COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Massachusetts Water Resources Authority Employees' Retirement System,
Petitioner,

v.

Public Employee Retirement Administration Commission,
Respondent.

No. CR-23-0486

Dated: May 30, 2025

Appearances:
For Petitioner: Gerald A. McDonough, Esq.
For Respondent: Felicia McGinniss, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

A member of the retirement system administered by the petitioner board passed away while still employed. His survivor is entitled to an allowance under G.L. c. 32, § 12(2)(d). The amount of the allowance is derived from the member's pay during a three-year period. *Id.* §§ 5(2)(a), 12(2)(a), (c), (d). The three-year period includes any unpaid leave of absence "not in excess of 1 year," *id.* § 5(3)(b); the member is viewed as having earned the same pay rate during such a period as he was receiving when it began. *Id.* The member in this case was on leave for fifteen months. For purposes of § 5(3)(b), the first year of that leave is includable in the three-year calculation period.

DECISION

This appeal revolves around a survivor's allowance payable by petitioner the Massachusetts Water Resources Authority Employees' Retirement System (board) to the survivor of one of its members. The appeal challenges instructions from respondent the Public Employee Retirement Administration Commission (PERAC) about the manner in which the allowance should be calculated. The appeal was submitted on the papers at the board's unopposed request. *See* 801 CMR § 1.01(10)(c). I admit into evidence exhibits marked 1-7.

Findings of Fact

The following facts are not in dispute.

1. In 2008, Mr. Dennis Vargus became a Massachusetts public employee and a member of the retirement system administered by the board. At some point after that, Mr. Vargus filed a form appointing his wife as his beneficiary for purposes of any survivor's benefits under G.L. c. 32, § 12(2)(d). (Exhibit 2.)

2. In 2021, Mr. Vargus became ill. He took three resulting unpaid leaves of absence. The first two periods of leave were three to four months long each. The last period of leave began in March 2022. It was still underway fifteen months later, when Mr. Vargus passed away. (Exhibit 1.)

3. When the board came to calculate the survivor's allowance payable to Mr. Vargus's beneficiary, it confronted a dilemma analyzed in detail below. Roughly speaking, the board wondered whether any portion of Mr. Vargus's final, fifteen-month leave of absence counts as within the three-year pay period from which the survivor's allowance is derived. PERAC, which the board prudently consulted, said no. The board then took this timely appeal. (Exhibits 3-7.)[1]

Analysis

I. Overview

The dispute here runs roughly as follows. Mr. Vargus's beneficiary is entitled to a survivor's allowance under G.L. c. 32, § 12(2)(d). The amount of the allowance is derived from Mr. Vargus's pay during a three-year period. *See id.* §§ 5(2)(a), 12(2)(a), (c), (d). The three-

[1] PERAC's decision was appealable for the reasons discussed today in *Gloucester Ret. Bd. v. Public Emp. Ret. Admin. Comm'n*, No. CR-22-452, at *4-5 (Div. Admin. Law App. May 30, 2025).

year period may include unpaid leaves of absence "not in excess of 1 year," *id.* § 5(3)(b); as to such periods, the member is treated as having earned the same rate of pay that he or she was receiving immediately before the leave began. *Id.* Mr. Vargus's final leave of absence was more than one year long. The essential question is whether the three-year calculation period includes one year out of his final leave of absence. On balance, the better answer is yes.

II. Statutory Context

The benefits ordinarily payable under the public retirement law are allowances to retired employees. But some employees will pass away without ever retiring. The law allows employees to account for that scenario by appointing a beneficiary for purposes of a survivor's allowance. The rules that govern eligibility for the survivor's allowance are stated in G.L. c. 32, § 12(2)(d). The parties agree that Mr. Vargus's beneficiary qualifies.

The amount of the survivor's allowance is prescribed by the same statute. The allowance must equal "the option (c) allowance to which [the] member would have been entitled had his retirement taken place on the date of his death." G.L. c. 32, § 12(2)(d). "Option (c)" is one of the three alternative payout schemes that the retirement law makes available to retiring members. *See generally id.* §§ 5(2)(a), 12(2)(a), (c).

