

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Thomas Howard,
Petitioner,

No. CR-23-0461

Dated: April 25, 2025

v.

Newburyport Retirement Board,
Respondent.

ORDER GRANTING SUMMARY DECISION

This is an appeal from a decision of the Newburyport Retirement Board (board) to adjust the amount of petitioner Thomas Howard's retirement allowance. The board has filed a motion for summary decision, which Mr. Howard has opposed.¹

The facts that follow are beyond genuine dispute. *See* 801 C.M.R. § 1.01(7)(h); *Goudreau v. Nikas*, 98 Mass. App. Ct. 266, 269-70 (2020); *Caitlin v. Board of Registration of Architects*, 414 Mass. 1 (1992). Mr. Howard began working for the city of Newburyport in 1978. He served the city first as a member of its police department and then as a city marshal.

At some point, the terms of Mr. Howard's employment began to entitle him to a longevity stipend equaling 10% of his annual salary. The city habitually paid out the longevity stipends toward the end of each calendar year. In December 2014, Mr. Howard's pay included a longevity stipend derived from his twelve months of work in calendar year 2014.

In late October 2015, Mr. Howard retired for accidental disability. He received his final paycheck from the city during November of that year. That check included a longevity stipend derived from Mr. Howard's approximately nine months of work during calendar year 2015.

¹ The board's motion also sought dismissal based on failure to prosecute. After initially allowing that motion, I vacated the dismissal when it became clear that certain papers submitted by Mr. Howard had been omitted inadvertently from the case file.

The amount of the allowance payable to a retiree for accidental disability is based on the “rate of his regular compensation for the 12-month period for which he last received regular compensation” (or alternatives irrelevant here). *See* G.L. c. 32, § 7(2)(a)(ii). The board calculated Mr. Howard’s allowance based on his paychecks during October 2014–October 2015. Those checks included the longevity stipends paid to Mr. Howard in December 2014 (for twelve months of work) and November 2015 (for nine months of work). The board did not then realize that its calculations were encompassing 21 months’ worth of longevity stipends.

In August 2022, the Public Employee Retirement Administration Commission released an audit of the board’s records. The audit found that the board had been overpaying Mr. Howard by approximately \$500 per month. The board voted to waive repayment by Mr. Howard of sums totaling approximately \$50,000. The board did adjust Mr. Howard’s monthly allowance prospectively, memorializing the adjustment in an appealable decision.

On appeal, Mr. Howard recognizes that the board’s original calculations covered longevity stipends corresponding to 21 months of work. He does not develop any argument to the effect that a “rate of . . . regular compensation for [a] 12-month period,” G.L. c. 32, § 7(2)(a)(ii), may include sums that compensate more than 12 months of work. Nor would such an argument be meritorious. The statutory calculations rely on “the average annual *rate* of regular compensation rather than the actual *amount* of compensation received by the member.” *City of North Adams v. North Adams Ret. Bd.*, No. CR-01-1073, at * 7-8 (Div. Admin. Law App. Jan. 8, 2003, *aff’d*, Contributory Ret. App. Bd. July 30, 2003).

Mr. Howard states that he “relied on the accuracy of the [board’s] calculations.” It is presumably for that reason that the board waived its right to repayment. Regardless, a member’s reliance on a board’s missteps does not alter the member’s legislatively prescribed entitlements.

See Clothier v. Teachers' Ret. Bd., 78 Mass. App. Ct. 143, 146 (2010). The boards are obligated to correct any errors in their records and to adjust their members' benefits accordingly. *See* G.L. c. 32, § 20(5)(c)(2); *Hunter v. Contributory Ret. Appeal Bd.*, 80 Mass. App. Ct. 257, 263 (2011); *Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 448-49 (2006).

Mr. Howard's final claim is that he was "arbitrarily singled out for [an] audit." That allegation is too conclusory to have survived even a motion to dismiss. *See Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). In any event, this tribunal lacks "jurisdiction to consider a selective enforcement claim." *Sarno v. Massachusetts Teachers' Ret. Syst.*, No. CR-07-253, at *6-7 (Div. Admin. Law App. Oct. 29, 2010). *See Racow v. Winthrop Ret. Bd.*, No. CR-20-492, 2022 WL 22569214, at *2 (Div. Admin. Law App. Mar. 25, 2022). The proper scope of these proceedings does not include the board's actions with respect to non-party members. The only question is whether the board has applied the law correctly to Mr. Howard. As to that question, Mr. Howard has not mounted a genuine dispute.

In view of the foregoing, it is hereby ORDERED that the motion for summary decision is ALLOWED. Summary decision is hereby entered to the effect that the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate