

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Frances Bowen-Sanford
Petitioner

v.

Docket No. CR-18-0387
Date issued: May 19, 2023

**Massachusetts Teachers’
Retirement System**
Respondent

Appearance for Petitioner:

Courtney Simmons, Esq.
Tamsin R. Kaplan, Esq.
Davis, Malm & D’Agostine, P.C.
One Boston Place, 37th Floor
Boston, MA 02108

Appearance for Respondent:

Salvatore Coco, Esq.
MTRS
500 Rutherford Ave, Suite 210
Charlestown, MA 02129

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

MTRS’s decision that a retiree had excess earnings under G.L. c. 32, § 91(b) that will be recovered in 12 monthly installments over one year is affirmed in part but remanded for further processing consistent with this decision. G.L. c. 32, § 91(b) states that excess earnings are calculated based on “the salary being paid for the position from which [the member] was retired.” MTRS’s policy of sometimes using the member’s last annual salary adjusted according to the CPI to calculate excess earnings is inconsistent with § 91(b). Under G.L. c. 32, § 20(5)(c) and its own policies, the Board has the discretion to impose a one-year repayment period to recoup the excess earnings. *See Flanagan v. Contributory Retirement Appeal Bd.*, 51 Mass. App. Ct. 862 (2001).

DECISION

Petitioner Frances Bowen-Sanford appeals under G.L. c. 32, § 16(4) the Respondent MTRS's decision that she had excess earnings from 2010 through 2016.

On September 16, 2022, the Petitioner filed her pre-hearing memorandum and a motion for summary decision. I conducted a status conference on September 26, 2022. Afterward, I concluded that the appeal could be decided on the written submissions and ordered the parties to file any further submissions. On October 5, 2022, MTRS filed its opposition to the Petitioner's motion, and its own cross motion for summary decision. On October 21, 2022, the Petitioner submitted a supplemental memorandum.

From the record and the documents submitted by the parties, I enter the following exhibits into evidence:

Ex. 1: Hearing Officer's Report (subdivided into 1(a) through 1(u)), dated May 16, 2018;

Ex. 2: Notice from MTRS to Petitioner, dated May 30, 2018;

Ex. 3: Petitioner's individual contract for period August 29, 2003 through June 30, 2006, dated August 29, 2003;

Ex. 4: Amendment to Petitioner's individual contract extending contract period through June 30, 2007, dated December 29, 2005;

Ex. 5: MTRS Board minutes, dated April 26, 2013;

Ex. 6: Memorandum regarding "Policy on Determination of Post-Retirement Earnings," dated April 26, 2013;

Ex. 7: Petitioner's appeal letter and attachments, dated June 12, 2018;

Ex. 8: Affidavit of Kathleen Perry, dated September 15, 2022;

Ex. 9: MTRS policy, “Recovery of overpayments—non-‘Needham Bill,’” last amended January 29, 2010;

Ex. 10: Petitioner’s calculation of post-retirement excess payments;

Ex. 11: “Needham Bill” policy and implementation plan, last amended July 27, 2018;

Ex. 12: MTRS memorandum regarding Policy on Determination of Post-Retirement Earnings, dated July 20, 2012; and

Ex. 13: Petitioner’s alternative excess earnings calculation.

FINDINGS OF FACT

Based on the evidence presented by the parties, I make the following findings of fact:

1. Frances Bowen-Sanford is a member of the MTRS. (Ex. 1(j).)
2. Ms. Bowen-Sanford first became an MTRS member in September 1963 as a teacher in the Reading Public Schools. (Ex. 1(j).)
3. Ms. Bowen-Sanford worked continuously until her retirement as a full-time teacher or administrator except for a four-year maternity leave. (Ex. 1.)
4. Ms. Bowen-Sanford retired in June 2007 from the Milford Public School system as the Director of Special Education. She had approximately 31 years and 5 months of creditable service. (Ex. 1(j).)
5. As Director of Special Education in Milford, Ms. Bowen Sanford was compensated under an individual contract. Her final contract salary was \$94,296.00. (Exs. 1(j), 3, 4.)

6. After she retired, Ms. Bowen-Sanford worked part-time for Billerica Public Schools as the team chair of the special education department. (Exs. 1(d), 1(g), 1(t).)

7. On June 23, 2017, Billerica notified MTRS that Ms. Bowen-Sanford was working there and that she had possibly exceeded the post-retirement earnings limitations of G.L. c. 32, §§ 91(a) and (b). (Ex. 1(u).)

8. Ms. Bowen-Sanford's post-retirement income from the Billerica Public Schools was as follows:

2007 - \$6,622.20
2008 - \$36,888.59
2009 - \$41,415.66
2010 - \$57,140.61
2011 - \$46,578.45
2012 - \$50,840.58
2013 - \$51,686.51
2014 - \$52,659.30
2015 - \$54,279.40
2016 - \$65,271.10

(Ex. 1(g).)

9. Ms. Bowen-Sanford's retirement allowance for the years 2007 through 2017 was as follows:

2007 - \$35,782.02
2008 - \$72,624.04
2009 - \$72,104.04
2010 - \$72,464.04
2011 - \$72,824.04
2012 - \$73,199.04
2013 - \$73,589.04
2014 - \$73,979.04
2015 - \$74,369.04
2016 - \$74,759.04
2017 - \$74,759.04

(Ex. 1(a).)

10. At MTRS's request, Milford Public Schools provided MTRS with salary amounts for Ms. Bowen-Sanford's successors who held the position from which Ms. Bowen-Sanford had retired, Director of Special Education. Several different people held the job after Ms. Bowen-Sanford, and their salaries were as follows:

2008 - \$110,000.00
2009 - \$110,000.00
2010 - \$113,300.00
2011 - \$113,300.00
2012 - \$93,000.00
2013 - \$94,860.00
2014 - \$100,000.00
2015 - \$110,000.00
2016 - \$113,300.00
2017 - \$118,700.00

(Ex. 1(a).)

11. MTRS initially computed Ms. Bowen-Sanford's post-retirement earnings limit and excess earnings using the actual successor salaries that had been paid for the Milford Director of Special Education position from which she had retired. MTRS arrived at a combined total amount of \$59,776.74 in excess earnings for 2010, 2012, 2013, 2014, 2015 and 2016. MTRS did not find any excess earnings in 2007, 2008, 2009, and 2011. (Ex. 1(a).)

12. On August 9, 2017, MTRS notified Ms. Bowen-Sanford that she was required to repay her excess earnings and informed her of her right to an informal hearing to address the issue. (Ex. 1(a).)

13. On October 5, 2017, Ms. Bowen-Sanford attended a hearing before an MTRS hearing officer. (Ex. 1.)

14. At that hearing, Ms. Bowen-Sanford submitted a letter from Milford Public Schools, dated September 14, 2017, that documented projected annual salaries she

would have been paid if she had remained the Director of Special Education instead of retiring. Milford calculated the projections based on the actual cost of living increases that were given to all Milford administrators subject to further adjustments based on individual performance. The projections were:

2006-2007	\$94,296.00
2007-2008	\$96,181.92
2008-2009	\$99,067.38
2009-2010	\$99,067.38
2010-2011	\$102,039.41
2011-2012	\$104,590.40
2012-2013	\$106,682.21
2013-2014	\$108,815.86
2014-2015	\$110,992.18
2015-2016	\$114,321.95
2016-2017	\$117,180.00
2017-2018	\$120,695.40

(Ex. 8.)

15. The MTRS hearing officer found that Ms. Bowen-Sanford had been paid in 2010 for certain work she performed in 2009. As a result, the MTRS hearing officer treated the \$8,710.68 paid for that work as though it had been paid in 2009 and subtracted an equal amount from the 2010 figure. (Ex. 1.)

16. The MTRS hearing officer recalculated Ms. Bowen-Sanford's excess earnings under MTRS's "Policy on Determination of Post-Retirement Earnings" for members working under individual contracts. That policy, adopted on April 26, 2013 and effective January 1, 2014, provides:

When determining the Salary Being Paid [*sic*] for a member who is not covered by a collective bargaining agreement, unless the member provides sufficient evidence for staff to reliably determine what the member would have earned in a year after his/her retirement, staff shall calculate the member's post-retirement earnings limit using the salary that the member received during his or her last year of employment, indexed each year

according to the Consumer Price Index, as certified by the Commissioner of Social Security.

(Exs. 1, 5, 6.)

17. The MTRS hearing officer determined that MTRS's original calculation method (using the actual salaries paid to Ms. Bowen-Sanford's successors) was not a "reliable determination" of what Ms. Bowen-Sanford would have made in that position, noting the salaries were inconsistent because they were based on a "few different people" holding the position and at one point the salary actually dropped below Ms. Bowen-Sanford's final salary in 2012. (Ex. 1.)

18. The MTRS hearing officer instead concluded that the calculation of Ms. Bowen-Sanford's allowable post-retirement earnings cap should be done using the Consumer Price Index (CPI). (Ex. 1.)

19. Before MTRS adopted that policy in April 2013, it followed a policy in effect since 1997, that used the higher of the replacement employee's salary or the retiree's last salary plus a cost-of-living adjustment based on a different Consumer Price Index published by the Department of Labor. (Ex. 12.)

20. Lastly, the MTRS hearing officer determined that the recovery of excess earnings was not eligible for forgiveness under G.L. c. 32, § 20(5)(c)(3) and recommended recovering the overpayment through either a lump-sum payment or a 12-month offset of Ms. Bowen-Sanford's retirement allowance. (Ex. 1.)

21. The hearing officer's 12-month recovery recommendation would deduct \$4,134.84 from her monthly allowance of \$5,138.61, leaving her with \$1,003.77 per month. (Ex. 1.)

22. MTRS’s Needham Bill policy specifically excludes from eligibility for waiver of repayment “[a]mounts owed by a retired member due to working after retirement in excess of the limits set forth in G.L. c. 32, § 91.” (Ex. 11.)

23. MTRS’s policy for recovery of funds not eligible for waiver of repayment provides:

Overpayments that last for more than one year shall be brought before the Board for review and consideration under the Board’s “Needham bill” policy, unless excluded from Board consideration by that policy. If the Board determines that forgiveness is not warranted, then it shall establish the repayment terms in accordance with said policy.

(Ex. 1(a).)

24. MTRS’s Needham Bill policy provides that the Board “will attempt to structure a repayment plan that is within the member’s ability to pay but that maximizes the amount recovered and minimizes the time to recover it” and “will primarily consider the member’s ability to pay.” (Ex. 11.)

25. On May 16, 2018, the MTRS hearing officer provided a copy of his findings and his recommendations to the MTRS Board. (Ex. 1.)

26. On May 25, 2018, the MTRS Board adopted the hearing officer’s report and recommendations, including a one-year repayment schedule. On May 30, 2018, the Board provided Ms. Bowen-Sanford written notice of its determination and her right to appeal. (Ex. 2.)

27. The Petitioner timely appealed. (Ex. 7.)

CONCLUSION AND ORDER

This appeal considers the extent of Ms. Bowen-Sanford’s excess earnings under G.L. c. 32, § 91. The parties disagree over the calculation. After reviewing the evidence

and applying the plain language of G.L. c. 32, § 91(b), I conclude that neither party's calculation was correct, and remand this appeal to MTRS for recalculation and further processing consistent with this decision.

Chapter 32's rules on post-retirement government work can be confusing. On the one hand, G.L. c. 32, § 91(a) prohibits retirees from continuing to work in paid public positions after the effective date of their retirement, but it also provides a special exception for retired teachers during a critical shortage. At the time of Ms. Bowen-Sanford's retirement, G.L. c. 32, § 91(a) provided, in pertinent part:

No person while receiving a pension, disability pension, or retirement allowance from the commonwealth, or from any county, city, town, district or authority shall, after the date of his retirement be paid for any service rendered to the commonwealth or any county, city, town or district¹

On the other hand, G.L. c. 32, § 91(b) sets forth a broad exception. A person retired and receiving a retirement allowance under chapter 32, like Ms. Bowen-Sanford,

may . . . be employed in the service of the commonwealth, county, city, town, district or authority for not more than nine hundred and sixty hours in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance [she] is receiving do not exceed *the salary that is being paid for the position from which [she] was retired* . . . plus \$15,000

(Emphasis added.)

The parties agree on how much Ms. Bowen-Sanford earned from her post-retirement employer, Billerica, in each applicable year. There is also no dispute over her

¹ Section 91(a) provides its own exception for "any period during which there is a critical shortage of certified teachers available for employment in a school district." There is no evidence that Ms. Bowen-Sanford's post-retirement employer, Billerica Public Schools, submitted a critical shortage waiver during the time of petitioner's retirement. Nor is there any other evidence that there was a critical shortage of certified teachers while she taught there.

retirement allowance figures. They do disagree, however, on the other critical figures required to make the excess earnings calculation. The statute describes these annual amounts as “the salary that is being paid for the position from which [she] was retired.” G.L. c. 32, § 91(b). At first glance, it is hard to understand how the parties could disagree over these amounts, where, as in this appeal, the parties know exactly how much the successors to Ms. Bowen-Sanford in the Director of Special Education position made during the relevant years. Those figures were supplied by her former employer, Milford Public Schools, and are not in dispute. MTRS even used the successor salary figures when it initially performed the excess earnings calculations.

After MTRS conducted its hearing, however, it changed the calculation. Instead, MTRS applied an April 2013 policy for members working under individual contracts, which provides that, unless the member provides sufficient evidence to allow MTRS to determine what the member would have earned, the excess earnings calculation should use the member’s final annual salary adjusted each year using the Consumer Price Index published by the Social Security Administration. The MTRS hearing officer explained the change was made because he concluded that the actual successor salaries would not enable MTRS to reliably determine what Ms. Bowen-Sanford would have made if she stayed in her Milford position. When I asked MTRS at the DALA hearing why it was measuring what Ms. Bowen-Sanford would have made instead of the salary that was actually paid for her position, it explained its reliance on the policy, which was based on Appeals Court dicta in *Bristol County Retirement Bd. v. Contributory Retirement Appeal Board*, 65 Mass. App. Ct. 443, 447 (2006). There, the Court stated: “The statute [§ 91] reflects a clear policy that an employee of a governmental unit in Massachusetts

generally may not retire, receive a pension, accept employment elsewhere in the government, and, by combining her pension and her new compensation, *make more money than if she had not retired.*” *Id.* (Emphasis added.)

Ms. Bowen-Sanford agrees that the calculations should not use the successor salaries, citing *Bristol County*, *supra*, and additionally citing *Pellegrino v. Springfield Parking Auth.*, 69 Mass. App. Ct. 94 (2007), which repeats the policy statement from *Bristol County* but does not go into detail regarding the plaintiff’s excess earnings calculation. Ms. Bowen-Sanford contends that the calculation should instead be based on her final salary adjusted annually using a series of cost-of-living increases that Milford provided to MTRS. These adjustments were based not on the CPI but on actual cost-of-living adjustments the town granted to its administrators in each of the pertinent years. Those Milford adjustments, she urges, provide sufficient evidence to allow MTRS to determine what she would have earned, and, thus, there is no need to adjust the annual salary using the CPI. Ms. Bowen-Sanford further insists that MTRS should apply its pre-2013 excess earnings policy to her pre-2013 earnings. This would mean using the greater of the actual successor salary or the last annual salary adjusted by the CPI published by the Department of Labor.

Although the parties have complicated matters considerably, the analysis here is straightforward. Section 91(b) directs that excess earnings calculations be based on “the salary that is being paid for the position from which [she] was retired.” It does *not* direct that the calculation be based on her final salary annually indexed to a CPI or any other cost-of-living index. Section 91(b) directs the retirement board to base the calculation on the “salary *that is being paid.*” Milford supplied those salary figures, so those are the

figures that should be used. That the Appeals Court stated that the policy goal of § 91 is to prevent retirees from making more money while receiving a retirement allowance and continuing to work in government than if they had not retired does not change the plain language of the statute. Assuming the Appeals Court is right, the method that the Legislature chose to achieve that goal was to compare the retiree's retirement allowance and compensation in the post-retirement job to the salary that is being paid in the position for the year of the calculation. Chief among the reasons that method may have been preferred by the Legislature is that successor salaries are real, hard figures, whatever else their weaknesses may be, and are not subject to the myriad adjustments possible under an approach like the parties want to take.

If MTRS's policies were regulations, I would be bound to follow the regulations and be sure that MTRS complied with its own regulations. But, in this appeal, the MTRS policies are *not regulations*, and I am not required to defer to MTRS's interpretation of the statute. *See Richards, et al. v. Essex Regional Retirement Sys.*, CR-12-463 and CR-12-469, at * 6-7 (DALA Aug. 1, 2014). There is good reason for this different treatment, as internal retirement board policies are not submitted to the Public Employee Retirement Administration Commission for approval² and are not subject to the notice and comment procedures that regulations are subject to and that give regulations the force of law. *See* G.L. c. 30A, §§ 2, 3, 3A.

² *See* G.L. c. 32, § 20(5)(b) (Retirement boards “may adopt by-laws and make rules and regulations consistent with law, which shall be subject to approval as provided for in subdivision (4) of section twenty-one.”); G.L. c. 32, § 21(4) (PERAC or its agent “shall approve any by-laws, rules, regulations, prescribed forms or determinations of any board in order to effectuate [the] purposes [of Chapter 32].”).

Under the formula outlined in § 91(b), the correct method to determine how much Ms. Bowen-Sanford was overpaid is to sum her retirement allowance and her earnings for each calendar year, 2007 through 2017, minus \$15,000 per year and then subtract the resulting annual figures from her successors' annual salaries.³ After adjusting 2009 and 2010, as discussed above, using the correct method yields the following calculations:

Year	Milford Successor Salary	Retirement Allowance	Billerica Reported Income	Income + Allowance - \$15,000	Excess Earnings
2007	\$94,296	\$35,782.04	\$6,622.20	\$27,404.24	N/A
2008	\$110,000	\$72,624.04	\$36,888.59	\$94,512.63	N/A
2009	\$110,000	\$72,104.04	\$41,415.66	\$98,519.70	N/A
2010	\$113,300	\$72,464.04	\$57,140.61	\$114,604.65	(\$1,304.65)
2011	\$113,300	\$72,824.04	\$46,578.45	\$104,402.49	N/A
2012	\$93,000	\$73,199.04	\$50,840.58	\$109,039.62	(\$16,039.62)
2013	\$94,860	\$73,589.04	\$51,686.51	\$110,275.55	(\$15,415.55)
2014	\$100,000	\$73,979.04	\$52,659.30	\$111,638.34	(\$11,638.34)
2015	\$110,000	\$74,369.04	\$54,279.40	\$113,648.44	(\$3,648.44)
2016	\$113,300	\$74,759.04	\$65,271.10	\$125,030.14	(\$11,730.14)
2017	\$118,700	\$74,759.04	\$50,806.80	\$110,565.84	N/A
				TOTAL:	(\$59,776.74)

Ms. Bowen-Sanford had excess earnings in 2010, 2012, 2013, 2014, 2015, and 2016 totaling \$59,776.74.

The Board has chosen to recover the total excess earnings in one year. Ms.

Bowen-Sanford argues that she should be given more than the one year to repay the

³ Ms. Bowen-Sanford argues that if MTRS adds up her 11 years of Billerica earnings, 11 years of her retirement allowance for the same years, and \$15,000 for each of those years, and then subtracts the total salary that she would have earned in Milford, this calculation produces no excess earnings. There is no precedent for calculating excess earnings using this aggregate method. Section 91(b) provides for an annual calculation based on a calendar year. First, during the relevant period, Ms. Bowen-Sanford could not work more than 960 hours in “any calendar year.” Then there is an additional *earnings* limitation no matter how many hours were worked. It is most sensible to assume that the earnings limitation is also based on the calendar year, as both limitations are part of the same sentence. Moreover, annual calculation avoids the administrative difficulties of choosing exactly when to perform these multi-year aggregate calculations instead of doing them each calendar year.

excess earnings to the Board. G.L. c. 32, § 91(c) directs recipients of excess earnings to return the excess to “the appropriate treasurer or other person responsible for the payment of compensation.” Any excess earnings not returned may be recovered in an action of contract by the treasurer or it may be offset from the member’s pension. G.L. c. 32, § 91(c); *Flanagan v. Contributory Retirement Appeal Bd.*, 51 Mass. App. Ct. 862, 869 (2001); *Prevey v. Berkshire County Retirement Sys.*, CR-16-576 (DALA Nov. 30, 2018).

MTRS has the discretion to waive underpayments by and overpayments to members if they meet the requirements of the so-called “Needham Bill,” G.L. c. 32, § 20(5)(c)(3). Such a waiver has been considered to fall within the exclusive discretion of a retirement system, and the Appeals Court has questioned whether it would be reviewable on appeal. *Bristol County*, 65 Mass. App. Ct. at 451. Under MTRS’s “Needham Bill” policy, “[a]mounts owed by a retired member due to working after retirement in excess of the limits set forth in G.L. c. 32, § 91” are specifically excluded from eligibility for waiver of repayment. Ms. Bowen-Sanford is therefore not eligible for a waiver.

MTRS also has a policy for repayment when members do not qualify for a waiver. Under that policy, because the overpayment lasted more than one year the issue was presented to the Board. The hearing officer’s report recommended either a lump sum recovery or monthly recovery over a period of one year. MTRS’s policy provides that the Board “will attempt to structure a repayment plan that is within the member’s ability to pay but that maximizes the amount recovered and minimizes the time to recover it” and “will primarily consider the member’s ability to pay.” After considering the report, the Board ordered a one-year recovery.

If she even has any power to challenge the Board's choice of recovery period, Ms. Bowen-Sanford has provided no evidence that the Board did not consider her ability to pay. Evidently, the Board decided that a lump sum repayment would impose too great a burden on her and decided to recover it over 12 months. This leaves more than \$1,000.00 per month for Ms. Bowen-Sanford. She makes no showing that she is unable to pay back her excess earnings in the year that the Board chose or that it would impose an undue hardship. After all, the reason that she owes the money back is that she made extra-large amounts in the previous years.

For the reasons stated above, MTRS's decision finding that the petitioner, Frances Bowen-Sanford, had excess earnings in violation of G.L. c. 32, § 91 and ordering the recovery of the excess over one year is affirmed in part. The calculation of excess earnings is vacated and shall be replaced with the calculation in this decision. The appeal is remanded to MTRS for further processing consistent with this decision.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: May 19, 2023