COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Susan Hartnett**,

Petitioner

v. Docket No. CR-17-218

**Boston Retirement System and**

**Public Employee Retirement Administration Commission**,

Respondents

**Appearance for Petitioner**:

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

From 1978 to 1990, petitioner belonged to the State Retirement System. Her salary was in the low $30,000s. From 2002 to 2006, Ms. Hartnett belonged to the Boston Retirement System. Her salary ranged between $94,000 and $103,771. In calculating her pension, Boston Retirement System applied an anti-spiking provision to the petitioner. Decision affirmed.

**DECISION**

The petitioner, Susan Hartnett, appeals the Boston Retirement System’s decision that an anti-spiking legislative provision applies to her.

On June 21, 2017, Ms. Hartnett moved to join the Public Employee Retirement Administration Commission (PERAC) as a party respondent. On June 28, 2017, the Division of Administrative Law Appeals granted the motion.

At some time before June 28, 2017, Ms. Hartnett agreed to waive a hearing and rely on written submissions under 801 CMR 1.01(10)(c). (DALA Scheduling Order dated June 28, 2017.)

I accepted into evidence seven exhibits.

1. BRS letter to Ms. Hartnett, April 20, 2017.

2. Ms. Hartnett’s appeal, May 1, 2017.

3. PERAC Memorandum #38, 2012.

4. *Ahern v. Watertown Retirement Board*, 85 Mass. App. Ct. 1115 (2014).

5. Excerpt from Final Report of the Special Commission to Study the Massachusetts Contributory Retirement Systems.

6. Article, *Boston Globe*, Jan. 19, 2011.

7. Article, unidentified source, July 2011.

Ms. Hartnett and PERAC submitted memoranda in support of their positions. BRS relied on PERAC’s memorandum**.**

**Findings of Fact**

1. From 1978 to 1990, Ms. Hartnett was a member in service of the State Board of Retirement. Her salary ranged between $33,360 and $34,068. (Stipulation.)[[1]](#footnote-1)

2. From July 15, 2002 to April 1, 2006, Ms. Hartnett was a member in service of the Boston Retirement System (BRS). Her salary ranged between $94,000 and $103,771. (Stipulation.)

3. Ms. Hartnett’s service with the City of Boston lasted approximately three years and eight months. To calculate Ms. Hartnett’s last five years of service, BRS added approximately one year and four months of her state service, namely from November 16, 1988 to January 28, 1989, and from February 19, 1989 to April 7, 1990. (Stipulation.)

4. Ms. Hartnett retired in October 2016. (Stipulation.)

5. On April 20, 2017, BRS wrote a letter to Ms. Hartnett, stating in part:

We regret to inform you that a recent audit of your case identified a need for recalculation to a lower monthly benefit due to the application of Massachusetts’ anti-spiking provision of pension reform law. We want to reassure you that we have made numerous attempts at the best possible recalculation of your case, which results in the following:

Original Monthly Benefit: $2,651.63

Corrected Monthly Benefit $2,163.63

Reduction: $488.00

October 2016 to March 2017

overpayment: $2,928.00

Monthly recoupment

(spread over 60 months): $48.80

Net Monthly Benefit: $2,114.83

Please know that we are forced to recover the overpayment, but will do so over the longest possible period of 5 years to minimize the impact to the monthly benefit. Your situation is rather unique in that your career was composed of two parts: (1) 1978 to 1990 service under the State Retirement Board and (2) 2002 to 2006 with the Boston Retirement Board. We have used State Retirement Board deduction records to verify that you were paid significantly less during the 1978 to 1990 period [than during 2002 to 2006].

(Ex. 1.)

6. The letter invoked St. 2011, c. 176, §§ 14 and 18.[[2]](#footnote-2) The letter continued:

When reading these two provisions together, the net impact of the recalculation is to reduce your Final Average Salary to $81,969.27, resulting in the reduced monthly benefit.

(Ex. 2.)

7. The letter enclosed PERAC’s Memorandum #38, 2012, “Re: Anti-Spiking Provisions of Chapter 176 of the Acts of 2011.” (Ex. 3.)

8. On May 2, 2017, Ms. Hartnett timely appealed. (Ex. 2.)

**Discussion**

For purposes of this appeal, G.L. c. 32, § 5(2)(a) in general has three provisions:

1. For a retiree who joined a retirement system on or before April 1, 2012, his or her pension is based on whichever is higher:

A. the average of his or her *three* highest paid consecutive years; or

B. the average compensation of his or her last *three* years of working, whether or not those years were consecutive.

(The substance of this provision is not at issue. What is at issue is the meaning of “consecutive.”)

2. For a retiree who joined a retirement system after April 1, 2012, his or her pension is based on whichever is higher:

A. the average of his or her *five* highest paid consecutive years; or

B. the average compensation of his or her last *five* years of working, whether or not those years are consecutive.

(The substance of this provision is also not at issue. What is at issue, as with the previous provision, is the meaning of “consecutive.”)

3. No matter when a retiree joined a retirement system, if

A. in his or her last five years of working,

B. his or her regular compensation increased from one year to the next year by more than 100%,

then his or her pension is based on the average compensation of his or her last five years of working.

The third provision is called one of the anti-spiking provisions. *E.g.*, *Frances Phillips v. Public Employee Retirement Administration Commission*, CR-12-865 (DALA 2015). This decision will call it “the anti-spiking provision,” because the other such provision, G.L. c. 32, § 5(f), is not at issue here.

Now to examine the actual wording of G.L. c. 32, § 5(2)(a). It reads in part:

The normal yearly amount of the retirement allowance…shall…be based on the average annual rate of regular compensation received by such member during any period of *three consecutive years of creditable service* for which such rate of compensation was the highest, or on the average annual rate of regular compensation received by such member *during the period or periods, whether consecutive or not, constituting his last three years of creditable service preceding retirement*, whichever is the greater…; provided, however that for a member who became a member on or after April 2, 2012, the total amount of regular compensation shall be based on the average annual rate of regular compensation received by such member during any period of *5 consecutive years of creditable service* for which such rate of compensation was the highest, or on the average annual rate of regular compensation received by such member during *the period or periods, whether consecutive or not, constituting the member’s last 5 years of creditable service preceding retirement*, whichever is the greater. **Notwithstanding the previous sentence, if in the *5 years of creditable service immediately preceding retirement*, the difference in the annual rate of regular compensation between any *2 consecutive years* exceeds 100 per cent, the normal yearly amount of the retirement allowance shall be based on the average annual rate of regular compensation received by the member during the period of *5 consecutive years preceding retirement***….

(Emphasis added.) The bolded excerpt marks the anti-spiking provision. The italicized excerpts highlight the context of the word “consecutive,” which is a key word in this appeal.

It is not enough to focus on the word “consecutive” and argue, as Ms. Hartnett does, that “consecutive” must mean the same thing throughout G.L. c. 32, § 5(2)(a). It is not enough because “the same words in different parts of a statute *enacted at the same time*...should receive the same meaning.” *Commonwealth v. Wynton W.*, 459 Mass. 745, 751-52 (2011) (emphasis added)(citation and internal quotation marks omitted). However, the anti-spiking provision was not enacted at the same time as the first provision in G.L. c. 32, § 5(2)(a). (The anti-spiking provision was enacted at the same time as the second provision, but the second provision’s wording parallels that of the first.) In addition, subtle indications exist that the word “consecutive” does not mean the same thing throughout § 5(2)(a).

The first provision of § 5(2)(a) refers to “three consecutive years of creditable service” and “the period or periods, *whether consecutive or not*, constituting his last three years of creditable service.” (Emphasis added.) The phrase “whether consecutive or not” indicates that the earlier phrase “three consecutive years” should be interpreted strictly as “three years that run continuously and without interruption” or “a sequence of 1,095 days that follow each other (1,096 days if Leap Day is relevant).” (The definitions in quotation marks are mine.)

The second provision is similar to the first, except that it refers to five years, rather than three. In it, the phrase “five consecutive years” should also be interpreted strictly. In contrast, the anti-spiking provision has no similar indication that “2 consecutive years” should be interpreted as strictly.

The anti-spiking provision begins by referring to “the 5 years of creditable service immediately preceding retirement.” It does not use the word “consecutive” or the phrase “whether consecutive or not.” It does not refer to “the 5 years immediately preceding retirement,” which would imply calendar years. The provision applies to five years of creditable service that may be interrupted. If a state employee retired in 2011, his or her five years of creditable service could comprise 2004, 2006, 2008-09, and 2011.

Now to examine the key phrase “2 consecutive years.” It means “two years of creditable service that immediately follow each other without another intervening year of creditable service,” not “two years that follow each other without interruption.”

