COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Lynn Clark**,

Petitioner

v. Docket No. CR-13-437

**Massachusetts Teachers’ Retirement System**,

Respondent

**Appearance for Petitioner**:

Lynn Clark

3 Foster Street

Wenham, MA 01984

**Appearance for Respondent**:

Lauren E. Hatch, Esq.

Associate General Counsel

Massachusetts Teachers’ Retirement System

500 Rutherford Avenue, Suite 210

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

Petitioner declined to submit a prehearing memorandum and was deemed to have waived a hearing. She was therefore unavailable to answer questions about the respondent’s contention that her stipend was for a special project, which is not regular compensation. In addition, her stipend did not appear in detail in the collective bargaining agreement. Exclusion of her stipend from regular compensation affirmed.

**DECISION**

 The petitioner, Lynn Clark, appeals the exclusion by the Massachusetts Teachers’ Retirement System (MTRS) of a $300 stipend from her regular compensation.

 On March 13, 2017, the Division of Administrative Law Appeals (DALA) instructed Ms. Clark to file a prehearing memorandum by April 19, 2017. On November 30, 2017, seven-and-a-half months later, DALA had not received the memorandum. On that date, DALA ordered Ms. Clark to show cause why her appeal should not be dismissed for lack of prosecution.

 On January 25, 2018, I found that that Ms. Clark had shown good cause why her appeal should proceed. I wrote in part:

 In her response, Ms. Clark stated that she does “not intend to file a prehearing memorandum” and that because “it is a small issue,” she does “not plan to file anything additional.” I deem this as a motion under 801 CMR 1.01(10)(c) (“Any Party may elect to waive a hearing and submit his case upon written submissions”) and grant it.

 I accept into evidence six exhibits, as follows:

 1. Retirement application, Part 2.

 2. Collective bargaining agreement between the Topsfield School Committee and the Topsfield Teachers’ Association, Sept. 1, 2010 through Aug. 31, 2013.

 3. Special Assignment Posting.

 4. Denial letter.

 5. Appeal.

 6. Letter from Tri-Town School District Superintendent.

 The Massachusetts Teachers’ Retirement System submitted a prehearing memorandum. Ms. Clark submitted her appeal letter, which argued her case.

**Findings of Fact**

 1. Ms. Clark was a teacher in the Topsfield Public Schools, which was part of the Tri-Town School Union. (Exs. 1, 6.)

 2. The collective bargaining agreement (CBA) between the Topsfield School Committee and the Topsfield Teachers’ Association, effective September 1, 2010 through August 31, 2013, listed various “Professional Development, Co-Curricular and Extra-Curricular Positions” for 2004, 2005-06, and 2007-10. (Ex. 2, p. 11.)[[1]](#footnote-1)

 3. The list of such positions included “Teacher to Teacher I” at Level 10 for $300 in 2007-10. (Ex. 2, p. 12.)[[2]](#footnote-2) Level 10 meant that it was expected to take a total of 10 hours to perform. (Ex. 3, p. 1.)

 4. On May 21, 2010, the school superintendent issued a Special Assignment Posting, inviting staff members to apply for various positions and stipends, with the understanding that many of them were subject to the availability of funding from the local budget or state and federal grants. (Ex. 3, p. 1.)

 5. The posting also stated that

the successful completion of committee work is predicated on consistent attendance and participation. Stipends will only be awarded based on regular participation in the completion of the committee’s assignment.

(Ex. 3, p. 1.)

 6. One position was the Code of Conduct Committee, whose stipend was to be determined based on contract negotiations. Its stipend in the 2009-10 school year was $300. (Ex. 3, p. 6.)

 7. The posting described the position as follows:

This committee will meet to help implement the new conduct documents which have been drafted. This could include planning professional development and student assemblies, communicating at JAM’s and staff meetings about implementation progress and evaluating the model and making suggestions about revisions to the model. Seeking 4 representatives from each school. Preference will be given to those who volunteered their time to draft the code of conduct.

(Ex. 1, p. 6.)[[3]](#footnote-3)

 8. As part of Ms. Clark’s application for her intended retirement at the end of the 2012-13 school year, the school district filled in Part 2 of her application on February 19, 2013. (Ex. 1.)

 9. In Part 2 of Ms. Clark’s application, the school district listed a $300 payment to her for the 2010-11 school year for “Teacher to Teacher I – Code of Conduct.” (Ex. 1.)

 10. On August 22, 2013, MTRS excluded this $300 payment from her regular compensation. It reasoned that per diem expenses are not regular compensation. (Ex. 4.)

 11. On August 30, 2013, the Division of Administrative Law Appeals received Ms. Clark’s undated timely appeal. (Ex. 5.)

**Discussion**

 In its denial letter, MTRS reasoned that Ms. Clark’s $300 payment was a per diem payment. It was not.

 In its prehearing memorandum, MTRS ignored the per-diem argument and presented two other ones. (It is permissible for MTRS to shift rationales, because appeals are *de novo*. *Namay v. Contributory Retirement Appeal Board*, [19 Mass. App. Ct. 456](http://sll.gvpi.net/document.php?id=sjcapp:19_mass_app_ct_456), 462 (1985).) MTRS argued that the Code of Conduct Committee’s work was a “special project[] involving tasks which are not performed on a year to year basis,” and therefore not regular compensation. 807 CMR 6.02(2)(a). It also argued that because Ms. Clark was paid hourly, “it stands to reason that...these duties [were] outside of the normal school year or school hours.” Therefore, the stipend for the committee work was not regular compensation. 807 CMR 6.02(2)(b). Two problems exist with this argument. Ms. Clark was not paid hourly. She was paid a $300 stipend for what was *expected* to be 10 hours of work, but no evidence exists about how much time Ms. Clark worked. In addition, the posting stated that stipends would be paid for “regular participation,” but it is unclear whether a staff member who missed some of the committee’s work could still receive the entire stipend.

 The second problem is that it did *not* stand to reason that Ms. Clark performed committee work during the summer. The reference in the posting to “student assemblies” indicates that at least some of the committee’s work was supposed to be during the school year. As for the committee work being performed after school hours, it is unclear whether MTRS meant after classes have ended or after a school building has closed for the day. No regulation bars regulation compensation to teachers for their work after school hours and no evidence or even indication exists that committee members met after school buildings had closed for the day.

 What remains is MTRS’s first reason that the Code of Conduct Committee’s work was a special project that did not continue year to year. No evidence or even indication exists that this was the case. Nonetheless, Ms. Clark has, in effect, made herself unavailable to present her case or counter MTRS’s contention. She did not present her case in a prehearing memorandum, as ordered, and, rather than dismiss her appeal, as I could have under 801 CMR 1.01(7)(g)(2), I allowed it to proceed as if she had waived a hearing.

 MTRS did not have the opportunity to question Ms. Clark about its contention. It could not ask her, for example, how many years the Code of Conduct Committee operated. This was Ms. Clark’s case to make, *Lisbon v. Contributory Retirement Appeal Board*, [41 Mass. App. Ct. 246](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_246), 255 (1996), and she has barely participated in trying to make it. Ms. Clark’s unavailability is one reason that she does not prevail.

 Another reason is that for public school teachers, “regular compensation” includes “salary payable under the terms of an annual contract for additional services.” G.L. c. 32, § 1 (definition of “regular compensation”).

807 CMR 6.02 elaborates on the statute. Regular compensation includes “salary payable under the terms of an annual contract for additional services so long as...[t]he additional services are set forth in the annual contract” and “[t]he remuneration for these services is provided in the annual contract.” 807 CMR 6.02(a) and (c). (An “annual contract” under G.L. c. 32, § 1 and 807 CMR 6.02 is a collective bargaining agreement. 807 CMR 6.01.)

 Although “Teacher to Teacher I” appears in the CBA (Ex. 2, p. 12), the Code of Conduct Committee does not. Neither does the remuneration for Teacher to Teacher I in the year that Ms. Clark received it. Therefore, the $300 stipend was not regular compensation.

**Conclusion and Order**

 Ms. Clark’s $300 stipend was not regular compensation and was properly excluded from her pension calculation. It was not regular compensation because the stipend’s details did not appear in the CBA. In addition, Ms. Clark did not make her case that the stipend was regular compensation and not excludable as payment for a special project that did not continue year to year.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: June 22, 2018

1. It is unclear why the CBA, which began in September 2010, discussed previous school years. [↑](#footnote-ref-1)
2. The evidence did not explain what “Teacher to Teacher I” means. [↑](#footnote-ref-2)
3. The evidence did not explain what “JAM” means. [↑](#footnote-ref-3)