COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

GLOUCESTER RETIREMENT BOARD *Petitioner*	:	Docket No. CR-22-0452
	:	Date: May 30, 2025
v.	:	
PUBLIC EMPLOYEE REITREMENT ADMINISTRATION COMMISSION *Respondent*	:	
&	:	
JULIO MERCADO and ANDREW MARQUES *Intervenors.*	:	

Appearances:

For Petitioner: Thomas Gibson, Esq.
For Respondent: Felicia McGinniss, Esq.
For Intervenors: Lauren Kopec, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

A police officer seeking to purchase prior creditable service as a reserve police officer must first show that they earned at least $5,000.00 for each year. G.L. c. 32, § 4(1)(o). In a memorandum, the Public Employee Retirement Administration Commission ("PERAC") provided guidance to retirement boards that the source of the $5,000.00 is not limited to "regular compensation" and can include other income, such as detail pay. After two police officers sought to purchase their prior service, the Gloucester Board of Retirement asked PERAC to reconsider its position. PERAC denied the request and the Board appealed. Because PERAC's interpretation is correct, the Gloucester Retirement Board must follow it when processing the officers' applications.

INTRODUCTION

The Gloucester Retirement Board ("Board") timely appeals the Public Employee Retirement Administration Commission's ("PERAC") opinion that police officers may purchase their prior service as reserve police officers if they earned more than $5,000.00 dollars annually from, among other things, detail pay. In a letter, the Board requested that PERAC reconsider its position as stated in PERAC's Memo #38/2020, which PERAC declined to do. After the case was docketed, I held a status conference with the Board and PERAC questioning whether the Board had standing. The Board (and PERAC) both argued it did, and they submitted additional documents to show the Board's letter to PERAC was in response to actual requests to purchase this prior service by several officers.

With the additional submissions, I also issued an order giving the individual officers an opportunity to intervene; Julio Mercado and Andrew Marques responded, and I allowed their requests to intervene on November 4, 2024. I then gave the intervenors an opportunity to file their own briefs and exhibits, which they did through counsel.

I held a motion hearing on April 2, 2025 with all the parties to determine whether the matter could be decided on the papers. 801 Code Mass. Regs. § 1.01(10)(c). The parties agreed there were no facts in dispute and an evidentiary hearing was unnecessary. I then allowed the parties until April 18, 2025 to submit further briefs, which they did. I now enter exhibits J1-J11 and In1-In5 into evidence.[1]

[1] The "J" refers to the Joint exhibits submitted by the Board and PERAC and "In" refers to the Intervenors' exhibits.

FINDINGS OF FACT

1. Julio Mercado and Andrew Marques are both full-time police officers with the City of Gloucester. Before that, they were both part-time police officers, also with the City of Gloucester. (In2 & In3.)

2. When they became full-time police officers, they were enrolled as new members of the Gloucester Retirement System. In their enrollment forms, they were asked if they wished to purchase service as reserve police officers. They both answered yes. (J11.)

3. After obtaining their payroll records for their time as reserve police officers, the Board learned that each of them had received less than $5,000 in "regular compensation." However, they had each also been paid for detail[2] work which, when added to their regular compensation, meant they earned more than $5,000 in total compensation for each year they sought to purchase. (J11.)

4. Following a relevant Supreme Judicial Court case, *Plymouth Ret. Bd. vs. Contributory Ret. App. Bd.*, 483 Mass. 600 (2019) ("*Gomes*"), PERAC issued two memoranda clarifying certain aspects of this ruling. Specific to this case, PERAC issued Memo #38/2020 concerning purchasing prior service. The memo told Boards that, in calculating how much prior compensation an officer received, they had to count any compensation, not just regular compensation. (J2.)

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[2] The parties differed slightly in how they referred to this payment. The Intervenors referred to it as "detail" pay while the Board referred to it as "overtime." Nevertheless, they both agreed that however it was classified would not make a difference since neither overtime nor detail payments are considered regular compensation. G.L. c. 32, § 1 ("regular compensation" does not include overtime); *Desrosiers v. Worcester Reg. Ret. Sys.*, CR-18-0596 At *8 (Div. Admin. Law. Apps. Jul. 10, 2020), *citing Savage v. PERAC*, CR-11-397 (Div. Admin. Law Apps. Jan. 9, 2015) (Contributory Ret. App. Bd. Aug. 9, 2016) (detail pay not considered "regular compensation"). According to the collective bargaining agreement, it appears these payments were for "detail" work (Ex. In4), and I will thus refer to them as such in this decision.

5. PERAC's memo directly impacted whether officers Mercado and Marques would qualify to purchase this prior service. The Board disagreed with PERAC's interpretation and sent a letter to PERAC asking it to reconsider its position. (J9.)[3]

6. PERAC responded to the Board. It declined to change its position and issued a letter advising the Board of its right to appeal its decision. (J9.)

DISCUSSION

1. The Board has standing to bring this appeal.

I *sua sponte* raised the issue of standing with the parties. The Board is appealing PERAC's refusal to reconsider its advisory opinion. For a decision to be appealable, the decision needs to be binding and there must be an aggrieved party. *Marlborough Ret. Bd. v. Public Employee Ret. Admin. Commission*, CR-19-0014 (Div. Admin. Law Apps. Apr. 9, 2021). Sometimes, boards make requests to PERAC and disagree with PERAC's responses. Few of those requests give boards standing to appeal PERAC's opinions. *See Gloucester Ret. Bd. v. PERAC*, CR-21-217, 2022 WL 16921454 (Div. Admin. Law Apps. Jun. 10, 2022), and cases cited. That said, because boards are bound by PERAC's opinions, the Contributory Retirement Appeals Board ("CRAB") has explained certain narrow circumstances in which a board may appeal a PERAC opinion: "[i]f 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)." *Grimes v. Malden Ret. Bd.*, CR-15-05, 2016 WL 11956883 (Contributory Ret. App. Bd. Nov. 18, 2016).

[3] The letter included a lengthy argument section which I do not recount here. Rather, it forms the basis for the Board's arguments which I address below.

I raised this issue with the parties because I was initially unsure how the appeal started. However, the parties have satisfied me that the Board's request to PERAC was not hypothetical, but in response to actual members seeking to purchase their prior service. Like *Grimes* advised, the Board here "request[ed] a ruling as applied to a particular case." *Grimes*, *supra*. PERAC recognized the Board's request and issued it an appealable letter under *Barnstable County Ret. Bd. v. PERAC*, CR-07-163, 2012 WL 13406336 (Contributory Ret. App. Bd. Feb. 17, 2012). Having followed CRAB's guidance, the Board has standing to appeal.

2. "Compensation" under § 4(1)(o) includes detail pay.

The retirement allowance of a Massachusetts public employee is based in part on the duration of their "creditable service." G.L. c. 32, § 5(2). Normally, creditable service spans the employee's work for government units, starting when they became a member of a state or local retirement system. G.L. c. 32, § 4(1)(a). In some cases, the employee is entitled to purchase previous service that was not originally treated as creditable service. G.L. c. 32, § 4. Additionally, certain types of prior service are entitled to an "enhanced credit" under G.L. c. 32, § 4(2)(b). *Shailor v. Bristol Cty. Ret. Bd.*, CR-20-0343, 2025 WL 1092641 (Contributory Ret. App. Bd. Feb. 5, 2025). Specifically, for some reserve police officers,[4] "the board shall credit as full-time service not to exceed a maximum of five years that period of time during which a [reserve police officer] was on his respective list and was eligible for assignment to duty subsequent to his appointment[.]" G.L. c. 32, § 4(2)(b).