If the phrase “consecutive years” is interpreted to mean only years that run without interruption – years that “abut” each other – then the anti-spiking provision in the case of the hypothetical state employee potentially applies only to 2008-09. It does not apply to 2004 and 2006; 2006 and 2008; and 2009 and 2011. However, that interpretation would be an anomaly – making the provision apply to two years that follow each other *without* interruption, but not two years that follow each other *with* interruption. And to what end? No indication exists that the Legislature intended the anti-spiking provision to govern more than a doubling of compensation in years that follow each other without interruption, but not more than a doubling of compensation in two years that follow each other with an interruption of a year, a month, or a day. *See Boston Police Patrolmen's Association, Inc. v. Police Department of Boston*, 446 Mass. 46, 50 (2006)(legislation must be interpreted to harmonize with “common sense”).

Furthermore, the phrase “2 consecutive years” occurs in the context of “5 years of creditable service immediately preceding retirement” – five years of creditable service that may be interrupted, five years of creditable service that do not have to run continuously. And in that context, “2 consecutive years” means “2 consecutive years *of creditable service*,” not “2 consecutive *calendar* years” or “730 or 731 days in a row.” *See Mile Road Corp. v. City Of Boston*, 345 Mass. 379, 382-83 (1963)(“A general term in a statute or ordinance takes meaning from the setting in which it is employed”)(citation and internal quotation marks deleted).

Another indication exists that “2 consecutive years” does not mean “two years running continuously” or “730 or 731 days days in a row.” The indication takes some explanation. It has to do with the phrase that ends the anti-spiking provision: “5 consecutive years preceding retirement.”

Imagine an employee who retires at the end of 2011 with this excerpt from his or her work and salary history:

|  |  |
| --- | --- |
| 2005 | $40,000 |
| 2006 | $40,000 |
| 2007 | Not working, $0 |
| 2008 | Not working, $0 |
| 2009 | $45,00 |
| 2010 | $100,000 |
| 2011 | $100,000 |

In the last five years of creditable service before retiring – 2005-06 and 2009-11 – the employee’s salary more than doubled in two consecutive years – between 2009 and 2010. Therefore, the anti-spiking provision clearly applies.

What’s the consequence? The retiree’s pension must be based on compensation “during the…5 consecutive years preceding retirement.” The retiree in this example (as with Ms. Hartnett) does not have five consecutive *uninterrupted* years right before retirement. Does that mean that the anti-spiking provision does not apply (as she argues)? No.

The anti-spiking provision has two conditions and a consequence. The two conditions are: *if* in the last five years of creditable service before retiring, and *if* the employee’s salary more than doubled in two consecutive years. The consequence: A retiree’s pension will be based on compensation during the five consecutive years before retirement.

The anti-spiking provision does *not* have *three conditions*: *if* in the last five years of creditable service before retiring; *if* the employee’s salary more than doubled in two consecutive years; and *if* the employee *also* had five uninterrupted years of creditable service right before retiring.

To interpret the anti-spiking provision as governing only retirees who worked for five uninterrupted years right before they retired would transform a consequence into a condition *and* would defeat the purpose of the anti-spiking provision. Employees who returned to government service for one, two, three, or four years before retiring, or who returned for four years and eleven months, would not be governed by the anti-spiking provision. If such an interpretation prevailed, to escape the anti-spiking provision, employees who returned to government service would be sure to leave again or retire before five years had ended.

For all those reasons, and to make sure that the consequence in the anti-spiking provision has actual force, that is, it is a real consequence, “5 consecutive years preceding retirement” must mean the last five years before retirement, whether continuous or interrupted. *See Boston Police Patrolmen's Association, Inc.,* 446 Mass. at 50 (legislation must be interpreted to harmonize with “common sense”). And because “consecutive” in the phrase “5 consecutive years preceding retirement” can and does include five years that are interrupted and not continuous, then the earlier phrase “2 consecutive years” can and does mean years that are interrupted and not continuous, years that follow each other but do not “abut” each other.

(I realize that under my reading of the statute, the phrase at the beginning of the anti-spiking provision, “5 years of creditable service immediately preceding retirement,” means the same thing as the phrase at end of the provision: “5 consecutive years preceding retirement.” They both mean the last five years of credible service before retirement, whether continuous or interrupted. They mean the same thing even though they use different words. However, different terms do not always signal different meaning.

(The SJC has adopted the reasoning of a federal appellate case that the words “falsely made” and “forged” in federal criminal statutes are synonymous. *Commonwealth v. Apalakis*, 396 Mass. 292, 299 (1985)(citing *Marteney* v. *United States,* 216 F.2d 760, 763 (10th Cir.1954)). The SJC has ruled that the “word ‘person’ is synonymous with the term ‘human being.’”

*Commonwealth v. Cass*, 392 Mass. 799, 801 (1984). The statutory words “employing authority” and “employer” are synonymous. *Bulger v. Contributory Retirement Appeal Board*, 447 Mass. 651, 657 n.8 (2006). The words “regular rate” and “regular hourly rate” in a regulation are synonymous. *Mullally v. Waste Management of Massachusetts, Inc.*, 452 Mass. 526, 534 n.15 (2008). The words “areas subject to flooding” and “in such flood-prone areas” in a municipal bylaw are synonymous. *Doherty v. Planning Board of Scituate*, 467 Mass. 560, 571 (2014).)

PERAC’s Memorandum #38, 2012, “Re: Anti-Spiking Provisions of Chapter 176 of the Acts of 2011” uses an example of a hypothetical retiree whose last five years that are not continuous. (Ex. 3, p. 3.) And PERAC “has considerable leeway in interpreting a statute it is charged with enforcing.” *Barnstable County Retirement Board v. Contributory Retirement Appeal Board*, 43 Mass. App. Ct. 341, 345 (1997)(citations and internal quotation marks omitted).

Finally, to discuss legislative intent. Legislative intent is often hard to discern in Massachusetts. The Massachusetts Legislature does not have a journal akin to *The Congressional Record* or, in general, committee reports. In the absence of official legislative records, I will not rely on two news articles that Ms. Hartnett submitted. One, from *The Boston Globe*, about *the introduction* of the legislation that included the anti-spiking provision, not its *enactment*, discusses the anti-spiking proposal in two sentences. The second article, from an unidentified source, discusses anti-spiking proposals in various states. They do not prove that the Legislature did not intend the anti-spiking provision to apply to retirees in Ms. Hartnett’s circumstances.

In support of her position, Ms. Hartnett also invokes an excerpt from the Final Report of the Special Commission to Study the Massachusetts Contributory Retirement Systems. (Ex. 5.) There are two problems with this invocation. One, she does not connect the dots, namely, the final report and the anti-spiking provision. I presume that the final report led to the anti-spiking provision, but Ms. Hartnett leaves me to presume, not to know. Two, the excerpt consists of one general paragraph. It is so general that it neither supports nor undermines Ms. Hartnett’s position.

PERAC – and if any agency should know, it is PERAC – stated in its memorandum #38, 2012:

There is no information or data available about whether this practice [spiking] occurs in the Massachusetts public pension system to any great extent. *Nevertheless*, the Massachusetts Legislature has followed the lead of many other states and enacted what is known as “anti-spiking” legislation.

(Ex. 3, p. 1.) Determining legislative intent can include identifying “the evil to be remedied.”

*Hayon v. Coca Cola Bottling Co. of New England*, 375 Mass. 644, 648, (1978). Here, there may not have been an evil to be remedied, as the word “Nevertheless” indicates, only possibly a potential problem to head off. That makes determining legislative intent even harder. Thus, I use principles of statutory interpretation other than legislative intent: common sense; the principle that different words in the same statute can mean the same thing; and deference to the interpretation of a statute by the agency charged with its interpretation.

**Conclusion and Order**

The anti-spiking provision applies to Ms. Hartnett. BRS’s decision to apply it to her is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kenneth Bresler

Administrative Magistrate

Dated: April 27, 2018

1. Ms. Hartnett alleged these facts in her memorandum of law. Although she did not document these facts, PERAC accepted them. Hence, I cite these facts as a stipulation. Ms. Hartnett does not dispute the substance of the calculations in BRS’s letter of April 20, 2017. Rather, she disputes that she should have been subjected to the calculations at all. Therefore, the exact details of these facts (such as how much Ms. Hartnett made in each year) are not significant. This footnote applies to all findings of fact cited as stipulations. [↑](#footnote-ref-1)
2. Section 14 was codified in G.L. c. 32, § 5(2)(a). Section 18 was codified in G.L. c. 32, § 5(f). Ultimately, only the first provision matters to this appeal. In her memorandum of law, Ms. Hartnett calls G.L. c. 32, § 5(f) irrelevant to her appeal. (Pet. Memo 6.) PERAC does not discuss the statute, indicating its agreement. [↑](#footnote-ref-2)