

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Carolyn Forsberg,
Petitioner

v.

Docket No. CR-21-0571

Massachusetts Teachers' Retirement System,
Respondent

Appearance for Petitioner:

Carolyn Forsberg, *pro se*

Appearance for Respondent:

Ashley Freeman, Esq.
Massachusetts Teachers' Retirement System
500 Rutherford Avenue, Suite 210
Charlestown, MA 02129-1628

Administrative Magistrate:

Melinda E. Troy, Esq.

SUMMARY OF DECISION

The MTRS's decision not to include three stipends as "regular compensation" for retirement purposes is affirmed. The stipends were properly excluded from the calculation of the Petitioner's retirement allowance because they were not included in the applicable collective bargaining agreement as required by 807 CMR 6.01 and 6.02.

DECISION

This appeal concerns the determination by the Massachusetts Teachers' Retirement System ("MTRS") that three types of additional pay that the Petitioner received in her final three years of employment (which were the Petitioner's highest years of earnings) did not qualify as "regular compensation" for retirement purposes. These three stipends were: the "Building

Base”/MTSS Committee stipend,¹ received in the 2018-2019, 2019-2020 and 2020-2021 school years; the Literacy Committee stipend received in the 2019-2020 and 2020-2021 school years; and the Poetry² Club advisor stipend received in the 2019-2020 and 2020-2021 school years, which was paid through a grant. For the reasons set forth below, I am affirming the MTRS’s decision.

PROCEDURAL BACKGROUND

I held a hearing in this matter on January 8, 2024, which I digitally recorded with the parties’ consent. I admitted into evidence the Respondent’s exhibits as Exhibits 1-11 and two additional exhibits submitted by the Petitioner, which I marked Exhibits 12 and 13. I have included an exhibit list as an addendum to this decision. I marked the following for identification: the Petitioner’s submission dated December 2, 2022 as Pleading A, her submission dated September 25, 2022 as Pleading B and the MTRS’s Pre-Hearing Memorandum as Pleading C. Neither party submitted a post-hearing memorandum, so the record closed at the conclusion of the hearing.

FINDINGS OF FACT

Based on the evidence presented by the parties and the uncontradicted statements of fact contained in the parties’ written submissions, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. Carolyn Forsberg (“Ms. Forsberg” or “the Petitioner”) is a retired member of the

¹ Hereinafter the “MTSS Committee stipend”.

² In some documents, the Poetry Club and its associated stipend is referred to as the “Pottery Club”. The parties agreed that this is a typographical error and that Ms. Forsberg was only the advisor to the Poetry Club during the relevant times.

MTRS.

2. Ms. Forsberg began teaching in Bourne on a part-time or substitute basis in 1988. From the 1995-1996 school year until the effective date of her retirement, she worked full-time. (Exhibit 6.)
3. Ms. Forsberg was an English teacher. She taught at Bourne Middle School from the 1995-1996 school year through end of the 2017-2018 school year. Starting in the 2018-2019 school year she began working at Bourne High School (“BHS”). She worked at BHS until she retired. She retired earlier than originally anticipated for personal reasons. (Testimony, Forsberg.)
4. When Ms. Forsberg’s retirement allowance was calculated, her three highest years of earnings were the 2018-2019, 2019-2020 and 2020-2021 school years. The MTRS determined that three stipends paid to her during some or all of this time period did not qualify as “regular compensation” for retirement purposes: the MTSS Committee stipend, the Literacy Committee stipend and the Poetry Club advisor stipend. (Exhibit 4.)
5. “MTSS,” as used by the Bourne Public Schools, is an acronym for “Multi-Tiered System of Support, which is a program of services directed to supporting at-risk students in the areas of academic, behavioral and social-emotional learning. (Exhibit 12; Testimony, Forsberg).
6. The Literacy Committee was established in 2019-2020. The mission of this committee was to “provide and promote literacy strategies to be used across content areas; develop tiered supports for literacy instruction; and establish a common language within content areas of all grade levels” in order to “foster growth and

increase student confidence in the ability to read, write, and speak in all content areas and in all areas of literacy.” (Exhibit 12.)

7. The Poetry Club was established to help students develop and foster an interest in poetry, which was a passion of Ms. Forsberg’s. (Testimony, Forsberg.)
8. Ms. Forsberg received the MTSS Committee stipend in three years: the 2018-2019, 2019-2020 and 2020-2021 school years. That stipend was \$500.00. (Exhibit 9.)
9. Ms. Forsberg received the Literacy Committee stipend in two school years: the 2019-2020 and 2020-2021 school years. The first year she received it, she received \$427.78, which was a pro-rated amount because she did not participate from the beginning of the school year. The second year she received it, she received \$500.00. (Exhibit 9; Testimony, Forsberg.)
10. Ms. Forsberg received the Poetry Club advisor stipend in two years: the 2019-2020 and 2020-2021 school years, which was paid through a Nye Grant.³ The first year she received it, she received \$684.44, which was a pro-rated amount because she did not participate from the beginning of the school year. The second year she received it, she received \$800.00. (Exhibit 9; Testimony, Forsberg.)
11. The Bourne School Committee and the Bourne Educators Association entered into a Collective Bargaining Agreement (“CBA”) which initially covered the time period between July 1, 2018 and June 30, 2021. In Appendix B to the CBA, entitled “Extracurricular Activities”, the CBA lists “Nye Grant Club Advisors” at Bourne High School for three clubs- the Book Club, the Film and Radio Club, and the

³ It is not clear from the record what type of grant a Nye Grant is, but there is no dispute that the Poetry Club stipend that Ms. Forsberg received was funded in this manner. The applicable CBA designates certain stipends as being funded by Nye Grants.

- History Club. The amount of the stipend paid for advising each of these three clubs is not listed. Appendix B does not list the Poetry Club among the Nye Grant Clubs or Club Advisors. (Exhibit 8.)
12. The 2018-2021 CBA did not list the MTSS Committee stipend or the Literacy Committee Stipend in the document itself or any of its appendices. (Exhibit 8.)
 13. The 2018-2021 CBA was to have ended on July 1, 2021, but it was extended for an additional year because the Bourne School Committee and the Bourne Educators Association agreed to do so. (Exhibit 2.)
 14. Ms. Forsberg retired effective November 6, 2021. (Exhibit 6.)
 15. By letter dated November 12, 2021, the MTRS notified Ms. Forsberg that it would not include the stipends described above as regular compensation for retirement purposes when calculating her retirement allowance. (Exhibit 4.)
 16. By letter dated November 17, 2021, received at DALA on November 22, 2021, Ms. Forsberg timely appealed the MTRS's determination. (Exhibit 5.)
 17. On December 15, 2022, after Ms. Forsberg retired, the Bourne School Committee and the Bourne Educators Association signed a Memorandum of Agreement ("MOA") covering the period of July 1, 2022 through June 30, 2025. Appendix B to that agreement was a "stipend list." The Nye Grant sponsored clubs listed in Appendix B were the Book Club, the Film and Radio Club, the History Club, and the (newly added) Poetry Club. The amount of these stipends was not listed in Appendix B to the MOA. (Exhibit 13.)
 18. Appendix B1 to the MOA also listed "Pre-K to 12 MTSS Committee Members" and the "6-12 Secondary Literacy Team" as stipends. The amount of each of these

stipends was \$500.00.

DISCUSSION

When one is considering whether a certain payment or stipend qualifies as “regular compensation” for retirement purposes, the general requirements are clear under the case law and existing regulatory scheme.⁴ Regular compensation “include[s] 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; [and] (d) the additional services are performed during the school year.” 807 CMR 6.02(1). “[A]nnual contract,” as used in G.L. c. 32, § 1, is defined as “the collective bargaining agreement for the unit that governs the rights of the members whether it is a one year or multi-year agreement.” 807 CMR 6.01. The requirement that additional services be included in a written contract establishes “a safeguard against the introduction into the computations of adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems. (The safeguard is needed especially where the public entity that negotiates a collective agreement is not the one that will have to find the funds to pay the continuing retirement benefits above the avails of employee contributions).” *Boston Ass’n of Sch. Administrators & Sup’rs v. Boston Retirement Board*, 383 Mass. 336, 341 (1981).

⁴G.L. c. 32, § 1 states, in relevant part, “‘Regular Compensation’, during any period subsequent to June 30, 2009, shall be compensation received exclusively as wages by an employee for services performed in the course of employment for his employer.”

That same statutory section defines “wages”, in turn, as, “the base salary or other base compensation of an employee paid to that employee for employment by an employer”. The definition of “wages” then goes on to state several specific exclusions from that definition, none of which is relevant here.

In *Kozloski v. Contributory Retirement Appeal Board*, 61 Mass. App. Ct. 783, 785-87 (2004), the Appeals Court affirmed MTRS's authority to define the term "annual contract," holding that it served the valid purpose of relieving MTRS staff of the obligation to "sift through a multiplicity of alleged oral or side agreements" to determine whether any particular payment is "regular compensation" for retirement purposes. In dismissing side agreements as unreliable, the Court suggested that the only relevant factor was that a stipend is omitted from a collective bargaining agreement; the reasons why a stipend was omitted from a collective bargaining agreement were irrelevant. *Id.* at 788; *see also Vellante v. Contributory Retirement Appeal Board*, Civil Action No. 03-0184 (Mass. Sup. Ct. Feb. 6, 2004), *aff'd* 62 Mass. App. Ct. 1122 (2005) (Court concluded that, while *Kozloski* deals with oral side agreements, the same rationale applies to written side agreements, as well).

In this case, the Petitioner acknowledges that the three types of payments at issue were not included in the CBA that applied from July 1, 2018 through her retirement in November 2021. She argues that the fact that these payments were included and specified in the MOA that was executed in December 2022 should be evidence that the Bourne School Committee and the Bourne Educators Association intended to include the payments and would have done so prior to her retirement if they had been able to execute the successor CBA to the 2018-2021 CBA in a timely manner.

DALA has considered what impact later-enacted agreements have on CBAs and related regular compensation determinations on multiple occasions. In *DeMelo v. Massachusetts Teachers' Retirement System*, CR-08-47 (DALA 2012), the Petitioner was a high school teacher who was subject to a CBA. Under its terms, the CBA was to apply from July 1, 2004 until June 30, 2007 but a successor CBA was not executed by the original end date. During the 2006-2007

school year, the Petitioner in *DeMelo* took on additional duties as a curriculum coordinator, for which he was paid a \$5,000.00 stipend. However, the 2004-2007 CBA was not amended to include it, despite the fact that all parties intended to do so. Instead, in October 2007, the month in which Mr. DeMelo retired, the parties drafted a MOA purporting to include the curriculum coordinator position and stipend retroactively in the 2004-2007 CBA. When the successor CBA was eventually drafted, the curriculum coordinator position and stipend were included in it. The MTRS declined to consider this stipend part of Mr. DeMelo's regular compensation. DALA affirmed that decision, finding that although the parties to the CBA were entitled to amend the CBA in this manner under applicable labor law, they were "not able to bind the retirement system... in terms of what is regular compensation for retirement purposes." *DeMelo* at *8.

Similarly, in *Farrell v. Massachusetts Teachers' Retirement System*, CR-11-425 (DALA 2015), a Petitioner was only permitted to include a stipend as "regular compensation" after it had been added to a CBA. The Petitioner in *Farrell* was a teacher. In September 2009, the last year of the then-applicable CBA, she agreed to take on the duties of a Data Warehouse Analyst, for which she was paid an annual stipend of \$5,000.00. After she had performed the duties for the first year, the 2007-2010 CBA to which she had been subject was renegotiated for another three-year term (2010-2013) and the new CBA included that Data Warehouse Analyst position and stipend amount. When the Petitioner in *Farrell* retired in 2011, the MTRS did not include the 2009-2010 stipend she received as "regular compensation"⁵ and she appealed. While her appeal was pending, the school district and union entered into an agreement stating that the position of Data Warehouse Analyst had been omitted from the 2007-2010 CBA and purporting to amend

⁵ The MTRS did include the stipend as regular compensation for the 2010-2011 school year because it was included in the 2010-2013 CBA.

that CBA retroactively to include the position and stipend. DALA affirmed the MTRS decision, relying on *Kozloski* and rejecting the argument that the failure to include the stipend in the 2007-2010 CBA was an “oversight”. DALA concluded that like in *Kozloski*, the decisive factor was simply the fact that the position was not included in the CBA, not the reason it was omitted. *Farrell* at *4.

Finally, in *Lutz v. Massachusetts Teachers’ Retirement System*, CR-21-0075 (DALA 2023), the Petitioner was a music teacher who retired effective June 30, 2020. In addition to teaching, he served in two additional capacities in the years prior to his retirement, as “Spring Band” [Coordinator] and as the “Instrumental Band Coordinator”. The applicable CBA ran from July 1, 2017 to June 30, 2020. That CBA was amended by various MOAs between 2017 and 2019 (before the Petitioner retired) and one of those memoranda included the “Spring Band” stipend he received.⁶ The \$7,500.00 stipend that the Petitioner in *Lutz* received as “Instrumental Band Coordinator” was not included in any CBA or MOA prior to his retirement. In September 2020, the MTRS notified him that it would include the “Spring Band” stipend as regular compensation, but it would not consider the “Instrumental Band Coordinator” stipend to be regular compensation. He appealed. In November 2020, the school district and the union in *Lutz* executed a MOA which purported to include the position of “Instrumental Band Coordinator” in the CBA, retroactive to June 2016. DALA affirmed the MTRS’s decision to exclude the “Instrumental Band Coordinator” stipend as regular compensation. DALA found two things to be dispositive-that the execution of the MOA occurred after the MTRS had determined that the amount was not regular compensation, and that it occurred after the Petitioner in *Lutz* had performed those services. DALA found that these were facts that were “critical, and fatal” to his

⁶ The amount of the “Spring Band” stipend is not specified in the decision.

claim that the amounts should be considered regular compensation. *Lutz* at *7. Ultimately, DALA again relied on *Kozloski* and although acknowledging that the failure to include “Instrumental Band Coordinator” in the CBA or any MOA may have been an oversight, found that the reason why the stipend may have been omitted was irrelevant. *Lutz* at *9.⁷

In this case, similarly, the reasons why the three stipends paid to Ms. Forsberg were omitted from the CBA in effect at the time that she retired are not relevant- it is sufficient that they were excluded. The later inclusion of these stipends in the December 2022 MOA does not change this result. In fact, as in *Lutz*, the fact that the December 2022 MOA was executed after the MTRS made its determination that these payments were not regular compensation and after Ms. Forsberg had performed the services at issue is “critical, and fatal” to her claim that the stipends should be considered regular compensation for retirement purposes.

For all of these reasons, the MTRS properly excluded the MTSS Committee stipend, the Literacy Committee stipend and the Poetry Club advisor stipend from the calculation of the Petitioner’s retirement allowance.

SO ORDERED,

DIVISION OF ADMINISTRATIVE LAW APPEALS

Melinda E. Troy

Melinda E. Troy
Administrative Magistrate

Dated: August 9, 2024

⁷ The *Lutz* decision includes an extensive discussion as to why its determination is also central to the efficient administration of the public employee retirement systems, as well as to ensuring that the actuarial and administrative predictability of the retirement systems is maintained. Both are important considerations.

Exhibit List

1. Letter from Kelly M. Cook to Edward McGrath, dated December 2, 2021.
2. Letter from Ann Marie Strode to Edward McGrath, dated November 23, 2021.
3. Memorandum of Understanding related to the CBA in effect from July 1, 2018 to June 30, 2021.
4. Letter from the MTRS to the Petitioner denying her request to include certain payments to her as “regular compensation” for retirement purposes, dated November 12, 2021.
5. Petitioner’s letter of appeal, dated November 17, 2021 and received at DALA on November 22, 2021.
6. Petitioner’s retirement application, received at MTRS July 12, 2021.
7. Notice of Estimated Retirement Benefit, dated November 15, 2021.
8. Collective Bargaining Agreement between the Bourne School Committee and the Bourne Educators Association, effective July 1, 2018 to June 30, 2021.
9. Email chain between MTRS and Bourne Public Schools ending November 10, 2021.
10. Email chain between MTRS and Bourne Public Schools ending August 26, 2021.
11. Petitioner’s Appointment Letters for the 2018-2019 school year, the 2019-2020 school year and the 2020-2021 school year.
12. Petitioner’s letter to Edward McGrath dated December 2, 2021.

Letter to Edward McGrath from Ann-Marie Strode dated November 23, 2021, with enclosed Appendix B: “Stipend Schedule, Extra Curricular Activities 2018-2021; Memorandum of Agreement between the Bourne School Committee and the Bourne Educators Association applicable to the time period for the 2021-2022 school year and the 2022-2025 Collective Bargaining Agreements.”