COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

November 17, 2023

Middlesex, ss.

Docket Nos. CR-15-482, CR-15-483

MARY ELLEN JOHNSON, Petitioner

v.

MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM, Respondent

DECISION

Appearance for Petitioner:

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2400 Massachusetts Ave.
Cambridge, MA 02140-1854

Appearance for Respondent:

James C. O'Leary, Esq.
General Counsel
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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Retirement - Computation of Retirement Benefits - (1) Regular Compensation - Service or Amounts Included - M.G.L. c. 32, § 1; MTRS regulations, 807 C.M.R. § 6.02(1)(a) - School Superintendent - Additional Service and Stipend Not Listed in Employment Contract or Contract Extension (grant funding work related to curriculum and program development) - Exclusion of stipend from regular compensation in computing retirement allowance affirmed; **(2) Retirement Date - Retirement application filed more than 60 days after last date of service - M.G.L. c. 32, § 10(3) -** Even if time period was tolled while petitioner's court action for breach of employment contract extension remained pending, retirement application was filed more than 60 days after judgment in her favor became unquestionably final - MTRS determination that retirement date was 15 days after petitioner filed her retirement application affirmed.

(1) Petitioner, a former School Superintendent, worked through June 30, 2011 under an employment contract that the Sandwich School Committee extended for an additional two school years (2011-12 and 2012-13). After successor School Committee members repudiated the contract extension, petitioner commenced a breach of contract action against the School Committee in the Barnstable Superior Court. She recovered breach of contract damages that included (under the "benefit of the bargain"standard applied by the Massachusetts Superior Court) lost base salary, discretionary performance-based incentive payments reasonably expected under the contract extension, and stipends for additional grant writing service equal to those she received for similar additional service while she worked under her original employment contract. However, in determining petitioner's retirement benefit pursuant to M.G.L. c. 32, § 1, respondent Massachusetts Teachers' Retirement System (MTRS) properly excluded the grant writing stipends in computing her regular compensation. Neither petitioner's original contract nor its extension mentioned this additional service or the additional money she was paid for performing it; and she did not prove that grant writing became an additional regular part of her School Superintendent so as to make the stipends she received part of her regular compensation for retirement benefit computation purposes.

(2) MTRS determined that petitioner's retirement date was October 30, 2014, 15 days after she filed her retirement application, rather than June 30, 2013, the last day she would have worked as School Superintendent if the School Committee had not breached her two-year employment contract extension. Assuming, as petitioner alleged, that MTRS personnel advised her to defer filing a retirement application until her breach of contract action concluded, and that the action concluded on May 1, 2014 (with the Court's final amendment of the partial summary judgment it granted in petitioner's favor), her retirement application was still filed more than 60 days from that date. MTRS properly determined a retirement date within the time prescribed by M.G.L. c. 32, § 10(3) when a retirement application is filed more than 60 days after public employment service ended.

Background

Petitioner Mary Ellen Johnson (Dr. Johnson), the former Town of Sandwich, Massachusetts Superintendent of Schools, timely appealed, pursuant to M.G.L. c. 32, § 16A, the August 2015 decisions of respondent Massachusetts Teachers' Retirement System (MTRS) regarding the computation of her retirement benefits and the date of her retirement.

Dr. Johnson had been employed as the town's Superintendent of Schools, under a contract approved by the town's School Committee, between July 1, 2008 and June 30, 2011, the end of the 2010-11 school year. The contract included an option to extend Dr. Johnson's employment at a salary that would be based partially upon performance evaluations but would not be less than what she had been paid under the original contract. There was to be no change in the original employment contract's provisions regarding discretionary performance incentive payments for which Dr. Johnson was eligible. In April 2010, the School Committee extended Dr. Johnson's employment contract for two additional school years, until June 30, 2013.

In June 2010 a newly-elected School Committee voted to rescind Dr. Johnson's contract extension. Dr. Johnson challenged this decision by commencing an action in the Barnstable Superior Court seeking specific performance of her employment contract and its extension, as well as damages for breach of contract. The Superior Court's dismissal of that action was reversed by the Appeals Court in 2012. *See Johnson v. School Committee of Sandwich*, 81 Mass. App. Ct. 812, 969 N.E.2d 175 (2012), *rev. denied*, 463 Mass. 1105, 972 N.E.2d 1057 (2012).

The action proceeded in the Barnstable Superior Court, subsequently. On December 31,

2013, the Court issued an Interim Order that tentatively awarded Dr. Johnson $434,317.82 in damages for the School Committee's breach of her employment contract extension. The Court finalized this sum, after reviewing a proposed damages computation filed by the School Committee, in its March 18, 2014 decision granting Dr. Johnson partial summary judgment on her breach of contract claim and the damages award, while dismissing her remaining claims against the School Committee and its members.

