

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals
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Robert J. Kenney

Docket No: CR-21-0255

Petitioner

v.

Boston Retirement System

Date: January 3, 2025

Respondent

DISMISSAL

The issue in this matter is whether certain vacation buyback payments that Robert Kenney received should be counted as regular compensation when calculating his retirement allowance. The retirement system's decision was originally based on the Contributory Retirement Appeal Board's *O'Leary* decision. The Supreme Judicial Court affirmed CRAB's decision, which excluded vacation buybacks from regular compensation. 490 Mass. 480 (2022). However, just days later, the Legislature enacted G.L. c. 32, § 106, which essentially overrode the Court's decision by allowing certain members in certain situations to count their vacation buyback pay if they "consistently participate" in a buyback program. The Boston Retirement System promulgated a regulation to define better what consistent participation means; it was approved by PERAC on February 26, 2024.

The regulation defines "consistently" participating as being paid for annual unused vacation leave (1) at least the last 5 years of creditable service, or (2) no less than 8 of the member's last 10 years of service. The Board has reviewed its original decision and determined that Mr. Kenney does not satisfy either of the regulation's requirements. In his appeal letter, Mr. Kenney argues that he would have qualified under the 5-year option if it weren't for a difficult surgery on his foot and ankle that made him miss the 2018 deadline to sell back his vacation time that year.

I determined that the matter could be decided on written submissions because it appeared

that the retirement system appeared to be correctly applying § 106 and its regulation. In a Scheduling Order dated October 18, 2024, I encouraged Mr. Kenney to inquire whether he was paid annual unused vacation leave any earlier than August 2015. If he had been, there was a possibility that he could have been paid in 8 of the last 10 years and thus qualify to have his vacation buyback payments treated as regular compensation. Mr. Kenney also could have attempted to persuade the Board that his extenuating circumstances made a difference in the application of the regulation.

I ordered Mr. Kenney to file his memorandum no later than November 29, 2024 and ordered the Board to respond no later than January 10, 2025. Mr. Kenney did not file his memorandum by the deadline. On December 1, 2024, the Board reminded him that he needed to file his memorandum. Having not received the memorandum, on December 5, 2024 DALA ordered Mr. Kenney to file his memorandum no later than December 20, 2024; otherwise, his appeal would be dismissed for failure to prosecute it. Mr. Kenney still has not filed his memorandum.

Accordingly, the above-captioned appeal is hereby dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

Notice sent to: Robert J. Kenney
Timothy Smyth, Esq.