

**TITLE 941: STATE BOARD OF RETIREMENT
CHAPTER 2.00: ADMINISTRATIVE REGULATIONS**

941 CMR 2.10: Procedures Related to G.L. c. 32, § 15, Dereliction of Duty by Members.

1. Introduction

Purpose. The purpose of 941 CMR 2.10 is to clarify the procedures used to implement the provisions of G.L. c. 32, § 15. Specifically, this regulation defines the standards and procedures under which the State Board of Retirement will act on issues that arise under the provisions of G.L. c. 32, § 15, as they apply to the retirement rights and benefits of members of the Massachusetts State Employees' Retirement System ("MSERS"), including members of the former Massachusetts Turnpike Employees' Retirement System, members of the retirement system established for the judiciary under G. L. c. 32, §§ 65A – 65J, and any other public employees whose retirement benefits fall under the administration of the MSERS.

Authority of the State Board of Retirement. The State Board of Retirement ("SBR") is established by G.L. c. 10, § 18 to administer the state employees' contributory retirement system established by G.L. c. 32, § 1 *et seq.* Individually and collectively, these statutes impose a fiduciary duty on the State Board of Retirement, and on each member of the Board, to serve the public interest by ensuring that the contributory retirement system is prudently managed to protect and preserve its integrity and its viability for the long term, and that it is fairly and equitably administered to provide benefits to the members and the beneficiaries of the MSERS consistent with the provisions of G. L. c. 32. G.L. c. 32, § 15 grants public contributory retirement systems the authority and imposes on them the responsibility to determine whether the rights and benefits of a member or beneficiary within that system may be affected by actions of the member, and, pursuant to G.L. c. 32, § 15(2), to initiate proceedings under this section. The SBR may consider the application of the law and these regulations to the retirement rights and benefits of any member of the MSERS or beneficiary of such a member, and take appropriate action on those rights and benefits, including determining that the member's actions require forfeiture of all retirement benefits. Nothing in this regulation shall be construed to limit or negate the authority otherwise provided by law to the SBR to administer the MSERS.

2. Definitions

In general, the terms used in this regulation shall have the meanings set forth in G.L. c. 32, §§ 1 - 3. For the purposes of this regulation:

(a) “Accumulated total deductions” shall have the meaning set forth in G.L. c. 32, § 1, provided that one of the systems to which the deductions have been credited is MSERS.

(b) “Board” shall mean the members of the Board of the State Board of Retirement established under G.L. c. 10, § 18, and, if the context so requires, the staff of the State Board of Retirement.

(c) “Final conviction” shall mean the entry of a judgment of a judge or jury that a person is guilty of a crime as charged and the imposition of sentence for that crime.

(d) “Member” shall have the meaning set forth in G.L. c. 32, § 1, provided that the employee or retiree is a member of the MSERS, as defined in G.L. c. 32, § 20(1), and including both members in service and members inactive, as defined herein. Unless the context requires otherwise, it shall also mean an employee or retiree who is or has been a member of MSERS and another contributory retirement system established under G.L. c. 32, including the retirement system established under G.L. c. 32, §§ 65A – 65J.

(e) “Member in service” and “member inactive” shall have the same meanings as set forth in G.L. c. 32, § 3, but only as applied to members of the MSERS, as defined in G.L. c. 32, § 20(1) and 941 CMR 2.10 (2)(d).

(f) “Membership service” shall mean service as an employee of the Commonwealth rendered since becoming a member of the MSERS or another contributory retirement system organized pursuant to G.L. c. 32, including the retirement system established under G.L. c. 32 §§ 65A – 65J.

(g) “Retirement benefits” shall mean the “retirement allowance” as defined in G.L. c. 32, § 1, together with such other retirement benefits made available by the Commonwealth to members of the MSERS, and to their survivors and beneficiaries.

3. Application

Administrative action under these regulations may apply to active, inactive, retired, and deceased members of the MSERS, including members of the former Massachusetts Turnpike Employees’ Retirement System, members of the judiciary, and any other public employees whose retirement benefits fall under the administration of the MSERS; and to their representatives, survivors and

beneficiaries. It may also apply to former members of MSERS who are members of another contributory retirement system organized under G. L. c. 32, and to their representatives, survivors and beneficiaries.

4. Initiation of Administrative Review

- (a) The Board or its staff may initiate an administrative review at any time, and shall initiate one upon notice that charges which would trigger the provisions of G.L. c. 32, § 15 have been brought against a member; upon notice that a member has been suspended from employment pursuant to G.L. c. 30, § 59; upon notice of a conviction or other disposition of a criminal matter against a member, or if given reason to believe reported compensation is inaccurate.
- (b) The Board or its staff shall make a good faith effort to determine the validity of any report of charges, violations or convictions related to the member, and to ascertain the applicability of the requirements of G.L. c. 32, § 15. The Board or its staff shall make reasonable efforts to obtain all additional relevant information, which may include: certified copies of court records, pleadings and documents related to the member; correspondence or documents from the applicable prosecuting agency; employment records; and any other relevant records and documents.

5. Administrative Action by the State Board of Retirement

- a) If the Board or its staff determines that it has credible information that a member has been or is being charged with a violation that would trigger the provisions of G.L. c. 32, § 15; or upon notice that a member has been suspended from employment pursuant to G.L. c. 30, § 59; or that a member has been convicted of such a violation, it will notify the member of this determination. It will advise them that if they file a request to withdraw their accumulated total deductions on account with the MSERS or transfer their accumulated total deductions to another contributory retirement system or elsewhere, the Board may determine that any action on such a request may be stayed pending disposition of the criminal charges filed. It will advise the member that the Board will take appropriate actions to enforce those provisions and protect the assets and resources of the MSERS, including initiating temporary administrative action prior to the final disposition of any precipitating criminal matter or prior to a final conviction.
- b) Upon a determination that it will initiate any action pursuant to paragraphs (c) through (f), below, the Board or its staff will notify the member of its determination, and of the Board meeting at which the recommendation to proceed to take such action will be presented to the Board. Upon a decision of the Board that it should proceed to take any action pursuant to paragraphs (c) through (f), it will issue a Notice of Action, as set forth in 941 CMR 2.10 (6), below.

- c) If a member has submitted an application for retirement benefits, or a request to withdraw their accumulated total deductions on account with the MSERS, or transfer their accumulated total deductions to another contributory retirement system or elsewhere, the Board may stay action on the application or request pending disposition of charges filed, or pending verification of compensation the member has received.
- d) If a member, survivor, or beneficiary is already receiving a retirement benefit, and the Board determines that the benefits paid have exceeded or are, within six months, likely to exceed the amount of their total accumulated deductions, or that the charges are such that, pursuant to G. L. c. 32, § 15(1), § 15(3), or § 15(3A), the member will not be entitled to the return of the balance of his accumulated total deductions, the SBR may initiate action to determine whether it should withhold further issuance of the applicable retirement allowance pending the disposition of those charges.
- e) Upon the final conviction of a member of an offense that would trigger the provisions of G.L. c. 32, § 15, the Board may determine that the member's retirement benefits are forfeited, and may initiate action to implement the provisions of G.L. c. 32, § 15. If the member has already withdrawn any accumulated retirement deductions from his or her retirement account or is receiving a retirement benefit, the SBR may initiate appropriate action to terminate benefits that the member is receiving, recover the paid contributions, accrued interest, or both from the member, his survivors or beneficiaries, and, pursuant to G.L. c. 32, § 15(6), to recover all benefits received after the date of the offense of which the member was convicted.
- f) If a member, survivor, or beneficiary is already receiving a retirement benefit, and the Board determines that the retirement allowance was calculated based on a salary that was intentionally concealed from or intentionally misreported to the commonwealth, or any political subdivision, district or authority of the commonwealth, it shall, consistent with G.L. c. 32, § 15(7), initiate action to reduce the retirement allowance to the level that reflects the regular compensation actually reported to that entity or the amount reported to the SBR, whichever is lower, and may, further, withhold that benefit until any overpayment has been recovered.

6. Notice

- a) Upon a determination that the SBR will take or initiate any action pursuant to 941 CMR 2.10 (5) (a) – (f) above, and in accordance with 801 CMR 1.01(6)(a), the SBR will issue a Notice of Action to notify the member, survivor, or beneficiary of the action it is taking or intends to take, the

effective date of the action, the reason for the action, the material facts on which the SBR relies, the statutes and regulations which authorize it to act, and how to contact a staff person at the SBR who can provide additional information about the matter. If applicable, it will notify the member that, pending final disposition of any criminal matter, it will not process any application for retirement benefits or request to withdraw accumulated deductions. The Notice of Action will be issued by U.S. Mail, certified and postage prepaid to the last address the member or beneficiary has provided the SBR. A certificate of service shall be filed with the SBR.

- b) Upon a vote of the Board that the SBR should take any action pursuant to 941 CMR 2.10 (5) (c) – (f) above, the SBR will issue a Notice of Hearing, which shall include the date, time, and place of the hearing; identify the rules under which the hearing will be held; and notify the member, survivor or beneficiary of the right to have an authorized representative present. The Notice of Hearing will be issued by U.S. Mail, certified and postage prepaid, and a certificate of service shall be filed with the SBR.
- c) All papers filed thereafter may be served by regular U.S. Mail, postage prepaid, with copies to all parties and to the SBR; or, if allowed by the Hearing Officer, by electronic service to all parties and to the SBR.
- d) A copy of the Notice of Action and of the Notice of Hearing may be provided to the member's employing agency.

7. Conduct of Hearings

Except as otherwise provided herein, administrative hearings under these regulations shall be conducted pursuant to the Formal Rules of Adjudicatory Practice and Procedure, 801 CMR 1.01.

The Board shall designate a Hearing Officer to conduct hearings arising under these regulations. The Hearing Officer has the authority to enter procedural orders consistent with 801 CMR 1.01 and with this regulation, and to limit the issues for consideration.

8. Representation

An individual may appear on his or her own behalf, or may be represented or advised by their own attorney or another duly authorized representative. Attorneys or individuals acting on behalf of the member must file a written notice of appearance that includes their name, address, telephone number, e-mail address, and, if available, facsimile transmission number. The filing of any pleading, motion, or other paper by an attorney is deemed to constitute the filing of an appearance unless the paper states otherwise.

9. Submission Without a Hearing

Any party may elect to waive a hearing and to submit his case upon written submissions, and shall so notify the Hearing Officer and the other party prior to the scheduled time for the hearing. Submission of a case without a hearing does not relieve the parties from the necessity of supplying evidence sufficient to prove the facts supporting their allegations or defenses. Consistent with 801 CMR 1.01, affidavits and stipulations may be employed to supplement other documentary evidence in the record.

10. Decision

- a) After reviewing the evidence, the arguments of the parties, and any post-hearing memoranda and briefs submitted by the parties, the Hearing Officer shall, within a reasonable time after the close of the record, render a recommended decision, which shall include a statement of reasons which determines each issue of fact or law necessary to the decision.
- b) The Parties shall be provided with a copy of the Hearing Officer's recommended decision, and shall have ten days in which to file written objections or responses to it. Parties may file replies to any such objections or responses within ten days of the receipt of a copy of the objections.
- c) The recommended decision of the Hearing Officer shall be reviewed by the Board at the next regularly scheduled meeting after the expiration of the time for filing objections and responses, or at a special Board meeting so convened by the Board.
- d) The member and his attorney or representative shall be given notice of the Board meeting at which the recommended decision will be considered. Upon request, a party may present a legal argument, either orally or in writing as the Board may, at its discretion, order, and under such limitations regarding time and scope as may be imposed by the Board.
- e) Consistent with G. L. c. 30A, §§ 18 - 25, and unless otherwise requested by the member and approved by the Board, consideration of the Hearing Officer's recommended decision shall be conducted in Executive Session. The Board may affirm and adopt the recommended decision in whole or in part, recommit the recommended decision to the Hearing Officer for further findings as it may direct, or take any other action consistent with law as it may deem necessary for the full and fair consideration of the matter. The same procedural provisions applicable to the initial recommended decision shall apply to any re-filed recommended decision after recommittal. The findings and decision of the Board will be deemed its certificate of decision pursuant to G. L. c. 32, § 16(2).

- f) The member or his attorney or representative shall be provided with notice of the Board's decision, and the time and manner of filing an appeal from it.

11. Right of Appeal

Any party aggrieved by a final decision of the Board may appeal pursuant to the provisions of G.L. c. 32, § 16 (3).

12. Severability

The provisions of 941 CMR 2.10 are severable. If any provision or the application of any provision is held to be invalid or unconstitutional, such invalidity shall not be construed to affect the validity or constitutionality of any remaining provisions of 941 CMR 2.10 or the application of such provisions to administrative proceedings related to G.L. c. 32, § 15.

- Regulatory Authority: G.L. c. 32, § 1 et seq.; G. L. c. 32, §§ 20 (1)(b) and 20 (5)(b); G.L. c. 30, § 59; G.L. c. 30A, §§1 – 17.
- MacLean v. State Board of Retirement, 432 Mass. 339 (2000); Gaffney v. CRAB, 423 Mass. 1, 665 N.E.2d 998 (1996).
 - *Opinion of the Attorney General*, March 19, 1962.