Applying a "benefit of the bargain" standard for measuring breach of contract damages, the Court computed Dr. Johnson's damages award based upon what it determined she would have earned through the 2012-13 school year if the contract extension had not been breached. This amount included the same base salary of $152,000 Dr. Johnson had received under the original contract, which the Court assumed she would have earned during each of the two contract extension years, adjusted to $155,000 per year. The additional $3,000 of base pay included, under the terms of the contract extension agreement, 20 percent of an additional $7,500 discretionary performance incentive the School Committee had voted to pay Dr. Johnson during the 2010-11 and 2011-12 school years under the original contract. The damages award also Included the value of dental, health and life insurance benefits Dr. Johnson would have received under the contract extension had it not been breached. The damages award also included the value of additional stipends for grant writing work the Court assumed Dr. Johnson would have received under the contract extension, as she had during the original contract term. The assumed stipend amount Dr. Johnson would have received during the 2011-12 and 2012-13 school years if her employment contract had not been breached was $33,000 ($16,500 per school year), plus interest on this amount ($4,290).

Amended orders issued by the Barnstable Superior Court through May 1, 2014 adjusted the award to Dr. Johnson of prejudgement interest on, and costs related to, the damages award, but the Court did not change the principal amount of the damages award.

With the Superior Court action concluded, Dr. Johnson filed with MTRS, on October 15, 2014, an application to purchase for retirement credit the two years of employment as School Supervisor under the contract extension that she had lost as a result of the School Committee's breach. MTRS invoiced her for two years of "pensionable earnings," which comprised the $155,000 base pay she would have earned under the contract extension, and incentive pay equal to 20 percent of her base pay, as Dr. Johnson's original employment contract stated she would receive if the contract was extended. MTRS computed Dr. Johnson's regular compensation for retirement purposes to have been $157,525, slightly higher than what the Barnstable Superior Court had computed by applying the "benefit of the bargain" standard for breach of contract.

However, MTRS did not include, as regular compensation, the stipends Dr. Johnson had received from the School Committee—$14,500 on July 15, 2010, and $18,500 in July 2011— for grant writing work related to curriculum and program development. It also did not include, as Dr. Johnson's regular compensation, the two additional years of grant writing stipends the Court assumed she would have continued receiving if the contract extension had been honored. MTRS excluded these stipends for additional service from regular compensation because neither the original employment contract, nor the contract extension, had listed grant writing work as one of the duties for which she was paid wages as School Superintendent, relying upon the definition of regular

compensation recited by M.G.L. c. 32, § 1 and the MTRS regulations, at 807 C.M.R. § 6.02.[1]

After paying the full invoice amount, Dr. Johnson filed a retirement application with MTRS. The application generated two decisions by MTRS that Dr. Johnson appeals here.

In Docket No. CR-15-482, Dr. Johnson appeals MTRS's August 4, 2015 decision determining the amount of her "regular compensation" without including additional stipends she received under her employment contract, and anticipated receiving under the contract extension, for grant writing work.

In Docket No. CR-15-483, Dr. Johnson appeals MTRS's August 12, 2015 decision denying her request to change the date of her retirement from October 30, 2014 (fifteen days after MTRS received Part I of her retirement application) to July 1, 2013, the date on which Dr. Johnson she had intended to retire after completing her work as School Superintendent under her employment contract extension, if the School Committee had not breached it.

On December 13, 2017, DALA issued an order to show cause why the appeals should not be dismissed for failure to state a claim for relief because (1) the stipend payments she had received for grant writing work were not for additional services rendered under her contract, per 807 C.M.R. § 6.02(1)(a); and (2) her retirement date was based upon when she had filed her retirement application, as required by M.G.L. c. 32, § 10(3), and could not be backdated to the date she preferred without violating the statute.

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[1]/ No written contract was identified or offered in evidence other than Dr. Johnson's original employment contract for her position as School Supervisor and the employment contract extension.

Dr. Johnson filed a memorandum in response to the order to show cause on January 31, 2018. Without passing on the merits of Dr. Johnson's claims, DALA allowed Dr. Johnson's appeal to proceed to a hearing. In response to DALA's first prehearing order, Dr. Johnson filed a prehearing memorandum and seven proposed exhibits on March 28, 2018 (Exhs. P1-P7). MTRS filed a prehearing memorandum and 15 proposed exhibits (Exhs. R1-R15) on May 29, 2018.

I held a hearing on April 10, 2019 at DALA in Malden, Massachusetts. I marked all of the 22 proposed hearing exhibits in evidence, without objection. The hearing was recorded digitally. The parties made opening statements. Dr. Johnson testified; MTRS presented no witnesses. Both parties waived closing statements but reserved the right to file post-hearing memoranda following receipt of a written transcription of the recorded hearing, which Dr. Johnson's counsel agreed to have prepared. I closed the evidentiary record, but left the record open for the receipt of the written hearing transcription, which Dr. Johnson's counsel filed subsequently,[2] and for the receipt of the parties' post-hearing memoranda, which were filed on September 30, 2019. The record closed fully on that date.

Findings of Fact

I make the following findings of fact based upon the testimony, hearing exhibits and other

[2]/ References below to "TR." are to the written transcript of the hearing recording prepared by Lisa W. Starr, Registered Professional Reporter, of Copley Court Reporting, Inc.

materials in the record and the reasonable inferences drawn from them.[3]

1. Petitioner Dr. Mary Ellen Johnson, currently retired, began her teaching career in New York as a local public school superintendent while she completed her doctoral work at Columbia University. In 1970, she taught special needs students in the Cambridge public schools, and then taught in the Boston public schools, where she also worked as a multicultural curriculum developer and a superintendent's assistant. Dr. Johnson taught in the Sandwich, Massachusetts public schools from 1979 until December 10, 2008, when the Town of Sandwich School Committee employed her as Superintendent of Schools for the remainder of the 2008-09 school year and for the 2009-10 and 2010-11 school years. (Johnson directs testimony, TR. at 12-14; Exh. P4: Dr. Johnson's December 2008 employment contract for the position of Sandwich School Superintendent, dated December 10, 2008).

Dr. Johnson's School Superintendent Employment Contract

2. Dr. Johnson's December 10, 2008 employment contract for the Sandwich School Superintendent position included the following provisions:

(a) ***Contract employment term***. The original term of Dr. Johnson's employment as Superintendent of Schools ran from December 10, 2008 to June 30, 2011. (Exh. P4 at para. 2.)

[3]/ This includes the Appeals Court's decision reversing the dismissal of Dr. Johnson's against the School Committee for breach of her employment contract extension (cited above at 3).

(b) ***Job duties as School Superintendent***. Under a subheading entitled "Administration and Supervision," the employment contract provided that "Dr. Johnson shall administer and supervise the Public Schools as provided by applicable State laws and the policies and directives of the [School] Committee as they may be promulgated from time to time." (Exh. P4 at para. 23.) The employment contract included no other provision specifying her duties as School Superintendent, or distinguishing or differentiating her duties as Superintendent from those of an assistant superintendent. The contract did *not* state that the work for which Dr. Johnson would receive regular compensation included grant writing related to curriculum and program development (or any other additional service).

(c) ***Salary and discretionary adjustments***. Dr. Johnson's annual salary under the contract was $152,000 through the end of the 2008-09 school year, increasing to $157,525 for the 2009-10 school year. (Exh. P4 at paras. 4-6.) Further discretionary adjustments to Dr. Johnson's compensation could be made during the remainder of the agreement based upon performance and salary reviews, but in no event would her compensation be reduced below what she had been paid during the previous fiscal year. (*Id*. at para. 4)

(d) ***Performance and salary reviews***. These were to occur before November 1 of each year of the employment contract, would cover Dr. Johnson's job performance during the previous school year, and would be based upon a mutually agreed-upon performance review "instrument." Each annual performance review would include agreement upon a cost of living adjustment to Dr. Johnson's salary, based upon her performance. (*Id*. at para. 5.)

(e) ***Discretionary performance-based incentive payments***. Starting in the 2009-10

school year, Dr. Johnson would be "eligible to receive a discretionary, performance-based annual incentive payment. Discretionary incentive payments, "if any," would be awarded by the School Committee "to recognize on-going, sustained District progress and improvements as measured/indicated by: demonstrable gains in student performance during each School Year, the implementation and execution of teacher and administrator written performance evaluations, active and on-going school administrator community involvement and outreach, and effective and prudent fiscal reporting and management, as determined and judged by the Committee." A discretionary incentive, "if and when awarded by the Committee," would be paid on or about November 1 in the year following "the achievement of the performance result." An incentive payment was to be "computed into the Superintendent's base pay at a value of 20% of the initial sum voted" by the School Committee as Dr. Johnson's first, discretionary performance-based incentive payment. (*Id*. at para. 6.)

(f) ***Reimbursement of Dr. Johnson's work-related expenses***. The School Committee was to reimburse Dr. Johnson "for all reasonable in-state expenses reasonably incurred in the performance of her duties" under the employment contract. Dr. Johnson could incur, and obtain reimbursement for, out of state travel and expenses only with the School Committee's prior approval. (*Id*. at para. 7.)

(g) ***Employment contract extension***. Dr. Johnson's employment contract provided that "[p]rior to July 1, 2010, the term of this Agreement shall be extended based on the mutual agreement of both parties to all terms and benefits provided therein." (*Id*. at para. 3.)

3. The employment contract also provided that:

(a) Dr. Johnson was to remain a member of the Massachusetts Teachers' Retirement System (MTRS) during the employment contract's original term and its extension. (*Id*. at para. 11.)

(b) Dr. Johnson was entitled to the same medical and life insurance benefits provided to other professional personnel of the school committee. (*Id*. at para. 19.)

(c) The school committee was to provide Dr. Johnson "with benefits equal to" those provided by the Town. (*Id*. at para. 21.)

(d) The contract could be "re-opened for discussion of its terms and conditions upon mutual written agreement by the school committee and Dr. Johnson." (*Id*. at para. 25.)

(e) Under the subheading "School Committee Protection," Dr. Johnson and the School Committee agreed that individual School Committee members could not be sued personally for any alleged violation of the employment contract. (*Id*. at para. 28.)

4. Dr. Johnson's original employment contract included no provision regarding additional compensation for curriculum and program development work, or for grant writing, that she performed while she served as School Superintendent.

5. Dr. Johnson agreed to waive an increase in her salary for the 2009-10 school year and for the 2010-11 school year, in view of budget constraints that the Sandwich Public Schools faced, including reduced school funding by the Commonwealth and a School Department staff reduction. (Exh. P1; Johnson direct testimony; TR. at 16.)

6. For each of the three years of her employment contract (2008-09, 2009-10 and 2010-11), Dr. Johnson was paid a base salary of $152,000, because she had waived a salary increase. (Exh.

P2: School Committee handwritten note received by Dr. Johnson from Town Manager George Dunham dated Nov, 25, 2013, showing amounts paid to Dr. Johnson in FY 2010 and FY 2011 including "contracted salary" ($152,000 in each fiscal year.)

7. For each of those years, the School Committee granted, and Dr. Johnson received, a discretionary, performance-based incentive payment of $7,500. (Johnson direct testimony; TR. at 16.)

8. Per paragraph 4 of her employment contract, the $7,500 incentive payment was additional compensation allowed by the School Committee, but it was not part of Dr. Johnson's base salary. (*See* Finding 2(e).)

9. Per paragraph 6 of the employment contract, 20 percent of the $7,500 incentive payment for additional service ($1,500), reflecting her performance during the 2008-09 school year, was added to Johnson's base salary during the 2009-10 school year, the second year of her employment contract. (*Id*.; see also Johnson direct testimony; TR. at 17.)

10. Starting in November 2010, Dr. Johnson performed an additional service—grant writing related to curriculum and instruction development—after the School Committee eliminated, as a cost-saving measure, the position of an Assistant School Superintendent for "curriculum and instruction."

(a) Dr. Johnson's employment contract included no provision regarding her assumption of the Assistant School Superintendent's responsibilities or additional compensation for performing grant writing work, and the contract was not amended to add this additional service or compensation for performing it.

(b) The school committee agreed (either orally or in a separate written side agreement not in the record) to pay Dr. Johnson for this additional service from the funding received as a result of her grant writing work. She was paid, in this manner, an additional $14,500 over her contract salary for grant writing during the 2009-10 school year, and $18,500 for this additional service during the 2010-11 school year.

(Johnson direct testimony, TR. at 17, 25-27; Johnson cross-examination, TR. 43-44; Exh. P2: School Committee handwritten note received by Dr. Johnson from Town Manager George Dunham dated Nov, 25, 2013 showing amounts paid to Dr. Johnson in FY 2010 and FY 2011 including "contracted salary" ($152,000 in each fiscal year), and additional compensation not included in "contracted salary" — $14,500 on July 15, 2010 for "Title I and Title Ed Quality [Grants]" additional work, and $18,500 on July 14, 2011 for "Arra Grant; Title 2, Part A Grant," and "Title 1 Grant"; *see also* Dr. Johnson's Response to First Prehearing Order (Mar. 28, 2018) at 4-6, 8.)[4]

The Employment Contract Extension

11. On April 30, 2010, Dr. Johnson's School Superintendent employment contract was extended for two additional school years (September 2011-June 30, 2012 and September 2012-June 30, 2013), pursuant to the original employment contract's extension provision. (*See* Finding 2(g).) Dr. Johnson and the Sandwich School Committee chairman signed a memorandum of agreement

[4]/ The record does not include the contract for the Assistant Superintendent for curriculum and instruction before that position was eliminated by the School Committee. The record also does not include an official job description for that position.

extending the contract for this period, and the school committee, as then constituted, voted 4-2 to approve the memorandum of agreement. (Exh. P1: Memorandum of Agreement dated April 30, 2010.)[5]

12. The memorandum of agreement included the following provisions:

(a) Dr. Johnson "again agreed to waive an increase in salary for the year ending June 30, 2011 due to the current economic situation facing both the Town of Sandwich and the Sandwich Public Schools." (Exh. P1 at para. 3.)

(b) Dr. Johnson's compensation for the balance of the contract would " be established in conjunction with her annual salary and performance reviews, but in no case [would] it be reduced below that of the previous fiscal year." (*Id*. at para. 4.)

(c) There would be no change in the original employment contract's provisions regarding the 20 percent-of-base-salary discretionary performance incentives, except that the date of payment was changed from November 1 to May 1 to correspond with the revised date of her performance evaluation. (*Id*. at para. 6.)

(d) As was true of her original employment contract, the contract extension, as stated in the April 30, 2010 Memorandum of Agreement did not mention grant writing as one of Dr. Johnson's duties as School Superintendent, or what she would be paid for performing this additional service. (Exh. P1, *passim*.)

[5]/The School Committee vote approving the memorandum of agreement appears at the end of the agreement, before the signatures.

Repudiation of Employment Contract Extension by Successor School Committee

13. In early May 2010, a successor Sandwich School Committee was formed as the result of a School Committee member election. Two weeks later, an Assistant District Attorney for the Cape and Islands district issued a letter stating that the prior School Committee's April 30, 2010 meeting had violated the Commonwealth's open meeting law, M.G.L. c. 30A, §§ 18-25, and that all of the actions the Committee had taken at the meeting were therefore null and void. That opinion was "endorsed," several days later, by the new school committee's counsel, apparently on the School Committee's behalf. *See Johnson v. School Committee of Sandwich*, 81 Mass. App. Ct. 812, 813, 969 N.E.2d 175, 177 (2012), *rev. denied*, 463 Mass. 1105, 972 N.E.2d 1057 (2012).

14. None of the parties allowed to do so by statute[6] filed, within 21 days, a complaint to invalidate this action by the School Committee in the Superior Court or in the Supreme Judicial Court. *Id;* 81 Mass. App. Ct. at 813, 969 N.E.2d at 177.

15. On June 16, 2010, the new School Committee voted to not renew Dr. Johnson's employment or recognize the previous extension of her employment contract. *Id*.

16. Dr. Johnson continued working under the original contract through its end date, June 30, 2011. (Johnson direct testimony.)

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[6]/ Three or more registered voters, the attorney general, or the district attorney of the county in which the city or town is located. *See* M.G.L. c. 39, § 23B, eleventh para., as amended by St. 1976, c. 397, § 6.

Dr. Johnson's Breach of Contract Action Against the Sandwich School Committee, Partial Summary Judgment, and Breach of Contract Damages Award

17. After her employment as School Superintendent under the original contract had ended, Dr. Johnson commenced an action against the School Committee and its members in the Barnstable Superior Court seeking damages for breach of her employment contract extension, and for declaratory relief compelling specific performance of the contract extension. The Barnstable Superior Court granted the School Committee's motion to dismiss this action. Upon Dr. Johnson's appeal, the Appeals Court reversed the dismissal on June 12, 2012, and her action proceeded in the Barnstable Superior Court, subsequently.[7]

18. On July 1, 2013, the School Committee and its co-defendants in Dr. Johnson's action moved for summary judgment on all of her claims, including breach of contract; and Dr. Johnson cross-moved for partial summary judgment on her breach of contract claim. On October 23, 2013, the Court (a) granted Dr. Johnson's motion for partial summary judgment, based upon her entitlement to unpaid compensation resulting from the breach of her employment contract extension;

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[7]/ The defendants moved to dismiss Dr. Johnson's action on the ground that the prior School Committee had violated the public meeting law by not giving sufficient advance public notice of the meeting at which it voted to extend her employment as School Superintendent. In reversing the Barnstable Superior Court's dismissal of Dr. Johnson's action, the Appeals Court held that (1) the alleged open meetings law violation did not automatically invalidate the Committee's vote extending Dr. Johnson's employment contract; (2) even if that vote had violated the open meetings law, the sole remedy was for any of the parties allowed to do so by statute to file, within 21 days, a complaint to invalidate the Committee's action (*see* n. 6 above), but no such complaint was filed; and (2) Dr. Johnson's verified complaint sufficed to defeat dismissal for failure to state a claim for relief. *Johnson v. School Committee of Sandwich*; 81 Mass. App. Ct. at 813-16; 969 N.E.2d at 177-79.

and (b) granted the defendants' motion for summary judgment on Dr. Johnson's other claims. The Court also ordered the parties to confer and submit a proposed judgment "reflecting all terms of back pay and other compensation resulting from the breach" of the employment contract extension. (Exh. P8: Docket Information for Dr. Johnson's Barnstable Superior Court action; Docket items 32–35 and accompanying Docket descriptions of these filings).

19. The parties were apparently unable to reach agreement on the computation and amount of Dr. Johnson's breach of contract damages award, and the Sandwich School Committee filed its own damages award proposal on November 13, 2013. (*See* Exh. P8: Barnstable Superior Court Docket Information printout for Dr. Johnson's action against the Sandwich School Committee and other defendants; Docket item 37.)[8]

20. On November 14, 2013, the Barnstable Superior Court issued an interim Order (known as a "make whole" order) directing the parties to brief how Dr. Johnson's damages were to be calculated, including the applicable measure of damages, and the methodology for computing interest on the various elements of her damages award. (Exh. R3: *Johnson v. Town of Sandwich School Committee*, C.A. No. BACV2010-00663, Interim Order on Judgment and Further Procedural Orders (Barnstable Super. Ct., Nov. 14, 2013).)

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[8]/ The School Committee filed two revisions of its proposal, the last of which was dated December 12, 2013. (Exh. P8: Barnstable Superior Court docket information printout, Docket items 40 and 43.) By that time, Dr. Johnson, who had been represented previously by counsel, was self-represented in the Superior Court action. The Court Docket Information printout shows no filing by Dr. Johnson regarding the compensation element of a damages computation following the Court's October 23, 2013 Memorandum Decision and Order directing the parties to do so.

(a) The Court stated, in its Interim Order, that the "ordinary measure of damages for a proven breach of an employment contract [was] the so-called 'benefit of the bargain.'" With this measure of damages applied, Dr. Johnson was "entitled to those damages that would put her in a position to obtain that which she has bargained to obtain, so far as compensation in money can be computed by rational methods on a firm basis in fact" (*Id*., *quoting* Mass. Super. Ct. Civil Jury Instructions § 14.3(1)(b) (1998)).

(b) The Court also instructed, in its November 14, 2013 Interim Order, that "grant administration duties, in addition to [Dr. Johnson's] Superintendent duties," were, "like coaching, after-school program supervision, summer curriculum development, etc . . . compensable duties not uncommonly associated with educational positions" and were "[g]enerally . . . included in 'make whole' orders following suspensions or terminations that were subsequently found to be, like here, unlawful." It invited the School Committee to submit further memoranda asserting a contrary position. (*Id*.)

(c) The Court did *not* instruct the parties, in its November 14, 2013 Interim Order, that the computation of a breach of contract damages component for grant stipends Dr. Johnson would have received but for the breach were to be based upon the definition of "regular compensation" applied in computing public employee retirement benefits pursuant to M.G.L. c. 32. *(Id)*.[9]

[9]/ For the definition of regular compensation in the Massachusetts public employment context that I apply here, *see* M.G.L. c. 32, § 1 and 807 C.M.R.§ 6.02(1) (the MTRS regulation applying the M.G.L. c. 32, § 1 definition of "regular compensation").

21. On December 31, 2013, the Barnstable Superior Court issued a Final Memorandum of Damages and Order for Judgment awarding Dr. Johnson $434,317.82 in damages for breach of contract. This award comprised "two years of overall compensation Dr. Johnson was denied because of the School Committee's breach of the extension agreement. The Court included in Dr. Johnson's damages amount the base salary she would have received for an additional two school years under the employment contract extension, which the Court determined would have been $155,000 per year.[10] The damages award also included the following amounts that Dr. Johnson would have

[10]/The Barnstable Superior Court's December 31, 2013 Final Memorandum of Damages and Order for Judgment does not state the amount of Dr. Johnson's base salary that it applied in computing her damages award. However, it appears from the interim Order and other evidence in the record here that the Court accepted the base salary amount the School Committee stated in its December 13, 2013 revised proposal regarding back pay and other compensation to be included in a damage award for breach of contract.

The School Committee had proposed that for FY 2012 (July 1, 2011 through June 30, 2012), Dr. Johnson's base salary would have been $152,000 (her base salary following her waiver of salary increases for the prior school years) plus 20 percent of the additional $7,500 performance incentive approved by the School Committee ($3,000), for a total of $155,000. From this base salary, the School Committee proposed deducting $30,000 of unemployment compensation benefits Dr. Johnson was paid during that fiscal year, resulting in a net base salary award of $125,000 for FY 2012 (July 1, 2011 to June 30, 2012).

For the FY 2013 base salary, the School Committee again assumed a $7,500 incentive payment, and another addition of $3,000 (20 percent of the $7,500 incentive payment) to a base salary of $155,000 (although it appears that the base salary amount for the second year of the contract extension would have been $158,000 with the prior year's 20 percent of the incentive payment built in). From this amount, the School Committee proposed deducting $7,500 of unemployment benefits Dr. Johnson received during FY 2013, and a $1,502.27 after-tax payment by another town (Barnstable) to Dr. Johnson, resulting in a net base salary award for FY 2013 of $145,997.73. (*See* Exh. R4; Town of Sandwich School Committee Further Revised Proposal Regarding Back Pay and Other Compensation Resulting from the Alleged Breach of Plaintiff's Two-Year Extension Agreement (Dec. 10, 2013) at 1 (compensation and benefits chart) and n. 1.)

received if the contract extension had not been breached:

(a) "a yearly average sum of $16,500 of grant monies (sic) over the two years at issue;"

(b) a full performance incentive payment of $7,500 per year, had the School Committee decided to award Dr. Johnson an incentive payment during FY 2012 and FY 2013. [11] The Court found that this would have resulted in an adjustment to the base salary Dr. Johnson would have been paid under the employment contract extension "of $6,000 per year for a total additional compensation of $12,000 (for two years), plus prejudgment interest of $2,750 (*id.*);[12] and

(c) An additional $1,693 in damages, inclusive of interest, reflecting what Dr. Johnson would have received in health, dental and life insurance benefits under the contract extension had it not been breached. (*Id.*)[13]

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[11]/ The contract extension provided that Dr. Johnson's compensation would not be less than her compensation under the original employment contract (*see* Finding 2(c)), which had included "a discretionary performance-based annual incentive payment" equal to 20 percent of her base pay." Therefore, if the School Committee had approved an incentive payment to Dr. Johnson for her performance in FY 2012, the incentive amount could not have been less than the $7,500 incentive she had been paid during last year of the original employment contract, and the incentive payment for 2013 could not have been less than the $7,500 incentive payment for FY 2012.

[12]/ The School Committee's December 10, 2013 breach of contract damages proposal (*see* n. 7) had included an assumption that Dr. Johnson would have received $33,000 for "grant stipends" ($16,500 each in FY 2012 and FY 2013), plus interest on this amount ($4,290 for two fiscal years).

[13]/ The School Committee's December 10, 2013 breach of damages proposal added other elements of lost contract benefit to Dr. Johnson's base compensation—sick leave buyback

(*See* Exhs. P3 and R5: *Johnson v. Town of Sandwich School Committee*, C.A. No. BACV2010-00663, Final Memorandum of Damages and Order for Judgment (Barnstable Super. Ct., Dec. 31, 2013); Exh. P8, Docket item 46 and accompanying docket entry.)

22. Between January and March 2014, the Barnstable Superior Court denied motions Dr. Johnson filed to vacate or reconsider the Barnstable Superior Court's Final Memorandum of Damages and Order for Judgment. (*See* Exh. P8; Docket items 51 and 54.)

23. On March 18, 2014, the Court issued a summary judgment in Dr. Johnson's favor on her breach of damages claim, which confirmed the $434,317.82 damages award the Court had determined in its December 31, 2013 Final Memorandum if Damages and Order for Judgment, together with interest and costs, and dismissed Dr. Johnson's remaining claims. (*See* Exh. P8: Docket item 55.) The Court amended its summary judgment on April 24, 2014 and May 1, 2014 with respect to the amount of costs and pre-judgment interest it awarded to Dr. Johnson. Neither amendment changed the principal amount of the damages award. (*Id.*; Docket items 58 and 60.) The summary judgment as amended through May 1, 2014 was not amended further. On June 6, 2014, the Court denied Dr. Johnson's motion, which the School Committee opposed, to alter or amend the summary judgment, and "with some reluctance" it assessed sanctions for filing the motion (attorneys' fees and motion costs)" against Dr. Johnson. (*Id.*; Docket items 64-65).

($8,543.09); vacation buyback ($35,596.20); health, dental and life insurance buyback ($9,844.40); and interest on each of those amounts totaling $6,726.92. The total damages award that the School Committee proposed for breach of contract was $417,874.82, which was $16,442.99 less than the damages the court awarded to Dr. Johnson for breach of contract.

Dr. Johnson's Retirement Application

24. Dr. Johnson had originally intended to retire on July 1, 2013, after she had completed her contract term as School Superintendent through the end of the 2012-13 school year under the two year extension of her employment contract.

(a) Dr. Johnson needed the two years of service she would have completed under the contract extension and for which retirement contributions would have been taken from her salary, but for its breach, in order to retire with 30 years of creditable service.

(b) The School Committee's breach had left unresolved Dr. Johnson's employment status through June 30, 2013 (the end date of what was to have been the two-year contract extension) and, as well, the years of service for which she would be credited in computing her regular compensation for retirement purposes, and the earnings on which her retirement amount would be based. Because it appeared that the resolution of her Superior Court breach of contract action might clarify these elements of her compensation, MTRS had advised Dr. Johnson to defer filing a retirement application until her court action concluded.

(Johnson direct testimony; TR. at 29-33.)

25. In October 2014, Dr. Johnson applied to MTRS to purchase, for retirement credit, the two years of employment as school Superintendent (the 2011-12 and 2012-13 school years) under the contract extension that she had lost as a result of its breach by the School Committee. (Johnson direct testimony.)

26. On September 17, 2014, MTRS sent Dr. Johnson a creditable service purchase

invoice for $34,100.

(a) This purchase amount was based upon two years of "pensionable earnings"—the $155,000 per year base pay she would have earned under the contract extension, plus an annual incentive pay equal to 20 percent of her base pay ($1,500), as the contract stated she would receive if it was extended.

