Public Employee Retirement Issues and Recent Decisions

MMAAA Annual Conference
March 13, 2018

Thomas F. Gibson, Esq.

Topics

- Retirement Board Composition
- Retirement Board Compensation
- Working After Retirement
- Contribution Rates
- Regular Compensation
- Death Before Retirement

Retirement Board Composition and Compensation

Retirement Board Composition

- 104 contributory retirement systems within the Commonwealth: State, Teachers, County/ Regional, Municipal (84) and others
- Chapter 32 of the General Laws is the public employee "retirement plan," and defines the benefits, contribution requirements, accounting and investment structure for all retirement systems
- Retirement systems are overseen by retirement boards consisting of 5 members

Retirement Board Composition

- In municipal retirement systems, the second member is “the city auditor or town accountant or other officer having similar powers and duties who shall be a member ex officio” – G.L. c. 32, §20(4)(b) (Local option provides for an alternative board composition – G.L. c. 32, §20(4)(c) – adoption rare)

- No set term for ex officio member – status cannot be delegated to another – powers come “from the office” and stay with the person holding the office

Retirement Board Compensation

- G.L. c. 32, §20(6) provides a local option to compensate retirement board members with a stipend of no less than $3,000, and no more than $4,500
- Compensation is also provided to municipal officers who participate in the operations of the retirement system, i.e., the *auditor or town accountant,* and the *treasurer*

Retirement Board Compensation

- G.L. c. 32 § 20(4)(d) sets the compensation of the auditor or town accountant at "not less than two hundred nor more than fifteen hundred dollars per annum," for services rendered in the active administration of the retirement
- G.L. c. 32, § 20(4)(d1/2) provides a *local option* to compensate the auditor or town accountant "not less than two hundred nor more than three thousand dollars per annum"

Retirement Board Compensation

- G.L. c. 32, §20(6) provides, however, that if the auditor or town accountant also serves as the ex officio member of the retirement board, and receives a stipend for so serving, the stipend for the auditor or town accountant cannot be more than $4,500 per year in the aggregate

Retirement Board Compensation

- G.L. c. 32 § 20(4)(g) provides compensation to the treasurer for services rendered as custodian of the funds of the retirement system at “not more than fifteen hundred dollars per annum”

- G.L. c. 32 § 20(4)(h) provides a *local option* to compensate the treasurer in an amount “not …more than three thousand dollars per annum”

Retirement Board Compensation

- The local options provided in G.L. c. 32, § 20(4)(d1/2) and G.L. c. 32 § 20(4)(h) must be adopted by the appropriate legislative body – the approval of the retirement board is not required

- Compensation to the auditor or town accountant and treasurer are paid from the expense fund of the retirement system

Working After Retirement

Working After Retirement

In The Private Sector

- <u>Salary Restrictions</u>
  - As a general rule, a non-disability retiree can earn *unlimited salary* in the private sector with no impact upon the retiree's retirement allowance
  - A disability retiree is limited to earning the difference between the current salary for the retiree's former position, minus the current retirement allowance, plus $15,000

Working After Retirement

Earnings Example – Disability Retiree

Current Salary	$60,000
Disability Retirement Allowance	$40,000
Allowable Earnings	$20,000
	+ 15,000 =
	$35,000

Excess Earnings Must Be Refunded to the Retirement Board per G.L. c. 32, § 91A

Working After Retirement

In the Public Sector ("Returning Annuitant"):

- With limited exceptions, no retiree may work more than **960 HOURS** in a Massachusetts governmental position per calendar year
- Earnings from elective office, jury service and emergency employment with a public entity are unrestricted
- There are no restrictions on a non-disability retiree's employment with the federal government or in the public sector in another state

Working After Retirement

In the Public Sector

- Earnings Restrictions - Retirees who return to Massachusetts public sector employment cannot earn more than the current pay for the position held at the time of retirement, plus $15,000,* less the retirement allowance. (*Effective January 1 of the year after first 12 months of retirement)

Current Salary :	$60,000
Retirement Allowance:	$40,000
Allowable Public Sector Earnings (Add $15,000):	$20,000 $35,000

Working After Retirement

- **N.B.** The restrictions on hours and earnings apply to "consultants" and "independent contractors" and "persons whose regular duties require that his [or her] time be devoted to the service of the commonwealth, county, city, town, district or authority during regular business hours" – G.L. c. 32, § 91(b)

- **N.B.** May include retirees who are employed by a private entity which provides services to Massachusetts public entities

Working After Retirement

- How are "earnings" calculated?

