

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

John Dillon,
Petitioner,

No. CR-21-330

Dated: December 15, 2023

v.

Middlesex County Retirement System,
Respondent.

Appearance for Petitioner:

Andrew P. DiCenzo, Esq.

Appearance for Respondent:

Thomas F. Gibson, Esq.

Appearance for the Public Employee Retirement Administration Commission:

Judith A. Corrigan, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

After he became disabled, the petitioner received accrued sick pay on a regular basis for several months. He subsequently received four sporadic payments for personal time, vacation time, and two training sessions. For purposes of determining the petitioner's retirement date, his recurrent sick pay was "regular compensation," but the other payments to him were not.

DECISION

Petitioner John Dillon appeals from the Middlesex County Retirement System's determination of his effective date of retirement. The appeal was submitted on the papers. PERAC was impleaded and filed a brief. I admit into evidence Mr. Dillon's exhibits marked 1-9 and the board's exhibits marked 1-11.

Findings of Fact

I find the following facts.

1. Mr. Dillon was a police officer in Ashby. On March 31, 2020, while on duty, he suffered a heart attack. He has not returned to work since. (Resp. Ex. 2.)

2. The police department declined to authorize injured-on-duty benefits to Mr. Dillon under G.L. c. 41, § 111F. Instead, Mr. Dillon expended his balance of accrued sick time, which gave him approximately his usual biweekly pay. Mr. Dillon's final paycheck reflecting accrued sick time was dated July 23, 2020. (Pet'r Exs. 2-6; Resp. Ex. 6.)

3. Mr. Dillon received additional sums from his employer on four subsequent occasions. On August 6, 2020, he was paid for twelve hours of personal time. On August 20, 2020, he was paid for eight hours of vacation time. On July 8, 2021, he was paid for eighteen hours of training. And on August 5, 2021, he was paid for another six hours of training. (Resp. Exs. 4-6, 10.)

4. The training-related rights and obligations of Ashby's police officers were prescribed by their CBA. The officers were required to participate in "yearly in-service training as set out in the guidelines of the Massachusetts Criminal Justice Training Council." In return, they were entitled to be paid for their training time at their usual pay rate. (Resp. Ex. 11.)

5. On November 23, 2020, Mr. Dillon applied for accidental disability retirement. The board and then PERAC granted the application. In August 2021, the board issued an appealable decision setting August 5, 2021 as the effective date of Mr. Dillon's retirement. Seeking an earlier retirement date, Mr. Dillon timely appealed. (Resp. Exs. 2-4, 7-9.)

Analysis

The effective retirement date of an employee retiring for accidental disability is the latest among three options: "the date the injury was sustained," "the date six months prior to the filing of the written [retirement] application," or "the date for which [the employee] last received regular compensation for his employment." G.L. c. 32, § 7(2).

Mr. Dillon sustained his injury on March 31, 2020. The date six months before he filed his retirement application was the subsequent date of May 23, 2020. The question in dispute is whether Mr. Dillon received regular compensation for any date after that.¹

Most of the case law analyzing the term “regular compensation” has arisen in the context of pension-amount computations under G.L. c. 32, § 5. Different considerations may be implicated when regular compensation affects a member’s retirement date under G.L. c. 32, § 7. But the Supreme Judicial Court has held that the term carries the same meaning in both contexts. *Worcester Reg’l Ret. Bd. v. Public Emp. Ret. Admin. Comm’n (Vernava II)*, 489 Mass. 94, 100 (2022).

By statutory definition, regular compensation means “compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.” G.L. c. 32, § 1. “Wages” are the employee’s “base salary or other base compensation.” *Id.* To satisfy this definition, payments must be “ordinary, recurrent, or repeated,” as opposed to “extraordinary” or “ad hoc.” *O’Leary v. Contributory Ret. Appeal Bd.*, 490 Mass. 480, 484 (2022). They also must be “pre-determined,” “non-discretionary,” and “guaranteed.” 840 C.M.R. § 15.03(3)(b).

The four payments to Mr. Dillon after he exhausted his paid sick time obviously were not regular compensation. His employer made those payments on isolated occasions. There is no indication in the record that Mr. Dillon received similar payments in other years. The sums he received post-sick-time vacillated erratically from month to month, with most months featuring

¹ The parties agree implicitly that each payment to Mr. Dillon covered the period running through the date of payment.

no pay at all. His payments for personal time, vacation time, and training epitomized irregularity in that word's specialized and ordinary meanings.

Additional reasons support the conclusion that Mr. Dillon's July-August 2021 training pay was not regular compensation. His entitlement to that pay depended on his participation in training sessions, and the size of the payments depended on the sessions' durations. Mr. Dillon's training pay therefore was not "guaranteed" and "pre-determined." 840 C.M.R. § 15.03(3)(b). It is also questionable whether payments for attending training relate to "services performed in the course of employment." G.L. c. 32, § 1. *See Kelleher v. Barnstable Cty. Ret. Bd.*, No. CR-10-794, at *8 (DALA Apr. 17, 2015, *aff'd*, CRAB Feb. 26, 2016).

The latter requirement generates this appeal's central problem. In the months immediately following his accident, Mr. Dillon's accrued sick time gave him approximately his usual salary. His compensation during that period was "regular" in the sense of ordinariness, recurrence, and repetitiveness. But Mr. Dillon's absence from work presents doubts as to whether he was being paid "for services performed in the course of employment." G.L. c. 32, § 1.

Prior cases have analyzed this type of question in the context of workers' compensation. Since *Zelesky v. Commissioner of Div. of Pub. Emp. Ret. Admin.*, 30 Mass. App. Ct. 106 (1991), it has been settled that workers' compensation payments are not regular compensation. The Appeals Court explained in that case that:

Workers' compensation insurance is not paid for the individual service of the employee, but instead is paid only where the employee cannot perform any service due to injury. It thus is neither a "salary" nor a "wage" and is therefore not remuneration geared to work or services performed.

Id. at 108-09 (citations and quotation marks omitted). The Supreme Judicial Court agreed more recently. In the case known as *Vernava I*, extending *Zelesky* to employer payments that “supplement” workers compensation, the Court wrote:

[A]n injured employee on workers’ compensation[] no longer possesse[s] the ability to provide services to his employer. . . . [P]ay received while an employee is no longer able to provide employment services for his or her employer does not constitute regular compensation.

Public Emp. Ret. Admin. Comm’n v. Contributory Ret. Appeal Bd. (Vernava I), 478 Mass. 832, 835-36, 838 (2018). *See also* PERAC Memo No. 15 / 2021 (Apr. 13, 2021) (adopting a similar analysis with respect to paid family medical leave).

Published PERAC memoranda reflect the view that, unlike workers’ compensation, accrued sick pay *is* regular compensation. *See* PERAC Memo No. 14 / 2022 (June 2, 2022); PERAC Memo No. 17 / 2018 (Apr. 9, 2018). PERAC has filed a brief stoutly defending that view. It acknowledges that employees do not provide employment services on the days when they are out sick. But PERAC theorizes that accrued sick days may be viewed as non-contemporaneous compensation for an employee’s work during good health: that is, in exchange for his or her work, an employee receives not only periodic paychecks, but also the right to a certain number of paid sick days. PERAC adds that, as a practical matter, sick days are exceedingly commonplace. They are universally treated as regular compensation in the computations of members’ pensions. A holding that sick pay is not regular compensation would complicate most pension calculations and would require a crushing number of pensions to be recalculated. PERAC observes that, in all of these respects, accrued sick days are similar to routine vacation days.

PERAC’s view enjoys additional supports. The statutory definition of “wages” provides a long list of items that do not count as regular. Among them are “1-time lump sum payments in

lieu of or for unused vacation or sick leave.” G.L. c. 32, § 1. See *O’Leary*, 490 Mass. at 484-85. Whether because of the considerations articulated by PERAC or for other reasons, the Legislature clearly expected that regular compensation *would* include *non-lump-sum* payments for *used* vacation or sick leave. The same expectation emerges from *Vernava I*, where the SJC emphasized that a recipient of workers’ compensation “is not merely out sick or taking a vacation” 478 Mass. at 838.

PERAC, overwhelming common practice, the Legislature, and the SJC thus view pay on accrued sick days as compensation for employee services. Mr. Dillon suggests that a different approach may be warranted when a member’s illness or injury is permanent. But as a logical matter, the analysis of whether employees are being compensated for their work is unconnected to the durations of their unavailability. Workers’ compensation is not pay for services whether the employee’s disability is permanent or temporary. Correspondingly, pay for accrued sick days *is* pay for services whether or not the employee eventually returns to work.

The upshot is that, as long as it satisfies regularity’s other requirements, pay for accrued sick days actually taken by an employee may count as regular compensation. Through July 23, 2020, Mr. Dillon’s sick pay was ordinary, recurrent, and repeated. That date was the last date for which Mr. Dillon received regular compensation.² Because it came after both the date of Mr. Dillon’s injury (March 31, 2020) and the date six months before he filed his retirement application (May 23, 2020), that date is the effective date of his retirement.

² Mr. Dillon’s August 2020 payments for personal and vacation time likely were pay “for services performed in the course of employment,” G.L. c. 32, § 1, but not ordinary, recurrent, or repeated given the circumstances analyzed *supra*.

Conclusion and Order

The effective date of Mr. Dillon's retirement is July 23, 2020. The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate