

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Michael Florio,
Petitioner,

No. CR-18-509

Dated: May 7, 2021

v.

**Massachusetts Teachers' Retirement
System,**
Respondent.

Appearance for Petitioner:

Michael Florio (pro se)
4 Fairview Drive
Mattapoisett, MA 02739

Appearance for Respondent:

Ashley Freeman, Esq.
500 Rutherford Avenue
Charlestown, MA 02129

Administrative Magistrate:

Yakov Malkiel

Summary of Decision

Petitioner's work as an advisor to a high school EMT club was an "additional service" countable as "regular compensation" for purposes of calculating petitioner's retirement allowance. To count as "regular compensation," "additional services" must be "set forth" in the applicable collective bargaining agreement. 807 C.M.R. § 6.02(1)(a). The CBAs in effect here did not expressly reference the EMT club, but they "set forth" that service consistent with § 6.02(1)(a) by stating that activities are compensable if they are "extracurricular," are "clubs," and are offered at the particular high school where petitioner worked.

DECISION

Background

Petitioner Michael Florio was a teacher at a public high school in New Bedford. In the portion of his retirement application detailing his "regular compensation" during certain years, Mr. Florio included stipends for advising a high school "EMT club." The Massachusetts

Teachers' Retirement System (MTRS) denied Mr. Florio's request to count those stipends as "regular compensation." Mr. Florio appealed.

Administrative Magistrate Judithann Burke held an evidentiary hearing by videoconference. Mr. Florio was the only witness. Magistrate Burke admitted ten agreed-upon exhibits into evidence, and closed the record at the end of the hearing.

The case was reassigned to me after Magistrate Burke's retirement, and the parties agreed that no additional evidentiary hearing was necessary. *See Lighthouse Masonry, Inc. v. DALA*, 466 Mass. 692, 704-05 (2013).

Findings of Fact

Having considered the admitted exhibits and a video recording of the testimony, I find the following facts. All of them are undisputed.

1. Michael Florio worked for the New Bedford Public Schools as a teacher from 1984 to 2018. (Florio testimony.)
2. The relevant school years for purposes of calculating Mr. Florio's retirement allowance are those ending in 2015, 2016, and 2017. (Exhibits 4, 5.)
3. For a number of years, including the period 2015-2017, Mr. Florio served as the advisor to an extracurricular high school program described as an "EMT club." The EMT club prepared students for Emergency Medical Technician examinations. Participants in the club provided first aid and other forms of assistance to members of the public at sporting events, blood-pressure clinics, and elsewhere. (Florio testimony.)
4. Mr. Florio was subject to collective bargaining agreements between the New Bedford Educators' Association, Inc., of which he was a member, and the New Bedford School Committee. CBAs identical in all material respects governed the three school years at issue. *See* Exhibit 7 (CBA effective July 2011-June 2014); Exhibit 8 (memorandum extending the July

2011 CBA through July 2015); Exhibit 9 (memorandum further extending the same CBA through June 2016); Exhibit 10 (CBA effective August 2016-June 2019).

5. Each relevant CBA detailed the compensation amounts to be paid in connection with extracurricular activities in Appendix A, Schedule D. Each Schedule D consisted of three portions, bearing the respective headings “Extracurricular Activities New Bedford High School,” “Middle School Extracurricular Activities,” and “Elementary Extracurricular Activities.” (Exhibits 7, 10.)

6. In each relevant CBA, the bulk of the text under the heading “Extracurricular Activities New Bedford High School” appeared in a two-column table. The table’s left column listed the names of various activities, many, but not all, identified as “clubs.” The right column stated a compensation amount, in dollars, corresponding to each activity. The EMT club was not listed in these tables. (Exhibits 7, 10.)

7. Below each two-column table, the following text appeared: “NOTE: Unless otherwise specified, any clubs not listed will be paid \$742.00 effective July 1, 2008 and \$757 effective July 1, 2010.” (Exhibits 7, 10.)

8. In each of the years at issue, Mr. Florio was paid a stipend of \$757 for his work as advisor to the EMT club. (Exhibits 2, 4, 5.)

9. Mr. Florio applied for a retirement allowance effective August 2018. In the portions of his retirement application detailing his “regular compensation,” Mr. Florio included the stipends he received as advisor to the EMT club. (Exhibits 4, 5.)

10. MTRS denied Mr. Florio’s request to treat his EMT club stipends as regular compensation, reasoning that “[t]he EMT stipend is not explicitly listed in your contract, as it is listed under the ‘NOTE’ section.” (Exhibit 2.) Mr. Florio appealed. (Exhibit 1.)

Analysis

The retirement allowance of a Massachusetts public employee depends in part on the amount of “regular compensation” the employee received during certain years. Generally speaking, “regular compensation” means “wages . . . for services performed in the course of employment.” G.L. c. 32, § 1. This definition is designed to capture “recurrent or repeated amounts of compensation not inflated by extraordinary ad hoc payments.” *Bos. Ass’n of Sch. Administrators & Sup’rs v. Bos. Ret. Bd.*, 383 Mass. 336, 341 (1981).

A teacher’s regular compensation includes “salary payable under the terms of an annual contract for additional services.” G.L. c. 32, § 1. For purposes of this rule, an applicable collective bargaining agreement is the “annual contract.” 807 C.M.R. § 6.01.

A regulation promulgated by the Teachers’ Retirement Board states that payments satisfy G.L. c. 32, § 1’s “additional services” rule if:

- (a) The additional services are set forth in the annual contract;
- (b) The additional services are educational in nature;
- (c) The remuneration for these services is provided in the annual contract;
- (d) The additional services are performed during the school year.

807 C.M.R. § 6.02(1). The Appeals Court has upheld this regulation’s validity. *Kozloski v. CRAB*, 61 Mass. App. Ct. 783 (2004).