  "Current salary" for the position from which retired includes all payments that were pensionable at time of retirement – if position no longer exists, then use last paid salary plus reasonable inflationary factor, e.g., COLAs, CPI

  "Retirement allowance" is the gross pension and annuity amount before deductions

Working After Retirement

- Should retirement or OBRA contributions be withheld from a retiree's earnings?

  Neither retirement contributions nor OBRA contributions should be withheld – a retiree who is receiving retirement benefits who is hired by an employer that participates in the *same retirement system* as the former employer, is exempt from OBRA

  In Massachusetts, Chapter 32 is the one statutory retirement plan for public employees

Working After Retirement

- Who monitors a retiree's hours and earnings?

  The retiree primarily, and then the employer. Unlike the requirements for disability retirees, there are no reporting requirements to PERAC – difficult to track restrictions when 2 or more employers are involved

  Employment must cease when either the hours or earnings restrictions are reached, i.e., whichever limitation is first met

Working After Retirement

- <u>Who collects a retiree's excess earnings?</u>

  The retiree is obligated to return excess earnings to the employer. If not, the treasurer "may" seek to recover excess earnings through litigation – G.L. c , 32 §91(c)

  Case law has expanded the recovery right to allow the retiree's retirement board to seek recovery when the employer does not

Working After Retirement

- *Plymouth County Retirement Board v. Contributory Retirement Appeal Board, PERAC and Michael Daley*, Mass. App. Ct., 17-P-23, February 16, 2018 (Rule 1.28 Decision)

- Summary: Daley was the former Finance Director for the Town of Plymouth who retired in 2006. Daley had also established a corporation in 1994 which provided financial consulting services to Massachusetts government entities and private clients, Financial Advisory Services, Inc. ("FAA").

Working After Retirement

- In 2010, the Plymouth Retirement Board determined that Daley was in violation of the earnings restrictions of § 91, and Daley appealed.
- After a very complicated procedural history, CRAB determined that a retiree cannot evade § 91 limitations by incorporating, or by entering into an independent contractor agreement: "any retired public employee who works on a state or local contract, providing a service to a governmental entity within the Commonwealth, must comply with § 91."

Working After Retirement

- CRAB ordered that the Plymouth Retirement Board recover the amounts of any retirement benefits paid to Daley for the years 2007-2010
- The Plymouth Retirement Board appealed further, seeking to have Daley disgorge *all* of the earnings of his corporation ($350,000)
- CRAB, the Superior Court and Appeals Court denied Plymouth request, and affirmed CRAB's decision

Working After Retirement

Takeaway from *Daley*:

- The earnings and hours limitations for returning annuitants are difficult to avoid – no matter as an employee, consultant or independent contractor
- Moreover, a retiree employed by a private corporation which provides services to public entities in Massachusetts is similarly restricted – e.g., school bus drivers

Employee Contribution Rates

Employee Contribution Rates

- Employees contribute a percentage of "regular compensation" to the retirement system

Membership Date	Rate
Prior to 1/1/75	5%
After 1/1/75, prior to 1/1/84	7%
After 1/1/84, prior to 7/1/96	8%
After 7/1/96	9%

- Employees who established membership after 1/1/79 contribute an additional 2% of compensation in excess of $30,000 ($576.92 per week, $1,153.85 bi-weekly)

Employee Contribution Rates

- Employees with a membership date on or after April 2, 2012, will contribute 9% plus an additional 2% of compensation in excess of $30,000
- Employees with a membership date on or after April 2, 2012, who are classified in Group 1 will, after 30 years of creditable service, have their contribution rate decreased to 6%

Employee Contribution Rates

- Employees who transfer from one retirement system to another retirement system will keep their original contribution rate

- **NOTE:** these employees should be enrolled at the 9% rate, plus the additional 2% if applicable, until confirmation is received from the retirement system that the contribution rate should be decreased

Employee Contribution Rates

- If a member receives a refund of retirement contributions from any retirement system and later re-establishes membership in a retirement system, his or her contribution rate will be at the new contribution rate, even if the member re-deposits the amount withdrawn

Regular Compensation

Regular Compensation

- Defined since July 1, 2009 as: "compensation received exclusively as wages by an employee for services performed in the course of employment for the employer" – G.L. c. 32, § 1
- "Wages" are defined as "base salary or other base compensation" – G.L. c. 32, § 1
- Other base compensation must be "pre-determined, non-discretionary and guaranteed payments" – PERAC Regulation 840 CMR 15.03

Regular Compensation

Regular Compensation Generally Includes:

- The annual rate of compensation in salary schedule
- Educational incentives
- Payments for length of service, i.e., “longevity”
- Premiums for holidays (police and fire)
- Shift differentials
- Payments for certain compensatory time granted in lieu of overtime pay
- Hazmat pay (police and fire)
- Certain standby or on-call pay

Regular Compensation

Regular Compensation Generally Includes:

- Used Sick Leave and Vacation Leave (excluding terminal pay) – *Except When Paid To Supplement Workers' Compensation – discussed further on*
- G.L. c. 41, § 111F Injured on Duty Pay (but non-taxable)
- Supplemental Compensation under the Military Pay Act

Regular Compensation

Regular Compensation Generally Excludes:

- Overtime
- Bonuses
- Payments from salary enhancements or salary augmentation plans which will recur for a limited or definite term (e.g., “enhanced longevity”, sick leave swaps)
- Expense Reimbursements
- Workers’ Compensation

Regular Compensation

Regular Compensation Generally Excludes:

- Amounts paid for selling back unused vacation, sick leave, or other leave - *Pending Appeal*
- Severance pay
- Amounts paid as an early retirement incentive
- Any payments made as a result of giving notice of retirement
- Housing, lodging, travel, clothing allowances, annuities, expense payments, automobile usage, insurance premiums

Regular Compensation

Public Employee Retirement Administration Commission v. Contributory Retirement Appeal Board, et. al., SJC-12331 (Feb. 13, 2018)

- Summary: Robert Vernava was an employee of the Town of Swampscott who suffered a work-related injury on June 13, 2010 and was paid workers' compensation benefits.

- To supplement his workers' compensation benefits, Vernava received two hours per week of sick or vacation pay, as allowed by the Workers' Compensation Law – G.L. c. 152, § 69

Regular Compensation

- On February 1, 2012, the employer filed an application to involuntarily retire Vernava for accidental disability, and on June 28, 2012, he was retired

- For accidental disability retirement, the retirement date is the latest of:

  the date the injury was sustained;

  the date six months prior to the filing; or

  the date for which the applicant last received regular compensation

Regular Compensation

- Vernava continued to receive workers' compensation benefits with his supplemental pay until July 7, 2012
- PERAC approved the effective date of his retirement as July 7, 2012, which was the last date Vernava received "regular compensation" in the form of supplemental pay from his sick leave and vacation
- Vernava appealed PERAC's determination, seeking an earlier effective date of retirement – i.e., 6 months prior to the date of the application, August 1, 2011

Regular Compensation

- Vernava argued that the modest supplemental payments he received with his workers' compensation deprived him of the retroactive payment of his retirement allowance
- The Superior Court affirmed CRAB's decision that the supplemental pay was not "regular compensation", and PERAC appealed
- The Supreme Judicial Court also agreed that supplemental sick and vacation pay do not constitute "regular compensation" for purposes of determining the effective date of accidental disability retirement

Regular Compensation

- Court's Rationale: "[W]hen an employee is ... injured, on workers' compensation, and inherently unable to provide services to his or her employer -- that employee has ceased providing services to the employer." ----

- Under G.L. c. 32, § 1, "regular compensation" is defined, as "compensation received exclusively as wages by an employee *for services performed in the course of employment* for his employer." ----

Regular Compensation

- Therefore, where regular compensation is geared to “services performed” and where “both workers’ compensation and supplemental pay ... are received while the employee is no longer able to provide those services” the supplemental sick and vacation payments made in conjunction with workers’ compensation cannot be “regular compensation.”

- “We also do not find persuasive PERAC's concern that confusion will ensue if CRAB's interpretation is upheld.”

Regular Compensation

Takeaways from *PERAC v. CRAB*:

- Retirement withholdings from supplemental payments from sick leave and vacation paid to a member who is receiving workers' compensation benefits should cease
- Absent a legislative fix or promulgation from PERAC to the contrary, all ADRs where supplemental payments were included as regular compensation will need to be recalculated, so as to determine a new effective date of retirement and a new (i.e., in most cases, lower) retirement allowance

Regular Compensation

Takeaways from *PERAC v. CRAB*:

- After retroactive adjustments and calculations are performed, any resulting overpayment of benefits is subject to recoupment by the retirement board
- Retirement withholdings from supplemental pay must be refunded to the member – supplemental payments made after the new effective date of retirement arguably should be refunded by the employee to the employer
- Where an employee does not retire for ADR, creditable service adjustments must be made in cases where an employee received partial workers' compensation

