COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Raymond Barnes,
Petitioner,

v.

Essex Regional Retirement System,
Respondent.

No. CR-21-469

Dated: December 1, 2023

Appearance for Petitioner:
Alan H. Shapiro, Esq.

Appearance for Respondent:
Christopher J. Collins, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner was paid weekly stipends for his work as a police department's K-9 officer. The stipends corresponded to responsibilities of the petitioner's usual, regular, consistent work schedule. As a result, they were not "overtime" within the meaning of the retirement law, and were eligible to be counted within the petitioner's "regular compensation."

DECISION

Police Officer Raymond Barnes appeals from a decision of the Essex Regional Retirement System declining to treat his stipends for work in a K-9 unit as "regular compensation" for retirement purposes. The appeal was submitted on the papers. I admit into evidence exhibits marked 1-7, 7A, and 8-13 in DALA's case file.[1]

[1] Exhibits 1-10 and 7A accompanied Officer Barnes's submissions. Exhibits 11-13 accompanied the board's submissions but were originally numbered 1, 2, and again 1. Given that Officer Barnes agreed to forgo a live evidentiary hearing, I do not admit the affidavit that he enclosed with his supplemental brief.

Findings of Fact

The following facts are not in dispute.

1. Officer Barnes began working for the Lynnfield Police Department in 2011. In 2014, he became the department's K-9 officer. In that capacity, he was responsible for handling, training, caring for, and kenneling a police dog (Ace). He was required to be available to respond to calls with the police dog at any hours of the day or night. (Exhibits 1-3.)

2. In addition to other pay items, Officer Barnes was paid a weekly "K-9 stipend." He was required to file weekly slips requesting these stipends. But the amount of the stipends did not vary from week to week. It did not depend on the number of hours that Officer Barnes actually devoted to K-9-related work. It was calculated as the equivalent of eight hours times the pay rate that Officer Barnes would have received for overtime work. (Exhibits 4-7, 7A, 11, 12.)

3. The police department terminated the K-9 program in mid-2019. Officer Barnes last received a K-9 stipend in June of that year. He retired in August 2021, apparently for superannuation. For purposes of calculating his retirement allowance, the board declined to treat Officer Barnes's K-9 stipends as regular compensation, explaining that "these wages are characterized as overtime payments." Officer Barnes timely appealed. (Exhibits 8-10, 13.)

Analysis

The retirement allowance of a Massachusetts public employee is derived from the employee's "regular compensation." G.L. c. 32, §§ 1, 5(2)(a). Since 2009, the retirement law has defined regular compensation as "wages . . . for services performed in the course of employment." § 1. In turn, wages are "the base salary or other base compensation of an employee . . . ." *Id.* The statutory definition of wages explicitly excludes "overtime," "commissions," "bonuses," and a long list of other items. *Id.* PERAC regulations reiterate these points. 840 C.M.R. § 15.03(3)(a), (f).

The appellate courts have explained that regular compensation is intended to cover all "ordinary, recurrent, or repeated payments." *O'Leary v. Contributory Ret. Appeal Bd.*, 490 Mass. 480, 484 (2022). PERAC's regulations add that regular compensation includes "pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees." 840 C.M.R. § 15.03(3)(b). It is clear that Officer Barnes's K-9 stipends satisfied this collection of requirements: they were ordinary, recurrent, predetermined, non-discretionary, and available to any similarly situated employees.[2]

The dispute focuses on whether the K-9 stipends count as "overtime," a category explicitly excluded from regular compensation. G.L. c. 32, § 1. The meaning of the term "overtime" is therefore pivotal. That term is defined neither in the retirement law nor, apparently, in the labor laws. *See* G.L. c. 32, § 1; G.L. c. 149, §§ 1, 30b, 30c, 33a, 33b, 33c; G.L. c. 151, §§ 1a, 1b, 2.

General principles of statutory interpretation provide that "statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature." *Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012). "Where the statutory language is clear and unambiguous and leads to a workable result, we need look no further." *Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021). When a statute is susceptible to

[2] In its supplemental memorandum, the board notes that K-9 stipends were not available to members of the police department who were not K-9 officers. But such individuals were not "similarly situated." 840 C.M.R. § 15.03(3)(b). Also, observing that Lynnfield eventually ended its K-9 program, the board contends that the K-9 stipends were "salary enhancements . . . which will recur for a limited or definite term." G.L. c. 32, § 1. But even if payments corresponding to specified responsibilities may count as "salary enhancements," the record suggests that the lifespan of the Lynnfield K-9 program was originally open-ended. *See Twohig v. Braintree Ret. Bd.*, No. CR-18-505, 2022 WL 16921472, at *3 (DALA May 20, 2022).

multiple "common meanings," the proper construction is the one that "most appropriately suits [the statute's] intent and purpose." *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015).

The briefs suggest that the term "overtime" may bear multiple meanings. Apparently it is used to denote all of the following: (a) pay at a rate of 1.5 times an employee's lowest pay rate; (b) pay for an employee's work exceeding 40 hours per week; (c) pay for an employee's work exceeding the usual schedule of similarly situated employees; and (d) pay for an employee's work exceeding the employee's own usual schedule.

In an instructive opinion, the Utah Supreme Court concluded that only the last of these four usages is consistent with plain English. A public employee in that case was sometimes required to work up to 43 hours per week. The Utah statute excluded "overtime" from an employee's pensionable "compensation." The intermediate appellate court viewed all hours in excess of 40 per week as overtime. The state supreme court analyzed matters differently:

> [W]e find the meaning of overtime to be plain and unambiguous and therefore have no need to resort to other methods of construction. . . . [Our] understanding of overtime is well illustrated by its definition in several dictionaries. . . . [W]e believe that overtime . . . is properly defined as hours worked in excess of an employee's regularly scheduled work period. . . . [O]ur ruling necessitates a case-by-case determination of an employee's regularly scheduled work period.

O'Keefe v. Utah State Ret. Bd., 956 P.2d 279, 281-82 (Utah 1998) (citations omitted).

The Utah court's plain-meaning analysis is strikingly unambivalent. It is nevertheless prudent to assume that the parties' other usages of the term "overtime" are reasonably "common." *Cf. Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 465 (1948). On that assumption, the decisive question becomes which interpretation "most appropriately suits [the retirement law's] intent and purpose." *Ortiz*, 470 Mass. at 788.

It is easy to see that this inquiry favors the same result, i.e., that overtime means pay for work in excess of the employee's own usual schedule. The purpose of the retirement law's

insistence on "regularity" is to prevent extraordinary, "adventitious" payments from imposing disproportionate burdens on the retirement systems' finances. *See Rotondi*, 463 Mass. at 652; *Pelonzi v. Ret. Bd. of Beverly*, 451 Mass. 475, 479 (2008); *Boston Ass'n of Sch. Administrators & Sup'rs v. Boston Ret. Bd.*, 383 Mass. 336, 341 (1981). Overtime pay implicates this concern when it "hinge[s] on fortuitous additions to [the member's] regular schedule." *Doherty v. Revere Ret. Bd.*, No. CR-16-363, at *5 (DALA Oct. 22, 2021). It is in that scenario that the member's benefits may overbalance his or her contributions. A member working a consistent, predetermined schedule imposes no special risks on the system, even if his or her hours exceed 40 per week or other industry norms.

The case law mostly runs in the same direction. *See generally Doherty*, *supra*, at *4-5 (surveying cases). Two precedents are especially noteworthy.

As long ago as *Smith v. City of Lowell*, 334 Mass. 516 (1956), the Supreme Judicial Court took up the case of an employee who worked a recurring schedule of seven days per week. For the seventh day's work, he was paid "one and one half times the amount he was paid for the sixth day regardless of the number of hours he worked." *Id.* at 518. The Court held that the employee's retirement benefits "should be calculated from his actual compensation," explaining: "None of it could properly be considered payment for 'overtime' because it was payment for his customary and normal work." *Id.* at 519.

In a more recent CRAB case, the petitioner's colleagues worked 40 hours per week, whereas he worked 42.5 hours per week, receiving time-and-a-half pay for his additional hours. CRAB concluded that the petitioner's extra pay was regular compensation, explaining:

> Petitioner's service . . . is within his normal and regularly scheduled workweek. The payments are recurrent and are not a bonus because they are paid for required work each week. While the amount paid for these

> hours is calculated at an overtime rate, the payment is . . . for his regularly scheduled work period.

Abbott v. Plymouth Ret. Bd., No. CR-01-868, at *1-2 (CRAB Jan. 31, 2003). *Cf. Cyrulik v. Adams Ret. Bd.*, No. CR-13-369 (DALA Oct. 2, 2015, *aff'd*, CRAB Feb. 26, 2016) (mandatory overtime *not* paid "on a regular schedule" was not regular compensation); *Buglio v. Fall River Ret. Bd.*, No. CR-19-239, 2022 WL 16921429, at *9 (DALA Mar. 18, 2022) (similar, but also stating that "[o]vertime pay is not regular compensation even if it is ordinary, recurrent, and repeated").

Statutory language, legislative purpose, and prior cases thus converge on an interpretation of "overtime" as pay for an employee's work in excess of his or her own usual work schedule. The board points out that, on this view, the statute's discussion of overtime is superfluous: more general principles would have sufficed to exclude extraordinary pay for extraordinary hours from the scope of regular compensation. But it is equally true that "bonuses," "commissions," and other items that the statute addresses separately could not have counted as "wages" under the general meaning of that term. The Legislature in this instance must have favored belt-and-suspenders caution over strict parsimony. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020); *Martha's Vineyard Land Bank Comm'n v. Board of Assessors of W. Tisbury*, 62 Mass. App. Ct. 25, 28 (2004).

Mr. Barnes received his K-9 stipends in connection with his usual, regular, consistent work schedule. That schedule and the resulting pay amounts did not fluctuate from pay period to pay period. The K-9 stipends therefore were not "overtime" within the meaning of the retirement law.

Conclusion and Order

The board's decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate