COMMONWEALTH OF MASSACHUSETTS

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

Paula J. DeGiacomo,
Petitioner,

v.

State Board of Retirement and **Public Employee Retirement Administration Commission**,
Respondents.

No. CR-20-116

Dated: December 17, 2021

Appearance for Petitioner:
Paula J. DeGiacomo, Esq. (pro se)
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Appearance for the State Board of Retirement:
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Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner, an attorney, received a pay raise in 1991. Her compensation also increased substantially upon her return from private practice to state government in 2017. To calculate the petitioner's retirement allowance, the respondent board applied the anti-spiking provision of § 5(2)(f). The board consequently made downward adjustments to the petitioner's compensation figures for four different years. The adjustments relating to the 1991 pay raise were erroneous, because that raise resulted from a bona fide change in position. The adjustments relating to the 2017 pay increase, however, were proper, because the anti-spiking provision applies even when the pertinent compensation years are not consecutive.

DECISION

Petitioner Paula J. DeGiacomo appeals from a decision of the State Board of Retirement (board) applying the anti-spiking provision of G.L. c. 32, § 5(2)(f) in its computation of her retirement allowance. The board impleaded the Public Employee Retirement Administration Commission (PERAC), and the appeal was submitted on the papers at Ms. DeGiacomo's request. 801 C.M.R. § 1.01(10)(c).[1] I admit into evidence Ms. DeGiacomo's appeal letter, exhibits marked A-E and 1-22, and two affidavits.[2]

Findings of Fact

Having considered the exhibits and the affidavits, I make the following findings.

1. Ms. DeGiacomo, an attorney, was hired in September 1981 as an Assistant Attorney General. She served in the Criminal Appellate Division. (DeGiacomo Aff. ¶ 2.)

2. In September 1989, Ms. DeGiacomo was made Chief of the same unit. As Chief, Ms. DeGiacomo assumed substantial administrative and supervisory responsibilities. She distributed assignments, edited supervisees' briefs, trained new attorneys, reviewed complaints against law-enforcement personnel, and served as the Attorney General's designee in various forums. (DeGiacomo Aff. ¶¶ 6, 11-12, 18-19; Pappalardo Aff. ¶ 10-11; Exhibits 7, 14.)

3. Ms. DeGiacomo's annual salary increased from $47,500 to $57,500 in September 1990. That pay raise is accompanied in the payroll records of the Attorney General's Office by

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[1] The submission of the appeal on the papers on December 8, 2021 mooted Ms. DeGiacomo's then-pending motion for summary decision.

[2] Exhibits A-E are attached to the board's submission of October 5, 2020. The two affidavits and Exhibits 1-17 are attached to Ms. DeGiacomo's submission of November 17, 2020. Exhibits 18-19 are attached to PERAC's submission of December 11, 2020. Exhibits 20-22 are attached to Ms. DeGiacomo's submission of January 14, 2021.

the notation "PR:AAG#/APP," denoting a promotion to the role of Division Chief in an appellate division. (DeGiacomo Aff. ¶ 15; Exhibits 8-10, 16.)

4. In February 1992, Ms. DeGiacomo resumed work as a line Assistant Attorney General, now in the Narcotics Division. She continued to discharge certain appellate and supervisory functions. Her salary decreased to $55,000. (DeGiacomo Aff. ¶ 19; Pappalardo Aff. ¶12; Exhibits 8, 11.)

5. From July 1992 to November 2016, Ms. DeGiacomo worked outside the Massachusetts system, first as an Assistant United States Attorney and then in private practice. (DeGiacomo Aff. ¶ 21.)

6. Ms. DeGiacomo was rehired as an Assistant Attorney General in November 2016, joining the White Collar/Public Integrity Division. Her annual salaries were $85,000 in 2017 and 2018, and $89,250 in 2019. (DeGiacomo Aff. ¶¶ 22-23.)

7. Ms. DeGiacomo retired for superannuation effective September 27, 2019. To compute her retirement allowance, the board used salary years ending during 1991, 1992, 2017, 2018, and 2019. Applying G.L. c. 32, § 5(2)(f) and guidance by email from PERAC, the board made downward adjustments to the compensation figures for all years but 2019. These adjustments resulted from Ms. DeGiacomo's salary increases in 1991 (compared to 1989-1990) and 2017 (compared to 1991-1992). (DeGiacomo Aff. ¶ 26; Exhibits D-E.)

8. The board informed Ms. DeGiacomo of its calculation in a January 24, 2020 letter, and she timely appealed. (DeGiacomo Aff. ¶ 26; appeal letter.)