Death Before Retirement

Death Before Retirement

- A member may select a beneficiary or beneficiaries to receive survivor benefits in the event the member dies before retirement
- There are two different types of benefits available
- Only one will be paid out

Death Before Retirement

- The member's first choice is to name a beneficiary or beneficiaries to receive a lump-sum payment of the accumulated total deductions in the annuity savings account in the proportions designated
- A person or entity (e.g., a trust, MSPCA, Jimmy Fund) may be named a beneficiary

Death Before Retirement

- The member's second choice is to nominate a single beneficiary for the Option D, or "Member Survivor Allowance"
- Option D provides a named beneficiary with the monthly retirement allowance that the member would have received under Option C had the member retired on the member's date of death

Death Before Retirement

- The member’s years of service at death, plus any public employment service which the beneficiary may purchase by a "make-up" payment will be used in the calculation

- If the member is under age 55 at death, the member’s age will be increased to 55 to calculate the allowance. The age of the beneficiary is also increased by an equal amount. (For members joining the System after April 2, 2012, the age is 60.)

Death Before Retirement

- The minimum allowance is $250 or $500 per month, if a local option as been accepted by the retirement board and the legislative body
- A member can designate an Option D beneficiary at anytime

Death Before Retirement

- Only one Option D beneficiary may be named, and must be the member's:
  - Spouse
  - Child
  - Former spouse who has not remarried at date of death
  - Parent
  - Sibling
- Unless superseded by a spousal election, the nominated beneficiary must receive the allowance

Death Before Retirement

- If the member does not make an Option D designation, the member's spouse can still elect to receive the Option D allowance if:
  - The member has completed at least two years of creditable service
  - The member and spouse have been married for at least one year; and
  - The member and spouse have been living together at the time of member's death
  - If the member and spouse were not living together, the retirement board must find that it was for justifiable cause
- The rights of an eligible surviving spouse will always supersede any other person nominated

Death Before Retirement

- When an Option D allowance is paid, another part of the statute, Section 12B, provides an additional allowance to minor children.
- The dependent child allowance is $120.00 per month to the oldest child, and $90.00 per month to each additional child
- Benefits end upon adoption or marriage, or upon reaching age 18, or age 22 if a full-time student
- Benefits to children will not end if the child is physically or mentally incapacitated from earning on the date of death

Death Before Retirement

- An Option D allowance may also be available to a beneficiary of an inactive member. However, no benefit for children is available under Section 12B.

- If a member does not designate an Option D beneficiary and the eligible spouse does not elect to receive a lifetime allowance, the accumulated deductions will be paid in a lump sum to the designated beneficiary or beneficiaries

Accidental Death

- If the member's death is due to a job related injury, Option D benefits are payable until such time as other benefits become payable (e.g., accidental death, killed in the line of duty)

Beneficiary Selection Form

- To nominate an eligible beneficiary for the Option D benefit, the member **must** complete the **Beneficiary Selection Form** and file it **with the retirement board**
- The form must be on file prior to the date of the member's death
- The Option D beneficiary designation can be cancelled at any time by sending a request in writing to the Retirement Board
- The Option D beneficiary can be changed by filing a new Beneficiary Selection Form with the board

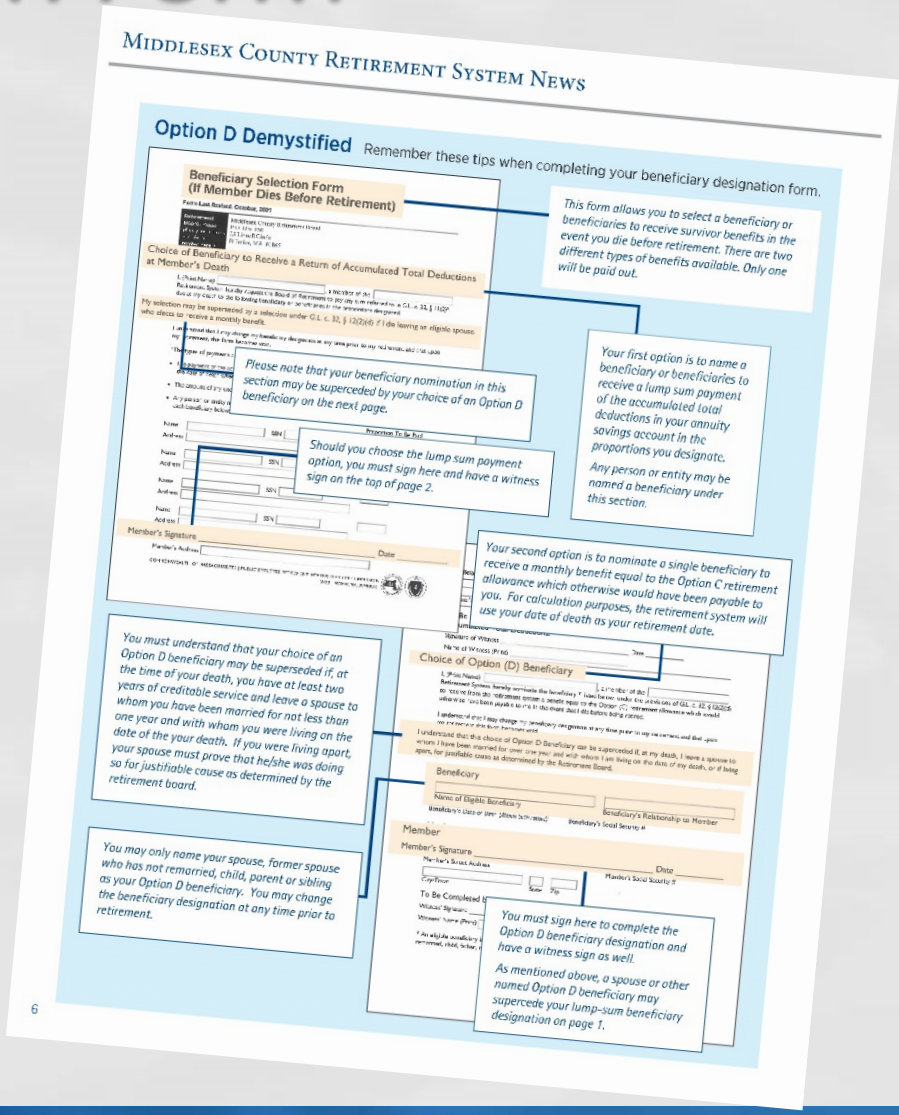
Beneficiary Selection Form

- The Option D election remains in force and effect until:
  - The member retires
  - The member cancels it in writing
  - The designated beneficiary predeceases the member
  - The surviving beneficiary is eligible to receive an accidental death benefit
  - The eligible surviving spouse elects to receive a benefit, even if the member did not choose the spouse as the Option D beneficiary

Beneficiary Selection Form

The Middlesex County Retirement System's Fall 2017 Newsletter provides helpful tips on completing the Beneficiary Selection Form

www.middlesexretirement.org



MIDDLESEX COUNTY RETIREMENT SYSTEM NEWS

Option D Demystified Remember these tips when completing your beneficiary designation form.

Beneficiary Selection Form (If Member Dies Before Retirement)

Choice of Beneficiary to Receive a Return of Accumulated Total Deductions at Member's Death

Member's Signature

Choice of Option (D) Beneficiary

Beneficiary

Member

Member's Signature

This form allows you to select a beneficiary or beneficiaries to receive survivor benefits in the event you die before retirement. There are two different types of benefits available. Only one will be paid out.

Your first option is to name a beneficiary or beneficiaries to receive a lump sum payment of the accumulated total deductions in your annuity savings account in the proportions you designate.

Any person or entity may be named a beneficiary under this section.

Please note that your beneficiary nomination in this section may be superceded by your choice of an Option D beneficiary on the next page.

Should you choose the lump sum payment option, you must sign here and have a witness sign on the top of page 2.

Your second option is to nominate a single beneficiary to receive a monthly benefit equal to the Option C retirement allowance which otherwise would have been payable to you. For calculation purposes, the retirement system will use your date of death as your retirement date.

You must understand that your choice of an Option D beneficiary may be superseded if, at the time of your death, you have at least two years of creditable service and leave a spouse to whom you have been married for not less than one year and with whom you were living on the date of the your death. If you were living apart, your spouse must prove that he/she was doing so for justifiable cause as determined by the retirement board.

You may only name your spouse, former spouse who has not remarried, child, parent or sibling as your Option D beneficiary. You may change the beneficiary designation at any time prior to retirement.

You must sign here to complete the Option D beneficiary designation and have a witness sign as well.

As mentioned above, a spouse or other named Option D beneficiary may supercede your lump-sum beneficiary designation on page 1.

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Thank You For
Your Time And Attention