



Oregon

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Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD
SUBJECT: Temporary Adoption and Notice of Permanent Rulemaking for Creditable Service and Retroactive Salary Payments Rules:
OAR 459-010-0014, *Creditable Service in the PERS Chapter 238 Program*
OAR 459-010-0042, *Retroactive Salary Payments*

MEETING DATE	03/28/08
AGENDA ITEM	C.6. Creditable Service/Retro Salary Payments

OVERVIEW

- Action: Adopt temporary modifications to the Creditable Service and Retroactive Salary Payments Rules, OAR 459-010-0014 and 459-010-0042.
- Reason for Temporary Rules: The rule would provide creditable service to an employee who receives a retroactive payment of wages incident to resolving an employment dispute. This issue needs to be addressed so ongoing employment matters can be resolved and the parties can understand the PERS impact of those resolutions.
- Subject: Creditable service and retroactive salary payments in the PERS Chapter 238 Program.
- Policy Issue: Should an employee who receives a retroactive payment of wages receive creditable service for the time associated with that retroactive payment award?

BACKGROUND

PERS regularly receives court orders, administrative orders, settlement agreements, and other documents representing the resolution of a dispute between an employer and employee. Often, the resolution results in payment of back wages for a period the employee was absent from employment. Generally, the order or agreement directs that the employee be “made whole,” including in regards to the PERS benefits the employee would have accrued.

ORS 238.005(21)(b)(C) includes these back wages as “salary” and provides specific authority to attribute them to the period they would have been earned. No statute contains a similar parallel for creditable service during that same period. Before 2003, “creditable service” was awarded for periods that members made contributions. Retroactive salary payments triggered contributions, which resulted in creditable service. When the 2003 PERS Reform legislation re-routed contributions from the member’s Regular Account to the IAP, the “creditable service” standard changed from contributions to present employment. These rule modifications clarify that this statutory change does still allow for creditable service during the period of absence under the specified circumstances.

POLICY ISSUE AND SUMMARY OF PROPOSED RULE MODIFICATIONS

Should an employee who receives a retroactive payment of wages receive creditable service for the time associated with that retroactive payment award?

The resolution that the employee be “made whole” indicates intent to restore the employee to the status they would be in if the absence had not occurred, including PERS contributions and creditable service. Without the award of creditable service for the period, PERS cannot completely restore that status, leaving the parties to craft another solution outside of the retirement system that compensates the employee for their lost creditable service. Crafting that solution could be very difficult, trying to account for the costs of delayed retirement eligibility, potentially lower benefit payments, etc.

The proposed rule modifications allow for creditable service in limited circumstances consistent with the current statutory structure. More specifically:

OAR 459-010-0014: This rule provides standards used to determine the accrual of creditable service in the PERS Chapter 238 Program. The rule was modified to reference the accrual of creditable service incident to a retroactive payment under OAR 459-010-0042(4).

OAR 459-010-0042: This rule outlines the administration of retroactive salary payments. The modifications to the rule clarify the definition of “retroactive payment” and provide standards for allocating such payments. The changes clarify that payments allocated to periods of non-membership may not be used to determine contributions or benefits. Also, a condition to receiving creditable service for periods to which retroactive payments are attributed is that the employee be an active member on the date of the retroactive payment. It also clarifies the time limit within which a member who receives a retroactive payment may restore rights forfeited by withdrawal during the period of absence. Lastly, the rule applies retroactively to July 31, 2003, the effective date of the statutory changes, to provide for consistency in the administration of retroactive payment and creditable service determinations.

JUSTIFICATION FOR TEMPORARY RULEMAKING

Staff recommends temporary adoption of the rule modifications and the commencement of permanent rulemaking. Failure to temporarily adopt the rules will perpetuate PERS’ inability to implement the intent of the parties associated with a retroactive payment. Members and employers will continue to be frustrated by their inability to adequately resolve their disputes. Recipients of retroactive payments since 2003 may now be eligible to retire upon receipt of creditable service made available by the retroactive application of the rule. Delay in adoption would delay retirement eligibility for these members. If adoption is postponed, retroactive adjustments will be necessary for retroactive payments administered in the interim. The temporary adoption of the rules will provide PERS an authority and mechanism to avoid these consequences.

PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing was held on March 25, 2008 at 2:00 p.m. at PERS headquarters in Tigard. Any comments will be brought forth to the PERS Board at its March 28, 2008 meeting. A second public comment period incident to the permanent rulemaking is scheduled for April 22, 2008. The public comment period ends on April 30, 2008 at 5:00 p.m.

LEGAL REVIEW

The attached rules have been submitted to the Department of Justice for legal review and any comments or changes are incorporated in the rules as presented for temporary adoption.

EFFECTIVE DATE

These rule modifications will become effective upon filing. The maximum period they can remain in effect is 180 days, so staff will initiate permanent rulemaking to replace these temporary rules.

IMPACT

Mandatory: No, the Board need not adopt the rules.

Impact: Employers, members, and staff will benefit from the rules' clarification of the standards used in these determinations. Administration of these resolutions will be closer to the parties' intentions.

Cost: There are no significant costs attributable to these rules.

RULEMAKING TIMELINE

February 15, 2008	Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.
March 1, 2008	<i>Oregon Bulletin</i> published the Notice of Rulemaking Hearing.
March 25, 2008	Rulemaking hearing held at 2:00 p.m. in Tigard.
March 28, 2008	PERS Board may adopt the proposed temporary rules; PERS staff will proceed with permanent rulemaking unless otherwise directed.
April 1, 2008	<i>Oregon Bulletin</i> publishes the Notice of Rulemaking Hearing.
April 22, 2008	Rulemaking hearing to be held at 2:00 p.m. in Tigard.
April 30, 2008	Public comment period ends.
May 16, 2008	Staff will propose adopting the permanent rule modifications, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt temporary modifications to OAR 459-010-0014 and 459-010-0042.”
2. Direct staff to make other changes to the rules or explore other options.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- Reason: The rules clarify that an employee who successfully disputes an employer discharge or suspension, is reinstated, and receives a retroactive payment of wages for the period of absence can receive creditable service for the period associated with the retroactive payment. Also, provisions regarding retroactive payments made to terminated members are obsolete and in need of revision.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.