



PERAC HITS THE ROAD — NORTHAMPTON | HYANNIS | DANVERS

BOARD ADMINISTRATOR TRAINING

# A Matter of Time: Buybacks and Other Service Purchases Under Chapter 32



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11/14/17



## Preliminary Considerations

- Was the person an employee during the service time they seek?
- What if someone was in a position for which the salary was set at less than \$5,000 per year?
- What if the municipality cannot verify that the person worked there in the past?

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## Independent Contractors and “03” Employees

- Independent Contractor
  - “the right to control test”
  - Master Servant relationship
  - Totality of the circumstances
- “03” Employees
  - G.L. c. 32, Section 4(1)(s)

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## The Under \$5,000 Rule

- Creditable service is no longer available for purchase if the position which the person held had an annual compensation of under \$5,000, and if such service occurred on or after July 1, 2009.
- This is the so-called “Under \$5,000 Rule.”

G.L. c. 32, Section 4(1)(o)

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## Lack of Documentation/Proof

- Member has burden to establish right to purchase service
  - What happens if service was so long ago, no documentation is available?
    - Affidavits from prior colleagues
    - Newsletters
    - Social Security statements

G.L. c. 32, Section 20(5)(c)(1)

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## The Most Common Service Purchases

- Purchase of prior non-membership time
- Redeposit of prior membership time

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## Purchases of Earlier, Non-Membership Time

- Sometimes permissible, but not always.
- Conditions spelled out in Chapter 32, Section 3(5) or Section 4(2)(c) must be met.
- The section under which the service purchase is being made will determine what interest rate will be used in making the purchase.

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## Service With the Same System

- “In the case of any employee of any governmental unit who is a member of the retirement system pertaining thereto, the board may allow credit, upon whatever proportionate basis it shall determine under appropriate rules and regulations which shall be subject to the approval of the actuary, for any previous period of part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service rendered by him after such a retirement system becomes operative and while he was not eligible for membership excluding any prescribed waiting period under the provisions of the law or under the board's rules and regulations in effect during such previous period before eligibility for membership...”

G. L. c. 32, Section 4(2)(c)

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## Example

- Jack Sprat is presently a member of the Quabbin Retirement System.
- Jack worked summers as a lifeguard in Quabbin.
- Quabbin had a rule excluding “seasonal” workers from membership when Jack worked there.
- Jack may purchase his lifeguard time under Section 4(2)(c).

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## Service With Another System

- “Pre-membership service in a temporary, provisional, or substitute position in a governmental unit other than that by which the current member is presently employed where the member was excluded from membership by the rules of the prior employer's retirement board and where the retirement board of the current employer system has rules permitting the buy-back of such service...”

G.L. c. 32, Section 3(5)

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## Example

- Jared Peverall is presently a member of the Quabbin Retirement System.
- Jared worked in a parks project temporarily filling in for an injured worker one summer as a teenager in Periwinkle.
- Periwinkle had a rule excluding “temporary” workers from membership at the time Jared was working on the parks project.
- Jared may purchase the parks project time under Section 3(5).

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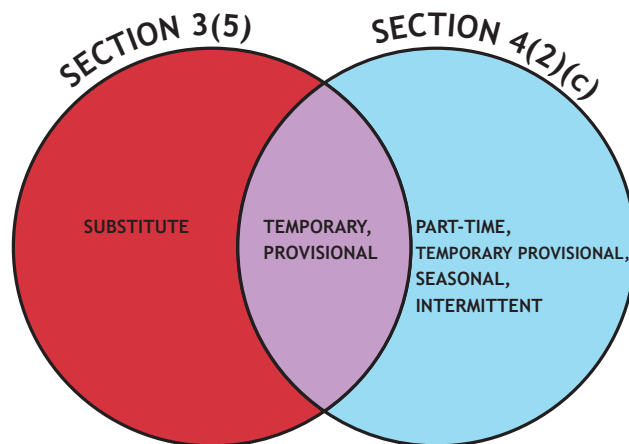
## Categories of This Eligible Time

Section 3(5)	Section 4(2)(c)
<ul style="list-style-type: none"><li>▪ temporary,</li><li>▪ provisional,</li><li>▪ substitute</li></ul>	<ul style="list-style-type: none"><li>▪ part-time,</li><li>▪ provisional,</li><li>▪ temporary,</li><li>▪ temporary provisional,</li><li>▪ seasonal or</li><li>▪ intermittent</li></ul>

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## Venn Diagram of Interplay Between Sections 3(5) and 4(2)(c)



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## ***Jan Berrick v. MTRB, CR-05-91 (2005)*** **(vacated on other grounds)**

- Member in service entitled to establish credit for non-membership service in five situations:
  - Section 4(1)(b)
  - Section 3(2)(c)
  - Section 4(1)(b) again
  - Section 3(5)
  - Section 4(2)(c)

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## **A Horse of a Different Color**

- Redeposits:
  - No worries about proving the time was worked.
  - No worries about how much time is available for purchase.
  - No worries about which Board will be liable for the time.

