

MEMORANDUM #30, 2011

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission

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Joseph E. Connarton, *Executive Director*

MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Shift Substitution, Creditable Service and Regular Compensation

DATE: October 26, 2011

This memorandum pertains solely to the calculation of creditable service and regular compensation with regard to shift substitution or similar practices where the responsibility for filling a work shift is transferred between or among employees. This should not be construed to exclude other forms of authorized leave from the calculation of regular compensation or creditable service. Recent newspaper articles and editorials have focused attention on “shift substitution.” The practice of shift substitution is widespread and, if safeguards are not put in place by the municipality in question, it may adversely affect a member’s retirement allowance.

Shift substitution is a common practice across the state and can be a valuable tool in certain professions (i.e., firefighting, police, and corrections) where the ability to take a day off when personal matters arise may be difficult if not impossible. These public safety professions obviously need full staffing at all times, causing some departments to require that time off be taken in two week increments, and a member has no ability to take a day off here and there as the need arises. Shift substitution keeps public safety departments fully staffed and also gives individuals members flexibility in attending to personal matters.

In most cases, shift substitution works as follows, using a fire department as an example. Firefighter A wants to attend his child’s kindergarten graduation, but cannot take one day off. He contacts Firefighter B, a firefighter who has the same specialized training as he. Firefighter B agrees to work Firefighter A’s shift. The shift supervisor is informed and agrees to the substitution, and the proper notation is made on the duty log. Firefighter A will then repay Firefighter B by working a shift for him in the future.

Shift substitution is provided for in numerous collective bargaining agreements throughout the state and the country. There is at least one software provider who offers “shift substitution” software for employers. This common practice is mentioned in the Fair Labor Standard Acts of 1938, or “FLSA.”

The practice of substitution shifts is sanctioned by the FLSA. FLSA does not require documentation of a shift swap, or that the shift “substituted” ever be paid back. However, the FLSA concerns itself with wages, overtime and child labor. That Act is not focused on retirement benefits, and the practice of shift substitution has the potential of adversely affecting a member’s retirement allowance. This is because a collective bargaining agreement may not alter the dictates of G.L. c. 32. See, generally, G.L. 150E, § 7. The provisions of G.L. c. 32, §§ 1 and 4 prohibit the grant of regular compensation or creditable service for time during which the member did not work.

Massachusetts General Laws, Chapter 32, Section 1, as amended by Chapter 21 of the Acts of 2009, provides as follows:

"Regular Compensation", during any period subsequent to June 30, 2009, shall be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.

Massachusetts General Laws, Chapter 32, Section 4(1)(a) provides as follows:

(1) *Qualifications for Credit for Service.* -- (a) Any member in service shall, subject to the provisions and limitations of sections one to twenty-eight inclusive, be credited with all service rendered by him as an employee in any governmental unit after becoming a member of the system pertaining thereto; provided, that in no event shall he be credited with more than one year of creditable service for all such membership service rendered during any one calendar year.

Where shift substitution occurs, there must be safeguards in place to assure that an individual, prior to retirement, has "repaid" all shifts owed by him.

When a member applies to retire and the retirement board is aware that the member's employer permits shift substitution, the retirement board must request and receive documentation that the member has actually worked the requisite number of shifts in a calendar year to qualify for all regular compensation and creditable service claimed. This documentation should be readily obtainable in departments with restrictions and safeguards on this practice.¹ In other departments where safeguards are not in place yet, a member may have a difficult time establishing his entitlement to creditable service and regular compensation when attempting to calculate his or her retirement allowance.

Because it is so imperative that no one retire utilizing creditable service for which they have not worked or regular compensation which they have not earned, PERAC has constructed a new form which is attached to this memorandum. This form must be utilized whenever a member who has engaged in shift substitution seeks to retire.

We are in the process of adding to the "Application for Voluntary Superannuation Retirement" form the following question: "Have you ever engaged in the practice of shift substitution?" If the answer to that question is yes, the new "Employer's Certification of Creditable Service and Regular Compensation in Connection With Shift Substitution" form must be filled out by the Employer prior to the calculation of a retirement allowance for the member.

We trust the foregoing will be of assistance to you.

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¹ While the FLSA does not mandate documentation, an Employer may require this, and an Employer must always agree in advance to the substitution of a shift. This is why documentation should be readily obtainable.

[Return to PERAC Home Page](#)