

## MEMORANDUM

TO: All Retirement Boards

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

RE: Questions arising in wake of the *Gomes* decision

DATE: December 21, 2020

Massachusetts General Laws Chapter 32, Section 4(2)(b) provides that members who served as reserve, permanent-intermittent or call firefighters or reserve or permanent-intermittent police officers prior to becoming members of a system may be awarded up to five (5) years of creditable service for such qualifying service. On December 3, 2019, the Supreme Judicial Court of Massachusetts (“SJC”) ruled that a member must pay for such service.

After the SJC made its determination in *Plymouth Retirement Board v. CRAB, & PERAC*, 483 Mass. 600 (December 3, 2019) (“Gomes”), PERAC issued Memorandum No. 11 of 2020 on February 11, 2020, to aid retirement boards in implementing the SJC’s decision.

Retirement boards have posed several questions to PERAC in the wake of the earlier memorandum, and the purpose of this memorandum is to answer those questions.

**Q.** The *Gomes* decision mandated that a person must receive \$5000 or more in a year for such service to be considered creditable service. Should the \$5000 compensation include detail pay? The person is able to do detail pay only because of the position that they hold.

**PERAC’s Response:** Yes, detail pay and other such pay should be counted as compensation. Section 4(1)(o), the “Under \$5,000 Rule” refers to “receiving compensation” and not “regular compensation.” It must be remembered that this interpretation only pertains to those being given credit for the service at issue in the *Gomes* case. Much of that service, some of it being sporadic by nature, would not fit into the definition of “regular compensation.”

**Q.** Memorandum No. 11 of 2020 refers to being appointed to the “same department.” Does this requirement pertain to both police officers and firefighters?

**PERAC’s Response:** No, it doesn’t. To obtain Section 4(2)(b) service, a firefighter must have been appointed subsequently to the same fire department for which he or she served as a call or



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permanent-intermittent firefighter. Police officers have no such requirement. Of note, a firefighter will be eligible for such service even if he or she is not subsequently appointed to the same fire department if his or her prior city, town or fire district has accepted the provisions of Section 4(2)(b) (1/2). Very few cities, towns or fire districts have accepted this paragraph, and so it will not apply to very many firefighters<sup>1</sup>.

**Q.** If a member is ineligible for the award of Section 4(2)(b) service either because he or she did not subsequently become a member of the same fire department or because he or she did not actually earn at least \$5000 in a calendar year, shouldn't the member be permitted to buy back this time under another section, if possible?

**PERAC's Response:** In PERAC Memorandum No 11 of 2020, we stated:

If a member is ineligible to purchase Section 4(2)(b) time, he or she will also be ineligible to purchase this time under the provisions of G.L. c. 32, §§ 3(3), 3(5) or 4(2)(c) or any other statutory mechanism in Chapter 32 which would permit the purchase of this time. (Emphasis supplied.)

This has caused some confusion, so we are clarifying our previous guidance. "This time" refers to the block of five years of service under the specific provisions of Section 4(2)(b), which is a special, augmented benefit. However, if a person is ineligible for Section 4(2)(b) service, he or she may still be eligible to buy back such prior service on a prorated, or day for day basis, depending upon the rules of a given retirement board.

For example, Chapter 32, Section 3(5) may offer a vehicle for the purchase of service. Section 3(5) provides in pertinent part as follows:

...[O]r any member of any system who rendered service in any governmental unit other than that by which he is presently employed, in a temporary, provisional, or substitute position and who was excluded from membership by the rules of any board, may, before the date any retirement allowance becomes effective for him, pay into the annuity savings fund of the system in one sum, or in instalments, upon such terms as the board may prescribe, an amount equal to that which would have been withheld as regular deductions from his regular compensation for such previous period, or most recent portion thereof...(Emphasis supplied.)

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<sup>1</sup> As of this writing, only 13 cities or towns have accepted Section 4(2)(b)(1/2).

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To purchase service under this subsection of the statute, the question becomes whether a member served in a temporary, provisional or substitute capacity, but that is a determination left to the retirement board. If a member was considered a temporary, provisional or substitute employee as a call firefighter or permanent intermittent police officer, a buy back could be undertaken under this section. Otherwise, it may not be undertaken.

It might be, depending upon the status of his or her prior service, that the member may not be eligible to buy back this time under one of the provisions of Chapter 32. Even if a member does undertake such a buy back, he or she would only be entitled to credit for time actually served, on a day by day basis.

We trust the foregoing will be of assistance to you. If you have further questions, please contact General Counsel Judith Corrigan at [jacorrigan@per.state.ma.us](mailto:jacorrigan@per.state.ma.us).