Analysis

I

The retirement allowance of each Massachusetts public employee is driven by the employee's compensation during a few short years. This methodology exposes the state's

retirement systems to sharp compensation increases, known as "spiking," into the pension-generating years. Spiking tends to yield retirement benefits disproportionate to an employee's retirement contributions over the duration of his or her career.

Certain provisions of law enacted in 2011 focus directly on counteracting spiking. The instant dispute revolves around G.L. c. 32, § 5(2)(f), which caps the pay increases countable in retirement-allowance computations. More specifically, § 5(2)(f) excludes from these computations any pay amount "that exceeds the average of regular compensation received in the 2 preceding years by more than 10 per cent."

This rule is subject to substantial exceptions. They include pay increases "that result[] from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary . . . negotiated for bargaining unit members . . . [or] from an increase in salary for a member whose salary amount is specified by law." *Id.*

II

The board's adjustments to Ms. DeGiacomo's compensation figures for 1991-1992 flowed from her September 1990 pay raise. The parties disagree on whether that raise is governed by § 5(2)(f)'s exception for raises "result[ing] from . . . a bona fide change in position."

A change in position sufficient to satisfy this exception requires a significant shift in the employee's essential functions and responsibilities. *Stanton v. State Bd. of Ret.*, No. CR-18-399, at 5 (DALA Aug. 20, 2021). The evidence shows that Ms. DeGiacomo underwent such a shift upon her promotion to Chief of the Criminal Appellate Division in September 1989. The board concedes as much.

What the board questions is the existence of a *causal* connection between Ms. DeGiacomo's promotion and her raise, given the one-year gap between the two occurrences. A preponderance of the evidence supports Ms. DeGiacomo's position on this point. The pertinent

payroll records tie the raise to the promotion, albeit in institutional shorthand. A considerable delay between a functional promotion and a corresponding pay raise may appear odd, but is ultimately plausible in a budget-constrained bureaucracy. And it is telling that neither the board nor the record suggests any alternative explanation for the September 1990 raise.

Ms. DeGiacomo's pay increase in September 1990 thus resulted from a bona fide change in position, and her compensation amounts in salary years 1991-1992 are exempt from adjustments under § 5(2)(f).

III

A

The board's adjustments to Ms. DeGiacomo's pay amounts in 2017-2018 followed from the difference between her pay when she left the Attorney General's Office and her pay when she returned. Ms. DeGiacomo does not maintain that any of § 5(2)(f)'s exceptions apply.[3] Instead, she reads § 5(2)(f)'s general rule as inapplicable to her circumstances. PERAC disagrees, and its position binds the board. *Grimes v. Malden Ret. Bd.*, No. CR-15-5, at 13 (CRAB Nov. 18, 2016) (retirement boards must follow PERAC's directives).

"[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003) (quoting *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001)). PERAC's interpretive position ultimately serves these goals better than Ms. DeGiacomo's alternative proposal.

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[3] Ms. DeGiacomo originally argued that she underwent a bona fide change in position between 1992 and 2017, but she has withdrawn that claim. She has not suggested that her 2017 pay increase satisfies any of § 5(2)(f)'s other exceptions.

B

Section 5(2)(f) requires an adjustment for purposes of the retirement-allowance computation whenever a year considered in the computation (computable year) exceeds the average of "the 2 preceding years" by more than 10%. The parties agree that "preceding" in this context means immediately prior. *See Merriam Webster's Collegiate Dictionary* 976 (10th ed. 1994). The statute is facially ambiguous as to whether it refers to the immediately prior *computable* years or the immediately prior years *on the calendar* (calendar-consecutive years).

It is important to see that neither of these options matches Ms. DeGiacomo's position. A § 5(2)(f) adjustment is required for any computable year "that exceeds the average of . . . the 2 preceding years by more than 10 per cent." To ensure compliance with this rule, a retirement board must conduct an analysis of each computable year. Under the theory that "preceding years" means preceding calendar-consecutive years, Ms. DeGiacomo's regular compensation in 2017 would need to be compared to her regular compensation in 2015-2016, which was zero. *See* G.L. c. 32, § 1 (limiting "regular compensation," through the definition of "employer," to government pay). The result would be a more dramatic downward adjustment of Ms. DeGiacomo's compensation figures.

A comparison between a computable year and calendar-consecutive preceding years outside state employment might be textually compatible with § 5(2)(f). But it is no surprise that neither party advocates for that approach. It is inordinately more likely that the phrase "preceding years" means preceding computable years, which is PERAC's interpretation.

What Ms. DeGiacomo's reading of the statute proposes is an implicit condition: that § 5(2)(f) adjustments are necessary only when the two preceding computable years *are also* the two preceding calendar-consecutive years. But there is no real basis for that condition in the statutory text. Ms. DeGiacomo suggests that § 5(2)(f) could have specified that it applies to the

two prior years "whether consecutive or not," a phrase that § 5(2) uses elsewhere. But the context of each such usage is a formula that chooses between a certain number of "consecutive years" and the same number of years of service, "whether consecutive or not." The phrase "whether consecutive or not" in those passages is thus a stylistic counterpoint. It does not plausibly suggest that every other time the retirement law refers to a grouping of years, it intends the unspoken proviso "as long as they are consecutive." *See Hartnett v. Boston Ret. Syst.*, No. CR-17-218, at 9 (DALA Apr. 27, 2018) (discussing an analogous aspect of § 5(2)(a)).

C

The implicit condition that Ms. DeGiacomo proposes also is not necessary to effectuate legislative intent and prevent illogical results. *Hatch*, 438 Mass. at 622.

Section 5(2)(f) reflects mixed legislative motivations. Pension-impacting pay spikes imbalance a retirement system's finances no matter how pure the accompanying intentions are. Even so, the exceptions to § 5(2)(f), including the exception for bona fide promotions, reflect the Legislature's special interest in neutralizing abusive, pension-oriented artifices. *Willette v. Somerville Retirement Board*, No. CR-20-282, at 8 (DALA May 7, 2021). Then again, the Legislature did not fixate on subjective intent and individual fairness. With an eye toward administrability, § 5(2)(f) tolerates some detriment to a substantial universe of blameless retirees. *Perry v. MTRS*, No. CR-19-362, at 3 (DALA Oct. 29, 2021).

It is true, as Ms. DeGiacomo suggests, that an employee's return to state government after a long hiatus will often yield a pay increase in nominal terms. The "spike" in such circumstances may largely reflect inflation. Yet that spike may still impose an unexpected deficit on a retirement system that otherwise would be paying benefits derived from dated compensation amounts. A member's pension-boosting return to service near retirement is therefore within the orbit of § 5(2)(f)'s concerns.

To be clear, the respondents do not suggest that Ms. DeGiacomo returned to the Attorney General's Office for any artificial purpose. Her career has featured a conspicuous element of admirable public service. But the Legislature did not tie § 5(2)(f) to individual circumstances. The fact is that Ms. DeGiacomo's case fits roughly within the outline of a "mischief or imperfection" that the statute is built to address. *State Bd. of Ret. v. Finneran*, 476 Mass. 714, 719 (2017) (quoting *Ret. Bd. of Somerville v. Buonomo*, 467 Mass. 662, 668 (2014)).

It is also worth recognizing that § 5(2)(f)'s solution is not snugly tailored to the case of a long hiatus amid a member's computable years. The provision's structure implies that certain raises are normal and should not be considered "spikes." The test designed to identify normal raises is a 110% cap on the ratio between each computable year and the two before it. It is unlikely that the exact same formula would be equally effective at sifting normal raises from spikes when it is transposed to the context of computable years separated by a long break.

But Ms. DeGiacomo's alternative proposal is an even worse fit for the statute's objectives. On her view, § 5(2)(f)'s applicability depends on the two preceding computable years also being the two preceding calendar-consecutive years. That condition would mean that § 5(2)(f) stands down whenever a non-computable year interrupts the retirement-facing chapter of a member's career. A member departing from government could therefore return even one year later to the same public position, accept an immoderate salary hike, and incur no § 5(2)(f) adjustment at all. That result would be far less compatible with legislative intent than the imperfect, 110%-based test that PERAC advances. *See Hartnett*, *supra*, at 7 (making an analogous point in the § 5(2)(a) context).

D

PERAC's view that § 5(2)(f) applies to non-calendar-consecutive years is reflected in a published memorandum. PERAC Memo No. 38 / 2012, at 7 (June 21, 2012). In these

proceedings, a PERAC memorandum is considered "an 'interpretive' rule, entitled to persuasive weight." *Grimes*, *supra*, at 13 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The memorandum in question does not present argumentation or authority in support of the pertinent proposition. It does, however, show thorough consideration overall, and thus may add a measure of support to the instant analysis.

Conclusion and Order

Ms. DeGiacomo's compensation increase in the salary year ending during 1991 resulted from a bona fide change in position. Her retirement allowance must be recomputed accordingly. The board's decision is REVERSED to that extent, and otherwise AFFIRMED.

SO ORDERED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate