

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Gloucester Retirement Board,
Petitioner,

Docket No.: CR-21-0217

v.

**Public Employee Retirement Administration
Commission, Joseph Catarino, Joseph
Fitzgerald, and Eugene MacDonald, Jr.,**
Respondents.

Appearances:

For Gloucester Retirement Board: Thomas F. Gibson, Esq., Gerald A. McDonough, Esq.
For Public Employee Retirement Administration Commission: Felicia M. Baruffi, Esq.
Eugene MacDonald, Jr., pro se

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

When the officers of a municipal police department work overtime hours, they are entitled by contract to forgo the usual overtime pay and to instead accrue “compensatory leave,” i.e., extra hours of paid time off at the officers’ usual pay rate. In effect, when officers opt for compensatory leave, they receive the same total amounts that they would have been paid if they had not worked overtime. The officers’ pay for compensatory leave is regular compensation for retirement purposes: it is recurrent, repeated, not inflated by extraordinary amounts, and not “overtime” within the meaning of the retirement law.

DECISION

Procedural Posture

This case revolves around a provision of the collective bargaining agreement (CBA) between the city of Gloucester and the superior officers of its police department. Petitioner the Gloucester Retirement Board (board) asked respondent the Public Employee Retirement Administration Commission (PERAC) whether certain payments to officers under the pertinent

CBA provision count as regular compensation for retirement purposes. In three formal letters, PERAC said yes.

The board initiated this appeal, which was submitted on the papers under 801 C.M.R. § 1.01(10)(c). After the parties filed memoranda and exhibits, the appeal was dismissed. The order of dismissal explained that PERAC's pertinent letters were not appealable: they were "advisory," were not "final," and made no "determination of concrete entitlements or liabilities." *Gloucester Ret. Bd. v. Public Emp. Ret. Admin. Comm'n*, No. CR-21-217, 2022 WL 16921454, at *2 (Div. Admin. Law App. June 10, 2022). The order of dismissal added: "[W]hen a retirement board disagrees with PERAC, its path to appellate review is to request a ruling stating PERAC's position 'as applied to a particular case.'" *Id.* (quoting *Grimes v. Malden Ret. Bd.*, No. CR-15-5, 2016 WL 11956883, at *5 (Contributory Ret. App. Bd. Nov. 18, 2016)).

On appeal, the Contributory Retirement Appeal Board (CRAB) affirmed, agreeing that "[o]pinion [l]etters from PERAC are not appealable decisions," with the result that "DALA and CRAB have no jurisdiction." 2025 WL 2322619, at *1 (Contributory Ret. App. Bd. May 28, 2025). But by that time, three police officers potentially affected by the dispute had retired. The board therefore asked CRAB to reconsider its decision. CRAB granted the request, remanded the matter to DALA, and stated that on remand "the affected [p]olice [o]fficers can be made parties . . . and DALA can address the merits." 2025 WL 2322618, at *1 (Contributory Ret. App. Bd. June 23, 2025).

The three affected officers are respondents Joseph Catarino, Joseph Fitzgerald, and Eugene MacDonald, Jr. On remand, they were invited to intervene; when they did not respond, they were joined as parties involuntarily and afforded another opportunity to be heard. Mr.

MacDonald stated his position briefly by email. Mr. Catarino and Mr. Fitzgerald made no submissions. The board and PERAC readopted their original memoranda and exhibits with minor updates, including a calculation of the dispute's potential impact on the three affected officers. I now admit into evidence exhibits marked 1-14.

Findings of Fact

I find the following facts.

1. The employment of superior officers in the Gloucester police department is governed by a CBA. A January 2020 memorandum of agreement amended the CBA by adding a provision about "compensatory leave," which states in part as follows:

As an alternative to paid overtime . . . and upon approval of the Police Chief, or his/her designee, an employee shall be allowed to accrue and use compensation [sic] leave in a given calendar year. This benefit shall not be unreasonably denied.

The practical effect of this provision is that officers who work overtime hours now have two options: they may choose to receive, as before, overtime pay (at the overtime rate); or they may choose for each hour of overtime work to be converted only into an entitlement to an extra hour of paid time off. When that "compensatory" time off is eventually taken, each hour of it is compensated at the officer's standard pay rate. (Exhibit 6.)¹

¹ In its original, July 2021 memorandum, the board wondered whether the police department might be paying for compensatory leave at an overtime rate. PERAC stated at that time that it would withdraw its disagreement with the board "[i]f the [b]oard, after contacting the [c]ity and [u]nion, discovers that the compensatory leave payments are paid at a one-and-one-half rate of pay." The parties have reported no such discovery after studying the pertinent pay data for the three individual respondents. (Exhibit 14.)

2. The CBA as amended prescribes a series of restrictions on the uses and consequences of compensatory leave, namely:

Compensatory time shall be allowed to accrue, however accrued balances cannot exceed more than ten (10) days of compensatory leave at any one time. . . .

There shall be no carry-over of compensatory leave from one calendar year to the next. . . .

Compensatory leave shall not serve to increase the cost of benefits buy-out through the [e]xit [i]nterview.

The first two of these rules limit the number of extra time off that officers can acquire through the use of compensatory leave. The third rule effectively prevents compensatory leave from being converted into a lump-sum payment disbursement at the time of an officer's separation from employment. (Exhibit 6.)

3. Over the years, the board and PERAC have exchanged correspondence about older CBA provisions stating similar rules. After the January 2020 amendment, the board asked PERAC whether a superior officer's regular compensation for retirement purposes now includes pay for compensatory leave. In a series of letters, PERAC said yes, essentially for the reasons discussed below. More recently, with the cases of the three individual respondents in mind, PERAC reconfirmed its position. (Exhibits 1-5, 7-14.)²

Analysis

To restate the factual crux of this case, when a Gloucester superior officer works any hour of overtime, he or she may choose between (a) an hour of pay at his or her overtime rate

² This appeal does not implicate PERAC's opinions about CBA provisions other than the one described here.

in the upcoming paycheck; or (b) an entitlement to an hour of “compensatory leave,” i.e., an extra hour of time off, paid at the officer’s usual pay rate, at some future date. The dispute focuses on officers who choose the latter option: the question of law is whether the pay that eventually accompanies the extra time off is “regular compensation” for retirement purposes. In practical terms, an employee’s regular compensation determines the amount of the employee’s retirement allowance. See G.L. c. 32, § 5(2)(a).

The essential definition of regular compensation today is “wages . . . for services performed in the course of employment.” G.L. c. 32, § 1. In turn, wages are the employee’s “base salary or other base compensation.” *Id.* The board maintains that the superior officers’ pay for compensatory leave is not “base salary” or “base compensation.”

The retirement statute does not actually define these two terms. But under the pertinent case law, they are intended to capture “ordinary, recurrent, or repeated payments not inflated by any extraordinary ad hoc amounts.” *Public Emp. Ret. Admin. Comm’n v. Contributory Ret. Appeal Bd. (Vernava I)*, 478 Mass. 832, 835 (2018). See *Twohig v. Braintree Ret. Bd.*, No. CR-18-505, 2022 WL 16921472, at *3 (Div. Admin. Law App. May 20, 2022). A PERAC regulation unpacks the rule against “extraordinary ad hoc amounts” by providing that, to qualify as wages, payments must be “pre-determined,” “non-discretionary,” and “guaranteed.” 840 C.M.R. § 15.03(3)(b).

The superior officers’ pay for compensatory leave satisfies these requirements. The key point appreciated by PERAC is that the governing rules focus not on the description of any payment but on its “amount[.]” *Vernava I*, 478 Mass. at 835. The amount is critical because the purpose of the statute and regulations is to prevent “the introduction into the

computations of adventitious payments . . . which could place untoward, massive, continuing burdens on the retirement systems.” *Boston Ass’n of Sch. Adm’rs & Supervisors v. Boston Ret. Bd.*, 383 Mass. 336, 341 (1981). When an employee is paid the same amount as usual, no new burden is placed on the system; the employee’s pay in such circumstances involves no “extraordinary” component.

When Gloucester officers are paid for compensatory leave, their pay stubs may include different line items than usual; a nonroutine CBA provision may be at work; but the employees’ total compensation remains unchanged. They receive the same amounts that they would have been paid if they had not worked their overtime hours. In the pertinent sense, the pay accompanying the officers’ eventual, extra time off is ordinary, recurrent, repeated, and uninflated. *Vernava I*, 478 Mass. at 835.

For similar reasons, the compensation of the pertinent officers is “pre-determined,” “non-discretionary,” and “guaranteed.” 840 C.M.R. § 15.03(3)(b). It is true that the officers make non-predetermined decisions whether to receive overtime pay or to accrue compensatory leave. But officers choosing to accrue compensatory leave are *not* thereby “opt[ing] to receive . . . payments.” *O’Leary v. Contributory Ret. Appeal Bd.*, 490 Mass. 480, 484 (2022). Instead, such officers are electing to keep their compensation unchanged. As PERAC observes, an analogous choice is made by any employees who take garden-variety days off: they may be opting to be paid under different CBA provisions than usual; but their pay amounts remain unchanged and continue to count as “regular.” *See Dillon v. Middlesex Cty. Ret. Syst.*, No. CR-21-330, 2023 WL 9190007, at *3 (Div. Admin. Law App. Dec. 15, 2023).

The board observes that the superior officers are paid for compensatory leave only as a result of having worked extra hours. On this basis, the board maintains that the sums at issue are “overtime,” a category of pay specifically excluded from the scope of “wages.” G.L. c. 32, § 1; 840 C.M.R. § 15.03(3)(f). This argument suffers from flaws analogous to those already discussed. The legislative purpose of the retirement law’s treatment of “overtime” is unrelated to the number of hours actually worked. The issue with overtime in the retirement context is its potential to drive up an employee’s pay during specific periods, with the consequence that the employee’s benefits may lose proportion to his or her long-term compensation and contributions. *See Smith v. City of Lowell*, 334 Mass. 516, 518-19 (1956); *Abbott v. Plymouth Ret. Bd.*, No. CR-01-868, at *1-2 (Contributory Ret. App. Bd. Jan. 31, 2003); *Barnes v. Essex Reg’l Ret. Syst.*, No. CR-21-469, 2023 WL 8526444, at *3 (Div. Admin. Law App. Dec. 1, 2023); *Doherty v. Revere Ret. Bd.*, No. CR-16-363, at *5 (Div. Admin. Law App. Oct. 22, 2021). Again, when Gloucester officers receive pay for compensatory leave, the amount of their total compensation remains unchanged. Although overtime *work* has occurred in such cases, no overtime *pay* has been remitted.

The board turns next to the statutory phrase that limits regular compensation to wages “for services performed in the course of employment.” G.L. c. 32, § 1. The board notes that during the specific hours of their compensatory leave, the officers perform no “services.” That is true as far as it goes, but compensation can be paid “for services” sometime after the services are performed. The analogy to ordinary vacation days is again instructive: in *Vernava I*, the Supreme Judicial Court noted that the pay to “an employee . . . taking a day off from work” is regular compensation, essentially because the day off was earned through

“prior . . . services.” 478 Mass. at 838. *See Dillon*, 2023 WL 9190007, at *3. Likewise, officers on compensatory leave are being paid as a result of services that they provided earlier on, i.e., during their overtime hours.

The board’s final suggestion is that the Gloucester police department may be breaching the federal labor laws by calculating pay for compensatory leave at a standard pay rate instead of at an overtime rate. The law on that point is nuanced. It turns on factual details not litigated here. *See* 29 U.S.C. § 207(o)(1); 29 C.F.R. § 541.3(b). More importantly, the consequences of a non-party’s behavior for non-retirement-law purposes is beyond the reach of this proceeding. This appeal rises and falls on whether the pertinent sums as paid by the police department in practice are regular compensation, and they are.

Conclusion and Order

In view of the foregoing, PERAC’s decision as reflected in its three pertinent letters is
AFFIRMED.

Dated: December 5, 2025

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate
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