

## MEMORANDUM #32, 2013

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission

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## MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Herrick v. Essex Regional Retirement Board – 465 Mass. 801 (2013)

DATE: November 20, 2013

On July 15, 2013 the Supreme Judicial Court (SJC) decided the case of Herrick v. Essex Regional Retirement Board. Due to an incorrect reference contained in a footnote, the SJC issued a corrected decision on September 20, 2013. This memorandum addresses the affirmative duty of retirement boards to implement the decision of the court.

In this case, Robert D. Herrick (“Herrick”) sought interest from the Essex Regional Retirement Board (“ERRB”) after the ERRB was found to have improperly forfeited Herrick’s pension. Approximately eight years after first applying for retirement, Herrick received a retroactive pension payment covering this period, but did not receive interest on this payment. Herrick sued the ERRB to recover interest on the retroactive payment. In July of this year, the SJC ruled that:

where, as here, a retirement board makes a legal error in denying retirement benefits that is corrected by a court, the plaintiff is entitled to a rate of interest determined by the board’s actuary “so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid.”

The SJC ordered ERRB “to make a one-time lump sum payment to the plaintiff amounting to the difference between that actuarial equivalent and the \$191,165.76 that has already been paid”.

As you know, G.L. c. 32 § 20(5)(c)(2), in addressing a retirement board’s responsibility to correct errors, also contains the discretionary “and as far as practicable” language as it relates to future payments being adjusted so that the actuarial equivalent to which the member or beneficiary was correctly entitled shall be paid.

PERAC has determined that the lump sum requirement in the Court’s holding, the discretionary language in the statute, and the application of the actuarial equivalent measure necessitate the need for an interest rate to be applied directly to the amount owed and paid as part of the lump-sum retroactive payment. In other words, once the amount of the payment owed the member has been determined, interest on that amount should be calculated and paid to the member as part of the payment.

The Herrick decision and G.L. c. 32 do not specify the interest rate to be applied in these adjustments. However, when an active member’s funds are held by a retirement board, the member’s contributions earn regular interest as determined by the provisions of G.L. c. 32, § 22(6)(b). Therefore, the board could properly apply the interest rate as annually determined by PERAC pursuant to this section for the period of underpayment. PERAC believes the boards

have discretion in this area to adopt an appropriate interest rate. In 2011, the Legislature adopted a 3% rate of return on refunds to members who leave the system after less than 10 years' service, indicating legislative intent relative to an appropriate interest rate. The rate adopted by a board must be applied consistently and used to calculate overpayments as well as underpayments.

As the court in Herrick points out, these interest payments should be included in each instance where a retirement board utilizes G. L. c. 32, § 20(5)(c)(2) to make an adjustment, in addition to court-ordered adjustments. This would include circumstances where a retirement board overpaid a retiree, subject, of course, to the waiver provisions of G.L. c. 32, § 20(5)(c)(3).

All adjustments going forward shall be subject to these provisions. In addition, any member or beneficiary who has received an adjustment and petitions the board for interest, shall be entitled to receive such payment for the period of underpayment prior to the lump sum payment.

We trust the foregoing will be of assistance to you. If you have any further questions, please contact PERAC's Legal Unit.