

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Joshua Dohan,
Petitioner

v.

Docket No. CR-22-0104
Date: Dec. 8, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

Joshua Dohan, Esq., *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)(f) when it reduced Petitioner’s regular compensation in 2018-2019 and 2019-2020 for the purpose of calculating his retirement allowance. Petitioner did not qualify for any of the enumerated exceptions to the anti-spiking provision. Petitioner did not have a bona fide change in position because, even though he took on additional duties, the new duties were the type that one would expect to perform in that position. Petitioner did not qualify for the exception of an increase in salary specified by law because, even though the increase in his salary was provided through a legislative appropriation, the amount of his salary was not “specified” by the law.

DECISION

Petitioner Joshua Dohan timely appeals under G.L. c. 32, § 16(4). He seeks to overturn the State Board of Retirement’s application of the anti-spiking law, G.L. c. 32, § 5(2)(f), to the calculation of his retirement allowance. The Board concluded that Mr. Dohan’s regular compensation in fiscal years 2018-2019 and 2019-2020 must be reduced.

On March 27, 2023, DALA suggested to the parties that Mr. Dohan’s appeal appeared to be one that could be resolved on written submissions under 801 CMR 1.01(10)(c) and ordered them to submit legal memoranda and proposed exhibits. On June 23, 2023, Mr. Dohan submitted a memorandum and one proposed exhibit, which I have marked P1, and requested a hearing. On August 10, 2023, the Board offered nine additional proposed exhibits, labeled R1 through R9. I have admitted these exhibits into evidence as proposed.

After a review of the evidence, I have determined that, although Mr. Dohan has requested a hearing, there are no disputed issues of material fact and that relief cannot be granted on this claim as a matter of law. I therefore decide this matter pursuant to 801 CMR 1.01(7)(g)(3).

FINDINGS OF FACT

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

1. From November 1, 1988, until his retirement on October 22, 2021, Joshua Dohan was employed with the Committee for Public Counsel Services (CPCS). (Exs. R1, R2.)
2. Mr. Dohan was a member of the State Retirement System at all times relevant to this appeal. (Ex. R2.)

3. When he filed for retirement, Mr. Dohan was the Director of the Youth Advocacy Division at CPCS. He dealt with juvenile delinquency and youthful offender cases. (Exs. P1, R1.)

4. At some point, Mr. Dohan began to oversee a new additional unit that dealt with adult parole revocation and release hearings. This changed the scope of his duties, but his title did not change and he continued to perform his Youth Advocacy Division duties as before. (Ex. P1.)

5. The Legislature appropriated a lump sum of money to increase the salaries of CPCS employees, including Mr. Dohan, generally for the 2017 fiscal year and 2018 fiscal year. (Ex. R9.)

6. Mr. Dohan's salary for the period of October 24, 2016, through October 23, 2017, was \$126,905.34. (Ex. R3.)

7. Mr. Dohan's salary for the period of October 24, 2017, through October 23, 2018, was \$133,168.30. (Ex. R3.)

8. Mr. Dohan's salary for the period of October 24, 2018, through October 23, 2019, was \$150,000.00. (Ex. R3.)

9. Mr. Dohan's salary for the period of October 24, 2019, through October 22, 2020, was \$156,287.67. (Ex. R3.)

10. Mr. Dohan's salary for the period of October 23, 2020, through October 22, 2021, was \$157,500.00. (Ex. R3.)

11. Mr. Dohan retired effective October 22, 2021. (Ex. R2.)

12. To determine Mr. Dohan's yearly retirement allowance, the Board used the average annual rate of regular compensation for the last three years (2018-2019,

2019-2020 and 2020-2021) that he worked, which were also his highest annual salary years. (Ex. R3.)

13. The Board calculated that Mr. Dohan’s 2018-2019 regular compensation of \$150,000.00 exceeded the average of the prior two years (\$130,036.82) by more than 10% (110% of the prior two-year average being \$143,040.50). The Board also calculated that Mr. Dohan’s 2019-2020 regular compensation of \$156,287.67 exceeded the average of the prior two years (\$141,584.15) by more than 10% (110% of the prior two-year average being \$155,742.57). Accordingly, the Board applied the anti-spiking provision to the years 2018-2019 and 2019-2020, which reduced the salary used to determine his retirement allowance in those years by \$6,959.50 and \$545.10, respectively. (Ex. R3.)

14. In a letter dated February 22, 2022, the Board informed Mr. Dohan that his creditable salary was reduced due to the anti-spiking provision. This letter informed Mr. Dohan of his appeal rights. (Ex. R6.)

15. On March 11, 2022, Mr. Dohan appealed the Board’s decision.

CONCLUSION AND ORDER

The Board has challenged the appeal as untimely. G.L. c. 32, § 16(4) requires that appeals be filed within 15 days of notification of the retirement board’s decision.

The statute provides:

any person when aggrieved by any action taken or decision of the retirement board . . . may appeal to the contributory retirement appeal board by filing therewith a claim in writing *within fifteen days of notification* of such action or decision of the retirement board

Notice of administrative actions by mail is presumed to have been received three days after deposit in the U.S. mail. 801 CMR 1.01(4)(c). The board’s letter is dated February 22, 2022, meaning Mr. Dohan is presumed to have received it on February 25, 2022.

Consequently, the fifteen-day deadline would be March 12, 2022, but that date was a Saturday. Therefore, the actual deadline was March 14, 2022. 801 CMR 1.01(4)(c) (“The last day of the time period is included, unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day.”) The appeal was received on March 11, 2022. Therefore, Mr. Dohan’s appeal was timely filed.

The Board’s application of the “anti-spiking” provision, which required it to reduce Mr. Dohan’s 2018-2019 and 2019-2020 regular compensation when calculating his retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Mr. Dohan, who were members of a retirement system before April 2, 2012, G.L. c. 32, § 5(2)(a) directs that a member’s yearly retirement allowance be calculated based, in part, on the highest average three-year period of regular compensation. For Mr. Dohan, these were the years 2018-2019, 2019-2020, and 2020-2021, during which time his regular compensation was \$150,000.00, \$156,287.67, and \$157,500.00 for each respective year.

Section 5(2)(f), referred to as the “anti-spiking” law, 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.

Mr. Dohan’s salary from October 24, 2018 - October 23, 2019 was \$150,000.00. The average regular compensation for the two prior years, October 24, 2016 - October 23, 2018 was \$130,036.82. A 10% increase to this average would be \$143,040.50. Mr. Dohan’s salary from October 24, 2019 - October 22, 2020 was \$156,287.67. The average regular compensation for the two prior years, October 24, 2017- October 23, 2019 was

\$141,584.15. A 10% increase to this average would be \$155,742.57. Both the 2018-2019 and 2019-2020 salaries exceed the 10% limit imposed by the anti-spiking provision. Accordingly, the Board reduced the salary in the calculations by \$6,959.50 and \$545.10 respectively. These mathematical calculations are not in dispute.

There are several exceptions to the anti-spiking law's limits. Mr. Dohan argues that two of these exceptions, (1) a bona fide change in position and (2) an increase in salary for a member whose salary is specified by law, apply to him. For the reasons explained below, Mr. Dohan does not qualify for either of these exceptions.

Mr. Dohan contends that, while his title did not change, he was given substantial new responsibilities that changed the nature of his position. Mr. Dohan was the Director of the Youth Advocacy Division for the Committee for Public Counsel Services. In this position he managed the branch of CPCS that provides representation for juveniles charged with crimes. At some point in the three to four years prior to retirement, Mr. Dohan's duties included establishing and overseeing a new unit that worked on adult parole revocation and release hearings. His title remained the same, and he also continued to perform his duties in the Youth Advocacy Division.

Mr. Dohan claims that this additional oversight amounted to a "bona fide change in position." As DALA has consistently held, merely assuming additional responsibilities is not sufficient to claim this exception unless the character of the work has changed in an essential way. *See, e.g., Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021); *Jenal v. State Bd. of Retirement*, CR-17-1054 (DALA May 29, 2020); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Dacri v. State Bd. of Retirement*, CR-17-627

(DALA May 31, 2019). PERAC has interpreted “bona fide change in position” to mean that a job’s essential duties have changed. PERAC Memorandum #16/2014.¹

As the Director of the Youth Advocacy Division, Mr. Dohan was a high-ranking manager at CPCS. Such officials are often asked by their superiors to take on initiatives, possibly expanding an agency’s portfolio of responsibilities. While these kinds of additional duties effect a change in a manager’s daily activities, they do not change those duties essentially. Adding additional areas of oversight is frequently a part of the natural progression of any director’s position, and the added duties in his last years did not replace any of his pre-existing Youth Advocacy Division duties.

Mr. Dohan also claims he qualifies for the “increase in salary for a member whose salary amount is specified by law” exception. G.L. c. 32, § 5(2)(f). DALA has held that general legislative appropriations do not rise to the level of a salary specified by law. *McHugh v. State Bd. of Retirement*, CR-22-0605 (DALA May 5, 2023) (on appeal to CRAB); *Bender v. State Bd. of Retirement*, CR-20-0279 (DALA Feb. 18, 2022) (on appeal to CRAB). More recently, DALA has also held that the statutory exception for an increase in salary specified by law requires that the law provide a precise and explicit amount.² See *Solomon v. Methuen Retirement Board*, CR-21-0274 and CR-21-0371, at *9 (DALA Sept. 8, 2023). A salary from legislative appropriations is too discretionary to

¹ Drawing a line between an essential change in duties and a non-essential change in duties is not always the easiest in practice. PERAC gives an example of a non-essential change: a change in title and pay without a change in duties. The obverse is also the case: taking on some additional duties without changing positions or titles is not likely to be a bona fide change in position.

² For examples of salaries specified by law, see G.L. c. 6, § 1(a) (setting governor salary at \$185,000.00 plus an annual defined adjustment) and G.L. c. 11, § 1(a) (setting state auditor salary at \$165,000.00 plus an annual defined adjustment).

be “specified by law.” Moreover, adopting Mr. Dohan’s argument would allow the exception to swallow the rule, as nearly all government employees are paid from legislative appropriations.

Finally, Mr. Dohan argues that the application of the anti-spiking law to him is “contrary to the intent of the law,” which he states is “combatting abusive, pension-oriented artifices” and preventing unanticipated pension-impacting pay hikes “that imbalance the retirement system’s finances.” *White v. Somerville Retirement Bd.*, CR-22-0095, WL 16921475, at *2 (DALA Sept. 2, 2022). Mr. Dohan’s late-breaking raises do not appear to be pension-oriented artifices, as they were part of an overall steep rise in pay at CPCS. They are, however, easily categorized as unanticipated pension-impacting pay hikes that imbalance the retirement system’s finances. Mr. Dohan insists that his raises could not possibly imbalance the retirement system’s finances because they are so small. That may be Mr. Dohan’s conclusion, but the Legislature came to its own conclusion as to how big a raise must be to imbalance a retirement system. The Legislature provided a concrete and mechanical formula to measure whether a raise in pay will do so, regardless of the intent behind the raise. *See Stanton v. State Board of Retirement*, CR-18-399 (DALA Aug. 20, 2021); *Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021).

To the extent that Mr. Dohan is requesting an equitable remedy, DALA cannot provide equitable relief that contradicts clear and specific statutory language. *See Petrillo v. Public Employee Retirement Admin. Comm’n*, CR-92-731 (DALA Feb. 15, 1993), *aff’d* (CRAB Oct. 22, 1993) (CRAB does not have the “authority to employ an equitable remedy in the face of specific statutory language [to the] contrary.”)

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

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Dec. 8, 2023