

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

James Hannon,
Petitioner

v.

Docket No. CR-20-0303
Dated: April 19, 2024

**Essex Regional Retirement Board,
Gloucester Retirement Board, and
Public Employee Retirement
Administration Commission,**
Respondents

Appearance for Petitioner:

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Appearance for PERAC:

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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

A member of two retirement systems who was approved for accidental disability retirement from one system and superannuation from the other was not subject to G.L. c. 32, § 5(2)(e) because that provision applies only to instances of two superannuation retirement allowances. Instead, the member's retirement must be paid according to G.L. c. 32, § 3(7)(d). The superannuation system must reclaim the retirement payments it made to the member and transfer the member's account to the accidental disability system, which must then recalculate the accidental disability allowance to include the member's compensation from both systems. The actuary should then calculate a prorated contribution from the superannuation system to the accidental disability system.

DECISION

James Hannon was a member of both the Essex Regional Retirement System and the Gloucester Retirement System for several years leading up to his retirement in 2018 because he worked two simultaneous public jobs in Middleton and Gloucester. Mr. Hannon retired separately from each system, from the Gloucester System on accidental disability and from the Essex System on superannuation. PERAC has rejected this arrangement and ordered the Essex System to terminate the superannuation allowance, recoup the allowance paid so far, and pay Mr. Hannon's contributions over to the Gloucester System. The Essex System has reluctantly complied with PERAC's order. Mr. Hannon appeals the Essex System's decision. PERAC also ordered the Gloucester System to recalculate Mr. Hannon's accidental disability retirement based not only on his Gloucester regular compensation, but also his Middleton compensation.

On September 14, 2020, the Essex Board moved DALA to join the Gloucester Retirement System and PERAC as necessary parties and suggested that the matter was purely a question of law and could be decided on written submissions. On September 21, 2020, DALA allowed the motion to join the Gloucester System and PERAC and ordered the remaining parties to identify any issue of fact requiring an evidentiary hearing. The

Gloucester Board raised an issue of fact that would require a hearing: whether Mr. Hannon was entitled to membership in the Essex Regional Retirement System in the first place. On November 23, 2021, DALA ordered the parties to file a joint pre-hearing memorandum. On April 15, 2022, the Gloucester System and PERAC filed a joint pre-hearing memorandum along with 37 proposed exhibits. On February 6, 2023, the Gloucester Board submitted three additional exhibits, as well. The Essex Board did not participate in the production of the joint pre-hearing memorandum because it had decided to abide by DALA's final decision, whatever that may be.

On February 7, 2023, a hearing was held by Webex. Mr. Hannon testified on his own behalf. The Respondents called no witnesses. I entered a total of 42 exhibits into evidence comprising the 40 pre-submitted exhibits, Mr. Hannon's appeal letter, and pay records from the Town of Middleton that Mr. Hannon submitted after the hearing. (Exs. 1-42.) Mr. Hannon submitted his closing brief on September 22, 2023. PERAC submitted its closing brief on September 19, 2023. The Gloucester Board submitted its closing brief on September 22, 2023. The Essex Board did not submit a closing brief.

FINDINGS OF FACT

Based on the exhibits, testimony, and the parties' stipulations, I make the following findings of fact:

1. At various times, James Hannon held multiple public jobs (Middleton call firefighter, Middleton member of Board of Registrars of Voters, and Gloucester full-time firefighter) and consequently was, on and off, a member of two different contributory retirement systems: the Essex Regional Retirement System (Essex System) and the Gloucester Retirement System (Gloucester System). While he worked this multiplicity of

public jobs, he also worked full time for AmTote International, selling and managing parimutuel betting equipment throughout New England. (Testimony; Stipulation.)

Middleton Employment and Essex Regional Retirement System

2. The Middleton Fire Department employed Mr. Hannon as a call firefighter from 1983 to 2018. (Exs. 1, 2; Tr. 48.)

3. Employees of the Town of Middleton who meet the eligibility requirements are entitled to membership in the Essex System. As of September 24, 1996, the Essex Board promulgated a supplementary regulation governing an employee's eligibility to join the retirement system. The threshold requirement for membership was that an employee had to work at least twenty hours per week to become a member. (Ex. 4.)

4. That 1996 regulation also contained a provision that permitted permanent part-time employees who did not work a fixed schedule to be eligible for membership if, after a ninety-day period, their work week averaged twenty hours per week. (Ex. 4.)

5. The collective bargaining agreement that Middleton call firefighters were subject to described them as "permanent part-time call firefighters." The call firefighters were treated as permanent part-time employees because, not only did they respond to emergency calls like a typical call fire fighter, but they also worked full fourteen-hour night shifts and eight-hour day shifts each month. Under the CBA, the call firefighters were collectively obligated to fill a certain number of these shifts. Generally, the call men bid on the shifts each month and the fire chief would make the schedule according to seniority. If nobody signed up for a shift, then the fire chief had authority to order a call member to fill the shift. There were monetary penalties for refusing to report for a fire

chief-ordered eight- or fourteen-hour shift. The call fire fighters also received a variety of other benefits that would go along with the status of permanent employee. (Ex. 31; *see generally* Ex. 41.)

6. On August 5, 2004, Mr. Hannon applied to become, and the Essex Board allowed him to become, a member-in-service of the Essex System.¹ (Ex. 5.)

7. As of March 27, 2006, Mr. Hannon had remitted a total amount of \$16,139.74 to the Essex System to purchase his prior service as a call firefighter, from 1983 up to his enrollment in the Essex System in 2004, for which he was credited with 113 months of creditable service.² (Ex. 7.)

8. In April 2012, the Essex Board rescinded its 1996 membership regulation and adopted a new membership regulation. The new regulation continued the requirement that an employee had to work a permanent twenty-hour per week schedule to be eligible for membership. This new membership policy also required that, to continue to accrue creditable service, a member had to maintain a permanent work schedule of at least twenty hours per week. If a member's work schedule dropped to less than twenty hours per week, then, from that point forward, the member would have been considered inactive and would have no longer contributed to the retirement system or continued to

¹ Mr. Hannon testified that, in 2004, the Essex System informed him that he was required to become a member of the Essex System because of something having to do with starting his position in Gloucester. It is not apparent what his Gloucester employment would have to do with membership in the Essex System, but nonetheless he was made an Essex member after he applied. (Tr. 9.)

² Mr. Hannon was able to purchase his call firefighter service because, on July 12, 2005, the Town of Middleton voted to accept the provisions of G.L. c. 32, § 4(2)(b $\frac{1}{2}$), which permits call firefighters to receive five years of creditable service without first having to become a permanent member of their fire department. (Ex. 6.)

accrue creditable service. (Ex. 8.)

9. On a number of occasions over the years, the Essex Board questioned whether Mr. Hannon's status as a call firefighter entitled him to membership in the Essex System. For example:

a) In November 2010, the Essex Board discussed Mr. Hannon's situation with the Gloucester Board and noted that his Gloucester funds, which had previously been transferred to Essex, should be refunded to him or transferred to Gloucester, but no such action took place. (Ex. 9.)

b) In 2013, the Essex Board, while looking into the status of call firefighters and making some of them inactive members, flagged Mr. Hannon and investigated his status, but the Essex Board took no action at that time. (Ex. 10.)

c) In April 2017, the Essex Board once again called into question Mr. Hannon's membership status.

In the end, however, the Essex Board concluded that Mr. Hannon was correctly admitted to membership. (Ex. 11.)

10. On May 16, 2017, the Essex Board rescinded its 2012 membership regulation and permitted members of the Essex System who had been made inactive under the 2012 regulation to return to active membership and purchase the service they rendered while "inactive" under the 2012 regulation. (Ex. 8.)

11. Additionally, the 2017 regulation defined "permanently employed 20 hours per week" to mean that "the employee is guaranteed 20 hours of weekly compensation each and every week." (Ex. 8.)

12. Mr. Hannon never had a set schedule but, instead, as is provided under the

CBA, would bid for shift work for days on which he was not working at his job in Gloucester. (Tr. 18-20.)

Gloucester Employment and Gloucester System Membership

13. On May 23, 2004, Mr. Hannon began working as a full-time firefighter in the City of Gloucester. He became a member of the Gloucester Retirement System that same day. He remained an active member until July 25, 2004, when he was laid off from his position. (Ex. 1; Tr. 9.)

14. Consequently, on September 17, 2004, the Essex System, which by this time he had been a member of for a number of years, requested the transfer of Mr. Hannon's two months of accumulated deductions from the Gloucester System. (Ex. 14.)

15. On or about October 7, 2004, the Gloucester System transferred Mr. Hannon's meager retirement contributions to the Essex System. (Ex. 15.)

16. On January 2, 2005, Gloucester subsequently rehired Mr. Hannon as a full-time firefighter, and he once again became a member-in-service of the Gloucester System. (Ex. 11.)

Retirement

17. On September 7, 2016, Mr. Hannon suffered a disabling injury on the job in Gloucester. (Tr. 12.)

18. On September 16, 2016, Mr. Hannon took a leave of absence from Middleton. (Ex. 33.)

19. Mr. Hannon continued to work light duty in Gloucester for approximately another year, until September 2017. (Testimony.)

20. Mr. Hannon applied to the Gloucester System for accidental disability

retirement, which the Gloucester Board approved on July 25, 2018. (Ex. 16.)

21. On July 31, 2018, Mr. Hannon retired from the Essex System on a superannuation retirement with 21 years, 5 months creditable service. (Ex. 17.)

22. On December 4, 2018, PERAC sent notice to the Gloucester System that, under G.L. c. 32, § 3(8)(c), the Gloucester System was required to reimburse the Essex System \$68.03 per year toward Mr. Hannon's Essex System superannuation retirement, stemming from the two months of contributions that the Gloucester System had sent the Essex System when he was laid off from Gloucester in July 2004. (Ex. 1.)

23. In or about October 2019, the Gloucester System contacted PERAC to discuss the § 3(8)(c) reimbursements that the Gloucester System was paying to the Essex System. (Ex. 18.)

24. On June 29, 2020, PERAC issued a letter in which it made the following directives:

- a) the Essex System was required to immediately cease paying a superannuation retirement benefit to Mr. Hannon;
- b) Mr. Hannon was required to repay all retirement benefits that he received from the Essex System;
- c) the Essex System was required to transfer Mr. Hannon's annuity savings account to the Gloucester System, and reimburse the Gloucester System for all amounts that it paid to the Essex System under § 3(8)(c);
- d) upon receipt of the transfer from the Essex System, the Gloucester System must recalculate Mr. Hannon's accidental disability benefits to include all the regular compensation that he had received from both the City of Gloucester and

the Town of Middleton; and

e) because the benefit to Mr. Hannon from Gloucester is a benefit paid under c. 32, § 7, there is no provision for Essex to reimburse Gloucester for any of those benefit payments.

(Ex. 18.)

25. On July 7, 2020, the Essex Board contacted Mr. Hannon about PERAC's June 29, 2020 letter, and asked him to comply with its terms by repaying the superannuation retirement payments he had received, plus interest, totaling \$23,726.25.

(Ex. 19; Tr. 26.)

26. Mr. Hannon filed a timely appeal of the Essex System's decision. (Ex. 41.)

27. On September 14, 2020, the Essex System filed a motion to join the Gloucester System and PERAC as necessary parties, which DALA allowed on September 21, 2020.

CONCLUSION AND ORDER

For approximately two years, Mr. Hannon collected two retirement allowances from two different retirement systems: accidental disability retirement from the Gloucester Retirement System and superannuation retirement from the Essex Regional Retirement System. This appeal has to do with how the retirement law's various dual membership provisions are applied.

Technically speaking, Mr. Hannon is appealing the Essex System's decision to comply with PERAC's order, but, once PERAC and the Gloucester System were joined as Respondents, each element of the PERAC order has been challenged by at least one of

the parties. It is therefore prudent to rule on each element of the entire PERAC order.

Mr. Hannon seeks to maintain the status quo. Mr. Hannon insists that he is entitled to continue to receive two retirement allowances under the “dual membership law,” which, in some circumstances, governs superannuation retirement of members of more than one retirement system. Section 5(2)(e) provides in pertinent part:

A person who has been a member of 2 or more systems and who, on or after January 1, 2010, has received regular compensation from 2 or more governmental units concurrently for greater than 60 days shall, upon retirement, receive *a superannuation retirement allowance to become effective on the date of retirement that is equal to the sum of the benefits calculated pursuant to this section as though the member were retiring solely from each system*; provided, however, that notwithstanding paragraph (c) of subdivision (8) of section 3, *each system shall pay the superannuation retirement allowance attributable to membership in that system to the member*; and provided further, that this section shall not apply to any member who has vested in 2 or more systems as of January 1, 2010 or to any position whose annual regular compensation was less than \$5,000. Paragraph (d) of subdivision (7) of section 3 shall not apply if this paragraph applies. Upon retirement a member shall be considered a dual member if the member satisfies this paragraph. This paragraph shall only apply to the 5 years of creditable service immediately preceding a member’s superannuation retirement under this section.

(Emphasis added.)

To qualify for dual membership under § 5(2)(e), a member must separately qualify for membership in both systems. It is undisputed that, when he retired for accidental disability, Mr. Hannon was a lawful member of the Gloucester System. His full-time employment in the City of Gloucester entitled him to membership. However, the Gloucester System challenges Mr. Hannon’s Essex System membership.³ It argues

³ Presumably, the Gloucester System has taken this position because it is trying to avoid PERAC’s order to recalculate Mr. Hannon’s accidental disability allowance based on the contemporaneous additional pay that he received from Middleton without any reimbursement from the Essex System for the increase. If Mr. Hannon was not properly admitted to the Essex System, then he would be entitled only to a return of his Essex

that he was never entitled to membership because Essex's membership regulation allowed membership only for permanent employees and the retirement law does not support membership based on call fire fighter status, as call firefighters are by definition not permanent employees.

When Mr. Hannon was admitted to membership in the Essex system, an employee qualified for membership either by working 20 hours per week, or, if the employee did not work a fixed schedule, worked at least an average of 20 hours per week over a 90-day period. There was no explicit requirement that an employee hold a permanent job. Later amendments in 2012 and 2019 required permanent employment for at least 20 hours per week.

Mr. Hannon did not work a fixed schedule in Middleton. Under their collective bargaining agreement, Middleton call fire fighters worked two different kinds of hours. Like most call fire fighters, they responded to fire alarms when they were available. But, they were also required to work regular 14-hour and 8-hour shifts like regular fire fighters. They bid on the shifts and the fire chief made the assignments based on seniority. If a shift was unfilled, the fire chief could force a call firefighter to fill the shift and impose financial penalties on call firefighters who refused to appear for a forced shift. Perhaps these requirements are what led the parties to the CBA to title the call fire fighters "permanent part-time call firefighters." Against this backdrop, it is difficult to place these employees neatly into a pre-existing category of "permanent part-time" *or* "call fire fighter." But, at least for the purposes of retirement system membership, Mr. Hannon was a permanent employee, and he satisfied the minimum hours requirement of

contributions and his accidental disability allowance would remain the same.

the regulation that was in effect at the time that he was admitted. Therefore, I must conclude that he was properly admitted to membership in the Essex System. His membership continued from that point forward until his retirement. See G.L. c. 32, § 3(1)(a)(i); *DeFelice v. Stoneham Retirement Bd.*, CR-10-656, at *3 (CRAB Jan. 16, 2014), *aff'd Stoneham Retirement Bd. v. Contributory Retirement Appeal Bd.*, 476 Mass. 130 (2016) (“We think it is clear that the Legislature did not contemplate allowing retirement boards to utilize § 3(2)(d) to deny or terminate active membership to persons continuously employed in the same position who are, or once were, eligible for membership.”)

Now that it is established that Mr. Hannon was entitled to membership in the Essex System, I must determine whether he should be treated as a dual member under § 5(2)(e). Mr. Hannon claims that his situation is covered by § 5(2)(e) because (1) he was a member of two retirement systems; (2) after January 1, 2010 he received regular compensation from two different government units for more than 60 days; and (3) he had not vested in both systems by January 1, 2010. See G.L. c. 32, § 5(2)(e). PERAC argues, however, that § 5(2)(e) applies only when a member retires for superannuation under each system, not when one or more of the member’s retirement allowances is for accidental disability. In that case, the member’s retirement is controlled by G.L. c. 32, § 3(7). See *North Adams v. North Adams Retirement Bd. and PERAC*, CR-01-1073 (DALA Jan. 8, 2003), *aff’d* (CRAB July 30, 2003) (§ 3(7)(b) “provides the method for calculating the pension of a dual member who is retired on accidental disability”).

Provisions for dual membership have been a part of the contributory retirement system since its inception in 1945. See G.L. c. 32, § 3(7); Acts 1945, c. 658, § 1. Dual

membership is not typical because it generally requires that a member work two different public jobs in two different contributory retirement systems at the same time. Until 2009, all dual membership benefits were calculated under G.L. c. 32, § 3(7), which in some circumstances allows a member to combine his creditable service and regular compensation from both jobs for the eventual payment of a larger superannuation retirement allowance than he would have received if he took separate superannuation retirement allowances from each retirement system. *See Pereira v. State Bd. of Retirement*, CR-16-558, at *1-2 (CRAB June 8, 2023) (brief description of § 3(7) retirement allowance calculation). After a shocking case involving a member receiving a particularly outsized dual membership retirement allowance, the Legislature enacted G.L. c. 32, § 5(2)(e) to make sure that it would not happen again. *See Acts 2009, c. 21*; Mark Pratt, *Retired police officer charged in alleged pension-boosting scheme*, Seacoastonline, Oct. 28, 2006, <https://www.seacoastonline.com/story/news/2006/10/28/retired-police-officer-charged-in/51211019007/>. Section 5(2)(e) forces qualifying dual members to retire for superannuation separately from each retirement system without combining creditable service or regular compensation.

PERAC maintains that, even if Mr. Hannon meets the three requirements for coverage under § 5(2)(e), his situation would still not qualify because one of his retirement allowances is for accidental disability. Section 5(2)(e) calls for the calculation of “a *superannuation* retirement allowance . . . calculated . . . as though the member were retiring solely from each system. . . . [E]ach system shall pay the *superannuation* retirement allowance attributable to membership in that system to the member.” (Emphasis added.) This language supports PERAC’s conclusion that § 5(2)(e) applies

only to superannuation retirement allowances. Moreover, § 3(7)(d) specifically covers situations when a member retires for accidental disability from one retirement system but remains on the payroll in his other public job, as Mr. Hannon briefly did. I therefore conclude that Mr. Hannon is not covered by § 5(2)(e), and his retirement must be calculated according to § 3(7)(d) instead.

Under § 3(7), for a member to be eligible for retirement from any of his retirement systems, he must have terminated employment with all public employers. If the member retires for disability from one system, but remains employed by the second employer, as Mr. Hannon did (if only briefly), he must waive the disability allowance while continuing in employment in the other job. G.L. c. 32, § 3(7)(d). Usually, when a member stops working at one employer and continues at another, his membership is transferred to the system of the employer where he is still working. *Id.* But, in the event that a member retires for disability from one employer and remains employed by another employer, as Mr. Hannon did, his membership in the first system is not transferred to the second system. *Id.* Then, when the disability retiree finally stops working at all public employers, his membership is transferred to “the governmental unit to which he is devoting the major portion of his employment” *Id.* In Mr. Hannon’s case, that means that he is required to transfer his Middleton annuity savings account from the Essex System to the Gloucester System, where he “devot[ed] the major portion of his employment as a full-time employee.”

This means that Mr. Hannon’s superannuation retirement has to be undone and his accidental disability retirement must be recalculated. These errors must be corrected under G.L. c. 32, § 20(5)(c). Because he is not entitled to a superannuation allowance

from the Essex System, he must reimburse the Essex System all of the superannuation payments that he received plus interest. Then, the Essex System must transfer Mr. Hannon's Essex annuity savings account to the Gloucester System. Once the account is transferred, the Gloucester System must determine if Mr. Hannon's accidental disability allowance must be recalculated using his concurrent earnings from both Gloucester and Middleton under G.L. c. 32, § 7(2)(a)(ii), which provides for

[a] yearly amount of pension equal to 72 per cent of the annual rate of his regular compensation on the date such injury was sustained or such hazard was undergone, or equal to 72 per cent of the average annual rate of his regular compensation for the 12-month period for which he last received regular compensation immediately preceding the date his retirement allowance becomes effective, whichever is greater

Presumably, 72 percent of the average annual rate of regular compensation for the last 12 months that he received regular compensation would be more than whatever allowance he is currently receiving from the Gloucester System.

PERAC insists however that, even though the Gloucester System will likely be required to pay a larger disability allowance to Mr. Hannon after it recalculates his disability allowance to account for his Middleton earnings, the Essex System will not be required to make any further reimbursement to the Gloucester System to cover the difference. PERAC contends that G.L. c. 32, § 3(8)(c) provides the only mechanism for reimbursement from one retirement system to another in these circumstances. Section 3(8)(c) provides in relevant part:

Whenever any retired member . . . receives a pension . . . from a system pertaining to one governmental unit in a case where a portion of such pension . . . is attributable to service in a second governmental unit to which another system pertains, the first governmental unit shall be reimbursed in full, in accordance with the provisions of this paragraph, by the second governmental unit for such portion of the pension as shall be computed by the actuary.

PERAC focuses on the word “service” to make its point. It contends that the increase in Mr. Hannon’s pension would not be “attributable to [his] service” in Middleton because an accidental disability allowance is calculated based on *regular compensation* and not the member’s creditable service.

There are several reasons not to read § 3(8)(c) so narrowly. First, such a reading would run contrary to the retirement law’s general policy of holding member retirement systems responsible for some reasonable portion of their member’s ultimate retirement benefits. Second, there is a more general, more natural way to read “attributable to his service,” viz., that any increase in Mr. Hannon’s disability allowance as a result of the proper application of § 3(7) to his situation is because he worked in Middleton. This reading is consistent with § 3(7)(b), which directs: “The amount of any pension, retirement allowance or other benefit to be paid on account of any person who is a member of two or more such systems shall be computed and paid in such proportions as may be ordered by the actuary.” Finally, such a contribution is clearly contemplated by G.L. c. 32, § 7(5), which provides: “In the event of a retirement where the injury was sustained in a governmental unit other than that by which the member is presently employed, the proration of the pension portion of the retirement allowance shall be computed by the actuary.” I conclude therefore that the actuary must prorate any additional disability allowance to include an appropriate contribution from the Essex System.⁴

⁴ The parties did not brief what would constitute an appropriate contribution from the Essex System, as they maintained that it would be either unlawful or unnecessary. It would make sense to base it on the percentage increase in the accidental disability

For the above-stated reasons, I conclude that Mr. Hannon qualified for membership in the Essex System, that he is not a dual member under G.L. c. 32, § 5(2)(e) and he must therefore refund any superannuation allowance that he has received back to the Essex System, that his annuity savings account must be transferred from the Essex System to the Gloucester System, that his Gloucester System retirement allowance must be recalculated using his concurrent compensation from both systems, and that the actuary must require the Essex system to contribute to the recalculated allowance on a prorated basis.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Apr. 19, 2024

retirement allowance, if any. However, I leave it to the actuary to make that determination in the first instance.