

## MEMORANDUM

TO: All Retirement Boards

FROM: John W. Parsons, Esq., Executive Director

RE: Buying Back Elected Official Service Time

DATE: October 19, 2021

PERAC has recently received inquiries from several retirement boards regarding the ability of members to buy back their prior service time as an elected official, specifically for members who did not elect membership within the required timeframe. As you are aware, elected officials are given the option of membership in a retirement system pursuant to G.L. c. 32, § 3(1)(a)(vi), which provides that membership is available to:

Any person hereafter elected by popular vote to a state, county or municipal office or position who files with the board on a prescribed form a written application for membership within ninety days after the date of assuming office; provided, that a member becoming an elected official shall retain his membership and an elected official who is a member shall remain a member upon his re-election or upon his election or appointment to any other position which would otherwise entitle him to membership.

The Contributory Retirement Appeal Board (“CRAB”) has consistently determined that elected officials must adhere to Section 3(1)(a)(vi)’s ninety-day requirement in order to gain membership to the retirement systems and receive creditable service. In *Levesque v. Essex County Ret. Bd.*, CR-95-571 (CRAB Oct. 7, 1996), CRAB determined that the petitioner could not purchase prior elected service time because she did not become a member of the relevant retirement system within ninety days of assuming office, as required by Section 3(2)(a)(vi). CRAB further held that a retirement board is not required by Chapter 32 to notify newly elected officials of their right to membership.

Similarly, in *Goode v. Weymouth Ret. Bd. and Norfolk County Ret. Bd.*, CR-99-701 (CRAB May 1, 2001), CRAB reaffirmed its decision in *Levesque* that Section 3(2)(a)(vi) “provides the mechanism for elected officials to become members of a retirement system and provides the time period during which they must exercise this option.” Thus, the petitioner in *Goode* was not permitted to purchase prior elected service time because he never became a member of that retirement system within the ninety-day requirement of Section 3(2)(a)(vi).



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More recently, CRAB reaffirmed its prior decisions in both *Levesque* and *Goode* and again stated that Section 3(2)(a)(vi) conditions an elected official's membership upon application within a specific time limit. *See Awad v. Hampshire County Ret. Bd.*, CR-08-621 (CRAB Dec. 19, 2014). In the *Awad* decision, CRAB further explained:

It would be entirely illogical for the Legislature to have enacted a ninety-day application limit and, at the same time, nullify that limit by allowing a late application.

...

We cannot conclude that the ninety-day limit was intended to be optional or subject to a late application – if it were, there would have been no reason to include it at all.

...

If creditable service for work as an elected official could be purchased later, it would also render the ninety-day limit for membership by elected officials meaningless as to those who later become members of a retirement system.

In *Awad*, CRAB sympathized that some elected officials may not be properly informed of their eligibility for membership under Section 3(2)(a)(vi), but noted that the statute contains no requirement that municipal employers notify newly-elected officials of their eligibility to join a retirement system. Further, CRAB held that compliance with the ninety-day statutory deadline cannot be avoided “for equitable reasons or because of incorrect information supplied by an employer or a retirement board.” CRAB further noted that:

Although there are quite a few decisions by DALA that appear to support such an equitable remedy for erroneous advice, they are not consistent with caselaw from the appellate or Superior Courts, as DALA has recently pointed out.<sup>1</sup>

Given the prevailing caselaw, it is PERAC's position that elected officials are neither eligible for membership nor are eligible to buy back previous elected official time if they have not applied for membership within ninety days of assuming office pursuant to G.L. c. 32, § 3(1)(a)(vi). The elected official has the opportunity to join the system each and every time he or she is elected to a new term. However, if an elected official opted to become a member upon his or her election to a third term, for example, he or she would still be ineligible to buy back the first two terms for which he or she did not elect membership.

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<sup>1</sup> *See Donnelly v. Mass. Teachers' Retirement System*, CR-09-176 (DALA Sept. 7, 2012) (Heidlage, C.M.) and cases cited; *Clothier v. Teachers' Retirement Bd.*, 78 Mass. App. Ct. 143, 146 (2010) (reliance on advice contrary to statute is not reasonable; estoppel not applied against government).

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Additionally, as there is no requirement in Chapter 32 for retirement boards to notify elected officials of their option to join the retirement system, failure to notify cannot be used as a reason to grant the buy back of prior elected official time. Although CRAB has consistently found retirement boards have no duty to notify elected officials, PERAC believes it is best practice to educate elected officials of the 90-day membership requirement and to provide those elected with information regarding their rights.

However, if there is evidence that a retirement board actually prevented an elected official from exercising their membership option within ninety days of assuming office, G.L. c. 32, § 20(5)(c)(2) requires correction by the retirement board. The ability to buy back time in this circumstance is limited, but an example would be if an elected official came to the retirement board and asked to become a member within ninety days of assuming office, and the retirement board advised the official he or she was not eligible and could not become a member. In a situation such as this, a correction would be required.

We trust the foregoing will be of some assistance to you. If you have questions, please feel free to contact General Counsel Judith Corrigan at (617) 666-4446 ext. 904.