

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kathryn Dulit,
Petitioner

v.

Docket No. CR-23-0357
Date: July 19, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Kathryn Dulit, *pro se*

Appearance for Respondent:

Jennifer Hunt, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108-4747

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The State Board of Retirement properly applied the “anti-spiking” law, G.L. c. 32, § 5(2)(f), when it reduced petitioner’s 2022-2023 pensionable regular compensation because her salary was not specified by law and no other exceptions applied. Increasing salaries *not* specified by law so that they keep pace with salaries that *are* specified by law does not, by extension, make those increases qualify for the exception for salaries specified by law.

DECISION

Petitioner Kathryn Dulit appeals from a decision of the State Board of Retirement applying the anti-spiking law, G.L. c. 32, § 5(2)(f), to the calculation of her retirement allowance. It was determined that this appeal could be submitted on the papers under 801

CMR 1.01(10)(c). Both petitioner and respondent submitted memoranda and exhibits. I enter into evidence exhibits marked 1-9.

FINDINGS OF FACT

I find the following facts:

1. Ms. Dulit is a retired member of the State Board of Retirement. (Ex. 1.)

2. Ms. Dulit retired from her position as a Deputy Director of Judicial Education for the Massachusetts Trial Court on February 3, 2023. (Exs. 1, 2.)

3. Prior to February 3, 2020, Ms. Dulit was a Program Manager for the Trial Courts. Effective February 3, 2020, she was promoted to Deputy Director of Judicial Education. Before her promotion, her salary was \$113,061.19. The salary for Ms. Dulit’s new position was \$120,695.30. (Ex. 3.)

4. In an email dated October 17, 2022, the Trial Court informed all managers at the court that a salary adjustment was being made to all “non-statutory managers,” meaning managers whose salaries were not specified by law, including Ms. Dulit. The email stated the pay increase was being made to maintain equity with a legislative increase to the salaries of trial court employees who had salaries specified by law. (Ex. 5.)

5. In an email dated October 28, 2022, the Trial Court stated that the non-statutory managers’ pay increase would be retroactive to July 3, 2022. (Ex. 6.)

6. Ms. Dulit received pay increases effective on the following dates:

- i. 7/5/20 \$123,712.68
- ii. 2/3/21 \$130,726.04
- iii. 7/4/21 \$133,340.56
- iv. 2/3/22 \$140,494.20
- v. 7/3/22 \$155,542.25

(Ex. 3.)

7. Ms. Dulit’s actual pay for her last five years was:

i. Year 1:	2/4/22-2/3/23	\$149,399.35
ii. Year 2:	2/4/21-2/3/22	\$132,285.70
iii. Year 3:	2/5/20-2/3/21	\$122,483.61
iv. Year 4:	2/5/20-2/3/21	\$112,179.82
v. Year 5:	2/5/20-2/3/21	\$109,933.25

(Ex. 3.)

8. To determine Ms. Dulit’s yearly retirement allowance, the Board used the average annual rate of regular compensation for the last three years (2020-2021, 2021-2022 and 2022-2023) that she worked, which were also her highest years of annual salary. (Ex. 3.)

9. The Board determined that Ms. Dulit’s 2022-2023 regular compensation of \$149,399.35 exceeded the average of the prior two years (\$126,937.58) by over 10% (110% of the prior two-year average being \$139,631.34). The Board applied the anti-spiking provision to the 2022-2023 year, reducing the salary used to determine her retirement benefit by \$9,768.01. (Ex. 3.)

10. On June 23, 2023, the Board informed Ms. Dulit that the regular compensation used to calculate her retirement allowance was being reduced because she triggered the anti-spiking provision. (Ex. 7.)

11. In a letter dated July 6, 2023, Petitioner timely appealed the decision. (Ex. 8.)

CONCLUSION AND ORDER

The Board’s application of the “anti-spiking” provision, under which it reduced Ms. Dulit’s 2022-2023 regular compensation for the purpose of calculating her retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Ms. Dulit, who were members of a retirement system before April 2, 2012, § 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 Ms. Dulit, these were the years 2020-2021, 2021-2022, and 2022-2023.

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

Ms. Dulit’s salary in the 2020-2021 and 2021-2022 years exceeded the average of the prior two years by over 10 percent. However, Ms. Dulit qualified for an exception to the anti-spiking provision during these years as her salary was increased because of a “bona-fide change in position.” *See id.* Having been promoted to the new position on February 3, 2020, the calculation to determine the application of the anti-spiking limitation was adjusted. The Board properly applied this exception, and these years are not in dispute.

The “bona fide change in position” exception is not applicable to Ms. Dulit’s salary in the 2022-2023 year, which exceeded the average of the prior two years by over 10 percent. Ms. Dulit’s salary from February 4, 2022 through February 3, 2023 was \$149,399.35. The average salary of her two prior years plus 10% was \$139,631.34. This leaves an excess of \$9,768.01. Consequently, her regular compensation was adjusted down to \$139,631.34. This calculation is also not in dispute.

There are a number of defined exceptions to the anti-spiking provision.¹ One that Ms. Dulit argues applies to her situation is that her increase in salary occurred because her salary was specified by law. Her salary was certainly not directly specified by law. The Trial Court recognized this fact when it adjusted her salary to keep pace with the salaries of managers whose pay *was* specified by law. Instead, Ms. Dulit argues that, because her salary increase was made to match salaries that *are* specified by law, then her increase is, by extension, also specified by law. While it would be true that her colleagues' statutory salaries would fall within this exception, Ms. Dulit's salary does not because it is *not* specified by law. *Cf. Solomon v. Methuen Retirement Bd.*, CR-21-0371 and CR-21-0274 (DALA Sept. 8, 2023) (Chief of Police, whose salary was calculated with reference to the salaries of officers that were negotiated under a collective bargaining agreement (another exception under § 5(2)(f)), did not qualify for the CBA exception).

Ms. Dulit further argues that applying the anti-spiking law to her is contrary to the intent of the law, as the anti-spiking provision was not intended to apply to salary increases to a whole group. Her increase in salary came as part of an increase to salaries for many other trial court employees. Because this increase was to all non-statutory managers at the court, she contends, there was no intent to inflate artificially her individual salary.

¹ “This paragraph shall not apply to an increase in the annual rate of regular compensation that results from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary or salary schedule negotiated for bargaining unit members under chapter 150E, from an increase in salary for a member whose salary amount is specified by law, or in the case of a teacher, from the performance of any services set forth in the third sentence of the first paragraph of the definition of ‘regular compensation’ in section 1.” G.L. c. 32, § 5(2)(f).

However, the anti-spiking provision is agnostic as to the intent of a salary increase. All the provision does is provide a mechanical calculation to limit increases to salary unless an enumerated exception applies; agency-wide increases are not a recognized exception. *See Giampietro v. State Bd. of Retirement*, CR-22-0382, at *4-5 (DALA Apr. 26, 2024); *Cincotta v. State Bd. of Retirement*, CR-22-0208, at *6-7 (DALA Feb. 23, 2024). The language of the anti-spiking statute is plain and thus conclusive as to the Legislature's intent. *See Allegaert v. Harbor View Hotel Owner LLC*, 100 Mass App. Ct. 483, 486 (2021). The Legislature enumerated specific exceptions to the anti-spiking provision, and nothing in the text of the statute implies a legislative intent to enlarge upon those exceptions. *Bender v. State Bd. of Retirement*, CR-20-0279, at *11 (DALA Feb. 18, 2022).

To the extent that Ms. Dulit is asking for an equitable remedy, DALA and CRAB do not have equitable powers in the face of specific contrary statutory language. *Petrillo v. Public Employee Ret. Admin.*, CR-92-731 (DALA Feb. 15, 1993), *aff'd* (CRAB Oct. 22, 1993).

For the above stated reasons, the Board's calculation is affirmed. The Board is directed to return to Ms. Dulit, with interest, any excess withholdings.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

Dated: July 19, 2024