

**COMMONWEALTH OF MASSACHUSETTS  
CONTRIBUTORY RETIREMENT APPEAL BOARD**

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**NEIL HURTON,**

**Petitioner-Appellant**

**v.**

**MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM,**

**Respondent-Appellee.**

**CR-17-0665**

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**DECISION**

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Petitioner Neil Hurton appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA) upholding the respondent Massachusetts Teachers' Retirement System's (MTRS) decision to exclude payments made to Mr. Hurton in excess of the wages earned for his work as a social studies teacher as part of a settlement agreement in the computation of his retirement allowance. The magistrate held an evidentiary hearing on December 11, 2019, and admitted eleven exhibits into evidence. The magistrate's decision is dated October 15, 2020. Mr. Hurton filed a timely appeal to us.

After giving careful consideration to all the evidence in the record and the arguments presented by the parties, we adopt the magistrate's findings of fact 1 – 13 as our own and incorporate the DALA decision by reference. For the reasons discussed below, we affirm.

**Background.** Neal Hurton is a social studies teacher employed by the Peabody School District and an active member of the MTRS.<sup>1</sup> From September 2004 to June 2006, he served as the Dean of Students for the school district.<sup>2</sup> In June 2006, the school district terminated him from that position and subsequently rehired him as a social studies teacher in September 2006.<sup>3</sup>

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<sup>1</sup> Finding of Fact (FF) 1, Exhibit 3.

<sup>2</sup> FF 3, Exhibit 3.

<sup>3</sup> FF 4, Exhibit 3.

In June 2007, the Peabody School District sought to fill two openings for the position of Dean of Students. The school district refused to interview Mr. Hurton and instead, interviewed candidates younger than Mr. Hurton's stated age of 61.<sup>4</sup> In August 2007, Mr. Hurton filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), alleging unlawful discrimination by the school district.<sup>5</sup> The Peabody School District and Mr. Hurton entered into a settlement agreement in 2013, and Mr. Hurton subsequently withdrew his discrimination complaint. MTRS was not a party to the settlement agreement.<sup>6</sup>

Pursuant to the settlement agreement, Mr. Hurton did not regain the position of Dean of Students. Instead, the Peabody School District agreed to pay Mr. Hurton back payments for the period 2007-2013 calculated by the difference between the Dean of Students salary and his social studies teacher's salary. Effectively, Mr. Hurton was paid the Dean of Students salary for the six years that he was a social studies teacher. The agreement further provided that the school district would pay Mr. Hurton prospectively (front pay) at the Dean of Students salary, while he remained a social studies teacher.<sup>7</sup>

On January 9, 2017, Mr. Hurton filed his application for superannuation retirement benefits, with an effective retirement date of June 30, 2017.<sup>8</sup> On July 25, 2017, MTRS notified Mr. Hurton that it would not include the additional payments associated with the settlement agreement for purposes of calculating his retirement benefits because those payments were not paid for services performed as a social studies teacher. Rather, those payments represented damages from his settlement agreement with the school district.<sup>9</sup> Subsequently, Mr. Hurton rescinded his application on August 1, 2017.<sup>10</sup> On August 4, 2017, he appealed MTRS's decision to DALA.<sup>11</sup> The DALA magistrate affirmed the decision of MTRS to exclude the excess payments from the calculation of his retirement benefits. Mr. Hurton appealed the DALA decision to us.

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<sup>4</sup> FF 5, Exhibit 2.

<sup>5</sup> FF 6, Exhibit 1.

<sup>6</sup> FF 7, Exhibits 1 and 2.

<sup>7</sup> FF 8, Exhibits 2 and 6.

<sup>8</sup> FF 10, Exhibit 6.

<sup>9</sup> FF 11, Exhibit 4.

<sup>10</sup> FF 12, Exhibit 11.

<sup>11</sup> FF 13, Exhibit 5.

**Discussion.** A member's yearly retirement allowance is based on the average rate of regular compensation over three or five years, depending on when the member entered state service. G.L. c. 32, § 5(2)(a). Prior to June 30, 2009, regular compensation was defined in pertinent part as "the salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives, or any other payments made as a result of giving notice of retirement..." Beginning July 1, 2009, the definition of regular compensation was amended to reflect:

*"compensation received exclusively as wages by an employee for services performed in the course of employment for his employer."*<sup>12</sup>

"Wages" is "the base salary or other base compensation of an employee paid to that employee for employment by an employer, provided, however, that 'wages' shall not include, without limitation, overtime, commissions, [or] bonuses ..." with certain exceptions. *Id.* It is also defined in 840 CMR 15.03(1)(b) as "the base salary or other base compensation of an employee paid to that employee for employment by an employer including pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees." In the case of a teacher employed in a public day school salary payable under the terms of an annual contract for additional services in such school is regarded as "regular compensation" rather than as bonus or overtime. ..." G.L. c. 32, § 1.

Courts have interpreted "regular compensation" to include recurrent and repeated payments that are not inflated by extraordinary ad hoc payments such as bonuses or overtime pay. *See Bower v. Contributory Retirement Appeal Bd.*, 393 Mass. 427, 429, 471 N.E.2d 1296 (1984); *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 339-340, 419 N.E.2d 277 (1981). Further, "'regular' as it modifies 'compensation,' imports the idea of ordinariness or normality as well as the idea of recurrence." *Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 658 (2006); *Bower v. Contributory Retirement Appeal Bd.*, *supra* at 429, 471 N.E.2d 1296, quoting *Boston Ass'n of Sch. Adm'rs & Supervisors v. Boston Retirement Bd.*, *supra* at 341, 419 N.E.2d 277. See also *Pelonzi v. Retirement Bd. of*

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<sup>12</sup> G.L. c. 32, § 1, inserted by St. 2009, c. 21, § 2.

*Beverly*, 451 Mass. 475 (2008); and *O'Malley v. Contributory Retirement Appeal Bd.*, 104 Mass. App. Ct. 778 (2024). The SJC is of the position that “the statutory intent [behind the definition of ‘regular compensation’] is clearly to exempt irregular payments of compensation from the retirement base.” *Hallett v. Contributory Retirement Appeal Bd.*, 431 Mass. 66, 70 (2000).

The Courts have also cautioned retirement boards regarding payment practices that could lead to employers shifting the cost of compensation to their employees onto the Commonwealth. In discussing § 5(2)(a), the SJC stated that the “expression seems to us to point to recurrent or repeated amounts of compensation not inflated by extraordinary ad hoc payments.” *BASAS* at 341. Together, § 5(2)(a) and the definition of regular compensation in § 1 serves as “a safeguard against the introduction into the computations of adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems.” *Id.* This is especially true where the public entity that negotiates a collective bargaining agreement is not the one that must find the funds to pay the continuing retirement benefits. *BASAS* at 341. Thus, we remain mindful of this as we consider this appeal.

### ***Back Pay For 2007 - 2013***

To recap, Mr. Hurton was terminated from his position of Dean of Students in June 2006. He was later rehired in September 2006, not as Dean of Students, but as a social studies teacher and was paid the salary of such position. The Peabody School District then sought to hire two individuals to fill the positions of Dean of Students in June 2007 without offering Mr. Hurton an interview. This prompted his complaint of discrimination filed with the MCAD in August 2007. This matter resulted in a Settlement Agreement that was signed between Mr. Hurton and the Peabody School District in 2013. The school district agreed to pay Mr. Hurton back payments for the period 2007-2013 calculated by the difference between the Dean of Students salary and his social studies teacher’s salary. Effectively, Mr. Hurton was paid the Dean of Students salary for the six years that he was a social studies teacher.

Mr. Hurton seeks to include the back pay as regular compensation. He argues that if a teacher challenges a discharge and is reinstated with full back pay, those sums should be included as regular compensation. He also contends that CRAB has held that retirement systems can grant creditable service for the purposes of pension benefits in conjunction with an award of back pay and correlates this to the circumstances of his appeal. He cites to *Corcoran v. Worcester Regional Retirement Board*, CR-13-243 (DALA 2016) for the proposition that where a member

is made whole for lost wages through a settlement agreement, that amount should be included as regular compensation. He explained that CRAB's decision in *Tarlow v. MTRS*, CR-10-793 (CRAB Nov. 2013), allows back pay to be recognized as regular compensation where the payments were made to make him whole. He states that CRAB noted "[t]he same rationale applies when a governmental unit and a member of a retirement system reach a settlement agreement that includes an award of back pay. Where the purpose of the award is to make the employee whole, the retirement system may award creditable service upon the payment of retirement contributions, as the employee is treated as if he or she was regularly employed" *Id.*

We do not find Mr. Hurton's argument compelling. While back pay can be considered regular compensation in certain circumstances, those circumstances are not present here. CRAB has held that a judgment entered by a court in a wrongful termination case may include an appropriate award of back pay, including restoration of "rights such as seniority, tenure, or retirement." *Tarlow*, citing *Ballotte v. City of Worcester*, 51 Mass. App. Ct, 728, 734-735 (2001). In so holding, CRAB explained that such a plaintiff cannot be made whole without being placed in the same position the employee would have been in had the employee not been terminated, including an award of the creditable service the employee would have earned, with concomitant retirement contributions. See *Ballotte* at 734-735 (2001).<sup>13</sup> CRAB noted that a back pay award, in effect, recognizes that the employee should have continued to be "regularly employed" and so the employee receives pay and benefits as if the employee had been so employed. In this instance, there has been no court-ordered judgment for wrongful termination as in *Tarlow* to support Mr. Hurton's position that his award of back pay should be regular compensation.

Further, there is a distinction between payments made under a court judgment and payments made under a settlement agreement between an employer and an employee. While CRAB determined that the rationale discussed in *Tarlow* applies to when a governmental unit and a member of a retirement system reach a settlement agreement that includes an award of

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<sup>13</sup> See Public Employee Retirement Administration Commission, *Guidelines for Civil Service or Court-Ordered Settlements*, PERAC MEMO #28/2001 (providing method for calculating creditable service and regular compensation in the case of an award of back pay); cf. *Jeannot v. New Hampshire Personnel Comm'n*, 118 N.H.597, 601-602 (1978) (back pay awards must include "annual leave, sick leave, insurance, retirement, and death benefits," as "[s]uch benefits are a means by which the state can attract qualified persons to enter and remain in State employment").

back pay, we look to the type of claim being settled and the reason for the back pay to discern if the back pay given in a settlement agreement is regular compensation. In wrongful termination cases, the back pay is regular compensation because there is an acknowledgement that the member should have received that pay but for his being terminated. On the otherhand, parties to a settlement are resolving their dispute without a determination of rights, and in this instance, the school district and Mr. Hurton were only agreeing to end their dispute by paying Mr. Hurton an amount agreed upon – not that he should be reinstated to the Dean of Students position with rights pertaining to this position. This factor distinguishes Mr. Hurton’s case from *Tarlow* and *Corcoran*. The Peabody School District and Mr. Hurton arrived at a settlement agreement to resolve Mr. Hurton’s discrimination complaint based on not being interviewed for the position, not to make Mr. Hurton whole due to a wrongful termination. Mr. Hurton cannot include this award of back pay as regular compensation where the harm that arose was not from being removed from his position. The harm in this case was not being interviewed for the position of Dean of Students. This difference, however slight, deems that this award of back pay does not meet the criteria to be regular compensation. The magistrate correctly held that the award of back pay cannot be included as regular compensation in the calculation of Mr. Hurton’s retirement benefits.

***Front Pay from 2014 to June 2017***

The front pay Mr. Hurton received associated with his settlement agreement does not align with the interpretation of regular compensation as importing the idea of regular, ordinariness or normality. This payment was made pursuant to a settlement agreement to settle a dispute and not awarded for services he was contracted to perform as contemplated in the definition of regular compensation (“*compensation received exclusively as wages by an employee **for services performed** in the course of employment for his employer.*” G.L. c. 32, § 1.). Nor was the front pay made available to other similarly situated employees generally. See *Burke v. Hampshire County Retirement Syst.*, CR-10-35 (DALA Aug. 2015) (future pay in the form of sick pay were ad hoc payments not available to employees generally, were not made for services rendered and were not genuine sick leave payments). Rather, this payment is more akin to ad hoc payments. *Bulger, supra*. There is nothing to suggest that this payment was normal, ordinary, or regular as contemplated by the Courts or the Legislature. But for the fact that a settlement agreement was reached, Mr. Hurton would not have normally been entitled to the

excess amounts above his social studies teacher salary. This is the advantageous payments for which the SJC deemed §§ 1 and 5(2)(a) serve as a safeguard against.

Nevertheless, Mr. Hurton maintains that the prospective payments he received during the relevant period qualifies as regular compensation because of the regularity of the payments. He found support for his argument, citing *Bulger*. Specifically, he explained that in *Bulger*, the petitioner's housing allowance was deemed to be regular compensation because the payments were "ordinary." *Bulger* at 658. Mr. Hurton asserts that the housing allowance was dispersed to Bulger the same way that his front pay was dispersed to him. In so arguing, he noted the Court explained that "[o]ther compensation in whatever form must be understood to encompass all other forms of *recurring payments* for an employee's services, so long as the payments *comport with the other requirements of §1*." *Id.* at 658. We do not find support for his contentions here. Specifically, Mr. Hurton fails to acknowledge that *Bulger* requires that the payments comport with the other requirements of §1. And in this instance, while the front pay was recurring, it was not made for services performed. G.L. c. 32, §1. Mr. Hurton was not performing the duties of Dean of Students while he was receiving these payments. But for the fact that he settled his discrimination complaint, he would have been paid the salary of a social studies teacher, the position he was performing, rather than the Dean of Students salary. As the SJC expressed, the intent of the statute is to exclude irregular payments, such as these, from the computation of retirement benefits.

The magistrate correlates this appeal to the circumstances in *Burke v. Hampshire City Retirement System*, CR-10-35 (DALA 2015), where CRAB determined that the payment received from a settlement agreement did not qualify as regular compensation "because they were ad hoc payments not available to employees generally, were not made for services rendered..." While Mr. Hurton tried to distinguish his case from *Burke* by arguing that the settlement agreement in *Burke* was premised on fraud - the petitioner was paid for sick leave when she was healthy - the magistrate determined, just as in *Burke*, that the payments stemming from Mr. Hurton's settlement agreement were also ad hoc payments, such that they were not made for services rendered as the Dean of Students and were not available to employees generally. We agree.

Additionally, Mr. Hurton went to great lengths arguing that PERAC Memorandum #28/2001, which provides guidelines for Civil Service or Court Ordered Settlements, applied to the calculation of his retirement benefits. Nevertheless, this Memorandum does not apply here

because PERAC established these guidelines for Civil Service or Court-Ordered Settlements. PERAC specifically drew a distinction between payments made as a result of the parties settling and payments made pursuant to a court judgment. The settlement agreement was made as a result of the parties settling and resolving their disputes without a determination of rights. Accordingly, PERAC Memorandum #28/2001 does not apply here to support Mr. Hurton's position.

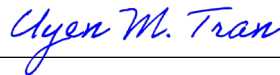
We agree with the magistrate that the front pay Mr. Hurton received associated with the settlement agreement is not regular compensation and must be excluded in the computation of his retirement benefits.

### **Conclusion**

For all the foregoing reasons, the DALA decision is affirmed. The payments made to Mr. Hurton pursuant to the settlement agreement are not regular compensation for the purposes of calculating his retirement allowance. *Affirm.*

SO ORDERED.

### CONTRIBUTORY RETIREMENT APPEAL BOARD



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