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MEMORANDUM

TO: MWRA Employees' Retirement Board

RE: Standby Pay Issues

DATE: July 31, 2014

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The Board has requested guidance as to the impact of the Authority's action to implement a payroll code for Scheduled Standby Pay effective June 28, 2014. Such payments conform to the definition of regular compensation as set forth in G.L. c. 32, § 1 and 840 CMR 15.03.

The payroll code was implemented subsequent to the Board's advising the Authority that payments for standby pay could, under certain circumstances, represent regular compensation from which retirement contributions should be withheld. The Board brought this issue to the attention of the Authority after becoming aware that payments representing standby pay were made to members pursuant to collective bargaining agreements.

The issue before the Board is the application of the new payroll code to retired and active members of the system, and the treatment of standby pay prior to the implementation of the payroll code.

**Retired Members**

Retirement boards have been advised that boards cannot accept retirement contributions from retired members for any purpose. In 2002, with reference to a regular compensation issue, PERAC issued Memo #38/2002, which states in pertinent part:

The Commission's special tax counsel has opined that retirement boards may not accept any retirement contributions from retirees... . Counsel determined that IRS Code Section 415(c) limits contributions to a defined benefit (pension) plan to the lesser of \$40,000 or 100% of compensation in a given year. Since retirees have no compensation from their former employers, they may not contribute anything to the pension plan.

**As such, all retirement boards shall immediately cease accepting all retirement contributions from retirees for any purposes.**  
[Emphasis in original.]

PERAC later confirmed this position in Memo #22 of 2013 regarding a newly required payment for purchases of service credit for reserve police officers and call fire fighters under § 4(2)(b). PERAC's memorandum was issued subsequent to a decision rendered by the Contributory Retirement Appeal Board on June 21, 2013, and stated, in pertinent part:

Retirees cannot remit funds to the retirement system as retired members, thus, there is no need to make this decision retroactively apply to all those persons affected by it.

Therefore, pursuant to PERAC's determinations under its rule-making authority over retirement boards, members who retired prior to June 28, 2014, will not be impacted.<sup>1</sup>

### **Active Members**

It is clear that retirement contributions are to be withheld from standby pay provided to active members commencing June 28, 2014. Further, the retirement laws provide that, with regard to active members, retroactive retirement contributions must be made for all payments of regular compensation.<sup>2</sup>

This may be a considerable project for the Board, which would include identifying active members who received standby pay prior to the implementation of the new pay code, and determining, if possible, the amount and periods of standby pay provided. However, if the Board considers the failure of the Authority to withhold retirement contributions from qualifying standby pay prior to the implementation of the new payroll code to be an error, which appears to be, then the provisions of G.L. c. 32, § 20(5)(c)(1) provide, in pertinent part, that:

Whenever any such board shall find it impossible or impracticable to consult an original record to determine the ... amount of regular compensation or other pertinent fact with regard to any member, it may, subject to the approval of the actuary, use estimates thereof on any basis which in its judgment is fair and just. The board, upon discovery of any error in any record of the system, shall, as far as practicable, correct such record.

Accordingly, the Board has an obligation to correct the error, and if such retirement contributions cannot be reasonably determined, then with PERAC's approval, the Board could use fair and just

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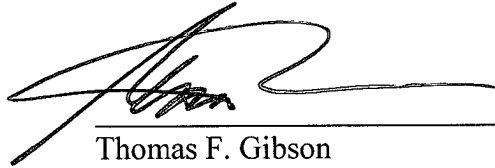
<sup>1</sup> Retired members may challenge a decision not to accept contributions so as to increase their retirement allowances. The Court has suggested elsewhere that there is "a genuine issue of material fact as to PERAC's authority to interpret federal tax laws and to issue orders to retirement boards pursuant to those laws." *Danvers Retirement Board v. PERAC*, Essex Sup. Ct. C.A. No. 2006-00328 (2007) (Tutteman, J.) It is also noted that in cases where a retiree's compensation while employed is collectively bargained, and result in a retroactive salary increase, retirement contributions are deducted from retroactive payments of compensation. Further, the Court may order such retroactive retirement adjustments. See, *Bulger v. CRAB*, 447 Mass. 651 (2006) (Payment for housing erroneously excluded as regular compensation by CRAB and the State Board of Retirement.)

<sup>2</sup> It is noted that the Board has been advised that employees of the Authority who are active members of the State Retirement System will be similarly subject to retroactive payment of retirement contributions from qualifying standby pay.

estimates of such payments as the basis for a demand for payment of retroactive retirement contributions.

In cases of underpayment of retirement contributions, a member may request the Board to exercise its discretion to waive the Board's demand for payment pursuant to G.L. c. 32, § 20(5)(c)(3).<sup>3</sup>

Finally, as with any issue involving the Board's application and implementation of the public employee retirement laws, the Board can request a technical advisory from PERAC.



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Thomas F. Gibson

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<sup>3</sup>“... at the request of a member who has been determined to owe funds to the retirement system, the board may waive repayment or recovery of such amounts provided that:

- (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; and
- (iii) the member or beneficiary did not have knowledge of the error or did not have reason to believe that the benefit amount or contribution rate was in error.”