The option (c) allowance to which Mr. Vargus hypothetically would have been entitled is derived in part from two variables that warrant further discussion. One variable is Mr. Vargus's "creditable service," which means, roughly speaking, the total amount of time he spent working in public service. *See generally* G.L. c. 32, § 4(1). A minor complication relating to Mr. Vargus's tally of creditable service is discussed below.

The other variable forms the focus of this dispute: it is Mr. Vargus's average rate of "regular compensation" during the three-year period when that rate was highest. *See* G.L. c. 32,

§§ 1, 5(2)(a).[2] The question presented is how this three-year calculation period should be identified against the background of Mr. Vargus's pre-retirement leaves of absence. The parties agree that the answer is located within the following provision:

> Any duly authorized leave or period of absence for which any member *is* allowed creditable service . . . and any such leave or period of absence not in excess of 1 year for which such member *is not* allowed creditable service, shall be included in any applicable 3-year . . . period to determine the average annual rate of such member's regular compensation . . . .

Id. § 5(3)(b) (emphasis added). When this provision brings an unpaid leave of absence into the three-year calculation period, the leave is treated as a period in which the member earned "the rate in effect for [him or her] immediately preceding [the] . . . absence." *Id.*

Section 5(3)(b) distinguishes between leaves of absence for which the member did and did not earn "creditable service." As a general rule, lengthy leaves of absence without pay are not creditable. *See* G.L. c. 32, § 4(1)(c). The parties agree that Mr. Vargus's leaves of absence remained within this general rule and did not earn him retirement credit.

Turning to § 5(3)(b)'s consequences here, the analysis is simple and undisputed with respect to Mr. Vargus's first two periods of leave. Those periods were only three to four months long each. They are therefore includable within the three-year calculation period as "leave . . . not in excess of 1 year." *Id.* As to each of these shorter periods of leave, Mr. Vargus is treated as having earned the same pay rate that he was receiving immediately before the leave began. *Id.*

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[2] More specifically, the period to be consulted is "any period of three consecutive years of creditable service for which [the] rate of compensation was the highest, or . . . the period or periods, whether consecutive or not, constituting [the member's] last three years of creditable service preceding retirement, whichever is the greater." G.L. c. 32, § 5(2)(a). The three-year period is replaced by a five-year period in the case of employees who established membership on or after April 2, 2012. *Id.*

III. Periods of Absence Not in Excess of One Year

The dispute concentrates on Mr. Vargus's final, fifteen-month-long leave of absence. The applicable portion of § 5(3)(b) provides that the three-year calculation period includes any "duly authorized leave or period of absence . . . not in excess of 1 year." The question presented is whether, under that provision, the calculation period should or should not include first "1 year" of Mr. Vargus's fifteen-month leave.

PERAC's argument on appeal draws attention first to that agency's key role in administering the retirement statute. Given that role, PERAC's views on any aspects of the statute are important. *See Boston Ret. Bd. v. Contributory Ret. Appeal Bd.*, 441 Mass. 78, 83-85 (2004); *Barnstable Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 43 Mass. App. Ct. 341, 345-47 (1997). But the measure of deference assigned to PERAC's opinions in proceedings before this tribunal is prescribed with specificity by *Grimes v. Malden Retirement Board*, No. CR-15-5, 2016 WL 11956883, at *5 (Contributory Ret. App. Bd. Nov. 18, 2016). When PERAC has published its views in a formal memorandum, that document "will be considered an 'interpretive' rule." *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The weight of an interpretive rule "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. *See also Alexander v. State Bd. of Ret.*, No. CR-19-452, 2021 WL 9583592, at *2 (Div. Admin. Law App. Nov. 5, 2021). Outside of the context covered by *Grimes*, namely in the circumstances of PERAC's unpublished, case-specific positions, less deference is warranted. *See Conroy v. Conservation Comm'n of Lexington*, 73 Mass. App. Ct. 552, 563 n.15 (2009);

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988). Straightforwardly speaking, the real question is whether PERAC's interpretive theory is compelling.

The interpretive principle on which PERAC relies provides that a statute must be enforced as written when it is "clear and unambiguous." *See Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021). But on close examination, the pertinent statutory passage is equivocal as to the particular problem presented here: i.e., the consequences that follow when a "period of absence" *is* "in excess of 1 year." Both parties' positions are reconcilable with the statutory text. PERAC reads the statute as allowing the three-year calculation period to include any "leave or period of absence *[lasting in total]* not in excess of 1 year" (and no part of periods lasting longer). But the statute also may be read, consistently with the board's position, as allowing the calculation period to include any "leave or period of absence *[up to an amount]* not in excess of 1 year."[3]

When a statute is susceptible to multiple ordinary meanings, the proper construction is the one that "most appropriately suits [the statute's] intent and purpose." *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015). The statutory purpose here is clear. As the board says in its brief, § 5(3)(b) "provides some protection for members who are on approved unpaid leaves of absence." PERAC does not disagree. In other words, up to a prescribed limit, § 5(3)(b) allows a

[3] An analogy to a very different context might illustrate the point. An old federal statute allowed Quapaw landholders to "lease their lands . . . for a term not exceeding . . . ten years." Act of June 7, 1897, c. 3, 30 Stat. 62, 72. When a property was leased for more than ten years, a federal Court of Appeals construed the statute as allowing the lease to be enforced up to a ten-year term. The Supreme Court disagreed, holding that a lease with a total duration of more than ten years cannot be implemented at all. *Smith v. McCullough*, 270 U.S. 456, 464-65 (1926). A key feature of that debate is that it revolved not around a plain reading of an unambiguous text but around the statutory "nature and purpose." *Id.* at 464.

member to enjoy the consequences of a pay rate that he or she *would have been* earning if not for circumstances sympathetic enough to warrant authorized leave.

So understood, the statutory purpose is much more reasonably advanced by the board's approach. On that view, all members on lengthy authorized leaves of absence may accumulate up to one year's worth of pay data for purposes of the three-year calculation period. By contrast, according to PERAC, the calculation period fully incorporates an absence of 365 days but fully disregards an absence of 366 days. Results so seemingly arbitrary sometimes flow unavoidably from legislative line drawing. But when a plausible construction would eliminate such results, that construction is the one that the Legislature is more likely to have intended. *See Genser v. Reconstruction Fin. Corp.*, 169 F.2d 136, 138-39 (Emer. Ct. App. 1948).

To round out the analysis, one other provision of the retirement law uses language reminiscent of § 5(3)(b)'s: the rule, mentioned earlier, about the leaves of absence that do and do not qualify an employee for "creditable service." With respect to unpaid periods of leave, that provision says: "Creditable service . . . may be allowed by the board for any period of . . . continuous absence . . . which is not in excess of one month." G.L. c. 32, § 4(1)(c). It is well established that this rule allows members to receive one month's worth of credit for lengthier absences. *See Hackenson v. Massachusetts Teachers' Ret. Syst.*, No. CR-14-94, 2016 WL 5872297, at *4 (Div. Admin. Law App. July 1, 2016); *Pray v. State Bd. of Ret.*, No. CR-06-180, 2007 WL 1074648, at *2 (Div. Admin. Law App. Mar. 2, 2007). Although § 4(1)(c) differs in important ways from § 5(3)(b), it offers additional support for the essential type of rule proposed by the board and adopted by this decision: i.e., when a member's absence is excessively long, the member may sometimes still receive the lesser benefit of a portion of the absence.

Conclusion and Order

In view of the foregoing, the three-year period used to generate the allowance to Mr. Vargus's survivor is properly calculated as including one year out of Mr. Vargus's final leave of absence. PERAC's contrary decision is VACATED. The matter is remanded to the board for calculations and processing consistent with this decision.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate