

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

James Sullivan,
Petitioner

v.

Docket No. CR-19-0623

Brockton Retirement Board,
Respondent

Appearance for Petitioner:

Derek M. Moitoso, Esq.
10 Monroe Drive
Acton, MA 01720

Appearance for Respondent:

Gregory F. Galvin, Esq.
775 Pleasant Street, Unit 16
Weymouth, MA 02189

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Petitioner, a disabled retiree, argues that his excess earnings were miscalculated under G.L. c. 32, §91A, and, when the respondent retirement board did not act on his request (partly under G.L. c. 32, §20(5)(c)(3)) to waive his repayments, it acted arbitrarily and capriciously. Petitioner did not prove that his excess earnings were miscalculated. Thus, it is not necessary to decide whether G.L. c. 32, §20(5)(c)(3) applies and whether the retirement board's non-action was arbitrary and capricious. Retirement Board's non-action is affirmed.

DECISION

The petitioner, James Sullivan, appeals the non-action of the Brockton Retirement Board (BRB) of his request that it waive repayment of his excess earnings.

I held a hearing on September 20, 2022 by Webex, which was recorded and transcribed. Mr. Sullivan testified and was the only witness. A witness from the Public Employee Retirement Administration Commission (PERAC) was available to testify and appeared on the Webex screen. Both parties decided not to question her. (Tr. 16, 49-50, 52)

The parties were not meticulous about introducing relevant exhibits, requiring me to request them. I admitted Exhibits A through W at the hearing. Also at the hearing, I asked Mr. Sullivan for three documents, which, after the hearing, I admitted as Exhibits X, Y, and Z, and which I describe below. Three more documents became relevant after the hearing, which I admit: Mr. Sullivan's 2022 request to BRB (Ex. AA); an email about Mr. Sullivan's 2022 request to BRB (Ex. BB); and Mr. Sullivan's 2022 appeal to DALA (Ex. CC). I also admit a fourth document: Mr. Sullivan's 2019 appeal to DALA. (Ex. DD) Both parties submitted post-hearing briefs in February 2023.

Findings of Fact

1. On June 5, 2010 Mr. Sullivan retired with a disability retirement pension from his position as firefighter/emergency medical technician for the Brockton Fire Department (BFD) (Tr. 5, 6, 10; Ex. A)

2. Around 2011 Mr. Sullivan became a professional pilot and started earning money. (Tr. 9-10)

3. On July 30, 2019 PERAC wrote a letter to Mr. Sullivan. Drawing on language from G.L. c. 32, §91A, PERAC stated in part:

A disability retirement allowance must be adjusted if a retiree's earnings, when added to his retirement allowance, exceeded the amount of regular compensation which would have been made payable to the retiree if he or she had continued in service in the grade at the time of retirement, plus \$15,000.

Based on the information you submitted, you must make a refund to your retirement system.

(Ex. Q)

4. The letter made the following calculation for 2018:

A. If Mr. Sullivan had continued in his position, he would have received \$104,117.44.

B. His retirement allowance was \$5,537.01.¹

C. \$104,117.44 plus \$15,000 minus \$5,537.01 equals \$113,580.43. That last amount was his allowable earnings.²

D. Since he reported \$129,583.33 of non-pension earnings,³ more than his allowable earnings, he had to refund the \$5,537.01 that he had received as a disabled retiree. (Ex.

Q)

5. On August 22, 2019 PERAC wrote a second letter to Mr. Sullivan. The wording was the same as in the July 30, 2019 letter, but the calculation for 2018 was different, as follows:

A. If Mr. Sullivan had continued in his position, he would have received \$104,117.44. (This was the same figure as in the July 30, 2019 letter)

B. His retirement allowance was \$66,444.12. (This figure equals the \$5,537.01 in the July 30, 2019 letter multiplied by 12.)

C. \$104,117.44 plus \$15,000 minus \$66,444.12 equals \$52,673.32. That last amount was his allowable earnings.

¹ Apparently, PERAC used Mr. Sullivan's *monthly* allowance here. $\$5,537.01 \times 12$ (months) = \$66,444.12. \$66,444.12 is the annual allowance that PERAC used in other calculations.

² Because the calculation apparently erroneously used Mr. Sullivan's monthly allowance, the allowable earnings figure was incorrect.

³ Presumably, these were Mr. Sullivan's earnings as a pilot.

D. Since he reported \$129,583.33 of non-pension earnings, more than his allowable earnings, he had to refund the \$66,444.12 that he had received as a disabled retiree.

(Ex. R)

6. Why PERAC sent the August 22, 2019 letter with a different calculation from the July 30, 2019 letter is not in evidence.⁴

7. On September 20, 2019 PERAC wrote a third letter to Mr. Sullivan. The wording was the same as in the two previous letters. The calculation for 2018 was different than in the two previous letters, but the amount that Mr. Sullivan had to refund remained the same. The calculation follows:

A. If Mr. Sullivan had continued in his position, he would have received \$107,842.29. (This was a few thousand dollars higher than in the two previous letters.)

B. His retirement allowance was \$66,444.12. (This was the same as in the second letter dated August 22, 2019.)

C. \$107,842.29 plus \$15,000 minus \$66,444.12 equals \$56,398.17. That last amount was his allowable earnings.

D. Since he reported \$129,583.33 of non-pension earnings, more than his allowable earnings, he had to refund the \$66,444.12 that he had received as a disabled retiree.

(Ex. R)

8. The reason for PERAC's third letter is that the Brockton Fire Department had raised

⁴ Nonetheless, I note three things. One, it is a fair assumption that the August 22, 2019 letter corrected and superseded the July 30, 2019 letter. For Mr. Sullivan to have been receiving \$5,537.01 in annual disability retirement benefits, as the July 30, 2019 letter stated, seemed low and incorrect. Two, Mr. Sullivan could have made the same previous fair assumption, especially if he received \$66,444.12 and not \$5,537.01 for his retirement allowance. Three, Mr. Sullivan decided not to question a witness from PERAC about PERAC's calculations or the reason for the different letters. (Tr. 16, 49-50, 52)

the salary to \$107,842.29 for Mr. Sullivan's former position. (Ex. U)

9. On September 23, 2019 BRB sent Mr. Sullivan a letter stating that the salary for his former position had increased and BRB had reported the increase to PERAC. BRB stated that the increase in salary increased his allowable earnings, but the amount of excess earnings that Mr. Sullivan owed to BRB stayed the same. (Ex. U)⁵

10. Meanwhile, to discuss an event out of chronological order, on September 4, 2019, PERAC sent Mr. Sullivan a letter about his 2017 earnings. (Ex. S) (PERAC's July 30, August 22, and September 20, 2019 letters were about his 2018 earnings.)

11. The wording in PERAC's September 4, 2019 letter was the same as in the three other letters. The 2017 calculation was as follows:

A. If Mr. Sullivan had continued in his position, he would have received \$105,170.76.

B. His retirement allowance was \$65,851.08.

C. \$105,170.76 plus \$15,000 minus \$65,851.08 equals \$54,319.68. That last amount was his allowable earnings.

D. He reported \$79,999.98 of non-pension earnings.

E. \$79,999.98 minus \$54,319.68 equals \$25,680.30, which was the amount of excess earnings that Mr. Sullivan had to repay. (Ex. S)

⁵ For 2018, PERAC used two salary figures, not four, as Mr. Sullivan asserted (Pet. Br. 4) and not "at least five," as he also asserted. (Pet. Br. 12)

