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

Petitioner

v.

**State Board of Retirement,**

 Respondent

Docket No. CR-18-0247

Dated: August 2, 2019

**Appearance for the Petitioner:**

Pro se

**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**

The State Board of Retirement calculated a Correction Officer’s retirement allowance with reference to an 18 month period preceding his retirement rather than the twelve month period prescribed by M.G.L. c. 32, § 28M. The Board’s decision is reversed.

**DECISION**

This matter involves a dispute between the Petitioner Daniel S. Auer, Jr. and the State Board of Retirement (“Board”) regarding the appropriate method for calculating Petitioner's regular compensation. On September 4, 2018, First Administrative Magistrate James P. Rooney ordered the parties to explain why this case should not be decided without a hearing and upon the record pursuant to 801 CMR 1.01 (10)(c). On January 15, 2019, the Board filed a memorandum containing a statement of undisputed facts, legal argument, and seven proposed exhibits. The Board stated that that it believed there were no facts in dispute and that the case involved only statutory interpretation. On February 22, 2019, Petitioner filed a response consisting of a brief argument and five proposed exhibits. Petitioner requested that a hearing be held so that he could “argue [his] case.” Subsequently, this case was assigned to me. Upon review of the record, I am convinced that there are no factual issues to be determined, that I understand fully the arguments advanced by both parties concerning the calculation methodology, and all that remains to determine is whether the Board’s chosen procedure for computing Petitioner’s compensation is consistent with M.G.L. c. 32, § 28M. Accordingly, I issue this decision upon the record pursuant to 801 CMR 1.01(10)(c).

I have marked the Board’s memorandum “A” and the Petitioner’s memorandum “B.” I have admitted the following documents into evidence:

1. Petitioner’s application for superannuation retirement dated April 28, 2017
2. Salary Request and Release Form from the Board to the Department of Corrections dated June 8, 2017
3. Spreadsheet compiled by the Board illustrating calculation of Petitioner’s regular compensation (submitted by both parties)
4. Data for annuity and pension from the Board concerning Petitioner
5. Letter from the Board to Petitioner dated February 20, 2018
6. Letter from Petitioner to Nicola Favorito, Executive Director of the Board, undated
7. Denial letter from Board to Petitioner dated December 29, 2017
8. Petitioner’s calculation of “differentials”
9. Board’s estimate of Petitioner’s retirement benefits dated April 28, 2017
10. Chart reflecting the incentive/differential pay amounts Petitioner received for 2016 and 2017
11. Denial (clarification) from Board to Petitioner dated February 27, 2018
12. Petitioner’s notice of appeal dated March 6, 2018

**FINDINGS OF FACT**

Based on the evidence presented in the exhibits and pleadings, and reasonable inferences drawn from them, I find the following facts:

1. Petitioner served as a Correction Officer for the Commonwealth of Massachusetts from approximately February 16, 1997 until his retirement on June 30, 2017. (Exh. 1.)
2. Petitioner elected to retire under the provisions of M.G.L. c. 32, § 28M, sometimes known as the “20/50” provision because it allows state correction officers with 20 years of service to retire at 50% of the pay they earned during the 12 months immediately preceding retirement. (Exh. 4, 6, 7.)
3. Two annual salary rates were in effect for Petitioner during his last year of service, which ran from July 1, 2016 to June 30, 2017. From July 1, 2016 to July 9, 2016 (9 days), Petitioner was paid according to an annual salary rate of $79,662.18. From July 10, 2016 until he retired on June 30, 2017, Petitioner’s annual salary rate was $82,649.32 (356 days). (Exh. 2.)
4. During 2016 and 2017, Petitioner also received, in addition to his salary, holiday pay for holidays worked, roll call pay, pay for shift differentials, and longevity pay (collectively hereafter referred to as “differential pay”). From January 1, 2016 to June 30, 2016, Petitioner received $2,208.96 in differential pay. From July 1, 2016 to December 31, 2016, Petitioner received $3,985.38 in differential pay. From January 1, 2017 to June 30 2017, Petitioner received $4,373.38 in differential pay. (Exhibit 3.)
5. The Board calculated Petitioner’s average salary by weighting the two different amounts based on the number of days each rate applied during the period July 1, 2016 to June 30, 2017. (Exh. 3.)
6. The Board calculated Petitioner’s differential pay using a different period of reference. The Board referenced the entire calendar year for 2016, reaching back to January 1, 2016, rather than limiting its calculation to the period July 1, 2016 to June 30, 2017. The Board used the entire differential pay earned for the calendar year 2016 to calculate an average daily rate to be used for the six month period July 1, 2016 to December 31, 2016. Because Petitioner received significantly more differential pay in the last six months of 2016 than in the first six months, the Board’s calculation resulted in a lesser amount being credited to Petitioner’s differential pay for July 1, 2016 to December 31, 2016 than he actually earned during those months. (Exh. 3.)
7. Petitioner asked the Board to review the way in which it had calculated the differential pay. (Exh. 6.)
8. On December 29, 2017, the Board confirmed its calculation and advised Petitioner of his appeal rights. (Exh. 7.)
9. Petitioner asked the Board to clarify its opinion, and it did so on February 29, 2018. The Board stated that it had discovered an error in its worksheet that resulted in a lower benefit being calculated. The Board stated that it had corrected that error, but that it stood by its original calculation methodology for the differential pay. The Board advised Petitioner of his appeal rights. (Exh. 11.)
10. Petitioner filed a timely appeal of that decision on March 9, 2018.

**CONCLUSION AND ORDER**

This dispute is a narrow one. There is no disagreement about Petitioner’s salary figures or the way in which the Board used the salary amounts in calculating Petitioner’s compensation. There is also no disagreement about the amount of differential pay that Petitioner received or whether the differential pay should be considered part of Petitioner’s regular compensation: both parties agree that it should. The only dispute is the manner in which the Board calculated the amount of differential pay that it credited to Petitioner for the July 1, 2016 to June 30, 2017 period.

Petitioner retired pursuant to the “20/50” law, M.G.L. c. 32, §28M, a statute that provides enhanced retirement benefits for certain Department of Correction employees. That section provides:

 … [a]ny employee of the department of correction, classified under Group 4 … who has performed services in the department of correction for not less than twenty years shall, at his own request, be retired by said retirement board. Upon retirement under the provisions of this section a member shall receive a retirement allowance to become effective on the date of his retirement. Payments under such allowance shall be made as provided for in section twelve and thirteen *and the normal yearly amount thereof shall be equal to one-half of 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* …

(Emphasis supplied.)

The Board focuses on the words “annual average rate of his regular compensations” to argue that its calculations must reference the six month period prior to July 1, 2016 in order to arrive at an annual average rate for the latter half of the 2016 calendar year. The Board argues that the legislature did not set out a mathematical formula for the Board to use in making these calculations. It states that the Board is attempting to fulfill the legislature’s intent by arriving at a mathematical daily average for the calendar year 2016 of the differential pay the Petitioner received by using payments made seven to eighteen months[[1]](#footnote-1) prior to Petitioner’s retirement. The Board urges that to fail to include the payments Petitioner received thirteen to eighteen months prior to his retirement would be to ignore the directive of the legislature that the calculations be based on the “annual average” rate of compensations.

Petitioner, on the other hand, focuses on the words “during the twelve months of his creditable service immediately preceding the date his retirement allowance becomes effective” to support his argument that the Board exceeded its authority when it included in its calculation the differential pay Petitioner earned thirteen to eighteen months prior to Petitioner’s date of retirement. In the Petitioner’s view, the clear meaning of the statute is that the Board is to consider only the compensation earned in the twelve months immediately before Petitioner retired and base its calculations only on that time period.

There is scant caselaw to assist in this decision. In *Silverthorne v. Massachusetts Teachers’ Retirement Board,* Docket No. CR-03-154 (CRAB decision, November 15, 2004), CRAB interpreted c. 32, § 5(2), a different but similar provision which governs how retirement benefits are to be calculated for those members not covered by the enhanced retirement provision of § 28M. Section 5(2) provides that a member’s retirement allowance

shall … be based on the average annual rate of regular compensation received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest, or on the average annual rate of regular compensation received by such member during the period or periods, whether consecutive or not, constituting his last three years of creditable service preceding retirement, whichever is the greater....

In this case, CRAB was required to decide the proper calculation of a part-time teacher’s retirement benefit so as not to penalize the teacher by combining a part-time creditable service determination with a part-time salary.[[2]](#footnote-2) Two calculation methods to avoid this undue penalty were proposed. In one, the teacher’s years of part-time service would be added together until those part-time years reached an equivalent of three years of full-time service (in this case, that period was four years), and the salary actually received in those three-plus years would then be divided by three to arrive at an average salary for three years. In the other, the teacher’s salary that she would have been paid had she worked full-time for the three year period preceding her retirement would be substituted for the part-time salary that she actually received during that three year period, and that three-year total would be divided by three to arrive at an average salary for three years. The different calculations yielded different results, with the former method resulting in a calculation that was approximately $1100 less than the latter method. CRAB held that the first method that yielded the lower number was the proper method: “Section 5(2) requires that a member's retirement calculation be based on the compensation actually ‘received’ by the member, not upon some theoretical rate that ‘would have been received’ if the facts were different from what actually occurred.” *Silverthorne* at 2. Although the Petitioner argued that the word “rate” supported an extrapolationof her part time salary to a full-time one, the Board rejected that approach stating that “the term ‘average annual rate’ refers to the fact that the calculation is determined as an annual average over a period of three years.” *Id.* at 3.

At first blush, *Silverthorne* would appear to support the Board’s contention that it is permitted to reach back beyond the specified statutory period in order to find Petitioner’s average annual compensation rate. However, the facts of *Silverthorne* distinguish it from this case. In considering how to calculate a part-time teacher’s retirement allowance, CRAB was faced with three conflicting principles. The first, mandated by the Appeals Court in *O’Brien,* was that whatever calculation it chose, CRAB could not arrive at a result that arbitrarily reduced a part-time employee’s allowance.27 Mass. App. Ct. at 1127, n.3. The second was that the statutory language clearly states that the retirement allowance should be based on the average compensation that a member actually received. The final consideration was that this statutory section prescribes a three-year period over which to average the compensation. There was no way for CRAB to harmonize the second and the third principle without compromising the first. If it chose to average the amount of compensation the teacher actually received over the three year period, it would violate the instruction of *O’Brien* to avoid an arbitrary reduction in the teacher’s retirement allowance. If it reached back beyond the three year period to include more years, it ran afoul of the instruction to consider a three year period. CRAB decided to add together the teacher’s work time until it reached the equivalent of three years, determine a gross compensation number for that time period, and average out that number over three years. This was CRAB’s best path. It achieved a solution that treated the part-time teacher fairly while respecting the statutory requirement that the retirement allowance be based on compensation actually received and honoring the spirit of the law that the allowance be calculated with reference to a three year average. *Silverthorne.*

The statutory language of section 5(2)(a) also distinguishes *Silverthorne.* The statutory sections applicable to *Silverthorne* and this case are not identical. The differences in language suggest that the legislature intended a different approach to the calculation of the retirement allowance. Section 5(2)(a) of c. 32 provides that a member’s retirement allowance shall be *based on* an annual rate of the compensation *received by the member* and derived from averaging *a three year period* preceding retirement. In contrast, section 28M states that a correction officer’s retirement shall be *equal to* one-half of his annual rate of compensation *during the twelve month period that immediately precedes* the date of his retirement*.* Section 28M’s language is more specific than that of section 5(2)(a). Use of the words “equal to” suggests less of a calculation than a reference to what was earned. Furthermore, the choice of a twelve month period indicates an intent to significantly limit the frame of reference when contrasted with section 5(2)(a).

The Board urges that I should pay close attention to the words “annual average” in section 28M and give those words great weight. The difficulty with the Board’s argument is twofold. First, it forces me to ignore the even more specific legislative directive that the rate of compensations that should be considered are those compensations earned in the twelve month period immediately preceding the date of retirement. Second, it results in different treatment of the two forms of Petitioner’s compensation. Under the Board’s formulation, Petitioner’s salary information is calculated pursuant to the twelve month period immediately preceding Petitioner’s date of retirement, whereas the differential pay is calculated pursuant to the eighteen month period immediately preceding Petitioner’s date of retirement. The statute makes no such distinction, but refers to all payments as “compensations.” A statute’s plain words cannot be ignored or construed to produce an illogical result. *Hollum, Jr. v. Contributory Retirement Appeal Board,* 68 Mass. App. Ct. 220, 225 (2001). Had the legislature intended that the different types of compensation be treated differently, and had the legislature intended that the differential compensation yield a lesser benefit, it could have so provided. It did not. *See Parker, Jr. v. Barnstable County Retirement Board*, Docket No. CR-95-596 (Div. of Admin. L. App., August 6, 1996 at 5; *aff’d in result by CRAB* February 5, 1997),

I conclude that the Board’s calculation is inconsistent with M.G.L. c. 32, § 28M. The Board’s decision is reversed. The Board is ordered to revise its calculations to consider only the differential pay Petitioner earned during the twelve month period of time immediately preceding the date his retirement allowance became effective.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kristin M. Palace

 Administrative Magistrate

1. January 1, 2016 to December 31, 2016. [↑](#footnote-ref-1)
2. The calculation of the retirement allowance for a member with part-time service requires special consideration. A member working half-time for 20 years contributes the same percentage of her salary as a full time member. If, upon calculation of her retirement benefit, she is credited with only the actual number of years that she worked (i.e., 10 years) and her salary is calculated as the salary that she actually received (i.e., 50% of full-time), then her retirement allowance will be one-quarter of the retirement allowance received by a full-time teacher, even though she worked half-time. Such a result, according to the Appeals Court, is “arbitrary and unfair.” *O’Brien v. Contributory Retirement Appeals Board,* 27 Mass. App. Ct. 1124, 1127 (1989), f.n.3. [↑](#footnote-ref-2)