sup>

### Background of Issue

<sup>1</sup> References in this memorandum to “Section 4(2)(b) service” should be understood to only refer to the 2<sup>nd</sup> and 3<sup>rd</sup> provisos of that section, which specifically allow for this special grant of service.

<sup>2</sup> This matter has been colloquially referred to as “Gomes” because that is the surname of the now retired police officer whose service was the subject of this case.



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Massachusetts General Laws, Chapter 32, § 4(2)(b) allows up to five full years of pre-membership credit to certain members of systems who served in the past as a reserve or permanent–intermittent police officer or a reserve, permanent-intermittent or call firefighter. The question presented to the SJC in the above-captioned case was whether a member had to pay for such service. As noted above, the SJC has answered that question in the affirmative.

**The SJC’s Conclusion**

Acknowledging that Section 4(2)(b) is silent on payment for creditable service, the SJC concludes that this section is intended only as a “measurement scheme,” and, reading the statute as a whole, the requirement for payment is found in Section 4(2)(c). The SJC finds that “Each subsection of G.L. c. 32 § 4(2) has a clear, connected role.” The SJC states that its reading of Section 4(2) “conforms to the backbone of a contributory retirement system: employees investing a portion of their earnings towards a future pension.”

**The “Under \$5,000 Rule,” G.L. c. 32, § 4(1)(o)**

The SJC’s decision breaks new ground in determining that the “Under \$5,000 Rule” will also be applied to Section 4(2)(b) service. Since the “Under \$5,000 Rule” was enacted in 2009, Retirement Boards and PERAC have not applied the rule to Section 4(2)(b) service. The SJC now requires us to do so.

**II. Implementation of the SJC Decision**

The SJC’s decision binds all retirement boards and PERAC and must be implemented immediately.

**Methodology for Calculating Purchases of Section 4(2)(b) Service**

**Compensated Service**

For a member who received compensation for such service, he or she would pay the retirement contribution that would have been made on such pay received at the rate that was in effect for the year(s) the service was provided, with buyback interest. For example, a call firefighter who was compensated for the years 1995-1997, would pay 8% on the pay received in 1995 through June 30, 1996. They would pay 9% on the pay received after July 1, 1996.

Section 4(2)(b) service of any monetary amount may be purchased by a member who performed compensated service prior to July 1, 2009.

On or after July 1, 2009, in order for Section 4(2)(b) service to be purchased, a member must have received a minimum of \$5,000 in payment for such service in a calendar year. Otherwise, it is not eligible for purchase and cannot be creditable service.

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### **Uncompensated Service**

In accord with the decision of CRAB in Grimes v. Malden Retirement Board, CR-15-5 (November 18, 2016), which decision the SJC explicitly lets stand, those who were available to be called into service, yet never were, could still be granted creditable service under G.L. c. 32, § 4(2)(b) at no cost. This will remain true for all people in this category who were on their respective lists through June 30, 2009. No payment shall be required from these members for the grant of service.

For those on their respective list and never called, who received no compensation for the time period after June 30, 2009, such service will not be credited. This is because the SJC has applied G.L. c. 32, § 4(1)(o), the “Under \$5,000 Rule” to Section 4(2)(b) service.

### **Service in the calendar year 2009**

Questions naturally arise regarding the calendar year 2009, with its demarcation point of June 30, 2009. Section 4(2)(b) provides that “the board shall credit as full-time service not to exceed five years...” With the imposition of the “Under \$5,000 Rule” upon Section 4(2)(b) service, the Retirement Board shall credit up to six months of full-time service for those members who fail to earn \$5,000 or more in the 2009 calendar year.

### **Actions which must be undertaken:**

#### **Active Members**

Since the MacAloney decision, all active members should have been paying for such compensated service in accord with the formula described above. However, it could be that members have been awarded credit for service after June 30, 2009 which no longer qualifies as creditable service. The Retirement Boards should identify all active members who have been awarded Section 4(2)(b) service, verify that the members have paid for such service, and make sure that all service awarded after June 30, 2009 was the result of a member having received at least \$5,000 in payment for a calendar year.

If an active member has already been credited for such compensated service and has not paid for it, they should do so now, with interest. Interest should be assessed as of June 21, 2013, the date of the amended MacAloney decision. For example, if a member has call firefighter service in 1975-1979, the retirement board should assess interest only as of June 21, 2013 and thereafter. If a member has qualifying call firefighter service in 2014, the Retirement Board should begin to charge interest as of the time of the service, i.e., 2014 and going forward.

If the active member paid for compensated service which no longer qualifies because of the “Under \$5,000 Rule,” all contributions should be returned to the member, without interest. (PERAC Memorandum No. 14 of 2018.) All creditable service for such time must be removed.

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A member with uncompensated service, as permitted by Grimes prior to July 1, 2009, needs no adjustment made. If the uncompensated service occurred July 1, 2009 or thereafter, all creditable service for such time must be removed.

**No other possible statutory mechanisms for the purchase of such time**

A member may be ineligible for Section 4(2)(b) time either because they did not become a permanent member of the department in the same town or because they did not make \$5,000 or more in the appropriate time period. If a member is ineligible to purchase Section 4(2)(b) time, he or she will also be ineligible to purchase this time under the provisions of G.L. c. 32, §§ 3(3), 3(5) or 4(2)(c) or any other section of the statute. There is no other statutory mechanism in Chapter 32 which would permit the purchase of this time.

**Retirees**

The Retirement Board should identify each retiree whose retirement allowance includes a grant of Section 4(2)(b) service. If a retiree has not yet paid for his or her compensated service, they should do so now, with interest, as explained above.

If the Retirement Board identifies post June 30, 2009 service which is no longer creditable because of the SJC's application of the "Under \$5,000 Rule," the creditable service must be removed and the retirement allowance recalculated.

Retirees whose service has been shortened will have been overpaid their retirement allowance. Such a retiree will have to pay the Retirement Board all amounts overpaid on the basis of the inclusion of this service in his or her retirement allowance. Overpayments must be recouped, with the correction of error interest the Retirement Board has adopted. (PERAC Memorandum No. 14 of 2018.)

The Retirement Boards should endeavor to set up a fair repayment plan for effected retirees. The Retirement Boards should provide retirees an optimum amount of time to repay the systems, not to exceed 5 years, in accord with 840 CMR 15.02(1)(2).

The Retirement Boards, in their discretion, may consider whether it would be appropriate to waive amounts owed by retirees pursuant to G.L. c. 32, § 20(5)(c)(3). It is important to note that overpayments and interest would be available for waiver, but the amount to be paid for service is never available for a waiver, nor can the use of a waiver preserve service no longer available.

**Further Questions**

If you have any further questions about this, please contact PERAC General Counsel Judith Corrigan at Extension 904.