12. In sum:

	Categories that PERAC used in its letters				
	Current Salary	Retirement Allowance	Allowable Earnings	Reported	Refund Due
2017 earnings					
(Ex. S)	\$105,170.76	\$65,851.08	\$54,319.68	\$79,999.98	\$25,680.30
2018 earnings					
July 30, 2019 (Ex. Q)	\$104,117.44	\$5,537.01 (1/12 of \$66,444.12)	\$113,580.43	\$129,583.33	\$5,537.01
Aug. 22, 2019 (Ex. R)	"	\$66,444.12	\$52,673.32	"	\$66,444.12
Sept. 20, 2019 (Ex. T)	\$107,842.29	"	\$56,398.17	"	"

13. The evidence did not explain an apparent discrepancy between PERAC’s letter about 2017 earnings and its three letters about 2018 earnings, as follows: PERAC’s calculation for Mr. Sullivan’s 2017 earnings was based on a salary of \$105,170.76 for his former position. PERAC’s first two letters about Mr. Sullivan’s earnings for the *next* year, 2018, were based on a *lower* salary, \$104,117.44.

14. On November 21, 2019, Mr. Sullivan appeared before the Brockton Retirement Board (BRB). (Ex. Z)

15. At the BRB meeting:

A. “Mr. Sullivan acknowledged that he has exceeded his allowable earnings for 2017 and 2018....” (Ex. Z)

B. Mr. Sullivan stated that he did not have the funds to pay the excess retirement benefits that he had received. (Ex. Z)

C. “The Board explained that they cannot excuse the debt and per the law this

debt must be repaid.” (Ex. Z)⁶

D. Mr. Sullivan asked that his pension allowance be waived.⁷

E. BRB approved the request to waive Mr. Sullivan’s pension allowance contingent on Mr. Sullivan’s submitting a formal letter of request. (Exs. X, Z)

16. On November 22, 2019, Mr. Sullivan wrote the letter to BRB that it had requested.

(Ex. Y)

⁶ BRB’s statement was correct when reading G.L. c. 32, §91A alone: A retiree must repay excess earnings; it is mandatory. G.L. c. 32, §91A (“If such earnings exceed an amount which when added to the member’s retirement allowance is greater than the amount of regular compensation which would have been payable to such member if such member had continued in service in the grade held by him at the time he was retired plus \$15,000, said member *shall refund* the portion of his retirement allowance for such preceding year equal to such excess and until such refund is made...””) (emphasis added).

According to the meeting minutes, Mr. Sullivan *may* have initially asked BRB to waive repayment of his excess earnings, and BRB may have denied his request, but the minutes are not clear. According to Mr. Sullivan’s testimony, he asked BRB to waive repayment of this excess earnings. Mr. Sullivan was silent on this key point during direct examination. On cross-examination, he (1) testified that he asked BRB to waive repayment; (2) conceded that when he did so, he did not know that he had a right to ask BRB to waive repayment; and (3) explained that he asked BRB to waive repayment anyway, as “a shot [in] the dark.” (Tr. 37, 38) The way that Mr. Sullivan’s testimony unfolded left me unsure whether he had asked BRB to waive repayment, and I make no finding on this point. Nor is it necessary that I make a finding on this point.

BRB’s position on whether Mr. Sullivan asked BRB to waive repayment of his excess earnings has been inconsistent. At the hearing, BRB’s lawyer said that its position was that Mr. Sullivan never asked for a waiver and it had not denied one. (Tr. 2, 44, 47, 53, 54) In its post-hearing brief, BRB asserted that in November 2019, “keeping in mind their fiduciary responsibility to the system as a whole, [BRB] determined that they would not waive the repayment.” (Pet. Br. 3) BRB asserted something that is not in evidence. I do not credit the assertion about the reason for BRB’s determination. Again, it is not necessary that I make a finding on this point.

⁷ “Waiver” has two possible different meanings in this appeal: (1) BRB’s waiving repayment, under G.L. c. 32, §20(5)(c)(3), of a retiree’s excess earnings if an error was made (and if in fact Chapter 32 allows such waiver of excess earnings); and (2) Mr. Sullivan’s waiving, under G.L. c. 32, §90B, of the pension allowance from a retirement board as a way to repay excess earnings. That is, in the first meaning, Mr. Sullivan would not need to pay back excess earnings. In the second meaning, Mr. Sullivan would forego his pension until he had “caught up” paying back the excess earnings.

17. On December 10, 2019, BRB wrote a letter to Mr. Sullivan telling him that it had waived his pension allowance under G.L. c. 32, §90B (Ex. X), that is, Mr. Sullivan would forego his pension until he had paid back his excess earnings.

18. In its December 10, 2019 letter, BRB informed Mr. Sullivan of his right to appeal the decision, a decision he had requested, if he was “aggrieved.” (Ex. X) It is unknown why BRB did so; it may have been out of an abundance of caution or perhaps because it was in BRB’s letter template.

19. On December 19, 2019 Mr. Sullivan timely appealed BRB’s decision, even though BRB had *granted his request* to waive his pension allowance. (Ex. DD)

20. Mr. Sullivan did not appeal (1) PERAC’s calculations of his excess earnings; or (2) BRB’s denial of his request to waive repayment of his excess earnings.

21. After various procedural developments and submissions from the parties, on September 14, 2022, I ruled:

The decisive issue at the hearing on September 20, 2022 will be whether the Brockton Retirement Board abused its discretion in denying Mr. Sullivan a waiver.

(Email from Kenneth Bresler to Derek Moitoso and Gregory Galvin, Sept. 14, 2022)⁸

22. At the hearing on September 20, 2022, I came to suspect that Mr. Sullivan had not appealed BRB’s denial of his request to waive repayment of excess earnings. I asked for more documents. (Tr. 47-48)

23. After reviewing documents that I had requested at the hearing, I determined that Mr. Sullivan had not appealed BRB’s denial of his request to waive repayment of excess earnings.

⁸ I issued this order based on Mr. Sullivan’s position and before having delved into the relevant law, that is, before considering G.L. c. 32, §91A’s requirement that a retiree repay excess earnings and before coming to doubt that G.L. c. 32 §20(5)(3)(c) applies here.

(Order Regarding Procedure)

24. On September 30, 2022 I ruled that the issue that had been the subject of the hearing was not before me. I continued:

If (1) Mr. Sullivan asks BRB to waive his excess earnings; (2) BRB denies his request; and (3) Mr. Sullivan appeals the denial of his request, I will accept the September 20, 2022 hearing as the hearing on his appeal.

(Order Regarding Procedure)⁹ That is, I held the hearing on Mr. Sullivan’s appeal before he actually appealed.

25. On October 4, 2022 Mr. Sullivan asked BRB to waive his 2017 and 2018 excess earnings under G.L. c. 32, §20(5)(c)(3). (Ex. AA) The substance of his request consisted of these two sentences:

Mr. Sullivan respectfully requests that the BRB waive his 2017 and 2018 excess earnings under G.L. c. 32, §91A by way of the provisions set forth in G.L. c. 32, §20(5)(c)(3). Mr. Sullivan makes this request based on the faulty information received from a combination of the BRB, the Public Employee Retirement Administration Commission and the Brockton Fire Department.

(Ex. AA)

⁹ When I stated at the hearing that I might issue such an order, BRB did not object. On September 28, 2022 I emailed the parties, in part:

I want to confirm that Brockton Retirement Board concurs that if (1) Mr. Sullivan asks the retirement board to waive what he owes under Section 91A; (2) the retirement board denies the request for a waiver; and (3) Mr. Sullivan appeals, the hearing that I presided over on September 20, 2022 will serve as the hearing for the appeal.

(Email from Kenneth Bresler to Gregory Galvin and Derek Moitoso, Sept. 28, 2022) BRB did not directly respond to this inquiry or object to my proposal. When I issued my order, BRB did not object. In its post-hearing brief, BRB in passing and without citation posited that my order violated due process. (Resp. Br. 2) I am unaware that government agencies have due process rights against other government agencies.

As for Mr. Sullivan, he ascribed my Order Regarding Procedure to an “irregularity” by BRB. (Pet. Br. 8) That is not the case. I issued my Order Regarding Procedure because Mr. Sullivan did not appeal what he thought he appealed. I issued the order to save time and resources. *See* Tr. 54-56.

26. Mr. Sullivan did not identify the faulty information or append documents or otherwise support his allegations that he had received faulty information.¹⁰

27. BRB decided not to answer Mr. Sullivan's request. (Ex. BB (email from BRB's lawyer to me reporting that BRB decided that "no further action was necessary"))¹¹

28. On November 8, 2022 Mr. Sullivan appealed BRB's non-action. (Ex. CC) *See* G.L. c. 32, § 16(4) (person may appeal retirement board's non-action after 30 days).

Discussion

Two statutes are at issue in this appeal. It is important to keep them separate and not conflate them, as Mr. Sullivan may have done in his post-hearing brief.

The first statute is G.L. c. 32, §91A, which requires that retirees be given "an opportunity to be heard by the retirement board." Mr. Sullivan asserts that

BRB held no formal excess earnings hearing. No testimony was taken, Mr. Sullivan was not heard on the issues,¹² [and] the BRB did not counsel Mr. Sullivan on his options...."¹³

¹⁰ I am aware of the apparent discrepancy in PERAC's 2017 calculations, as I have discussed. No evidence exists that BRB or the BFD provided Mr. Sullivan with faulty information about his excess earnings in 2017 or 2018, with the possible exception that BRB passed on to Mr. Sullivan calculations from PERAC.

¹¹ In its post-hearing brief, BRB made a different factual allegation: At a meeting on October 18, 2022, it reviewed the matter and "determined that their [BRB's] action of November 21, 2019 was the correct decision in this matter." (Pet. Br. 2) This allegation is not in evidence and I do not credit it. In addition, this allegation is a near non sequitur. Mr. Sullivan asked BRB to make a decision on his request of October 4, 2022; he did not ask BRB to revisit its 2019 decision.

¹² Strictly speaking, this assertion is incorrect. BRB did give Mr. Sullivan an opportunity to be heard. (Ex. Z)

¹³ Later, Mr. Sullivan asserts that BRB did not notify him that he had an opportunity to explain why he was entitled to a waiver. (Pet. Br. 7) However, he testified that he asked BRB for a waiver. (Tr. 37, 38) If Mr. Sullivan so requested without being notified of the opportunity to do so, I cannot discern any harm that Mr. Sullivan seems to allege.

(Pet. Br. 5) If the statute requires a formal hearing with testimony or requires that BRB have counseled him on his options, Mr. Sullivan did not cite any authority to that effect.

The second statute, G.L. c. 32, §20, contains two relevant provisions. The first states:

When an error exists in the records maintained by the system or an error is made in computing a benefit and, as a result, a member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct or had the error not been made, the records or error shall be corrected and as far as practicable

G.L. c. 32, §20(5)(c)(2). The next provision, G.L. c. 32, §20(5)(c)(3), which Mr. Sullivan has invoked, states that if

- “a member...has been determined to owe funds to the retirement system”;
- “(i) the error in any benefit payment or amount contributed to the system persisted for a period in excess of one year;”
- “(ii) the error was not the result of erroneous information provided by the member or beneficiary;”
- “(iii) the member...did not have knowledge of the error or did not have reason to believe that the...contribution rate was in error”; and
- the member requests a waiver,

“the board *may* waive repayment or recovery of such amounts.” G.L. c. 32, §20(5)(c)(3)

(emphasis added).¹⁴

¹⁴ Mr. Sullivan asserts that BRB did not give him “an opportunity to explain why he was entitled to a waiver under G.L. c. 32, §20(5)(c)(3).” (Pet. Br. 7) The “opportunity” language from G.L. c. 32, §91A used in the same sentence as “G.L. c. 32, §20(5)(c)(3)” leads me to suspect that Mr. Sullivan has conflated the two statutes. Whether or not BRB *gave* Mr. Sullivan the opportunity to explain why he was entitled to a waiver, Mr. Sullivan *took* the opportunity – at least once and possibly twice. At the BRB meeting on November 21, 2019, Mr. Sullivan seems to have asked for a waiver because he did not have the money to pay back his excess earnings to BRB. (Ex. Z) On October 4, 2022 Mr. Sullivan, through his lawyer, asked BRB to waive his excess earnings

As written and interpreted, the statute leaves waiver to the discretion of a retirement board. *See Bristol County Retirement Board v. Contributory Retirement Appeal Board*, 65 Mass. App. Ct. 443, 452 (2006). “[I]t is clear” that review of a retirement board’s decision on a waiver request is “limited to the question whether the...board abused its discretion.” *Id.* at 451. *See Kim L. Gaddy v. Boston Retirement System*, CR-18-0266 (DALA 2020) (“Indeed, at times this discretionary authority has been described as absolute – absent proof of arbitrary or capricious behavior”).

For a decision to constitute an abuse of discretion, the decision must be arbitrary and capricious, that is, lacking any rational explanation that reasonable persons might support. *Frawley v. Police Commissioner of Cambridge*, 473 Mass. 716, 729 (2016).

A retiree who meets all the conditions in G.L. c. 32, §20(5)(c)(3) is *eligible* for a waiver. No petitioner is *entitled* to a waiver. *Michael Dufresne et al. v. State Board of Retirement*, CR-19-0572 (DALA 2022).

As a preliminary matter, it is far from clear that G.L. c. 32, §20(5)(c)(3) applies to Mr. Sullivan’s situation. That statute refers to an “error in any benefit payment or amount contributed

“based on the faulty information received from a combination of the BRB,” PERAC, and BFD. (Ex. AA)

When Mr. Sullivan, represented by a lawyer, asked for a waiver, he did not ask for a hearing on his request. (Ex. AA) Yet, in his post-hearing brief, he faults BRB for not holding a hearing on his waiver request. (Pet. Br. 9,10, 11, 12) The statute, G.L. c. 32, §20(5)(c)(3), does not require a hearing. The other relevant statute, G.L. c. 32, §91A might not require a formal hearing. Mr. Sullivan faults BRB for not giving him a hearing that he did not request and was not entitled to under at least one statute. And to what end? So that in a hearing before BRB he could *not* prove that errors had been made, just as he did not prove before DALA that errors had been made? *See* G.L. c. 30A, §10 (“When a party to an adjudicatory proceeding has the opportunity, by provision of any law or by regulation, to obtain more than one agency hearing on the same question, whether before the same agency or before different agencies, it shall be sufficient if the last hearing available to the party complies with the requirements of this chapter, and the earlier hearings need not so comply”).

to the system.” G.L. c. 32, §20(5)(c)(3)(i). That language means a situation in which a member or retiree received a higher benefit than they were entitled to, or a member contributed less money to the retirement system than they should have. Neither situation applies to Mr. Sullivan.

However, G.L. c. 32, §20(5)(c)(2) might apply. That statute applies to “[w]hen an error exists in the records maintained by the system.” G.L. c. 32, §20(5)(c)(2). If PERAC erred in calculating Mr. Sullivan’s allowable earnings, the amount he owed BRB as a repayment, or both, that would be an error in BRB’s records. And BRB would be required to correct it under G.L. c. 32, §20(5)(c)(2). But that statute has no provision about a retirement’s board waiving payments that a member or retiree owes. And G.L. c. 32, §91A requires retirees to repay excess earnings. Repayment is mandatory; waiving repayment is not permitted.

For Mr. Sullivan to prevail in his appeal, he must prove three key issues that are in dispute. One, an error was made in calculating his allowable earnings, the amount he owed BRB as a repayment, or both. Two, G.L. c. 32, §20(5)(c)(3) applies to his situation and moderates the mandate of repayment in G.L. c. 32, §91A. *See Bristol County Retirement Board v. Contributory Retirement Appeal Board*, 65 Mass. App. Ct. 443 (2006). Three, BRB abused its discretion in declining to waive the repayment.

Mr. Sullivan has the burden of proof. *Deborah Herst Hill v. State Board of Retirement*, CR-07-605 (DALA 2009) (“The Petitioner has the burden of proof on each element necessary to establish entitlement to a benefit under Previous Chapter 32”). *See generally Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 255 (1996); *Blanchette v. Contributory Retirement Appeal Board*, 20 Mass. App. Ct. 479, 483 (1985). BRB does not have the burden of proof, as Mr. Sullivan seems to argue. (*E.g.*, Pet. Br. 11, 12)

What was the error or errors in calculating Mr. Sullivan’s allowable earnings, the amount

he owed BRB as a repayment, or both? Mr. Sullivan didn't specify. How much, if anything, did Mr. Sullivan owe BRB as a repayment? Mr. Sullivan didn't specify. According to BRB's minutes, "Mr. Sullivan acknowledged that he has exceeded his allowable earnings for 2017 and 2018...." (Ex. Z) Mr. Sullivan conceded that he owed *something*.

The apparent discrepancy that I discuss in Findings of Fact 13 might have been an error:

PERAC's calculation for Mr. Sullivan's 2017 earnings was based on a salary of \$105,170.76 for his former position. PERAC's first two letters about Mr. Sullivan's earnings for the next year, 2018, were based on a lower salary, \$104,117.44.

The \$105,170.76 figure as the salary for Mr. Sullivan's former position might have been an error. BRB explained to Mr. Sullivan that it had reported to PERAC that the salary for his former position had increased from \$104,117.44 to \$107,842.29 (Ex. U) – without pausing at \$105,170.76. The evidence does not explain where PERAC got the \$105,170.76 figure. Nonetheless, a higher figure, even an incorrect one, benefited Mr. Sullivan. It increased his allowable earnings.

Mr. Sullivan discussed this error in his post-hearing brief. (Pet. Br. 5) However, he did not explain how it harmed him, did not establish what the salary for his former position was in 2017, did not calculate what his allowable earnings in 2017 should have been, or how much, if any, his repayment to BRB should have been. A witness from PERAC was present at the hearing before DALA and Mr. Sullivan did not question her.

I can imagine that Mr. Sullivan's receiving PERAC's three letters about his 2018 earnings could have been disconcerting for Mr. Sullivan. However, if he had studied the letters, he could have assumed that the first letter was incorrect; the second letter corrected and superseded the first letter (as I assumed in footnote 4); and the third letter superseded the second letter, and was based on the new salary of his former position. PERAC's use of the new salary of

Mr. Sullivan's former position was not an error. If Mr. Sullivan assumed that all three letters were simultaneously in force and presented him with conflicting information, it would have been an unreasonable assumption.

Mr. Sullivan mischaracterized PERAC's letters as containing a "vast number of significant errors affecting" him. (Pet. Br. 4) PERAC's letter about 2017 possibly contained one error that possibly benefited him. Mr. Sullivan did not make me aware of a vast number of errors that were significant.

Elsewhere, Mr. Sullivan referred to "the multitude of calculation errors" that BRB made and "the various calculation errors it had made over the years." (Pet. Br. 5, 7). If BRB made any calculation errors, Mr. Sullivan did not identify them, offer evidence about them, or explain the relevance and relationship of *BRB*'s errors "over the years" to *PERAC*'s calculation of his excess earnings in 2017 and 2018.

Mr. Sullivan's first argument is titled, "The BRB incorrectly determined that Mr. Sullivan had excess earnings in 2017 and 2018 in the amount of \$92,124.92." (\$92,124.92 is the sum of Mr. Sullivan's repayment for 2017, \$25,680.30, and his corrected repayment for 2018, \$66,444.12. (Exs. S, T) Of course, it was PERAC, not BRB, who determined that Mr. Sullivan had excess earnings; BRB enforced that determination.) Rather than (1) explaining why \$92,124.92 was incorrect and (2) what the correct figure should be, Mr. Sullivan made a series of unsupported factual allegations. He alleged that:

- His "confusion [about the requirements of G.L. c. 32, §91A] was in part caused by dealing with the transition between two different BRB administrators....." (Pet. Br. 1 (citing Tr. 10-15)) I do not find that allegation supported by the transcript.
- "There was confusion from all entities as to who was responsible for determining his

excess earnings.” (Pet. Br. 3 (citing Tr. 31)) I do not find that PERAC and other entities were confused that PERAC determined his excess earnings. Moreover, Mr. Sullivan testified about confusion in 2011; he did not explain the relevance of the supposed confusion in 2011 to his excess earnings in 2017 and 2018. Furthermore, Mr. Sullivan suspected that PERAC determined his excess earnings. (Tr. 17, 19, 24, 39-40)

- He “received conflicting information regarding excess earnings from the BFD and PERAC.” (Pet. Br. 2 (citing Tr. 10-11)) I do not find that allegation supported by the transcript.

- He understood from PERAC not to worry about excess earnings limitations, as PERAC does not look at retiree’s yearly earnings statements as that responsibility belongs to BRB.

(Pet. Br. 3 (citing Tr. 31)) This summary of the transcript reads too much into the transcript and is inaccurate. Nor would it be reasonable that PERAC led him to believe that he should not be worried about excess earnings. If that was Mr. Sullivan’s understanding, it was unreasonable.

- Mr. Sullivan was given the impression, due to the confusion and lack of concern from all applicable entities, that the law was not enforced at the time.

(Pet. Br. 3 (citing Tr. 8)) This summary of the transcript is inaccurate. Nor would it be reasonable for Mr. Sullivan to have received the impression that the law was not enforced at the time. Moreover, Mr. Sullivan testified that “at the time” meant late 2010 or early 2011 (Tr. 9); he did not explain the relevance of that time to his excess earnings in 2017 and 2018.

- He was confident he was working within the limits of G.L. c. [32,] §91A because he relied on an incorrect figure from the BFD early in his retirement and he was submitting his earnings statements each year, on time and accurately.

(Pet. Br. 3 (citing Tr. 14-15)) This summary of the transcript is inaccurate. Furthermore, Mr. Sullivan did not establish that BFD gave him an incorrect earnings limit or that he relied on it. Moreover, Mr. Sullivan’s testimony on those two pages referred to late 2010 (Tr. 14); he did not explain the relevance of that time to his excess earnings in 2017 and 2018. Finally, Mr. Sullivan

acknowledged that his earning limit changed (Tr. 14-15); if he relied in 2017 or 2018 on an excess earnings figure from 2010, his reliance was unreasonable.

Even if the transcript supported Mr. Sullivan’s factual allegations, the factual allegations would not support his argument that the amount he was ordered to repay, \$92,124.92, was incorrect.

G.L. c. 32, §20(5)(c)(2) and (3) presuppose that an error was made. Because Mr. Sullivan has not proved the first issue, that an error was made, it is unnecessary for me to reach the second and third issues: whether G.L. c. 32, §20 applies here and moderates the mandate in G.L. c. 32, §91A, and whether BRB abused its discretion in not waiving repayment for the error. Any discussion of whether BRB abused its discretion by, for example, not acting on Mr. Sullivan’s request for a waiver (Pet. Br. 9), would be dictum.

Conclusion and Order

Because the petitioner did not prove that his excess earnings were miscalculated, it is not necessary to decide whether G.L. c. 32, §20 applies here and moderates G.L. c. 32, §91A, and whether the retirement board’s non-action was arbitrary and capricious. The retirement board’s non-action on the petitioner’s request to waive his excess earnings is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kenneth Bresler

Kenneth Bresler
Administrative Magistrate

Dated: June 9, 2023