

PERAC

PERAC Memo # 26 / 2018

COMMONWEALTH OF MASSACHUSETTS | PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION

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JOSEPH E. CONNARTON, *Executive Director*

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MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Regular Compensation Status of Payments Made in Lieu of Unused Leave Time

DATE: September 14, 2018

This is to inform the retirement boards of a recent CRAB decision which rejects PERAC Memorandum #39 of 2012 (“Memorandum #39”), which was issued on July 11, 2012, and involves the “Regular Compensation Status of Payments Made in Lieu of Taking Vacation Leave.” *O’Leary v. Lexington Retirement Board and PERAC*, CR-15-30 (“*O’Leary*”). Both PERAC and the member involved, Joseph O’Leary (“Mr. O’Leary”), have filed appeals of the CRAB decision in Suffolk Superior Court, so the CRAB decision is not final. As a result, PERAC is instructing retirement boards to continue to evaluate all existing vacation buyback plans in their usual manner, pursuant to Memorandum #39.

Memorandum #39 of 2012

Memorandum #39 outlined steps that a retirement board should take to determine if payments of unused vacation time could be includable in a member’s regular compensation. Memorandum #39 utilized the new definition of regular compensation as inserted into Chapter 32 by Chapter 21 of the Acts of 2009. Focusing on that definition, the memorandum explained how a retirement board should analyze the regular compensation status of such a payment, focusing on the term “other base compensation” and whether this type of payment would have resulted in a service to the employer. CRAB has now explicitly rejected this approach, and, as noted above, both PERAC and Mr. O’Leary have appealed the decision.

O’Leary

A copy of the *O’Leary* decision is attached for your information. In short, Mr. O’Leary was a police officer in Lexington who had availed himself of a vacation buyback program. The Lexington Retirement Board (the “Board”) declined to consider whether it was regular compensation pursuant to Memorandum #39. Mr. O’Leary appealed the Board’s decision, and the Board added PERAC as a necessary party due to our legal position that the procedure outlined in Memorandum #39 must be undertaken by the retirement boards when such a program is in effect. CRAB has now found that this sort of payment can never be regular compensation



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because in its view such payments are not base compensation, are not payments for a service to the employer, are not “pre-determined and non-discretionary,” and are in the nature of a salary augmentation plan and overtime.

During the Pendency of the Appeals

While these appeals are being undertaken, the regular compensation status of such payments currently being received should not be disturbed, and no retirement allowances which are being paid based on the inclusion of these payments should be recalculated at this time. Retirement boards should continue to evaluate all existing vacation buyback plans in their usual manner, pursuant to Memorandum #39, during the pendency of these appeals.

Should the Appeals be Unsuccessful

It is expected that this case will be pursued beyond the Superior Court to the Appeals Court and possibly to the Supreme Judicial Court. If CRAB’s decision in *O’Leary* is ultimately upheld, it will mean that any payments made to a member in lieu of that member taking vacation leave should not be considered regular compensation, and that any payments made in lieu of vacation time would not be included in a member’s retirement allowance. If these appeals are not successful, it is possible, depending upon the wording of the ultimate decision that all payments made pursuant to such a buyback program would be excised from regular compensation retroactively, any deductions paid by the member returned to him/her, and any retirement allowances granted with the inclusion of such time would be recalculated.

Payments for Unused Sick Time

Payments for unused sick time have never been considered regular compensation, as memorialized in the recent CRAB decision of *Fair v. Middlesex County Retirement Board*, CR-15-294 (2016).

Conclusion

PERAC will issue further memoranda as this case proceeds in the courts. In the meantime, if you have any questions about this, please contact Senior Associate General Counsel Ken Hill at Extension 945.

Attachment