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## Redeposits

- “Any former member of any contributory retirement system established under the provisions of this chapter, or under corresponding provisions of earlier laws or of any special law, who subsequently becomes employed in a position in any other governmental unit in which such a system is operative, may, before the date any retirement allowance becomes effective for him, pay into the annuity savings fund of the system pertaining to his new employment in one sum, or in installments, upon such terms and conditions as the board may prescribe, make-up payments of an amount equal to the accumulated regular deductions withdrawn by him from the system from which he last became separated, together with ...interest...”

G.L. c. 32, Section 3(8)(b)

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## Example

- Karen Kelly has 12 years of service with Magenta.
- She leaves her employment, and withdraws funds from retirement system.
- She begins work in the Periwinkle system, of which she becomes a member, 7 years later.
- Leaving aside the issue of interest, she may redeposit into Periwinkle all amounts withdrawn by her when she left Magenta plus ...interest at any time before a retirement allowance becomes effective for her.
- She will retain her right to make this redeposit even if she leaves her money in Periwinkle, but becomes inactive.

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## If Buyback is Happening Under Sections 3(5), 3(8)(b) or 4(2)(c)...

- How much of the time has to be purchased?
- Which Board will be liable for the time?
- What will the tax status of the funds in the annuity account be following the purchase?

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## How Much Time Needs To Be Purchased?

Redeposit of Withdrawn Funds	Purchase of Prior Non-Membership Service
<ul style="list-style-type: none"><li>■ Entire amount must be repaid, together with interest.</li><li>■ Lump sum or installment payments not to exceed five years.</li><li>■ Payment plan may exceed five years “with the approval of the board.”</li></ul>	<ul style="list-style-type: none"><li>■ May be purchased in accord with the Board’s regulations.</li><li>■ Less than all non-membership time may be purchased.</li><li>■ If less than all non-membership time is to be purchased, the member must purchase the most recent time first.</li></ul>

840 CMR 15.02(1) & (2)

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## 3(8)(c) Liability

- Pursuant to G.L. c. 32 Section 3(8)(c):
  - When a retiree receives a benefit from System A that includes service rendered under the jurisdiction of System B, System A is reimbursed for the pension portion of the benefits associated with the service in the System B, as determined by the Actuary.

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## Tax Status of Money in an Annuity Account After Purchase

- If paid for via any method (including payroll deduction) other than an eligible rollover distribution, the money in the account associated with this particular purchase will be considered to have been contributed using after-tax dollars (unless your system received its own PLR ruling on a pick up).

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## Tax Status of Money in an Annuity Account After Purchase *(Continued)*

- Some retirement systems may have obtained a private letter ruling from the IRS allowing picked-up, pre-tax payroll deduction service purchases (if the payroll deduction was on an irrevocable basis).
- There are likely not very many systems who would have this, and it is not something that could be obtained from the IRS any longer.

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## Tax Status of Money in an Annuity Account After Purchase *(Continued)*

- If paid for via an eligible rollover distribution, the money in the account associated with this particular purchase will be considered to have been contributed pre-tax.

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## Other Considerations

- Erroneous exclusions/mistakes of a board
- Inactive members making service purchases
- Federal Tax Code Section 415 limits

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## *Ret. Bd. Of Stoneham v. CRAB & DeFelice*

- **Case No.:** 470 Mass. 130 (SJC)
- **Decision Date:** Dec. 22, 2016
- **In a nutshell:** Once a member is granted initial membership in a retirement system, he or she will retain the membership status so long as he or she remains employed. Accordingly, a member whose hours or pay are reduced below the initial membership threshold of a Board may not have their membership revoked. “Once a member, always a member...” (...but not always).

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## Inactive Members Buying Back Service

- *Zavaglia v. Gloucester Retirement Board*, CR-09-459 (2015) (a final decision of CRAB)
- Purchases of service may usually be made only by active members of a retirement system.
- The ability of an inactive member to make a service purchase is extremely limited.
- Exceptions to this general rule include: Sections 3(4), 3(4A), 4(1)(q), 4(1)(r).
- The biggest exception: Section 3(6)(d).
- Other sections of limited applicability are in a grey area.

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## Ability To Buy Back Time, Everlasting

“Any former member who is reinstated to or who re-enters the active service of the governmental unit in which he was formerly employed to serve in a position which is subject to the provision of this chapter, more than two years after the date of his last separation therefrom may, before the date any retirement allowance becomes effective for him, pay into the annuity savings fund of the system in one sum, or in installments, upon such terms and conditions as the board may prescribe, make-up payments of an amount equal to the accumulated regular deductions withdrawn by him, together with buyback interest...”

G.L. c. 32, Section 3(6)(d)

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## ***Marley v. Teachers' Retirement Board*** **CR-04-326 (2004)**

**Case No.:** CR-04-326

**Date of Decision:** July 14, 2004

**In a nutshell:** Teacher left her position, and withdrew her funds from the system. Years later, she became an active member again, but was laid off before she redeposited the funds. CRAB found that she could make the redeposit, even though she was inactive, at any time before a retirement allowance became effective for her.

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## **Federal Tax Law Concerns – 415 Limit** **General Considerations**

- After-tax contributions for permissive service credit or redeposit contributions are tested under section 415(n) of the Code. Either the section 415(c) dollar limit (\$54,000 for 2017) or a modified 415(b) limit applies.
- The special limits under section 415(n) of the Code may only apply to up to 5 years of after-tax purchases of certain types of service, and members may have to have at least 5 years of membership before purchasing certain types of service under the special section 415(n) limits.
- Rollovers to purchase service or redeposit contributions are not subject to the limits under section 415(n) or section 415(c). The annual benefit attributable to the rollover purchase is generally excluded from the 415(b) limit.
- These are complex rules. You should consult with your actuary or tax counsel to confirm compliance.

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## Special Situations

- Settlement Agreements
- Veterans' buybacks
- Call firefighters (post-MacAloney era)
- Elected officials
- Certain layoff situations
- Section 105: Returning to active membership after retirement

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## Settlement Agreements

### “Guidelines for Civil Service or Court-Ordered Settlements”

You will need to determine:

1. Exact period the back pay award covers;
2. Amounts of regular compensation member would have received;
3. Earnings member had during back pay award period;

PERAC Memorandum #28 of 2001 (attachment)

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## Settlement Agreements *(Continued)*

4. Any retirement allowance received must be repaid;
5. Retirement contributions shall be paid to system on the “full amount of regular compensation that the member would have received at the appropriate contribution rate...”

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PERAC Memorandum #28 of 2001 (attachment)

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## Veterans' Buybacks

- a) Must be a member in service
- b) 10% of regular compensation when the member most recently established membership in the system
- c) 5 to 1 ratio for national guard and active reserve time (MUST qualify as a veteran first)
- d) Active duty leave time **cannot** be counted towards buyback
- e) Member has 180 days from notice to begin purchase process
- f) Active duty for training for the National Guard and Reserves is excluded
- g) Must have been discharged from the service, and discharged honorably or “under honorable conditions.”

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G.L. c. 32, Section 4(1)(h)

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## ***MacAloney v. Worcester Regional Retirement System & PERAC***

- **Case No.:** CR-11-19
- **Decision Date:** June 21, 2013
- **In a nutshell:** Pursuant to the provisions of Section 4(2)(b), a permanent firefighter can purchase up to 5 years of creditable service for any time they served as a call firefighter or for the time he or she was on the respective lists and/or rosters making him or her eligible for such duty, **but they must pay for such service.**

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PERAC Memoranda 22/2013 & 33/2013

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## ***Grimes v. Malden Ret. Bd. & PERAC***

- **Case No.:** CR-15-5 (CRAB)
- **Decision Date:** November 18, 2016
- **In a nutshell:** CRAB determined that creditable service under G.L. c. 32, Section 4(2)(b) does not require payment by the member if they were never compensated.
- Not appealed, final decision of CRAB.

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## ***Gomes v. Plymouth Ret. Bd. & PERAC***

- **Case No.:** CR-14-127 (CRAB)
- **Decision Date:** November 18, 2016
- **In a nutshell:** Employees listed in G.L. c. 32, Section 4(2)(b) are able to buy back service if make-up payments are made equal to what would have been contributed based on the salary paid to them.
- On appeal to Superior Court, motion hearing pending.

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## **Elected Officials**

- May be excluded from initial membership in a system if making under \$5,000 a year by a rule of the Board.
- Otherwise, in the absence of such a rule, compensated elected officials may elect whether or not to become a member of said system.
- If they elect to become a member of the system and withdraw funds, they are subject to the same “redeposit” requirements as anybody else.
- If they do not elect to become a member of the system while in office, they may not buy back the time thereafter UNLESS they subsequently become a member of the same retirement system for which they have service as an elected official.

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G.L. c. 32, Sections 3(2)(c) & 3(3)

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## Buybacks of Time During Layoffs

- Pinkus award of time
- Chapter 324 of the Acts of 1983

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## Firefighters and Police

- **Chapter 324 of the Acts of 1983**

Local option, provides an award of creditable service to certain police officers and firefighters who were laid off in 1981 and 1982, returned to service prior to July 1, 1983. (No charge). *Contrast:*

- **Chapter 235 of the Acts of 1994**

Another local option, provides an award of creditable service to certain police officers and firefighters who were terminated by a reduction in force and subsequently reinstated to their former positions within three years of such terminations.

(Member must pay contributions they would have made for the period of unemployment, plus regular interest.)

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PERAC Memorandum # 16 of 2007

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## Section 105

- Has consumed Section 5(1)(g), although 5(1)(g) remains on the books.
- Allows a person retired under Sections 5 or 10 to be reinstated to active membership in a retirement system.
- They must pay back the amount of retirement allowance received by them, plus buyback interest, to the retirement system from which they retired.
- Must then work another 5 years.

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## Conclusion

- Many considerations come into play when a member seeks to purchase creditable service.
- The facts of each case will need to be examined.
- Pension reform has impacted the amount of service time which may be purchased.
- Chapter 32 and the rules of each board will determine which time is eligible for purchase and under what conditions.

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**COMMONWEALTH OF MASSACHUSETTS**

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