**Daniel S. Auer, Jr.,**

Petitioner

v.

**State Board of Retirement,**

 Respondent

Docket No. CR-18-0247

Dated: September 27, 2019

**Appearance for the Petitioner:**

Pro se

30 Plain St.

Attleboro, MA 02703

**Appearance for the Respondent:**

James Salvie, Esq.

State Board of Retirement

One Winter St.

Boston, MA 02108

**Administrative Magistrate:**

**Kristin M. Palace, Esq.**

**SUMMARY OF DECISION ON RECONSIDERATION**

The State Board of Retirement’s motion for reconsideration of a decision reversing its calculation of a Correction Officer’s retirement allowance with reference to an 18 month period preceding retirement rather than the 12 month period prescribed by M.G.L. c. 32, § 28M is denied.

**DECISION ON RECONSIDERATION**

On August 2, 2019, I reversed a decision of the State Board of Retirement (the “Board”). The Board’s decision had calculated the Petitioner’s retirement allowance with reference to an 18 month period preceding his retirement rather than the 12 month period prescribed by M.G.L. c. 32, § 28M. On August 7, 2019, the Board moved for reconsideration. Daniel Auer, the Petitioner, has not responded to the Board’s motion.

The Board advances two arguments in support of granting reconsideration and vacating the previous decision: first, that I overlooked a decision of the Contributory Retirement Appeals Board, affirmed by the Superior Court, that specifically approved of the methodology used by the Board to make its calculations, and second, that if the Board were to perform the calculation in a manner consistent with my decision, the Petitioner’s retirement allowance would be lower than the amount the Board had previously calculated. For the reasons explained below, the Board’s motion for reconsideration is denied.

1. Standard for Reconsideration

The Formal Rules of the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01, provide that any party to a proceeding may move for reconsideration after a decision has been rendered. In order to succeed, the moving party must identify either a “clerical or mechanical error” in the decision or “a significant factor” that has been overlooked by the DALA Magistrate. 801 CMR 1.01(7)(l).

1. The DALA Decision

The Petitioner appealed to DALA contesting the methodology by which the Board calculated his differential pay for the purpose of calculating his retirement allowance. As a Corrections Officer, the Petitioner was paid a salary plus additional compensation (his “differential pay”) for holidays worked, roll calls, shift differentials, and longevity. In calculating the Petitioner’s retirement allowance, the Board referenced the 12 months of Petitioner’s regular salary immediately preceding his retirement and arrived at an annual average for that salary. The Board used a different approach to determine the rate of differential pay credited towards Petitioner’s retirement allowance. For this calculation, the Board referenced the differential pay earned in the 18 months prior to the Petitioner’s retirement. This longer horizon decreased the average amount of differential pay credited to the Petitioner. The Petitioner appealed, disputing the Board’s right to “look back” further than 12 months prior to his retirement. After careful consideration, I concluded that M.G.L. c. 32, § 28M, the statutory section under which the Petitioner retired, did not permit the Board to include in its calculations compensation earned more than 12 months prior to the Petitioner’s retirement, and I ordered the Board to recalculate the Petitioner’s retirement allowance making reference only to the differential pay he earned in the 12 months immediately preceding his retirement.

1. The Calculation Methodology
2. Annual salary calculation.

The calculation for the annual salary was not contested by the Petitioner, and thus it was not examined in my August 2, 2019 decision. The annualization method used by the Board to compute the Petitioner’s salary likely yields only a slightly different amount from what the Petitioner actually earned, and for this reason the Petitioner may not have challenged it. (The record does not contain an accounting of what the Petitioner’s actual salary was for the period 7/1/16 to 6/30/17.) Because the calculation of annual salary did not include amounts earned in any period other than the 12 month period immediately preceding retirement, it was unaffected by my August 2, 2019 decision.

The Board’s method for calculating the Petitioner’s annual salary begins with the yearly annual salary rate for each part of the 12 month period immediately preceding his retirement in which a different rate was applicable, multiplies that rate by the number of days worked at that rate, adds all of the products together, and then divides the total by 365 days to arrive at a yearly rate. Using this methodology, without including the differential pay earned by the Petitioner, the Board’s method of calculation yields a figure of $82,575.66 as the Petitioner’s average annual salary over 12 months. The table below illustrates the calculation.

|  |  |  |  |
| --- | --- | --- | --- |
| Period of time | # of days in period | Yearly salary rate for period | (Yearly salary) x (# of days paid that rate) |
| 7/1/16-7/9/16 | 9 | $79,662.18 | $716,959.62 |
| 7/10/16-12/31/16 | 175 | $82,649.32 | $14,463,631.00 |
| 1/1/17-6/30/17 | 181 | $82,649.32 | $14,959,526.92 |
| **Sum** |  |  | **$30,140,117.54** |
| ***Annual rate (Sum/365)*** |  |  | ***$82,575.66*** |

This is not the only way to arrive at an average annual salary over 12 months,[[1]](#footnote-1) but there is nothing in this methodology that contradicts the instruction of M.G.L. c. 32, § 28M to calculate the retiring member’s allowance with reference to the 12 months immediately preceding a member’s retirement. It is thus an acceptable way to calculate the Petitioner’s average annual salary for the purposes of computing his retirement allowance.

1. Differential pay calculation.

The Board argues that I have invalidated an approved method for calculating Petitioner’s differential pay, citing *Mirka v. State Board of Retirement,* CR-11-026 (CRAB, December 21, 2016), *aff’d sub nom. Mirka v. CRAB et al.,* C.A. No. 1782CV00076 (Norfolk Superior Court, Sullivan, J., May 21, 2018)*.* The *Mirka* case does not directly apply to this matter. In *Mirka*, a civil engineer who retired under M.G.L. c. 32, § 5 argued that the Board should determine the amount of his retirement allowance based on his *actual* salary earned over a three year period rather than on his *average annual compensation rate* over a three year period. DALA, CRAB and the Norfolk Superior Court all agreed that M.G.L. c. 32, § 5 requires that a member’s retirement allowance be based on the average annual compensation rate over three years and not on the member’s actual earnings. The Board’s annualization technique, illustrated in the section above, was thus approved for use in M.G.L. c. 32, § 5 cases by the reviewing bodies in *Mirka.*

Unlike *Mirka,* this matter concerns a calculation made under M.G.L. c. 32, § 28M. Section 28M instructs that a member’s retirement allowance shall be based on a “yearly amount equal to one-half the annual average rate of his regular compensations during the twelve month period of his creditable service immediately preceding the date his retirement allowance becomes effective.” As I concluded in my earlier decision, § 28M directs the Board to consider *only* the compensations received in the twelve month period immediately preceding the member’s retirement.

In reaching this conclusion, I did not invalidate the use of an annualization technique, only the data the Board used to achieve the calculations under the methodology. That said, it would be simpler and consistent with M.G.L. c. 32, § 28M if the Board were to add the amount of salary the Petitioner actually earned in the 12 months preceding his retirement to the amount of differential pay that the Petitioner actually earned in the 12 months preceding his retirement and divide by two to arrive at an amount “equal to one-half the annual average rate of his regular compensations during the twelve month period of his creditable service immediately preceding the date his retirement allowance becomes effective.” M.G.L. c. 32, § 28M. *Cf. John Dunne v. Melrose Retirement Board and Public Employee Retirement Administration Commission,* Docket No. CR-16-97 (Div. of Admin. L. App., August 9, 2019).

If, however, the Board insists on using the annualization technique approved in *Mirka*, *supra,* it must not penalize the Petitioner. The Board argues that applying the annualization technique using only the amounts earned by the Petitioner in the 12 months preceding his retirement will result in a substantially lower amount being granted to the Petitioner, but the methodology the Board has proffered in their attachment to their Motion for Reconsideration demonstrating this result is flawed. The Board’s revised calculation takes the amount Petitioner earned in differential pay from the period 7/1/2016 to 12/31/2016 ($3,985.38) and attempts to treat it as though it was an annual rate of pay, i.e., that had the Petitioner worked a full year, he would have received $3,985.38. Following this logic, Petitioner gets credited with only $2,009.07 of the $3,985.38 that he actually earned from 7/1/2016 to 12/31/2016 ($3,985.38 x 184 days = $733,309.92/365 days = $2,009.07). The calculation for the period 1/1/2017 to 6/30/2017 is similarly flawed. It takes the $4,373.38 that Petitioner actually earned during that period and also treats it as though it were an annual rate of pay. Petitioner thus gets credited with only $2,168.72 of the $4,373.38 that he actually earned ($4,373.38 x181 days = $791,581.78/365 days = $2,168.72). The difference between what Petitioner *actually* earned in differential pay in the 12 month period immediately preceding his retirement and what the Board calculates as his annual average is $4,180.97, a substantial sum ($8,358.76 actual earnings – $4,177.79 annualized earnings = $4,180.97).

In its calculations submitted as exhibits to support its original decision, the Board calculated the salary and differentials as follows:

Original Differential Pay Calculation

|  |  |  |  |
| --- | --- | --- | --- |
| Period of time | Actual amount paid |  Total # of days | Annualized amount |
| 1/1/2016-12/31/2016\* | $6,104.34\*\* | 366\*\*\* | $6,104.34 (this is the actual amount earned over the 2016 calendar year) |
| 1/1/2017-6/30/2017 | $4,373.38 | 181 | $8819.25 ($4,373.38/181 days = $24.16 x 365 days = $8819.25) |

\*Note that the Board “reached back” to a period 13 to 18 months prior to the Petitioner’s retirement in order to annualize his differential pay. It was the inclusion of the pay earned during the period 1/1/2016 to 6/30/2016 that I invalidated in my prior decision.

\*\*The board made an arithmetic error that it has acknowledged. The amount should be 6,194.34. For purposes of this analysis, the arithmetic error is immaterial.

\*\*\*2016 was a leap year and had 366 days.

Original Annual Pay Calculation (including differentials)

|  |  |  |  |
| --- | --- | --- | --- |
| Period of time | # of days in period | Yearly salary rate for period *plus* annualized differential amount | (Yearly salary plus differential pay) x (# of days worked in period) |
| 7/1/16-7/9/16 | 9 | $79,662.18 + $6104.34 = $85,766.52 | $771,898.68 |
| 7/10/16-12/31/16 | 175 | $82,649.32 + $6104.34 = $88,753.66 | $15,531,890.50 |
| 1/1/17-6/30/17 | 181 | $82,649.32 + $8819.25 = $91,468.57 | $16,555,811.17 |
| **Sum** |  |  | **$32,859,600.35** |
| ***Annual rate (Sum/365)*** |  |  | ***$90,026.30*** |

In these calculations, the Board annualized the Petitioner’s rate of pay for the period 1/1/2017 to 6/30/2017 by assuming that the Petitioner would have earned additional amounts of differentials for the latter half of 2017 when in fact he did not. Accordingly, the Board assumed a constant rate of pay over 365 days so that it could arrive at an annualized amount. Importantly, it did not penalize the Petitioner by attempting to annualize Petitioner’s 2017 differential pay by spreading what he had actually earned out over 12 months and dividing that amount by approximately half.

If the Board wishes to annualize Petitioner’s rate of pay for the period 7/1/2016 to 12/31/2016, it may use the same method. It may take the amount Petitioner actually earned for that period ($3,985.38), divide it by the number of days actually worked at that amount (184), and multiply that amount by 365. The calculation would be as follows: $3,985.38/184 = $21.66 x 365 days = $7,905.78. The revised full calculation would be as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Period of time | # of days in period | Yearly salary rate for period *plus* annualized differential amount | (Yearly salary and differential pay) x (# of days worked in period) |
| 7/1/16-7/9/16 | 9 | $79,662.18 + $7905.78 = $87,567.96 | $788,111.64 |
| 7/10/16-12/31/16 | 175 | $82,649.32 + $7905.78 = $90,555.10 | $15,847,142.50 |
| 1/1/17-6/30/17 | 181 | $82,649.32 + $8819.25 = $91,468.57 | $16,555,811.17 |
| **Sum** |  |  | **$33,191,065.31** |
| ***Annual rate (Sum/365)*** |  |  | ***$90,934.43*** |

Alternatively, if the Board were to add the actual differential pay earned by the Petitioner during the period from 7/1/16 to 6/30/17 to the total amount of annualized salary it had calculated for that period, the total number would be $90,934.42 ($82,575.66 + $3,985.38 + $4,373.38 = $90,934.42).

The Board may use an annualized calculation as long as doing so does not decrease the amount of pay a member actually earned by equating compensation earned over a less than 12 month period with the average annual compensation rate. Further, the Board may not, consistent with my prior decision, reach back in time to include in its calculation compensation earned prior to the 12 month period that immediately precedes the member’s retirement.

**CONCLUSION AND ORDER**

The Board’s motion for reconsideration shows neither a “clerical or mechanical error” in the Decision requiring correction nor “a significant factor” that the DALA Magistrate “may have overlooked” in deciding the case, the grounds for reconsideration specified by 801 CMR 1.01(7)(l). The Board’s Motion for Reconsideration is accordingly denied.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kristin M. Palace

 Administrative Magistrate

1. For example, another method to calculate the average annual salary over 12 months would be to derive a daily rate for each annual salary amount by dividing the annual rate by 365, multiplying that daily rate by the number of days worked at that rate, and finally adding the sums together. Using this methodology, without including the differential pay earned by the Petitioner, the Petitioner’s average annual salary over 12 months would be $82,576.89. [↑](#footnote-ref-1)