

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

MARK COHEN &	:	Docket No. CR-21-0142
JAMES VACCARI	:	Docket No. CR-21-0269
<i>Petitioners</i>	:	
	:	
v.	:	Date: July 14, 2023
	:	
STATE BOARD OF RETIREMENT	:	
<i>Respondent</i>	:	
	:	

Appearance for Petitioners:

James D. O’Leary, Esq.
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Appearance for Respondent:

Melinda Troy, Esq.
State Board of Retirement
Boston, MA 02108

Administrative Magistrate:

Eric Tennen, Esq.

SUMMARY OF DECISION

The Petitioners, State troopers, were paid \$75/week for having to commute longer than 75 miles to work. Because they commuted in a state vehicle, department policy mandated they carry out their regular duties while commuting—such as wearing a uniform and investigating accidents. Since they performed services for the department during their commute, the \$75/hour they received is considered regular compensation.

DECISION

This appeal concerns a decision by the State Board of Retirement (“Board”) to exclude a \$75/week commuting differential from the Petitioners’ regular compensation (in calculating their retirement allowances). The Petitioners each separately filed their appeals to the Division of

Administrative Law Appeals (“DALA”). They moved to consolidate their cases, which was allowed. Thereafter, DALA determined that there are no disputed issues of material fact, and the matter could be decided on the written submissions. *See* 801 Code Mass. Regs. § 1.01(10)(c).

The Petitioners submitted a memorandum and 10 exhibits on March 17, 2022; the Respondent submitted its memorandum and an additional 10 exhibits on June 7, 2022. I now admit both sets of exhibits as Pet. Exs. 1-10 and Resp. Exs. 1-10.

FINDINGS OF FACT

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

1. The Petitioners were both officers with the Massachusetts State Police (“MSP”). (Pet. Ex. 1.)
2. As employees of MSP, the Petitioners were subject to a collective bargaining agreement (“CBA”) between the Commonwealth of Massachusetts and the State Police Association of Massachusetts. (Pet. Ex. 2.)
3. Article 15 of the collective bargaining agreement is about “Employee Expenses.” It covers various expenses such as mileage reimbursement for use of personal vehicles, travel expenses for temporary assignments, meals, and more. (Pet. Ex. 2.)
4. Article 15, section 1(C) states that an “employee shall not be reimbursed for commuting between their home and office or other regular work location.” (Pet. Ex. 2.)
5. However, Article 15, section 1(D), which the parties refer to as the “commuting differential,” covers long commutes. It provides that:

Effective January 2, 2000, an employee who is required to commute to his/her regularly assigned duty station from his/her home seventy-five (75) or more miles one-way shall receive a weekly differential of seventy-five

dollars (\$75.00). Said differential shall be included in base pay for the purpose of computing overtime, holiday pay, personal leave pay, vacation leave pay, sick leave pay, injured leave pay, and pay for in-service training and such hourly amount shall be considered as regular compensation for pension, retirement and career incentive pay purposes.

(Pet. Ex. 2.)

6. Some MSP employees who commute do so in a department motor vehicle (sometimes referred to as a cruiser).¹ (Pet. Exs. 9 & 10(a).)
7. Mr. Cohen drove a cruiser when he commuted from his home to his assigned station, as he explained in a letter to the Board:

I believe the reason for the travel pay is that once you get in the cruiser, you are actually working. My shift may start at 11pm but I would normally leave home 1.5-2 hrs prior to shift start to make it on time to work. Due to the long commute, it was not uncommon to encounter something to and from work that needed to be addressed.

(Resp. Ex. 3.)

8. From the similar arguments surrounding Mr. Vaccari's petition, and the parties' pleadings, I infer that he too drove a cruiser when commuting. (Resp. Ex. 10, Pet. Exs. 9 & 10(a).)
9. Use of a cruiser in this context is governed by a policy (known as ADM-28: *Department Motor Vehicle*), and lists several obligations:

Members with cruisers, who are traveling to and from home to their duty stations or assignments, shall undertake all necessary activities ordinarily performed during motor patrol.

While commuting in a cruiser, all members are to be attired in the required duty uniform unless their usual duties require otherwise.

¹ It is not clear if every trooper who commutes more than 75 mile *must* use a department motor vehicle.

While commuting with a cruiser, discretion in choosing routes of travel should be used in order to promote the visibility concept on roadways which receive little or no coverage.

A member coming upon an accident scene while in commuting capacity shall . . . notify [the relevant] jurisdiction. . . assist at the scene until relieved. . . [and if] a State Police patrol is not available, he/she shall investigate the accident[.]

(Pet. Exs. 9 & 10 (a).)²

10. The Petitioners did not have to personally pay for gas; MSP issued fuel cards to its employees for “the purchase of fuel for assigned Department vehicles.” (Pet. Ex. 10(a).)
11. Nor did they have to pay for maintenance. Department vehicles were serviced, in house, by the Department Fleet Facility. (Pet. Ex. 10(a).)
12. From December 24, 2017 to May 23, 2020, both Petitioners received \$150 every two weeks for “travel pay” under the “commuting differential.” (Pet. Exs. 10(b) & (c).)
13. The Petitioners both retired in 2019 and began receiving their retirement allowance. (Resp. Exs. 1, 3, 6, & 7.)
14. In March 2021, each Petitioner received a letter from the Board regarding an adjustment to their retirement allowances. (Resp. Exs. 2 & 7.)
15. The Petitioners separately realized that the new calculations no longer included the commuting differential in the calculation of their retirement benefits. (Resp. Exs. 3 & 9.)
16. The Petitioners separately emailed the Board regarding the missing commuting differential. (Resp. Exs. 3 & 9.)

² The original Policy was effective March 1998, and updated in 2016, but in ways not relevant to this case. Both versions contain the identical language quoted above. (Pet. Ex. 9.)

17. The Board responded to each Petitioner using identical language. The Board determined that the commuting differential did not qualify as regular compensation. (Pet. Ex. 3.)

18. Petitioners each timely appealed the Board’s decision to DALA. (Resp. Exs. 5, 10.)

CONCLUSION AND ORDER

“The retirement allowance of a Massachusetts public employee is ‘based on the average annual rate of regular compensation received by such member’ during certain years.”

Baranowski v. MTRS, CR-19-0450, 2023 WL 2806505, (DALA Mar. 31, 2023), *quoting* G. L. c. 32, § 5(2)(a). Regular compensation is “compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.” G.L. c. 32, § 1. The statute further defines “[w]ages” as “the base salary or other base compensation³ of an employee paid to that employee for employment by an employer” not including “overtime, commissions, bonuses other than cost-of-living bonuses...lodging, [and] *travel*.” *Id.* (emphasis added). In addition to “comport[ing] with the other requirements of § 1,” payments must be “‘recurrent,’ ‘regular,’ and ‘ordinary’” to be regular compensation. *See Bulger v. CRAB*, 447 Mass. 651, 658 (2006).

Moreover, to be considered regular compensation, payments must be for service that is a required condition of employment, not voluntary. For example, in one instance, a member was paid for trainings and for arriving thirty minutes before her shift to prepare for roll call. *See Donovan v. State Bd. of Ret.*, CR-16-184, *10 (DALA Oct. 5, 2018). Donovan received payment only when she chose to attend a training or show up for shift preparation. Consequently, DALA

³ “Other base compensation” implies an actual payment and not, for example, the value of using a personal vehicle. *See Pelonzi v. Ret. Bd. of Beverly*, 451 Mass. 475 (2008).

held these payments were not “regular compensation” because they were voluntary services and were not regular or recurrent. *Id.* at 12.

The purpose and practical effect of an employer’s payment to an employee are crucial in determining whether that payment was regular compensation. If an employer issues a payment to an employee to compensate them for services they performed for their employer, then that payment may count as regular compensation; if a payment is meant to be used as reimbursement for expenses, the payment is not for service and is therefore not regular compensation. *Compare and contrast Bulger*, 447 Mass. at 659 (trustees’ payment of housing allowance to the university president was regular compensation because it was meant to compensate the president for his “outstanding job” and “enhance[] his compensation package.”) *with Parente v. State Bd. of Ret.*, 80 Mass. App. Ct. 747, 755 (2011) (annual allowance for state representative’s expenses was not regular compensation because it “was not given...in exchange for her service...but it was provided to assist her in serving the Commonwealth by providing a means to pay for the expenses.”).

Turning to this case, the commuting differential here has all the hallmarks of regular compensation. The Petitioners received their commuting differential payments bi-weekly along with the rest of their base salary, making these payments regular, recurrent, and ordinary. The payments did not depend on whether the Petitioners performed any specific job-related duty; for example, they did not have to engage in an active accident investigation to qualify for the payment. *Contrast Donovan, supra* (Petitioner paid only when she chose to attend training). That is because the Petitioners were on duty from the moment they left their driveway. Under MSP’s policy, troopers commuting in state-owned police cruisers “shall undertake all necessary

activities ordinarily performed during motor patrol.” Performing these services was not voluntary; the policy commands that they “shall” perform them.

One might question how a trooper who just drove to work could be “on duty”? I assume most commutes were non-eventful. The troopers drove to work without stopping for an accident or pulling over a speeding motorist. Nevertheless, they were on duty. MSP policy required they be in uniform,⁴ travel on roadways that receive little or no coverage to promote the visibility concept, and intercede if they came upon an incident requiring their help. This was no different than how they carried out their duties once they arrived at work. Troopers who patrol roadways spend a lot of time just driving, in uniform, being visible, and ready to act. No one would say a trooper is providing service only when he is actively engaging with a suspect or at an accident scene but not when he is simply driving to and from these events.

Reading the CBA together with the various MSP policies supports the interpretation that the commuting differential is meant to compensate officers for services rendered rather than as an expense. To be sure, “a contract cannot override Chapter 32, retroactively or prospectively” by declaring a certain payment as regular compensation. *See Donovan, supra*. “On the other hand, the circumstances of the negotiations and how the parties treat a payment or benefit in a contract may be relevant to determine the parties’ intent or expectations with regard to whether the payment is ‘compensation’ as opposed to a necessary incident to the employment duties or something else.” *Myette et al., v. Wakefield Ret. Bd.*, CR-09-394-397 (DALA Apr. 20, 2010); *Bulger* at 658.

⁴ Wearing a uniform may be both a “duty” in itself (to promote visibility) *and* an indicator that the officer truly must be ready to perform other services, *i.e.*, is already at work.

The specific section containing the commuting differential is unambiguous: it “shall be considered as regular compensation.” The Board counters that because this section is found within Article 15 about “Employee Expenses,” it unambiguously indicates it is an expense. They cannot both be right; that is why context matters. For starters, when the CBA was drafted, the policy requiring commuting officers driving state vehicles to undertake motor patrol duties was in place. The parties were likely aware of that and added the commuting differential to compensate the troopers for this service. I cannot say why the parties decided to insert the commuting differential in the Article about “Employee Expenses,” but that is probably why the commuting differential provision is the only provision within Article 15 that does not characterize its payments as “expenses” or “reimbursements” but rather as “regular compensation.”

Go further and more evidence emerges. Take the section just before, Article 15, section 1(C), which states “[e]mployees shall *not be reimbursed for commuting* between their home and office or other regular work location.” It would be odd for the CBA to exclude reimbursements for commuting in one section and then include reimbursements for commuting in the very next one. If the contract means what it says—that employees are not reimbursed for commuting—then the commuting differential is not a reimbursement for commuting; it is pay for providing service on the way to work.

Finally, the commuting differential was not created to reimburse the Petitioners for commuting related expenses, because they did not need it. They did not pay for gas—they received fuel cards for department vehicles; all vehicle maintenance was taken care of by the Department; and because it was not their personal vehicles, they were not entitled to mileage

reimbursement. *Contrast Casey v. Braintree Ret. Bd.*, CR-09-0650 (DALA Aug. 29, 2014) (\$200 stipend to cover commuting expenses, such as mileage, not regular compensation).

In short, at least as applied to the Petitioners, the commuting differential was regular compensation because it was payment for service. The Board's decision is **reversed**. The Petitioners' retirement allowances will be recalculated to include the commuting differential as regular compensation.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen, Esq.
Administrative Magistrate