

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

ROBERT DESROSIERS,

Petitioner-Appellant

v.

WORCESTER REGIONAL RETIREMENT SYSTEM,

Respondent-Appellee.

CR-18-0596

DECISION

Petitioner Robert Desrosiers appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the Worcester Regional Retirement System's refusal to classify the portion of his salary he received based on a Grant Agreement that his employer (the Town of Paxton, Massachusetts) made with Anna Maria College (AMC) as "regular compensation." The magistrate admitted nineteen exhibits and issued a decision on July 10, 2020 based on the written submissions of the parties pursuant to 801 CMR 1.01(10)(c). Chief Desrosiers filed a timely appeal to us.

After giving careful consideration to all the evidence in the record and the arguments presented by the parties, we incorporate the DALA decision by reference and adopt the magistrate's Findings of Facts 1 – 29 as our own with changes noted.¹ We affirm and add the following comments.

Background

¹ We amend Finding of Fact 20 to include the following language: Section 3D of the Grant Agreements states "AMC recognizes and agrees that the final decision making with regard to the costs incurred by the Town in furtherance of this Agreement shall in all events be with the Town and approval of the Town's Board of Selectmen." Ex. 7, p.40.

Robert Desrosiers served as Chief of Police in the town of Paxton, Massachusetts for over a decade and a half until his retirement in 2018. In 2011, the Town of Paxton entered into a Grant Agreement with Anna Maria College, a private, not-for-profit college located in the Town, whereby AMC—having “disband[ed]” its own Public Safety Department—agreed to fund “additional public safety resources,” which the Town would provide for the benefit of “AMC and the other occupants of Paxton.”² Under the Grant Agreement, the AMC campus would be incorporated into the public safety areas the Town policed and the Town would use the bulk of the grant money to cover expenses associated with the new public safety coverage of AMC, including the costs to hire additional full-time and part-time officers who would be “predominantly assigned to the AMC campus.”³ The Grant Agreement also required the Chief of Police to “from time to time identify an officer of the Town’s Police Department to serve as AMC Liaison,” and mentioned that this Liaison and the other police and public safety officers who would be hired under the Agreement would be subject to supervision by the Chief, like all other Town police officers.⁴

The Town also agreed to provide AMC with a budget of how it planned to spend the AMC grant—though AMC “recognize[d] and agree[d] that final decision making with regard to the costs incurred by the Town in furtherance of this Agreement shall in all events be with the Town and approval of the Town’s Board of Selectmen.”⁵ The Town decided to spend part of AMC’s grant on increasing the “salary” for the Chief of Police position, eventually contributing over \$28,000 in 2018, and likewise increased the salaries of several other supervising officers and of a secretary, as stated in the 2011 Grant Agreement, and the 2016 renewal of the same.⁶

As Chief Desrosiers prepared to retire, WRRB personnel initially provided Chief Desrosiers with a calculation of his retirement allowance that treated the portion of his salary stemming from the AMC grant as part of his base pay.⁷ However, WRRB ultimately determined that the portion of Chief Desrosiers’ salary that stemmed from the AMC Grant Agreement was not ‘regular compensation’ and thus could not count towards his annualized retirement allowance.

² Exhibits 7, 8 (p.35, 46), FF 9.

³ Exhibits 7, 8, p.36. Given that Exhibit 8 (the 2016 Grant Agreement) reproduced exactly the language quoted throughout this decision, only the page numbers for Exhibit 7 (the 2011 Grant Agreement), are cited.

⁴ Exhibits 7, 8, p.36.

⁵ Exhibits 7, 8, p.38.

⁶ FF 21.

⁷ Exhibits 10, 11, 12, FF 23, 24.

Accordingly, Chief Desrosiers filed timely appeals to DALA, and, after DALA ruled against him, to CRAB.

Discussion

Definitions of Regular Compensation. Chief Desrosiers' appeal turns on the singular question of whether the salary increases he received as a result of the Town of Paxton's Grant Agreement with Anna Maria College should be classified as "regular compensation." To answer this question, it is first necessary to elucidate how legal, regulatory, and judicial authorities have defined the term. M.G.L. c. 32, § 1, defines "regular compensation" as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." 'Wages' are defined in the same section as:

the base salary or other base compensation of an employee paid to that employee for employment by an employer; provided, however, that 'wages' shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, indirect, in-kind or other payments for such items as housing, lodging, travel, clothing allowances, annuities, welfare benefits, lump sum buyouts for workers' compensation, job-related expense payments, automobile usage, insurance premiums, dependent care assistance, 1-time lump sum payments in lieu of or for unused vacation or sick leave or the payment for termination, severance, dismissal or any amounts paid as premiums for working holidays, except in the case of police officers, firefighters, correctional officers and employees of a municipal department who are employed as fire alarm signal operators or signal maintenance repairmen money paid for holidays shall be regarded as regular compensation, amounts paid as early retirement incentives or any other payment made as a result of the employer having knowledge of the member's retirement, tuition, payments in kind and all payments other than payment received by an individual from his employing unit for services rendered to such employing unit, regardless of federal taxability.⁸

The Public Employee Retirement Administration Commission (PERAC) has also promulgated a regulation further defining 'regular compensation' as:

⁸ M.G.L. c. 32, § 1, "Wages,"

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIV/Chapter32/Section1>

[T]he base salary or other base compensation of an employee paid to that employee for employment by an employer including pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees, provided, that “wages” shall include payments made by the employer to the employee because of the character of the work, because of the employee’s length of service, because of the time at which the work takes place as a condition of employment in a particular position, because of educational incentives, and payments for holding the training, certification, licensing or other educational incentives approved by the employer for the performance of services related to the position the employee holds and payments made by the employer to the employee calculated as a percentage of base pay.⁹

Massachusetts courts have also helped to define the term. While many of the relevant decisions interpreting the phrase ‘regular compensation’ pertain to payments issued before the state legislature changed its legal definition in 2009 (albeit not significantly contradicting previous understandings), decisions relating to payments issued after the change have continued to cite the major interpretive criteria utilized beforehand, suggesting these decisions are still relevant and good law.¹⁰ In *Boston Ass’n of Sch. Adm’rs & Supervisors v. Boston Retirement Bd*, for example, the Supreme Judicial Court emphasized that the term “regular compensation” “refers to remuneration geared to work or services performed” and “imports the idea of ordinariness or normality as well as the idea of recurrence,” in juxtaposition “with ‘overtime,’...the compendious ‘bonus,’” and “extraordinary ad hoc payments.”¹¹ Similar language has been repeatedly invoked in other decisions interpreting the term, emphasizing the importance of payments being regular and recurrent, and made for services an employee was required to perform as part of their employment.¹²

Based on these definitions, in order to qualify as ‘regular compensation,’ a payment must be “received by an individual from his employing unit for services rendered to such employing

⁹ 840 CMR 15.03(3)(b), <https://www.mass.gov/regulations/840-CMR-1500-miscellaneous>

¹⁰ See, e.g. the Supreme Judicial Court’s citation of cases such as *Boston Ass’n of Sch. Adm’rs & Supervisors v. Boston Retirement Bd* (383 Mass. 336), *Pelonzi v. Retirement Bd. of Beverly* (451 Mass. 475), *Bulger v. CRAB* (447 Mass. 651), *Hallett v. CRAB* (431 Mass. 66), and *Rotondi v. CRAB* (463 Mass. 644) in post-2009 decisions such as *PERAC v. CRAB* (often referred to as the ‘Vernava’ decision), (478 Mass. 832).

¹¹ *Boston Ass’n of Sch. Adm’rs & Supervisors v. Boston Retirement Bd* (cited above). A similar quotation is cited in the *Vernava* decision (cited above).

¹² See e.g. the cases cited in footnote 9.

unit” (G.L. c.32 §1) and must further be “recurrent,” “regular,” and “ordinary” (*Boston Ass’n and Bulger v. CRAB*) and generally “pre-determined, non-discretionary, [and] guaranteed,” (840 CMR 15.03(3)(b)), in juxtaposition with “bonuses” and “amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term” (G.L. c.32 §1).¹³

Chief Desrosiers’ AMC Payments. Based on the plain language of the statutory definition of the term “wages,” binding rulings issued by the Supreme Judicial Court and Appeals Court, and interpretive regulations issued by PERAC, CRAB and DALA have long maintained that, in order for a payment to qualify as “regular compensation,” it must be a required term of an employee’s employment whose amount, frequency, and time of distribution are fixed and not subject to an employer’s discretion.¹⁴ The additional compensation Chief Desrosiers derived from the AMC Grant Agreement does not meet this requirement. As the Chief’s appellant brief expressly notes, the Town was in no way bound or restricted to use the funds it received from the AMC Grant Agreement to compensate him at all (let alone a particular amount), given that the Agreement specified that “final decision making with regard to the costs incurred by the Town in furtherance of this Agreement shall in all events be with the Town and approval of the Town’s Board of Selectmen.”¹⁵ While the Town agreed to submit a “proposed budget” that would provide a “reasonable estimations of the cost[s]” it would “incur,” the Grant Agreement specified both that this budget could be modified in the course of negotiations with AMC and that the Town could ultimately spend its grant money in whatever fashion it saw fit.¹⁶ The lack of a structure providing a “guarantee[]” that Chief Desrosiers would receive a “predetermined” amount of “payment[]” prevents CRAB from deeming the additional money he received from the AMC Grant Agreement to be “regular compensation” and render it much more

¹³ For the notion that such payments should be “recurrent,” “regular,” and “ordinary,” see, e.g. *Bulger v. CRAB* (cited above), citing *Boston Ass’n of Sch. Adm’rs & Supervisors v. Boston Retirement Bd* (cited above).

¹⁴ For the use of this standard in CRAB and DALA decisions, see *Cusolito v. Middlesex County Retirement Board* (CR-19-0191), *Bravacos v. Massachusetts Teachers’ Retirement System* (CR-14-797), *O’Leary v. Lexington Retirement Board and Public Employee Retirement Administration Commission* (CR-15-30), *Fair v. Middlesex County Retirement Board* (CR-15-294), *Coughlan v. Massachusetts Teachers’ Retirement System* (CR-18-0450), *Aiello v. Gloucester Retirement System and Public Employee Retirement Administration Commission* (CR-21-1), *Lucia v. Massachusetts Teachers’ Retirement System* (CR-18-608), *Brown v. Massachusetts Teachers’ Retirement System* (CR-19-0187).

¹⁵ Exhibits 7, 8, p.38. See Appellant’s brief, p.6.

¹⁶ Exhibits 7, 8 p.38.

akin to a “bonus” or a “salary enhancement.” Indeed, as the Appellees and the DALA Magistrate noted, the Town had repeated opportunities to lock itself into paying Chief Desrosiers these funds by including a reference to them in the three Employment Agreements he signed while the Grant Agreement was in effect and its decision not to do so thus weighs heavily against deeming these payments “regular compensation.”¹⁷

Perhaps most problematic for Chief Desrosiers’ case, though, is the fact that DALA and CRAB, as well as higher authorities whose decisions bind us, such as the Massachusetts Appeals Court, have long held that non-mandatory performance incentive payments—whether or not set out in contracts or Collective Bargaining Agreements—do not qualify as “regular compensation” because employees are not required to receive them based on the performance of their regular duties.¹⁸ For example, the Appeals Court held in *O’Brien v. CRAB* that the payment a police officer received for passing his physical fitness test was not ‘regular compensation’ because, even though almost every officer received these payments, they were not guaranteed to every officer.¹⁹ It is difficult, in light of this line of precedent, much of which is binding on CRAB, to argue that Chief Desrosiers’ AMC payments should qualify as “regular compensation,” given that these payments were indisputably significantly more flexible and discretionary than those in the performance incentive payment cases discussed above. The latter petitioners at least had a contractual guarantee that, if they achieved a certain objective, they would be entitled to a particular amount of money, whereas Chief Desrosiers had no binding assurance that there was something he could do to obligate the Town to pay him a specific amount of the AMC grant funds and instead relied solely on his employer’s goodwill. The payments Chief Desrosiers received from the AMC Grant Agreements are therefore not “regular compensation” insofar as they were not “guaranteed,” “non-discretionary,” or “pre-determined.”

Mutually Agreed-upon Stipulations. Chief Desrosiers’ appeal also contends that the DALA Magistrate inappropriately disregarded stipulations jointly affirmed by WRRB and Chief Desrosiers. First, neither Finding of Fact 20 nor Finding of Fact 21 appears to conflict with the stipulations to which the parties agreed. Neither Chief Desrosiers nor WRRB disputes that AMC

¹⁷ DALA Decision, p.10 and Appellee’s brief, p.10.

¹⁸ See e.g. *Brown v. Massachusetts Teachers’ Retirement System* (cited above), *Valiant v. Massachusetts Teachers’ Retirement System* (CR-20-330 / CR-20-427), *Kearns v. State Board of Retirement* (82 Mass. App. Ct. 682), and *O’Brien v. CRAB* (76 Mass. App. Ct. 901).

¹⁹ *O’Brien v. CRAB* (cited in above footnote).

paid the Town of Paxton money through a Grant Agreement that the Town then used to pay Chief Desrosiers, nor that these payments received separate accounting codes designating them ‘AMC Salary’ and ‘AMC incentive’ which is all these Findings state.²⁰ The parties of course disagree about the implications these facts have—specifically the extent to which they show that Chief Desrosiers received compensation ‘from’ AMC or the Town and rendered services ‘for’ AMC or the Town—but neither the Findings of Fact nor the stipulations are themselves these implications.²¹ Second, as WRRB noted in its appellate brief, to the extent the Magistrate found the stipulations entered into by parties to violate fact or law, she need not be bound by them—and, as WRRB notes, any interpretation of the stipulations that would hold that the above stated facts were incorrect would be “erroneous on its face” and could be rejected in the Magistrate’s Findings of Fact.²² We thus reject the Petitioner’s contention.

Clarification of Extent of Holdings. Despite our concurrence with the DALA Magistrate’s holding, we expressly decline to rely on her analogy to “private duty” cases to support her decision that Chief Desrosiers’ AMC payments should not be considered “regular compensation.” We do not agree with her reasoning suggesting that Chief Desrosiers received the disputed salary augmentation directly from AMC in exchange for services provided directly to AMC, rather than from the Town in light of his performance of his employment responsibilities.

The DALA Magistrate concluded, based on WRRB’s argument and uncontested facts, that the payments Chief Desrosiers received from the AMC Grant Agreement were akin to private duty pay in that they were “from” AMC, rather than “his employing unit.” Notably, however, the Grant Agreement expressly gives the Town complete control over the use of the funds provided by the Agreement, and repeatedly refers to the Town as the entity that will “incur[]” “costs” associated with the Agreement, “use[]” funds “for initial expenses and capitalization,” and “maint[ain] and continu[e] [the] development of its public safety resources.”²³ Chief Desrosiers’ salary increase, therefore, stemmed exclusively from the Town’s decision to compensate him in that manner, rather than from any decision made by AMC, let alone from an agreement between AMC and Chief

²⁰ Findings of Fact 20, 21.

²¹ Findings of Fact 20, 21, and stipulations 8, 10, and 12 as noted in Appellant’s brief, p. 4-5 and Appellee’s brief, p. 4-5.

²² 801 CMR 1.01(10)(b).

²³ Exhibits 7, 8, p. 35, 37, 38.

Desrosiers. Indeed, as WRRB admits, CRAB and DALA have long maintained that it “is not the funding source that determines if the person satisfies the definitions found in M.G.L. c.32, §1, but rather the relationship an employee has with an employing governmental unit or political subdivision of the state.”²⁴ No use of a different accounting code to track grant funds can change this principle, particularly when such grant fund tracking is mandated by Massachusetts law, for reasons having nothing to do with establishing for whom an employee is working.²⁵

Relatedly, the DALA Magistrate erred in accepting WRRB’s argument that Chief Desrosiers’ AMC Grant Payments were not given in exchange “for services rendered to [his] employing unit,” and in analogizing the Grant Agreement to private detail payments given to police officers. As the Grant Agreement makes explicit, Chief Desrosiers and all officers hired under the Grant Agreement would, to the extent they performed work that touched on AMC, be performing services as employees of the Town, not of AMC. Specifically, the Agreement emphasizes that “For the avoidance of any doubt, all individuals providing public safety resources for the benefit of AMC by and through the Town and in furtherance of this Agreement shall be Town employees.” Agreement also states that the Town’s “duties and responsibilities inherent in providing public safety services within the Town will now,” as a result of the Agreement, “include areas incorporating the AMC campus in the Town of Paxton.”²⁶ The Agreement thus clarifies that the Town’s officers would not be wrapped within the ambit of AMC authority so much as AMC would be wrapped within the ambit of the Town’s and Police Department’s existing authority over public safety throughout the entire Town, now to include AMC. In no sense, then, can AMC be considered the “employer” of the officers who were frequently assigned there, let alone of Chief Desrosiers. AMC had no power to assign, direct, control, or determine the hours, activities, or work locations of any of them, as they were all under the direction and control of the Town and indeed Chief Desrosiers himself. The Town thus, by the Grant Agreement’s explicit terms and functionally, remained the employing unit of all of its officers, including its Police Chief.

²⁴ See, e.g. *Pavoni v. State Board of Retirement*, CR-05-1365, as well as *Lincoff v. Boston Retirement Bd.*, 67 Mass. App. Ct. 1109 at k2 (2006), *Gomes v. Barnstable County Retirement Board*, CR-93-120, *Quirk vs. State Retirement Board*, CR-93-938, *Yarrows v State Retirement Board*, CR-90-923. See also Appellee’s brief, p.11.

²⁵ M.G.L. C. 44 § 53A.

²⁶ Exhibits 7,8, p.37. See also the Agreement’s statement that “AMC recognizes and agrees that all decisions relative to public safety are solely within the discretion of the Police Chief of the Town.”

A private detail is quite distinct from this type of arrangement. In a “private detail,” an individual Officer may volunteer to do work for a private entity that is additional to and separate from his or her normal job by performing work that is distinct in time and often location from the Officer’s ordinary responsibilities. Further, in a private detail, an Officer is generally paid per unit of work—often through overtime that is reimbursed by the private employer pursuant to a contract between the private entity and the police department.²⁷ None of these features of private details was true of Chief Desrosiers’ work for the Town in connection with AMC. To the extent his work touched on AMC, it was not distinct in time or location from his ordinary employment responsibilities of supervising all of his police officers and ensuring public safety throughout the entire Town. Further, unlike a private detail, Chief Desrosiers had no choice whether to accept this additional work; the Town contracted to include AMC within its public safety ambit, and supervising the policing of AMC and appointing a Liaison thus newly fell within Chief Desrosiers’ existing contractual responsibility to supervise public safety within the Town. WRRB and the DALA Magistrate’s contention that the Grant Agreements were, in WRRB’s words, “nothing more than private contracts between AMC and the Town, similar to contracts municipalities and private entities execute to permit police officers to work private details,” is thus incorrect.²⁸

Conclusion

We affirm the DALA decision for the reasons set forth above. Chief Desrosiers’ payments from the AMC Grant Agreement were not ‘regular compensation’ because they were discretionary and non-fixed rather than regular and ordinary. *Affirm.*

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

Uyen M. Tran
Uyen M. Tran, Esq.
Assistant Attorney General
Chair
Attorney General’s Appointee

Nicolle M. Allen
Nicolle M. Allen, Esq.

²⁷ *Fletcher v Holyoke Ret. Bd*, CR 12-50.

²⁸ Appellee’s brief, p.7.

Governor's Appointee

Patrick M. Charles

Patrick M. Charles, Esq.
Public Employee Retirement Administration
Commission Appointee

Date: September 4, 2024