MEMORANDUM #10, 2010

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission
Five Middlesex Avenue, Suite 304, Somerville, MA 02145
Ph 617 666 4446 | Fax 617 628 4002 | TTY 617 591 8917 | www.mass.gov/perac
Domenic J. F. Russo, *Chairman* | A. Joseph DeNucci, *Vice Chairman*
Mary Ann Bradley | Paul V. Doane | James M. Machado | Donald R. Marquis | Robert B. McCarthy
Joseph E. Connarton, *Executive Director*

M E M O R A N D U M

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: The "Under $5000 Rule"

DATE: January 21, 2010

This office has been receiving an increasing number of inquiries regarding how Retirement Boards should implement Section 5 of Chapter 21 of the Acts of 2009, the so-called "Under $5000 Rule." Now codified as G.L. c. 32, § 4(1)(o), it provides as follows:

The service of a state, county or municipal employee employed or elected 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.

Prospective Application of the Rule

In regard to those individuals who were not members in service when this law took effect, PERAC has urged Retirement Boards to consider using the authority granted to them by G.L. c. 32, § 3(2)(d), and exclude from membership all those making under $5000 by promulgating a supplementary regulation to this effect. Presumably, all individuals making under $5000 annually are part-time employees, and so would be subject to membership at the discretion of the Board under Section 3(2)(d). Since the newly enacted Section 4(1)(o) also applies explicitly by its terms to those elected to a position, such a regulation would preclude elected officials making less than $5000 per year from choosing to join the system under G.L. c. 32, § 3(2)(a)(vi). In those systems where such a regulation is not in effect, an elected official seeking to affirmatively choose membership in these circumstances should be counseled not to do so.

Application of the Rule to Members in Service

While the supplemental regulations suggested by PERAC would solve certain problems going forward, issues involving those individuals who were already members of the system at the time of the enactment of this statute are more difficult.

Once a Member, Always a Member

It has been and continues to be PERAC's position that members in service of a system will remain members in service of the retirement system to which they belong, regardless of whether they are making under $5000 per year. This is because no event described in G.L. c. 32, § 3(1) has occurred which would terminate their membership. That section of the statute provides, in pertinent part, "…[T]he status of a member in service shall continue as such until his death or until his prior separation from the service becomes effective by reason of his retirement, resignation, failure of re-

election or reappointment, removal or discharge from his office or position, or by reason of an authorized leave of absence without pay other than as provided for in this clause…." The new Section 4(1)(o) of Chapter 32 concerns only creditable service. It does not address itself to either membership or regular compensation. Some have argued that the Legislature intended to exclude this class of people from membership. However, that is not what Section 4(1)(o) says. When amending a statute or enacting a new one, the Legislature is presumed to be aware of prior statutory language. Ropes and Gray LLP v. Jalbert, 454 Mass. 407, 412-413, (2009.)

Continuing to Take Deductions from Members in Service

All retirement boards should continue to take deductions from those members in service making under $5000 per year. We are aware that, intuitively, this seems incorrect. Members would be continuing to pay into the system without accruing creditable service for this time. However, there are compelling legal reasons to require this, and there are benefits to membership beyond the accrual of creditable service.

Taking deductions from the regular compensation of members in service is mandated by M. G. L. c. 32, § 22(1)(b), which provides that the treasurer or disbursing officer, "shall, upon written notice from the board" "withhold on each pay day … per cent of the regular compensation of each employee who is a member in service of the system…."

Since individuals who were members in service of a system prior the new law taking effect retain their membership status as discussed above, and since the language of G.L.c. 32, § 22(1)(b) is mandatory, deductions must continue to be taken, unless a statutory change to Section 22(1)(b) is made specifically exempting such members from the contribution requirements.

There are many benefits to this approach, including that it will be easy for Boards to implement. It is sometimes difficult to know whether such a person will earn more or less than $5000 per year. This will be simpler for the Boards. As to the members in question, other than accruing creditable service, they will retain all the rights and protections of being a member in service, including eligibility for accidental disability retirement benefits in certain circumstances. Finally, this approach would appear to eliminate the need to have such individuals pay into an alternative deferred compensation program. (See, generally, PERA Memo #18/1991.)

Although it seems counterintuitive to have people contribute money when they are not earning creditable service, it should be remembered that the most anyone will contribute in this fashion is approximately $449.91 per year, or $37.50 per month, assuming a salary of $4,999.00 per year, with deductions taken out at a rate of nine per cent. For most of the people so situated, there will be substantially less of a contribution involved. In any event, all members will receive this money back at the conclusion of their service.

Finally, we need to remind all Boards that several lawsuits regarding the implementation of Chapter 21 of the Acts of 2009 have been filed and continue to make their way in both state and federal courts. We will keep you apprised as decisions are made in those courts.

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