

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

Charles Fazzio III,
Petitioner

v.

Docket No. CR-21-0294

Massachusetts Teachers' Retirement System,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

Lori Curtis Krusell, Esq.
Massachusetts Teachers' Retirement System
500 Rutherford Avenue, Suite 210
Charlestown, MA 02129

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Petitioner was paid per diem compensation for acting as substitute assistant principal. Massachusetts Teachers' Retirement System correctly declined to count per diem compensation as regular compensation.

DECISION

The petitioner, Charles Fazzio III, appeals the decision by the Massachusetts Teachers' Retirement System (MTRS) not to count his per diem compensation as regular compensation.

Under 801 CMR 1.01(10)(c), the parties elected to waive a hearing and submit the case upon written submissions, namely, the Joint Pre-Hearing Memorandum. I admit five exhibits.

Ex. 1: Denial letter by MTRS.

Ex. 2: Article XI of collective bargaining agreement (CBA) between Sharon School District/School Committee and Sharon Teachers Association. (The operative CBAs for July 1, 2016 – June 30, 2019 and July 1, 2020 – June 30, 2023 contained the same Article. (Stipulation))

Ex. 3: Letter, dated March 29, 2019, from Sharon Public Schools to Mr. Fazzio. (Letter refers to attachment that is not in evidence.)

Ex. 4: Letter, dated January 13, 2020, from Sharon Public Schools to Mr. Fazzio with attachment of “Overview,” dated January 10, 2020.

Ex. 5: Retirement Application.

Findings of Fact

1. Mr. Fazzio is a member of MTRS. (Stipulation)
2. Mr. Fazzio worked as a classroom teacher at the Sharon High School. (Stipulation)
3. Mr. Fazzio also worked as the Social Studies Coordinator. He worked an extra 10 days and received an extra 10% stipend. (Stipulation)¹
4. The Sharon School District/School Committee and the Sharon Teachers Association are parties to a CBA. (Ex. 2; Stipulation)
5. Article XI of the CBA is entitled “Vacancies and Promotions.” (Ex. 2; Stipulation)
6. Article XI(9) provides as follows:

Any teacher serving as a substitute or acting administrator will be paid according to the Administrators’ Salary Schedule for that year at Step 1 per diem rate for that position based upon one’s earned degree(s). Should the per diem rate for a substitute or acting

¹ The parties stipulated to this fact, but I cannot discern its relevance to this appeal.

administrator be less than a teacher's per diem rate under this Agreement for the regular school day, including stipend for departmental duties, the School Committee will establish an individual rate above the Step 1 per diem rate for that person. Payment for extra-curricular assignments [is] beyond the regular work day and are excluded from per diem calculations.

e.g. Elementary Principal: Doctorate Step 1 - \$49,214; Salary rate is \$49,214 / 215 days = \$228.91 per day. See Proposed Exhibit 2.

(Ex. 2; stipulation)

7. Mr. Fazio performed extra work under this provision, working as a substitute in an absent teacher's classroom. (Stipulation)²
8. Mr. Fazio also acted as an Assistant Principal during the 2018-2019 and the 2019-2020 school years on a substitute basis. (Stipulation)
9. On March 29, 2019 the Sharon Public Schools offered Mr. Fazio a per diem rate of \$590.46 for performing these duties, described as "beyond those you would normally tend to do." Mr. Fazio signed the document on March 29, 2019. (Ex. 3; stipulation)
10. On January 13, 2020, the Sharon Public Schools offered Mr. Fazio a proposed per diem rate of \$559.97 for performing Assistant Principal duties that he would not normally tend to do. Mr. Fazio signed the document on January 24, 2020. See: Respondent's proposed Exhibit 4.
11. The Sharon Public Schools also provided Mr. Fazio with an overview of his role and responsibilities, dated January 10, 2020. (Ex. 4; stipulation)
12. Mr. Fazio was paid after he filled out a pay slip for the days he worked as Assistant Principal. (Stipulation)
13. If Mr. Fazio was out sick, he was not paid for acting as Assistant Principal. (Stipulation)

² The parties stipulated to this fact, but I cannot discern its relevance to this appeal.

14. Mr. Fazio applied for superannuation retirement. (Ex. 6; stipulation)
15. By letter dated July 21, 2021, MTRS notified Mr. Fazio that payments of \$3,221.40 during the 2018-19 school year and \$6,035.34 during the 2019-20 school year for acting as Assistant Principal were not regular compensation. (Ex. 1; stipulation)
16. The letter stated that those two payments were not regular compensation because they were “variable and not associated with a fixed stipend.” (Ex. 1)
17. Mr. Fazio timely appealed. (Stipulation)

Discussion

Mr. Fazio’s compensation as a substitute assistant principal was per diem. Per diem compensation is not regular compensation. *Gerald Perriello v. Massachusetts Teachers’ Retirement System*, CR-17-093 (DALA 2020); *Meagher v. Massachusetts Teachers’ Retirement System*, CR-14-751 (DALA 2016).

Mr. Fazio argues that his “compensation as an Assistant Principal was not ‘variable’ and it was ‘associated with a fixed stipend.’” (Joint Pre-Hearing Memorandum 8 (quoting Ex. 1)) This argument is unavailing for a few reasons. It is true that Mr. Fazio’s *per diem compensation* was not variable; it was set by agreement. (Exs. 2, 3, 4) But Mr. Fazio *total per diem compensation* was variable. If he was sick, he was not paid a per diem amount for acting as Assistant Principal. (Stipulation). And compensation at a fixed per diem rate is still per diem compensation, which is not regular compensation.

MTRS denied that the two sets of payments at issue were regular compensation because they were “variable and not associated with a fixed stipend” (Ex. 1), implying that if the two sets of payments had *not* been variable and *had* been associated with a fixed stipend, they would have been regular compensation. Mr. Fazio’s response is to assert conclusorily that the payments

were not variable and were associated with a fixed stipend. However, Mr. Fazzio does not explain what “associated with” means in this context or identify which fixed stipend he was receiving. He does not argue why his per diem compensation was regular compensation. Rather, he negates MTRS’s reason in its denial letter and foregoes further argument. See Joint Pre-Hearing Memorandum 9 (repeating the argument that per diem compensation was “not variable” and was “associated with a fixed stipend” and therefore was regular compensation).

Conclusion and Order

Because Mr. Fazzio’s compensation as a substitute assistant principal was per diem, it was not regular compensation. MTRS’s decision not to count it as regular compensation is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: December 8, 2023