

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

**Division of Administrative Law Appeals**

**Joanne Derr,**  
Petitioner

v.

Docket No. CR-21-0337  
Date: May 19, 2023

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

Joanne Derr, *pro se*

**Appearance for Respondent:**

Yande Lombe, 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)(a). It calculated Petitioner’s retirement allowance using a five-year average instead of three years because her new position, which she occupied for less than 4 years, entailed a more than 300% increase in pay over her prior position with the Commonwealth. The Board properly applied the “anti-spiking” provision of G.L. c. 32, § 5(2)(f) when it reduced Petitioner’s regular compensation in 2005-2006, and 2006-2007 because she did not have a bona fide change in position during the 2005-2006 and 2006-2007 years and there is no exception for pay raises made to correct pay inequity.

**DECISION**

Petitioner Joanne Derr timely appeals under G.L. c. 32, § 16(4). She seeks to overturn the State Board of Retirement’s application of the two anti-spiking laws, G.L. c. 32, §§ 5(2)(a) and 5(2)(f), to the calculation of her retirement allowance. The Board concluded that Ms. Derr’s retirement allowance must be determined using the extended 5-year average under G.L. c. 32, § 5(2)(a) and that her regular compensation for the years 2005-2006 and 2006-2007 must be reduced under § 5(2)(f).

On March 24, 2022, DALA informed the parties that Ms. Derr’s appeal appeared to be one that could be resolved on written submissions pursuant to 801 CMR 1.01(10)(c) and ordered them to submit legal memoranda and proposed exhibits. Neither party objected to the magistrate’s order. Ms. Derr argued her position in a letter that I have labeled Petitioner Letter. The Board filed its argument and offered six proposed exhibits. I have admitted these exhibits into evidence as proposed.

**FINDINGS OF FACT**

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

1. From July 23, 1979, until March 27, 1987, Joanne Derr was employed by the Massachusetts Rehabilitation Commission office. (Ex. 1.)
2. From November 1, 2004, until August 2, 2008, Ms. Derr was employed by the University of Massachusetts Medical School. (Ex. 1.)
3. Ms. Derr was a member of the State Retirement System during both periods. (Ex. 1.)
4. From prior to December 29, 1985, until June 1, 1986, Ms. Derr’s salary was \$26,341.71. (Ex. 3.)

5. From June 1, 1986, until she left her position on March 27, 1987, Ms. Derr's salary was \$30,977.14. (Ex. 3.)
6. On November 1, 2004, Ms. Derr began her position with the University of Massachusetts Medical School. Her starting salary was \$150,000.00. (Ex. 3.)
7. On June 26, 2005, Ms. Derr's salary increased to \$168,000.04. (Ex. 3.)
8. On June 25, 2006, Ms. Derr's salary increased to \$176,400.12. (Ex. 3.)
9. On June 24, 2007, Ms. Derr's salary increased to \$186,984.20, where it remained until she left her position. (Ex. 3.)
10. Ms. Derr filed for retirement with an effective date of May 5, 2021. (Ex. 1.)
11. Ms. Derr worked for the University of Massachusetts Medical School for 3 years and 9 months. To calculate Ms. Derr's last five years of service, as required to see if the anti-spiking provision in § 5(2)(a) is applicable, it was necessary for the Board to add one year and three months of service from her employment with the Massachusetts Rehabilitation Commission. (Ex. 3.)
12. The Board determined that Ms. Derr's earnings for the period of December 29, 1985, through December 28, 1986, was \$29,021.37. (Ex. 4.)
13. The Board determined that Ms. Derr's earnings for the period of December 29, 1986, through August 3, 2005, was \$122,901.28.<sup>1</sup> (Ex. 4.)
14. The Board calculated that Ms. Derr's salary for the period of August 4, 2005, through August 3, 2006, was \$168,920.60. Because of the "bona fide change in

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<sup>1</sup> This value is less than Ms. Derr's starting salary as it prorates the eight months' salary from her position at UMass Medical School with four months' salary from her position with Massachusetts Rehabilitation Commission.

position” to her UMass position, Ms. Derr’s prior two-year average salary was treated as \$150,000.00 (her UMass salary). A 10% increase over this average salary was \$165,000.00. (Ex. 4.)

15. The Board determined that Ms. Derr’s salary from August 4, 2006, through August 3, 2007, was \$177,589.02. The average salary of the prior two years was \$159,460.30. A 10% increase over this average salary was \$175,406.33. (Ex. 4.)

16. The Board determined that Ms. Derr’s salary from August 4, 2007, through August 2, 2008, was \$186,984.20. The average salary of the prior two years was \$173,254.81. A 10% increase over this average salary was \$190,580.29. (Ex. 4.)

17. Because the difference between Ms. Derr’s salary from December 29, 1985, through December 28, 1986 (\$29,021.37) and from December 29, 1986, through August 3, 2005 (\$122,901.28) exceeded 100%, the Board determined that the anti-spiking provision of G.L. c. 32, § 5(2)(a) applied to the calculation of her retirement allowance. (Ex. 4.)

18. Under § 5(2)(a), the Board was forced to use the average annual rate of regular compensation received by her during her last five years of creditable service (1985-1986, 1986-2005, 2005-2006, 2006-2007 and 2007-2008), as opposed to the average of her three highest years of creditable service. (Ex. 4.)

19. The Board determined that the anti-spiking provision of G.L. c. 32, § 5(2)(f) also was triggered in the years 2005-2006 and 2006-2007. (Ex. 4.)

20. On August 31, 2021, the Board informed Ms. Derr that her retirement allowance would be reduced because of the application of G.L. c. 32, § 5(2)(a) and G.L. c. 32, § 5(2)(f) to her retirement allowance calculation. (Ex. 6.)

21. On September 7, 2021, Ms. Derr timely appealed the Board's decision.  
(Appeal Letter.)

### CONCLUSION AND ORDER

The Board's application of G.L. c. 32, § 5(2)(a), which required the Board to use the five-year average salary instead of the three-year average salary, is affirmed. The Board's application of the G.L. c. 32, § 5(2)(f), which required it to reduce Ms. Derr's 2006-2007 and 2007-2008 regular compensation when calculating her retirement allowance, is also affirmed.

G.L. c. 32, § 5(2)(a) provides, in relevant part:

[I]f in the 5 years of creditable service immediately preceding retirement, the difference in the annual rate of regular compensation between any 2 consecutive years exceeds 100 per cent, the normal yearly amount of the retirement allowance shall be based on the average annual rate of regular compensation received by the member during the period of 5 consecutive years preceding retirement.

Put simply: if in the last five years of creditable service, a member's salary doubles between two consecutive years of service, then the member's retirement allowance will be based on the last five years of regular compensation (rather than three years, *see* G.L. c. 32, § 5(2)(a)). The phrase "consecutive years" has consistently been read to mean consecutive creditable time, and not strictly consecutive calendar years. *See DeGiacomo v. State Bd. of Retirement*, CR-20-116 (DALA Dec. 17, 2021); *Hartnett v. Boston Retirement Sys. and PERAC*, CR-17-218 (DALA April 27, 2018); *see also* PERAC Memo #38/2012, issued June 21, 2012 (example 3 of the memo describes a hypothetical where a member's five creditable years were not continuous by calendar year but were considered consecutive creditable years of service). Ms. Derr's salary was \$29,021.37 from December 29, 1985, to December 28, 1986, and was \$122,901.28 the following

creditable year, well more than the 100% increase that triggers application of Section 5(2)(a).

Ms. Derr argues that her bona fide change in position from the Rehabilitation Commission to UMass exempts her from application of § 5(2)(a). While there are exceptions to the anti-spiking provision in G.L. c. 32, § 5(2)(f), there are no exceptions enumerated in § 5(2)(a). This is obviously by design. Section 5(2)(a) is meant to catch situations just like this one, where a brief stay in a significantly higher paying position would unnaturally inflate the retirement allowance a member who worked a long time in a low paying position would get, thus putting inordinate strain on the retirement system.

Ms. Derr is therefore subject to the 5-year salary average under § 5(2)(a). Those five years occurred during 1985-1986, 1986-2005, 2005-2006, 2006-2007 and 2007-2008. Her regular compensation was \$29,021.37, \$122,901.28, \$168,920.60, \$177,589.02, and \$186,984.20 for each respective year.

This is not the end of the calculation, however, because Ms. Derr's retirement allowance is also affected by the other anti-spiking provision in § 5. Section 5(2)(f) 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.

Usually, the average regular compensation is determined by the prior two years of creditable service. When a bona fide change in position occurs, the average of the previous two years' compensation will be set equal to the annual rate of the new position for the year of, and the year after, the position change. *See* PERAC Memo #16/2014, issued April 25, 2014. The Board calculated that Ms. Derr's salary for the period August

4, 2005 through August 3, 2006 was \$168,920.60. Because of the bona fide change in position, Ms. Derr's prior two-year average salary was treated as \$150,000.00. A 10% increase over this average salary was \$165,000.00. This leaves an excess of \$3,920.60 and means that her regular compensation for purposes of calculating her retirement allowance is \$165,000.00. For the period August 4, 2006 through August 3, 2007, her regular compensation was \$177,589.02. The average salary of the prior two years was \$159,460.30. A 10% increase over this average salary was \$175,406.33. This leaves an excess of \$2,182.69 and means that her regular compensation for that period is \$175,406.33.

There are several exceptions to the anti-spiking provision of § 5(2)(f). Ms. Derr argues that her salary change was due to a bona fide change in position. Additionally, she argues that the increase in her salary was due to a pay equity correction and is requesting equitable relief.

Addressing Ms. Derr's claim about a bona fide change in position, there is no doubt that a bona fide change in position occurred when Ms. Derr was hired for her new role at the University of Massachusetts Medical School so many years after her earlier position. As described above, the Board correctly accounted for that change in position in its calculations by treating Ms. Derr's minimum salary as \$150,000.00 for the year of, and the year after, her position change. *See* PERAC Memo #16/2014, *supra*. The anti-spiking provision applied to her 12.6% pay raise in 2005 and her subsequent 5% pay raise in 2006, which, when combined with the previous pay raise, brought her pay higher than 110% of her prior two-year salary average. There is no evidence that the pay raises that Ms. Derr received at UMass were based on any change in position or duties.

Rather, Ms. Derr claims that these raises were in connection with a gender pay equity adjustment. Ms. Derr appears to understand that salary increases to correct for pay inequity are not an enumerated exception to the anti-spiking law.<sup>2</sup> See *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019). She therefore requests equitable relief. It is easy to see Ms. Derr's point that such raises ought not be subject to the anti-spiking law, but neither DALA nor CRAB have equitable powers. *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Healy v. MTRS*, supra; *Petrillo v. PERAC*, CR-92-731 (DALA Feb. 15, 1993), aff'd (CRAB Oct. 22, 1993).

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

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ *Kenneth J. Forton*

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Kenneth J. Forton  
Administrative Magistrate

DATED: May 19, 2023

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<sup>2</sup> This is not the first time DALA has considered whether raises to achieve pay equity, as mandated by the legislature, are exempt from the anti-spiking law. The Pay Equity Act does not exempt such raises from the application of the anti-spiking law. Any fix must come from the legislature. See *Shor v. State Bd. of Retirement*, CR-21-0331, at \*5-6 and n.1 (May 12, 2023).