

**COMMONWEALTH OF MASSACHUSETTS  
CONTRIBUTORY RETIREMENT APPEAL BOARD**

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**ANNE FONSECA,  
Petitioner-Appellant**

**v.**

**MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM,  
Respondent-Appellee.**

**CR-12-164**

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**DECISION**

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The petitioner appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) affirming the Massachusetts Teachers' Retirement System's (MTRS) April 8, 2012 decision to exclude stipend she received for performing staff evaluations. On April 10, 2012, Ms. Fonseca timely appealed the MTRS's decision. The Division of Administrative Law Appeals (DALA) held a hearing on August 11, 2016. On December 2, 2016, the magistrate upheld MTRS's decision to exclude remuneration Ms. Fonseca received for performing staff evaluations. He determined that Ms. Fonseca's variable compensation was analogous to the periodic hourly payments in *Hallett v. Contributory Retirement Appeals Board*, 431 Mass. 66 (2000), and declined to consider it as regular compensation.<sup>1</sup> Ms. Fonseca timely appealed to the Contributory Retirement Appeal Board (CRAB) on April 8, 2012. On August 10, 2020, CRAB determined that more fact finding was necessary to determine whether the evaluations were part of Ms. Fonseca's core duties or whether she was providing additional services, as this fact determines whether it can be considered regular compensation. On December 21, 2020, MTRS filed a Motion for Clarification asking whether CRAB had adopted the findings of fact in the DALA decision of December

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<sup>1</sup> *Fonseca v. MTRS*, CR-12-164 (DALA decision December 2, 2016).

2016.<sup>2</sup> CRAB issued an Order on Motion for Clarification indicating that it deferred to DALA on whether to adopt, amend, or revise the previous findings of fact.<sup>3</sup>

On remand, the magistrate held a second hearing on July 21, 2021 in which Ms. Fonseca and Ms. Jean Spera, Director of Student Services for Cambridge Public Schools, testified. He admitted Respondent's exhibits 1-11 and Petitioner's exhibits 1-3, 6, and 8-11. On January 28, 2022, the DALA magistrate issued a decision after remand, again upholding MTRS's decision to exclude stipend Ms. Fonseca received for performing staff evaluations as regular compensation. Ms. Fonseca then again timely appealed to us.

After considering the evidence in the record and the arguments by the parties, we adopt the magistrate's Findings of Fact 1 – 25 as our own and incorporate the DALA decision by reference. We affirm the DALA decision for the reasons set forth in its Discussion and add the following comments.

**Background.** Ms. Fonseca worked as a Student Support Instructional Leader, later called "Teacher in Charge," at Cambridge Public Schools in the Office of Special Education. She worked for the district from September 1, 2006 to June 30, 2011. As part of her duties, Ms. Fonseca evaluated support staff including speech therapists, occupational therapists, and physical therapists. To perform the evaluations, she met with staff members to establish goals, observed staff interactions with students, drafted written evaluations, and discussed her findings with staff members. During her five years as a TIC, Ms. Fonseca received a salary, a stipend for being a TIC, and a stipend of \$311.90 for each staff evaluation she performed. Compensation for these evaluations was outlined in the Collective Bargaining Agreements (CBAs) between the Cambridge Teachers Association and the Cambridge School Committee for the periods of September 1, 2006 through August 31, 2009 and September 1, 2009 through August 31, 2012. Both CBAs provided:

Teachers-in-Charge . . . and Lead Teachers who evaluate members of the bargaining unit shall receive a stipend of \$3,119 annually for ten completed evaluations. The stipend will be pro-rated for fewer evaluations, and the number of evaluations performed shall be at the discretion of the Superintendent or her designee.

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<sup>2</sup> Motion for Clarification dated 12/21/2020.

<sup>3</sup> CRAB Order on Motion for Clarification, December 2020.

For each year in question, Ms. Fonseca performed more than ten evaluations. The exact number would vary based on the needs of the department. CPS paid her \$311.90 for each evaluation, which she received in a lump sum each year at the end of the school year. Ms. Fonseca received \$21,209.09 for the 2008-09 school year; \$20,274 for the 2009-10 school year; and \$17,466 for the 2010-11 school year. On July 30, 2011, Ms. Fonseca filed for retirement. MTRS declined to include the remuneration she received for the staff evaluation as regular compensation in the calculation of her retirement allowance.

**Discussion.** The magistrate concluded that Ms. Fonseca's per-evaluation stipends were not regular compensation, as it failed to meet the definition of regular compensation under the statute and the requirements of 840 CMR 15.03(a) and (b). In the decision, he outlined G.L. c. 32, § 1 and 840 CMR 15.03(a) and (b)'s requirement that regular compensation be pre-determined, non-discretionary, guaranteed, and paid by the employer to similarly situated employees. For teachers, regular compensation can be granted for payments outside these criteria if they are payments rendered as compensation for performing duties in accordance with the terms of an annual contract. DALA noted that under 807 CMR 6.02(1)(b), additional services compensated under this provision must be educational in nature. Based on these rules, the magistrate held that the stipend Ms. Fonseca received for performing support staff evaluations was not regular compensation for five reasons:

1. The number of evaluations, and thus the payment amount, was at the superintendent's discretion. Thus, the payments were not non-discretionary.
2. The stipends were not guaranteed to all similarly situated employees, as at least one Teacher-in-Charge had no staff to evaluate.
3. Ms. Fonseca was not a "*teacher* employed in a public day school" and thus could not be compensated for additional services under G.L. c. 32 § 1.
4. Any compensation above \$3,119 was not specified in a collective bargaining agreement and thus was not granted in accordance with the terms of an annual contract.
5. As to compensation below the amount of \$3,119, the compensation was not for educational services as required by 807 CMR 6.02(1)(b). Rather, the compensation was for administrative services.

#### **I. Regular compensation**

G.L. c. 32 § 1 defines compensation received after June 30, 2009, as “regular compensation” if it is “compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.”<sup>4</sup> The statute then defines “wages” as the base salary or other base compensation for employment, specifying that wages shall not include overtime, commissions, bonuses, or indirect payments.<sup>5</sup> According to 840 CMR 15(3)(b), wages include pre-determined, non-discretionary payments paid by the employer to similarly situated employees. CRAB has determined that for payments to constitute wages, they must be paid for performing a core responsibility of the position.<sup>6</sup>

Teachers enrolled in the MTRS are subject to a limited exception allowing them to include as regular compensation “salary payable under the terms of an annual contract for additional services” even if those payments do not fall under the statutory or regulatory definition of wages.<sup>7</sup> Under 807 CMR 6.02(1), pay for additional services may be considered regular compensation only if the additional services are set forth in the annual contract; the additional services are educational in nature; the remuneration for these services is provided in the annual contract; and the additional services are performed during the school year.<sup>8</sup>

The distinction between core duties and additional services is critical in determining what payments can be included as regular compensation: payment for core duties is regular compensation, because these payments are wages. Payments for additional services are subject to additional requirements. Thus, the notion of core duties and additional services is a useful one in determining not only what constitutes regular compensation, but what factors are considered in determining whether certain payments are regular compensation.

## **II. Distinction of core duties and additional services**

While CRAB has encountered a limited number of cases requiring a distinction between core duties and additional services, the following factors can be used to distinguish between them. First, we consider whether the compensation the member received for the duties performed was pre-determined, non-discretionary, and given to similarly situated employees.<sup>9</sup> We also

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<sup>4</sup> G.L. c. 32, § 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Marletta v. MTRS*, CR-10-347 (CRAB 2016).

<sup>7</sup> G.L. c. 32, § 1.

<sup>8</sup> 807 CMR 6.02(1).

<sup>9</sup> 840 CMR 15(3)(b). *See also Marletta v. MTRS*, CR-10-347 (CRAB 2016).

consider the amount of time spent on the duties in question;<sup>10</sup> and lastly, we look at the relationship between the duties in question and the remainder of the individual's job responsibilities.<sup>11</sup> Determining whether the performance of a specific duty is considered an additional service or a core duties will depend on the specific individuals' responsibilities. In order for a particular function to be considered a Core duty it must be a required element of the job and cannot be a discretionary aspect.

In *Marletta v. MTRS*, we determined that an individual's position as Assistant Dean of Academic Affairs, which took up roughly two-thirds of her time, was her core duty. Thus, while her compensation reflected that of a teacher with various stipends for additional services, Marletta's actual responsibilities centered around her role as Assistant Dean. Rather than being an additional service, her duties as Dean were her core duties because she spent more than two thirds of her time on them and because the compensation for the position of Dean "continued for an indefinite time, was ordinary and normal, and fulfilled the requirements that regular compensation be 'recurrent or repeated' and 'not inflated by extraordinary ad hoc payments.'"<sup>12</sup>

In Ms. Fonseca's case, neither the language in 840 CMR 15(3)(b) nor her actual responsibilities indicate that the performance of evaluations was a core duty. Ms. Fonseca's CBA specified that the number of evaluations performed and the amount received as compensation, "shall be at the discretion of the Superintendent or her designee."<sup>13</sup> The fact that the CBA did not specify the number of evaluations that were required to be completed implies that performing evaluations was not a core duty. The CBA also did not detail the payment required if more than 10 evaluations were completed. As a result, the payments were not predetermined or nondiscretionary. If the CBA required a set number of evaluations and specified the payment for that number then that pay would be predetermined and non-discretionary to anyone who performed the work.

Further, the nature of Ms. Fonseca's evaluations does not reflect those of core duties. She testified that she spent roughly 20% of her time performing evaluations, and the remainder of her time went to unrelated duties including communicating with parents, coordinating educational

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<sup>10</sup> *Marletta v. MTRS*, CR-10-347 (CRAB 2016).

<sup>11</sup> *Id.* See also *Rafferty v. MTRS*, CR-14-391 (DALA 2016).

<sup>12</sup> *Marletta v. MTRS* at 5 (citing *Boston Ass'n of Sch. Admr's & Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 341 (1981)).

<sup>13</sup> Petitioner Exhibits A, B.

programs, and supervising the services provided to children.<sup>14</sup> Ms. Spera, Director of Student Services for Cambridge Public Schools, also testified that evaluations may have consumed 30 to 35% of Ms. Fonseca's time. However, the magistrate did not find Ms. Spera's testimony credible because she was unsure of the exact percentage, did not state the basis of her knowledge, and Ms. Fonseca herself had indicated that the task took up about 20% of her working time. Regardless, the record reflects that the amount of time other TICs spent performing evaluations varied greatly across the district. Ms. Barbara Allen, Human Resources Director for the Cambridge Public Schools, testified that it was possible to maintain the position of TIC without performing a single evaluation.<sup>15</sup> No disciplinary action resulted from failure to complete assigned evaluations before the deadline.<sup>16</sup> Each of these factors suggests that performing evaluations was not a central component of the position or even a required component but rather, an additional responsibility for which TICs were compensated separately. Thus, the staff evaluations Ms. Fonseca performed during the period in question were not core duties but rather, additional services rendered by her.

### **III. Factors for additional services to be considered regular compensation**

Because performing staff evaluations was not a core duty but were instead additional services performed by her, Ms. Fonseca can only include the evaluation stipends as regular compensation if the additional services met the following requirements set out in 807 CMR 6.02(1), which states:

- (1) The term regular compensation as defined by M.G.L. c. 32, § 1 and further defined by 840 CMR 15.03: Regular Compensation shall include salary payable under the terms of an annual contract for additional services so long as:
  - (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.

Under these requirements, none of Ms. Fonseca's stipends can be considered regular compensation. Teacher and staff evaluations are an administrative duty and are not educational in nature. Thus, while compensation of up to \$3,119 meets the requirements of 807 CMR

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<sup>14</sup> 2016 Tr. 43, Finding of Fact #6.

<sup>15</sup> 2016 Tr. 46.

<sup>16</sup> 2016 Tr.49.

6.02(1)(a), (c), and (d), section (b) precludes its inclusion in Ms. Fonseca's regular compensation. While providing evaluations plays an important role in improving the quality of our educational system, the statutory and regulatory requirements dictate that Ms. Fonseca's stipends for performing staff evaluations cannot be included as regular compensation.

In addition, Ms. Fonseca's annual contract stipulates that ten evaluations are to be compensated at a rate of \$3,119 annually, with the amount pro-rated for fewer evaluations. Ms. Fonseca suggests that the wording of the CBA contemplates payment of \$3,119 for *each* ten evaluations, as evidenced by the fact that she was in fact paid \$311.90 for every evaluation she performed. However, by setting an annual rate and providing proration for fewer (but not more) evaluations, the contract makes clear that it contemplates payment for only ten evaluations. CPS's decision to compensate her for these additional evaluations does not change the plain language of the contract. As the magistrate stated in his decision, the language of 807 CMR 6.02(1) is to bring certainty to the requirements for eligible additional services and "provide *clear* records of approved stipends so as to avoid [the] *confusion and uncertainty* . . . of alleged oral or side agreements about which memories might well be hazy."<sup>17</sup> Thus, any payments over \$3,119 were not outlined in the annual contract. These payments fail to meet the requirements of 807 CMR 6.02(1)(a) and (c) in addition to the section (b) requirements outlined above.

Because none of Ms. Fonseca's compensation can be considered regular compensation and used in the calculation of her retirement allowance, we need not address the magistrate's determination that Ms. Fonseca was not a teacher.

**Conclusion.** While Ms. Fonseca played a significant role in improving the quality of the education system, her evaluation of support staff is not a core duty but is an additional service. The remuneration Ms. Fonseca received for performing these evaluations fails to meet the requirements of 807 CMR 6.02(1) to be included as regular compensation for the purposes of calculating her retirement allowance. The DALA decision is affirmed.

SO ORDERED.

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<sup>17</sup> *Fonseca v. MTRS*, CR-12-164 at 11, DALA decision January 28, 2022 (*quoting Kozloski v. Contributory Retirement Appeal Board*, 61 Mass. App. Ct. 783, 787 (2004)).

CONTRIBUTORY RETIREMENT APPEAL BOARD

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