The parties agree that Mr. Florio’s supervision of the EMT club was “educational in nature,” that the New Bedford CBAs stated the “remuneration for these services,” and that the services were “performed during the school year.” Paragraphs (b), (c), and (d) of § 6.02(1) therefore are satisfied. The parties’ dispute is whether the CBAs “set forth” the “additional services,” as paragraph (a) requires.

The issue of when services are, or are not, “set forth” in an agreement arose in *Fazio v. CRAB*, No. 17-664-D (Suffolk Super. Jan. 2, 2018). Mr. Fazio, a Framingham teacher, directed a

jazz choir. The governing CBA did not specifically mention jazz choirs. But under the heading “Student Activity Advisors—Middle Schools,” the CBA awarded stipends of \$825 each for “5 clubs selected by [the] principal.”

Vacating a contrary decision of DALA and CRAB, the Superior Court determined that the CBA “set forth” Mr. Fazio’s services of directing the jazz choir. The Superior Court acknowledged that a CBA stating “the equivalent of ‘miscellaneous’” might not “set forth” a teacher’s additional services. *Fazio*, slip op. at 6 n.3. Even so, the CBA in *Fazio* set forth the service of jazz-choir direction through two phrases: the heading indicating that “additional services” would include “Student Activity Advisor—Middle School,” and the statement that this category would include “5 clubs selected by the principal.” *Id. passim*.

With this background in mind, I conclude that the CBAs at issue did “set forth” Mr. Florio’s service as advisor to the EMT club. To the extent possible, the term “set forth” must be implemented “consistent with its plain meaning.” *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). As a matter of plain meaning, “[t]o ‘set forth’ is ‘to give an account or statement of.’” *Fazio*, slip op. at 6 (quoting *Merriam-Webster’s Online Dictionary*). To be sure, the CBAs did not provide any *detailed* account or statement of the EMT club; indeed, the CBAs did not even identify the EMT club by its individual name or subject matter. But what the CBAs did deliver was an “account” or “statement” of the EMT club’s existence, and compensable nature, through an open-ended category: The CBAs stated that compensable services would include certain “extracurricular activities” offered at the “New Bedford High School.” And they stated further that “clubs” would be among these compensable extracurricular activities, even if not listed by name in Schedule D’s two-column table. *See* Exhibits 7, 10.

Section 6.02(1)(a) does not specify any particular manner in which the setting-forth of additional services must be done. Explicit and detailed settings-forth may well be the gold standard. They could obviate disputes like the instant one. But there is no plain-meaning barrier to setting forth a service, such as a club, by way of an open-ended category. *See Fazio*, slip op. at 10 (rejecting the view that § 6.02(1)(a) requires “‘specificity,’ ‘sufficiency,’ or ‘adequacy’”).

Regulations also must be interpreted “with reference to their purpose.” *Friends & Fishers of Edgartown Great Pond, Inc. v. DEP*, 446 Mass. 830, 837 (2006). The purpose of § 6.02, as described by the Appeals Court, is “to provide clear records of approved stipends so as to avoid confusion and uncertainty . . . when retirement boards are called upon to calculate pension benefits.” *Kozloski*, 61 Mass. App. Ct. at 787. Retirement boards could be placed “in an untenable position if they had to sift through a multiplicity of alleged oral or side agreements about which memories might well be hazy.” *Id.*

Provisions such as those of the CBAs applicable here achieve these goals of § 6.02. The retirement board calculating Mr. Florio’s allowance faces no confusion or uncertainty. The computation that Mr. Florio proposes does not implicate any oral agreement or side agreement. The only sources the retirement board must consult are the CBAs. The CBAs answer every question that § 6.02(1)(a) refers to them by stating that school activities, regardless of name, are compensable if they are “extracurricular,” are “clubs,” and are offered at New Bedford High School. The real-life existence of Mr. Florio’s EMT club has never been in doubt—and even the most comprehensive CBA would not reveal whether a particular activity actually took place.

Finally, a reading of § 6.02(1)(a) that embraces CBAs such as those at issue here comports with “the purpose and design of the controlling statute.” *Friends & Fishers of Edgartown*, 446 Mass. at 837. In its treatment of “regular compensation,” the Legislature sought

to erect a “safeguard against the introduction into the computations of adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems.” *Bos. Ass’n of Sch. Administrators & Sup’rs*, 383 Mass. at 341. The CBAs here prespecified modest stipend amounts to be paid to advisors of “extracurricular . . . clubs” at a particular school. These CBAs created no realistic risk of inflated retirement benefits or of untoward burdens on the retirement system. The fixed stipends that Mr. Florio received each year for his work with the EMT club were just the sort of recurring, non-ad hoc payment that the Legislature intended to treat as “regular compensation.”

In support of its position, MTRS cites cases that did not truly turn on the meaning of § 6.02(1)(a)’s “setting forth” requirement. In those cases, the key reason why teachers’ services did not qualify for treatment as “regular compensation” was that the compensability of those services hinged on negotiations or agreements located outside the four corners of the applicable CBAs. *See Caruso v. MTRS*, No. CR-09-367 (DALA Oct. 31, 2014, *aff’d*, CRAB Dec. 2, 2015); *Gregorchik v. TRB*, No. CR-02-1317 (DALA Mar. 16, 2004, *aff’d*, CRAB Sept. 1, 2004). That critical flaw is absent here.

Conclusion and Order

For the foregoing reasons, the stipends that Mr. Florio received as advisor to the EMT club were “regular compensation” for purposes of calculating his retirement allowance. MTRS’s decision to the contrary is therefore REVERSED.

SO ORDERED.

Division of Administrative Law Appeals

Yakov Malkiel
Administrative Magistrate

Dated: May 7, 2021