

PERAC

COMMONWEALTH OF MASSACHUSETTS | PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION

PHILIP Y. BROWN, ESQ., *Chairman*

JOSEPH E. CONNARTON, *Executive Director*

Auditor SUZANNE M. BUMP | KATHLEEN M. FALLON | KATE FITZPATRICK | JAMES M. MACHADO | ROBERT B. MCCARTHY | JENNIFER F. SULLIVAN

MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: CRAB's Order of Partial Stay Regarding Regular Compensation Status of Payments Made in Lieu of Unused Leave Time

DATE: December 5, 2018

In PERAC Memorandum #26 of 2018 ("Memorandum #26"), dated September 14, 2018, PERAC alerted the retirement boards to a July 23, 2018 CRAB decision (the "Decision") that rejected PERAC Memorandum #39 of 2012 ("Memorandum #39"), dated July 11, 2012, and involved 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*"). In Memorandum #26, PERAC informed the retirement boards that both PERAC and the petitioner, Joseph O'Leary ("Mr. O'Leary"), had filed appeals of the CRAB decision in Suffolk Superior Court, so the CRAB decision was not final. As a result, PERAC instructed the retirement boards to continue to evaluate all existing vacation buyback plans in their usual manner, pursuant to Memorandum #39.

Pursuant to the requirements of Massachusetts administrative law, however, the filing of the appeals did not stay the enforcement of the CRAB decision. In order to stay such enforcement, PERAC filed an Emergency Motion for Stay with CRAB, wherein it argued that the underlying matter concerns novel and complex legal issues with far reaching consequences, and that the potential for disruptive changes during the pendency of the appeal necessitated a stay of enforcement.

Following its review of PERAC's Emergency Motion for Stay and the Lexington Retirement Board's opposition thereto, CRAB issued an Order of Partial Stay (the "Order"), dated November 6, 2018. A copy of that Order is attached to this Memorandum. In the Order, CRAB stated, in pertinent part:

We consider the potential for disruptive administrative changes during the pendency of judicial review to be a serious matter. PERAC and the retirement boards rely on clear rules so that they may properly and expeditiously administer the collection of contributions and the payment of benefits in the correct amounts. Thus, to the extent that our decision may require correction of past actions by retirement systems, we agree that such correction may await the completion of judicial review. As to future actions, however, we consider it wiser to require retirement systems to comply with our decision, so as to avoid a compounding of errors.



MEMORANDUM - Page Two

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Accordingly, pursuant to our authority under G.L. c. 30A, § 14(3), we issue a partial stay of enforcement of our decision in this matter, pending the completion of judicial review, and subject to any further order by the Superior Court or appellate court, as follows:

1. **Retired Members.** Enforcement of our decision shall be stayed insofar as it would require recalculation of retirement benefits currently being paid to retired members, or refunding of past retirement contributions made by retired members. As to retirees, the status quo may remain in effect pending completion of judicial review.
2. **Active Members.** Enforcement of our decision shall be stayed only insofar as it would require refunding of retirement contributions previously made by active members prior to retirement. No stay shall be in effect as to retirement contributions to be made in the future by active members. Going forward, no retirement contributions shall be collected on unused vacation pay.
3. **Pre-Retirement Inactive Members.** Enforcement of our decision shall be stayed pending the completion of judicial review, insofar as it would require refunding of retirement contributions previously made by members inactive, prior to their retirement.
4. **Future Retirees.** No stay shall be in effect as to the calculation of benefits to be paid to persons retiring in the future. Calculation of benefits to future retirees shall not include unused vacation pay, and any retirement contributions made on unused vacation pay shall be returned at the time of retirement.
5. **Petitioner-Appellant.** No stay shall be in effect as to the Petitioner-Appellant Joseph O'Leary. O'Leary's retirement benefits have been calculated without the inclusion of unused vacation pay, and that calculation shall remain in place pending appeal.
6. **Timing of Stay.** This stay shall be in effect until the completion of judicial review, unless modified by a court of competent jurisdiction.

MEMORANDUM - Page Three

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Application to All Retirement Systems

Following issuance of CRAB's Order, PERAC has been asked whether the Order applies to all retirement systems or is limited to the Lexington Retirement System and Mr. O'Leary. It is important to note that PERAC was also a party to this matter, as it was added as a necessary party by DALA following the Lexington Retirement Board's motion seeking PERAC's inclusion in the matter. Thus, PERAC is bound by the Decision and the Order.

As PERAC is bound to CRAB's Decision and Order, all retirement boards are bound to it as well. PERAC is the agency charged by statute with the responsibility for administering the public pension system throughout the Commonwealth, and has the "general responsibility for the efficient administration of the public employee retirement system, under chapter 32." G.L. c. 7, § 50. See *Barnstable County Retirement Board v. CRAB*, 43 Mass. App. Ct. 341, 345 (1997). In order to accomplish its statutory mandate, PERAC must apply the law equally to retirement boards "throughout the Commonwealth." PERAC cannot limit its application of a ruling to which it is bound to one retirement board. Such piecemeal application would be inefficient and unfair to both public pension systems and members throughout the Commonwealth. Moreover, it would likely be impossible for PERAC to statutorily administer a public pension system that would be so divided.

Furthermore, it is clear that CRAB did not intend to limit the scope of its Decision and Order to just the Lexington Retirement Board and Mr. O'Leary. CRAB plainly states throughout the Decision and Order that its instructions apply to "retirement systems" and "retirement boards." (Emphases added.) Indeed, CRAB states: "As to future actions, however, we consider it wiser to require retirement systems to comply with our decision, so as to avoid a compounding of errors." (Emphasis added.) In addition, CRAB specifically addresses how the Order applies to Mr. O'Leary, exclusive of how it applies to all other categories of members. Had CRAB intended the application of the Order to be limited to Mr. O'Leary and the Lexington Retirement Board, there would be no reason for CRAB to address those other categories.

Given the fact that PERAC is bound by the Decision and Order and must apply the law equally to all retirement systems, and the clear scope of CRAB's partial stay, all retirement systems are bound by CRAB's Decision and Order, and by the partial stay ordered therein, in the *O'Leary* matter.

Implementation of CRAB's Order

As quoted above, CRAB's Order specifically directs what actions retirement boards shall and shall not take regarding members and retirees. Those directions include the following:

- Regarding retirees, enforcement of CRAB's decision shall be stayed. Thus, retirement boards shall maintain the status quo in effect for all retirees who retired on or before November 6, 2018, pending judicial review.

MEMORANDUM - Page Four

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- Regarding active members, as of November 6, 2018, retirement boards shall not collect retirement contributions made on unused vacation pay. Pursuant to CRAB's Order, no retirement contributions previously taken for unused vacation pay shall be refunded, pending judicial review.
- Regarding pre-retirement inactive members, retirement boards shall not refund any retirement contributions previously taken for unused vacation pay, pending judicial review.
- Regarding future retirees, retirement boards shall not include any payments for unused vacation time when calculating a benefit for any member retiring on or after November 6, 2018. Upon all future retirees' retirement, retirement boards shall return any retirement contributions made on unused vacation pay.

Such implementation shall stay in effect until the completion of judicial review, unless modified by a court of competent jurisdiction.

Suspension of Prior Memoranda

In light of CRAB's Decision and Order, this Memorandum suspends Memorandum #26/2018, dated September 14, 2018, and Memorandum #39/2012, dated July 11, 2012. Memorandum #25/2000, dated June 8, 2000, and Memorandum #26/2000, dated June 28, 2000 were superseded by Memorandum #39 and remain superseded. These suspended Memoranda concerned the same issues addressed by CRAB in the *O'Leary* matter. Given CRAB's Decision and Order in *O'Leary*, such payments do not constitute regular compensation, pending the completion of judicial review.

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

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