[4] The statute applies more broadly to reserve or permanent-intermittent police officers and reserve, permanent-intermittent or call fire fighters later appointed as a permanent member of the fire department. G.L. c. 32, § 4(2)(b). Because this case involves only reserve police officers, I use that throughout the opinion as shorthand for all the different positions entitled to this credit.

In 2009, the Legislature amended chapter 32 so that service "in a position receiving compensation of less than $5,000 annually, which service occurs on or after July 1, 2009, shall not constitute creditable service for purposes of this chapter." G.L. c. 32, § 4(1)(o).[5] This amendment applies to reserve police officers seeking the enhanced credit under § 4(2)(b). *Plymouth Ret. Bd., supra*.

Following *Gomes*, PERAC released two memoranda that explained the implications regarding the application of § 4(1)(o) to § 4(2)(b) credit for reserve police officers. Relevant here is PERAC's explanation for how to calculate the $5,000 threshold:

> Q. The *Gomes* decision mandated that a person must receive $5,000 or more in a year for such service to be considered creditable service. Should the $5,000 compensation include detail pay? The person is able to do detail pay only because of the position that they hold.
>
> PERAC's RESPONSE: Yes, detail pay and other such pay should be counted as compensation. Section 4(1)(o), the "Under $5,000 Rule" refers to "receiving compensation" and not "regular compensation." It must be remembered that this interpretation pertains only to those being given credit for the service at issue in the *Gomes* case. Much of that service, some of it being sporadic by nature, would not fit into the definition of "regular compensation."

PERAC Memo #38/2020.

PERAC "shall have general responsibility for the efficient administration of the public employee retirement system, under chapter 32." G.L. c. 7, § 50. "PERA[C] ha[s] considerable leeway in interpreting a statute it is charged with enforcing." *Barnstable Cty. Ret. Bd. v. Contributory Ret. App. Bd.*, 43 Mass. App. Ct. 341, 345 (1997). Accordingly, "PERAC may issue memoranda interpreting G.L. c. 32 which are binding on retirement boards unless they are

[5] The $5,000 threshold matters. Before 2009, full-time police officers seeking to purchase their prior part-time service did not have to earn any minimum amount of compensation. However, the Legislature amended the law in 2009 so that service which resulted in less than $5,000 in compensation per year would not constitute "creditable service." G.L. c. 32, § 4(1)(o).

manifestly unreasonable." *Guido and Revere Ret. Sys. v. Public Employee Ret. Admin. Commission*, CR-12-422 (Div. Admin Law App. Oct. 2, 2015), *citing Barnstable*, at 347. On appeal to DALA, "PERAC's memorandum is an 'interpretive' rule and is entitled to persuasive weight." *Stanton v. State Bd. of Ret.*, CR-18-399, 2023 WL 11806178 (Contributory Ret. App. Bd. Oct. 11, 2023), *citing Grimes, supra*, in turn *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

PERAC's explanation is simple and persuasive: throughout chapter 32, and specifically throughout § 4, the Legislature used both "compensation" and "regular compensation." "Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings." *Com. v. Williamson*, 462 Mass. 676 (2012) *quoting Ginther v. Commissioner of Ins.*, 427 Mass. 319, 324 (1998); *see also* G.L. c. 4, § 6 ("Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."). Thus, the terms are not used synonymously in § 4; the term "compensation" in § 4(1)(o) is no accident, as I discuss further below.

The Board argues the opposite, that the word "regular" should be read into § 4(1)(o) even though it is not there. Its concern appears to be that members will get credit for certain compensation, i.e. overtime or detail, which did not require them to make retirement contributions. And since members make retirement contributions only when they receive "regular compensation," that must be what the statute intended. But the Board's argument runs counter to the general principles of statutory interpretation discussed above.

Also, PERAC was aware of this fact, as it explained in its pleadings:

> [M]uch of Section 4(2)(b) service would not fit into the definition of "regular compensation" and therefore, would be unable to be purchased. Specifically, reserve, permanent-intermittent or call firefighters, or reserve or permanent-intermittent police officers have schedules which by their very nature are sporadic and not guaranteed. This service would not normally be considered "regular compensation." Thus, Section 4(2)(b) was enacted by the Legislature to ensure that this type of service for police officers and firefighters would be eligible for purchase. Without Section 4(2)(b), police officers and firefighters would largely be ineligible to buy back their previous reserve or permanent-intermittent service because such service usually does not meet the definition of "regular compensation" as being predetermined, nondiscretionary, and guaranteed.
>
> Furthermore, the Legislature could not have intended that by enacting Section 4(1)(o) they would essentially be eliminating this special, augmented benefit[.]

PERAC pre-hearing memorandum, pgs. 10-11. Thus, PERAC provides a good explanation for why its interpretation conforms to the statute's intent. *See Florio v. MTRS*, CR-18-509, at *3, 2025 WL 1092638 (Contributory Ret. App. Bd. Mar. 26, 2025), *citing Bronstein v. Prudential Ins. Co. of America*, 390 Mass. 701 (1984) (if statutory language unclear, can look to Legislature's intent, "particularly with regard to the public policy benefits of a particular reading").

I also asked the parties if they were aware of any other provision of chapter 32 which references "compensation" but has been interpreted to mean what the Board suggests, "regular compensation." Neither party found an example that answers that exact question, but all suggested some analogies. The Board noted that the term "compensation" appears many times throughout chapter 32 (and offered an impressive addendum noting many, if not most, of those references). The Board then highlighted some examples of where it believes the term "compensation" is used, but a different term is implied. *See, e.g.*, G.L. c. 32, § 12C (arguably using the term "annual compensation" as synonym for "regular compensation"). These

examples, while useful, are not directly on point because they do not address the interpretation the Board urges here.[6]

For their part, the Respondents and Intervenors also failed to find any specific instances where the term "compensation" was interpreted to mean "regular compensation." That, however, bolsters their argument. In fact, PERAC points to one case in which the opposite was true—where the term "compensation" was not interpreted to mean "regular compensation." *Dougherty v. MTRS*, CR-04-259, 2005 WL 4541637 (Div. Admin. Law App. Jun. 9, 2005). In *Dougherty*, DALA explained that while a teacher could purchase prior non-public school service for "five per cent of the *compensation* received," G.L. c. 32, § 4(1)(p)(emphasis added),[7] that did not mean the prior service was considered "regular compensation." *Id*. ("The fact that a member can purchase as creditable service a period of non-public school service does not transfer the salary earned at the non-public school into regular compensation."). This research further supports PERAC's interpretation.

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[6] The Board also cites to *dictum* in *Rotondi v. Contributory Ret. App. Bd.*, 463 Mass. 644 (2012). There, in a footnote, the Court said that "§ 4(1)(o) would definitively exclude from membership employees, elected or otherwise, who earn less than $5,000 in *regular compensation*." *Id.* at 651 n.10 (emphasis added). But *Rotondi* was about a totally different issue, and it is not clear the Court even considered the scenario presented here.

[7] G.L. c. 32, § 4(1)(p) reads, in relevant part:

> Any member of a contributory retirement system who is engaged in a teaching position and holds a certificate issued by the department of education or is exempted from the requirement of certification and who was previously engaged in teaching pupils in any non-public school in the commonwealth, if the tuition of all such pupils taught was financed in part or in full by the commonwealth may, before the date any retirement allowance becomes effective for him, establish such service as creditable service by depositing into the annuity savings fund of the system of which he is a member in one sum, or in installments, upon such terms and conditions as the board may prescribe, an amount equal to five per cent of the compensation received by him during such period of service plus buyback interest to the date of such deposit for such previous period, or most recent portion thereof, as he may elect.

CONCLUSION AND ORDER

I agree with PERAC's interpretation of § 4(1)(o) in this case. Thus, its decision denying the Board's request to reconsider is **affirmed**.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate