

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kari Cincotta,
Petitioner

v.

Docket No. CR-22-0208
Date: Feb. 23, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Kari Cincotta, Esq., *pro se*

Appearance for Respondent:

Teneshia C. Lewis, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The State Board of Retirement properly applied the “anti-spiking” provision of G.L. c. 32, § 5(2)(f) when it reduced Petitioner’s regular compensation in 2020-2021 and 2019-2020 for the purpose of calculating her retirement allowance. Petitioner did not qualify for the exception of an increase in salary “specified by law” because the amount of her salary was not “specified” by the laws that she cites.

DECISION

Petitioner Kari Cincotta timely appeals under G.L. c. 32, § 16(4). She seeks to overturn the State Board of Retirement’s application of the anti-spiking law, G.L. c. 32, § 5(2)(f), to the calculation of her retirement allowance. The Board concluded that Ms.

Cincotta's regular compensation in fiscal years 2019-2020 and 2020-2021 must be reduced.

In scheduling orders dated March 30, 2023 and May 17, 2023, DALA informed the parties that Ms. Cincotta's appeal appeared to be one that could be resolved on written submissions under 801 CMR 1.01(10)(c) and ordered them to submit legal memoranda and proposed exhibits. Neither party objected to the magistrate's order. On June 6, 2023, the Board offered six attachments, labeled R1 through R6. On July 17, 2023, Ms. Cincotta filed a memorandum and three attachments, labeled P1 through P3. I hereby admit these exhibits into evidence as proposed. On August 18, 2023, the Board filed a reply brief.

FINDINGS OF FACT

Based on the documents in evidence, I make the following findings of fact:

1. From September 2, 2008, until her retirement on January 7, 2022, Kari Cincotta was employed with the Committee for Public Counsel Services (CPCS) in its public defender division. (Ex. R1.)
2. Ms. Cincotta was a member of the State Retirement System at all times relevant to this appeal. (Ex. R1.)
3. At the time of her retirement, Ms. Cincotta was a supervising attorney in the public defender division. (Ex. R1.)
4. CPCS increased the salaries of all staff on January 6, 2019 and on December 19, 2021. (Ex. R4.)

5. CPCS is required to pay its public defender division legal staff at “salaries comparable to the salary paid to an attorney employed in a district attorney's office.”

G.L. c. 211D, § 13.

6. Ms. Cincotta’s salary for the period of January 8, 2021, through January 7, 2022, was \$99,889.04. (Exs. R2 & R3.)

7. Ms. Cincotta’s salary for the period of January 9, 2020, through January 7, 2021, was \$99,500.00. (Exs. R2 & R3.)

8. Ms. Cincotta’s salary for the period of January 9, 2019, through January 8, 2020, was \$97,123.29. (Exs. R2 & R3.)

9. Ms. Cincotta’s salary for the period of January 9, 2018, through January 8, 2019, was \$83,580.05. (Exs. R2 & R3.)

10. Ms. Cincotta’s salary for the period of January 9, 2017, through January 8, 2018, was \$82,082.39. (Exs. R2 & R3.)

11. On December 2, 2021, Ms. Cincotta applied for superannuation retirement with an effective retirement date of January 7, 2022. (Ex. R1.)

12. To determine Ms. Cincotta’s yearly retirement allowance, the Board used the average annual rate of regular compensation of the last three years that she was working (2019-2020, 2020-2021, and 2021-2022), which were also her highest annual salary years. (Ex. R3.)

13. The Board determined that Ms. Cincotta’s 2020-2021 regular compensation of \$99,500.00 exceeded the average of the prior two years (\$90,351.67) by more than 10% (110% of the prior two-year average being \$99,386.84). The Board also determined that Ms. Cincotta’s 2019-2020 regular compensation of \$97,123.29 exceeded

the average of the prior two years (\$82,831.22) by more than 10% (110% of the prior two-year average being \$91,114.34). The Board applied the anti-spiking provision to the years 2020-2021 and 2019-2020, thus reducing the salary used to calculate her benefit in those years by \$113.16 and \$6,008.95, respectively. (Ex. R3.)

14. On May 17, 2022, the Board informed Ms. Cincotta that after the anti-spiking provision was applied to her retirement benefit calculation, her monthly benefit would be reduced by \$34.01. (Ex. R5.)

15. On May 25, 2022, Ms. Cincotta timely appealed the Board’s decision. (Ex. R6.)

CONCLUSION AND ORDER

The Board’s application of the “anti-spiking” provision, which required it to reduce Ms. Cincotta’s 2019-2020 and 2020-2021 regular compensation when calculating her retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Ms. Cincotta, who were members of a retirement system before April 2, 2012, § 5(2)(a) directs that a member’s yearly retirement allowance be calculated based on the highest average three-year period of regular compensation. For Ms. Cincotta, these were the years 2019-2020 at \$97,123.29, 2020-2021 at \$99,500.00, and 2021-2022 at \$99,889.04.

Section 5(2)(f), referred to as the “anti-spiking” provision, provides, in relevant part:

In calculating the average annual rate of regular compensation for purposes of this section, regular compensation in any year shall not include regular compensation that exceeds the average of regular compensation received in the 2 preceding years by more than 10 percent.

Ms. Cincotta's salary from January 9, 2020, through January 7, 2021, was \$99,500.00. The average regular compensation for the two prior years, January 9, 2018, through January 7, 2020, was \$90,351.67. A 10% increase to this average would be \$99,386.84. Ms. Cincotta's salary from January 9, 2019, through January 7, 2020, was \$97,123.29. The average regular compensation for the two prior years, January 9, 2017, through January 7, 2019, was \$82,831.22. A 10% increase to this average would be \$91,114.34. Both the 2018-2019 and 2019-2020 salaries exceed the 10% limit imposed by the anti-spiking provision. Accordingly, the Board reduced the salary in the calculations by \$6,008.95 and \$113.16 respectively. These mathematical calculations are not in dispute.

There are several exceptions to the anti-spiking provision's limits, however. Ms. Cincotta argues that the raise she received in the 2019-2020 year qualifies for one of the exceptions: "an increase in salary for a member whose salary amount is specified by law." See G.L. c. 32, § 5(2)(f). Ms. Cincotta contends that her salary is determined under G.L. c. 211D, § 13, which provides that CPCS public defender division legal staff like her must be paid "salaries comparable to the salary paid to an attorney employed in a district attorney's office." And, in turn, the salaries for Assistant District Attorneys are set by G.L. c. 12, § 16, which provides that the salaries shall be "approved by the house and senate committees on ways and means." G.L. c. 12, § 16. CPCS has additionally confirmed that Ms. Cincotta's 2019-2020 raise was the result of an agency-wide increase in salary, the reason for which CPCS did not provide.

For the reasons stated below, Ms. Cincotta's argument is incorrect. Her salary amount is *not* specified by law.

The anti-spiking law was enacted by the legislature in 2011. Acts 2011, c. 176, § 18. It did not originally include the exception based on salary amounts specified by law; that exception was added in 2014. Acts 2014, c. 165, § 68. Ms. Cincotta cites statutes, or “laws,” as the basis for concluding that her salary amount is specified by law. But the question is whether those laws *specify* a salary amount for supervising attorneys in the public defender division.

I have had occasion to address this issue in *Solomon v. Methuen Retirement Board*, Docket Nos. CR-21-0371; CR-21-0274, at *9-10 (DALA Sept. 8, 2023), where a police chief maintained that two statutes specified his pay. I explained:

“[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature” *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003) (quoting *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001)). The classic source of plain meaning is dictionary definitions. Merriam Webster defines “specify” as “to name or state explicitly or in detail.” Merriam Webster’s Collegiate Dictionary (10th ed. 1994). Black’s Law Dictionary provides a similar definition of “specify”: “to state in full and explicit terms; to point out; to tell or state precisely or in detail.” Black’s Law Dictionary (rev. 4th ed. 1968). Following these definitions, for a salary to be “specified by law,” the law must precisely and explicitly state the position’s salary. While G.L. c. 48, § 57G provides a minimum salary for a police chief, it does not explicitly state a salary amount. G.L. c. 41, § 108O is even worse; it sets no limitations at all on the negotiations over the police chief salary, it merely empowers the parties to negotiate. Thus, under the dictionary definitions fairly read, neither statute the parties used *specifies* a salary amount. *Compare, e.g.*, G.L. c. 6, § 1(a) (setting governor salary at \$185,000.00 plus an annual defined adjustment); G.L. c. 11, § 1(a) (setting state auditor salary at \$165,000.00 plus an annual defined adjustment).

PERAC has also offered some guidance. “Th[e] amendment [adding salary amounts specified by law] would address those positions, including certain elected and appointed officeholders, whose salary amount is statutorily set out in a state or federal general or special law. Therefore, raises received through a change in that salary-setting law would receive the same protection as raises received through Chapter 150E contracts.” PERAC Memo #29/2014, issued Aug. 13, 2014. This guidance reasonably assumes that the laws would list specific salaries for

particular positions. Consistent with this understanding, if the law that set the salary did not change, then any increased salary provided is not protected by the exception. Neither G.L. c. 48, § 57G nor G.L. c. 41, § 108O changed during the relevant period. Any fluctuations in Mr. Solomon's annual salaries were based on factors outside those statutes.

As for the aim of the legislature, “[i]n PERAC’s view, the purpose of § 5(2)(f) is to shield retirement systems from the disproportionate burdens of late-breaking upsurges in compensation.” *Willette and Heuston v. Somerville Retirement Bd. and PERAC*, CR-20-282, CR-20-381, at *7 (May 7, 2021). The exceptions to anti-spiking in § 5(2)(f) also must be read with this purpose in mind. *Id.* at *7-8. Neither G.L. c. 48, § 57G nor G.L. c. 41, § 108O specify a particular salary or even a maximum salary. Thus, they do nothing to govern or limit “late-breaking upsurges in compensation.” *Willette and Heuston*, *supra*.

Neither of the statutes that Ms. Cincotta cites list a salary that must be paid. The necessary conclusion is that Ms. Cincotta’s annual salaries during the years in question were not specified by law. Consequently, she is not entitled to that exception to the anti-spiking law.

Finally, Ms. Cincotta argues that applying the anti-spiking law to her in these circumstances is contrary to the intent of the law. She claims that the provision is intended to stop public employees from artificially inflating their compensation to receive larger pensions. While this statement of intent is accurate, the method that the legislature chose to achieve this policy goal was to impose a mechanical limit to increases in salary occurring in the final years of public employment. This provision is agnostic to whether the raise was a deserved one, an agency-wide raise, or one done to inflate a soon-to-be retiree’s pension. The provision’s limits are imposed only if the limits are exceeded and one of the enumerated exceptions does not apply. *See Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021); *see also Stanton v. State Board of Retirement*, CR-18-399 (DALA Aug. 20, 2021); *Dohan v. State Board of Retirement*, CR-22-0104 (DALA Dec. 8, 2023).

To the extent that Ms. Cincotta seeks equitable relief, DALA cannot provide equitable relief contrary to specific statutory language. *See Petrillo v. PERAC*, CR-92-731 (DALA Feb. 15, 1993), *aff'd* (CRAB Oct. 22, 1993).

The Board correctly applied G.L. c. 32, § 5(2)(f) in its calculation of Ms. Cincotta's retirement allowance. The decision of the Board is therefore affirmed. The Board is directed to return to Ms. Cincotta, with interest, any excess withholdings.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Feb. 23, 2024