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Public Employee Retirement Administration Commission
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MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Military Service Credit Provisions for Members Called to Active Military Duty

DATE: October 4, 2001

We have received several inquiries as to what actions must be taken to provide for members-in-service who are called to active military duty because of the current crisis.

This memo will outline the provisions of the federal Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. § 4301 et seq., hereinafter USERRA) and laws of the Commonwealth governing the responsibilities of retirement boards relative to public employees called to active duty by the Armed Forces of the United States. The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force and Coast Guard, and reserve components thereof which have been activated including the Army National Guard of the United States and Air National Guard of the United States.

USERRA pre-empts conflicting state laws and provides that any person who leaves a position (other than a temporary position) in the employ of a state or political subdivision thereof to serve in the Armed Forces is entitled to certain rights and benefits. It provides in part:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed. ... [A] person who is absent from a position of employment by reason of service in the uniformed services shall be ...deemed to be on furlough or leave of absence while performing such service.... 38 USCS §§ 4311(a)-(b)(1).

The Supreme Court has held that "accredited service" for the purpose of determining pension benefits is an aspect of seniority and thus must be granted to persons returning from military duty for the entire period of such duty. In other words, all employees returning to public employment from military duty must be given creditable service for the entire period of such duty.

Along with the requirement that members be granted creditable service while in the Armed Forces, they also retain their status as members in service for purposes of G.L. c. 32. G.L. c. 32,

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§ 3(1)(a)(i) provides that a member in service can retain that status only during unpaid leaves of absence of one year or less. However, this limitation conflicts with the portion of USERRA which states “any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter.” Thus, even where a member's unpaid leave of absence for military duty continues beyond one year, that member is still entitled to member in service status.

The provisions of G.L. c. 32, when read together with USERRA, mandate that the Commonwealth or political subdivision thereof is responsible for the payments that the members would have made into the annuity savings fund of their respective retirement systems had they not been called to military duty.

The procedures that must be followed in order to ensure that members called to active duty by the Armed Forces receive proper retirement benefits under G.L. c. 32 are outlined below.

Pursuant to G.L. c. 32, § 22(7), each board must furnish information each year to PERAC's Actuary so that the amount of its contribution to the pension fund for the following fiscal year can be determined. When providing this information, each board must also furnish information as to the amount of regular deductions any member on military leave of absence would have paid into the retirement system if he or she had not been called to active military duty. The board shall determine the amount to be paid by the board for the special fund for military service credit. This determination is subject to the Actuary's review.

Pursuant to G.L. c. 32, § 22(4)(b), if a member with military service credit retires or dies prior to retirement and leaves a beneficiary eligible for member-survivor benefits under G.L. c. 32, § 12(2)(d), the amount provided for the member in the special fund plus interest is to be transferred to the annuity reserve fund and added to the amount of the member's accumulated regular deductions. This total will be used to determine the amount of the annuity payable to the member or his or her beneficiary under the provisions of G.L. c. 32, § 12(2). Also, if the total amount of a member's retirement allowance is dependent on the amount of the accumulated total deductions, the amount transferred from the special fund is to be included in the aggregate of his or her regular deductions.

When a member with military service credit withdraws from the retirement system or dies before any retirement allowance becomes effective for him or her and if there is no member-survivor allowance payable under G.L. c. 32, § 12(2)(d) or survivor benefits under G.L. c. 32, § 12B, G.L. c. 32, § 22(4)(c) provides that the amount in the special fund for this member is to be transferred to the pension fund of the governmental unit or units that paid into the special fund for the member. If a member is later reinstated or becomes a member of another retirement system and re-deposits his or her accumulated total deductions plus interest, that governmental unit must re-

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transfer the amount originally transferred to the pension fund plus regular interest to the special fund.

If the member is a member of the Teachers' Retirement System, the amount paid into the special fund by a city or town on behalf of the member is to be returned to the appropriate city or town with accumulated interest and any portion paid by the Commonwealth is to be transferred to the pension fund of the Teachers' Retirement System. If the member is later reinstated and returns the full amount he or she withdrew with interest, the appropriate city or town is to be notified and must pay back the amount that was returned to it to the special fund of the Teachers' Retirement System with interest at three percent to the date of the repayment. Any amount transferred to the pension fund must also be re-transferred to the special fund with interest at three percent.

G.L. c. 32, § 22(4)(d) deals with instances in which a member with military service credit transfers his or her membership to a second system or re-establishes membership by paying into the annuity savings fund of a second system. When such a member retires or dies and his or her beneficiary is entitled to member-survivor benefits under G.L. c. 32, § 12(2)(d) or survivor benefits under G.L. c. 32, § 12B, the amount of the military service credit payments made on his or her behalf plus interest is to be transferred from the pension fund of the first system to the special fund of the second system and thereafter handled as discussed above.

In some communities a member will be paid the difference between his or her military pay and the total amount of regular compensation that would have been received had the member not been called to active duty. Pursuant to G.L. c. 32, § 3(6)(a), a retirement board has full power to make rules, regulations and findings as it deems necessary, consistent with the provisions of G.L. c. 32, §§ 1-28, relating to leaves and periods of absence. We find nothing in G.L. c. 32 that would prohibit treatment of such payments as regular compensation for the purposes of determining retirement allowances. Retirement deductions must be taken from these payments.

Finally, it should be noted that all persons called to active duty for at least ninety days in the Armed Forces would qualify as veterans for the purposes of G.L. c. 32 since current service would be included in the Persian Gulf period and is considered wartime service. It is important to note that persons who receive military service credit as outlined in this memorandum cannot later purchase service for the same period under the voluntary purchase provisions of G.L. c. 32, § 4(1)(h).

We trust the foregoing is of assistance. If you have further questions or concerns, please contact this office.