(b) MTRS did *not* include in the pensionable earnings on which its invoice was based any stipend payments for grant writing, because Dr. Johnson's contract (meaning the original contract and its extension) included no provision for these additional services or their payment.

(c) In excluding stipend payments for grant writing from Dr. Johnson's pensionable earnings under the contract extension, MTRS relied upon M.G.L. c. 32, § 1, 840 C.M.R. § 15.03, and 807 C.M.R. § 6.02.

(d) Dr. Johnson paid the invoice amount in full on November 7, 2014.

(Dr. Johnson's response to first prehearing order (Mar. 28, 2018) at 17, para. 2.; Exh. P7: MTRS invoice for creditable service purchase to Dr. Johnson, dated Sept. 17, 2014, with receipt of payment by Dr. Johnson on Nov. 5 or 7, 2014 date-stamped; and Exh. R2: email, Shannon Murphy, MTRS Senior Service Representative, Employee Services, to Dr. Johnson, dated Sept. 17, 2014 (explaining how the invoice was created and why the grant writing stipend payments were not included as pensionable earnings).)

27. Dr. Johnson filed her retirement application with MTRS on October 14, 2014, after she had received MTRS's creditable service buyback invoice. (Exh. P6: Retirement application cover

letter dated Oct. 14, 2014).

28. MTRS determined that Dr. Johnson's date of retirement was October 30, 2014, 15 days after it had received Part I (the member's portion) of her retirement application. MTRS based its decision upon M.G.L. c. 32, § 10(3) (which provides in pertinent part that if a member of a public retirement system files her retirement application more than 60 days after her separation from service, the effective date of retirement will be not less than 15 days after the application is filed).

29. MTRS calculated Dr. Johnson's retirement allowance based upon regular compensation that included her base salary, and performance-based adjustments that were made under her original employment contract.

(a) MTRS computed Dr. Johnson's regular compensation to have been $159,025 during the 2010-11 school year, the last year of her original employment contract term.

(b) It assumed that under the employment contract extension, Dr. Johnson would have had regular compensation of $161,000 (base salary plus performance-based adjustments) during each of two school years (2011-12 and 2012-13).

(c) MTRS declined to include, in its computation of Dr. Johnson's "regular compensation," stipends she was paid for grant writing..

(d) The Superior Court had included these types of compensation in the damages it awarded Dr. Johnson for breach of her employment extension contract, including the $16,500 stipends Dr. Johnson was paid for grant writing work she performed during the original employment contract period. (*See* Finding 21(a).)

(e) MTRS excluded these stipends from Dr. Johnson's regular compensation in

computing her retirement benefit because there was no provision for them, or for the additional service for which the stipends had been paid to her, in the employment contract or its extension. (*See* Attachment to Dr. Johnson's appeal: Letter, Jonathan M. Osimo, Assistant Director of Member Services, MTRS, to Dr. Johnson, dated Aug. 4, 2015.)[14]

30. On August 19, 2015, Dr. Johnson timely filed with the Division of Administrative Law Appeals a single appeal challenging MTRS's exclusion of the grant writing stipends from the regular compensation used to compute her retirement benefit, and MTRS's s determination that her retirement date was October 30, 2014, 15 days after she filed her retirement application, rather than 60 days from what would have been her last day of work as School Supervisor (June 30, 2013).

Discussion

1. Dr. Johnson's Retirement Date

M.G.L. c. 32, § 10(3), entitled "Right to Defer Receipt of Allowance," states in pertinent part that:

> The retirement allowance of any member entitled thereto under the provisions of subdivision (1), (2) or (2A) of this section shall become effective on the date of his termination of service if his written application therefor is filed with the board not more than sixty days after such date; otherwise his retirement allowance shall be deferred. Any such member may, at any time thereafter and before attaining the maximum age for his group, file with the board his written application for such

[14]/ This letter was not marked as a hearing exhibit. However, it was included in Dr. Johnson's appeal, and MTRS cited it in support of its position regarding what should and should not be included in Dr. Johnson's regular compensation for retirement purposes. *See* MTRS Post-Hearing Memorandum (Sept. 30, 2019), at 4-6.

> retirement allowance, and thereupon such retirement allowance shall become effective on the date which shall be specified in such application and which shall be not less than fifteen days nor more than four months after the filing of such application . . . .

Dr. Johnson filed her retirement application more than 60 days after June 30, 2013, the date on which her service as Sandwich Superintendent of Schools would have ended if her employment contract extension had not been breached. MTRS received Part I of Dr. Johnson's retirement application on October 15, 2014. It determined her date of retirement to be 15 days afterward, which was October 30, 2014.

Dr. Johnson requested that MTRS change the date of her retirement to July 1, 2013, the date on which she had intended to retire after she had completed her superintendency through the end of the 2012-13 school year under the two year extension of her employment contract had it not been breached. Dr. Johnson claims to have relied reasonably upon advice by MTRS personnel that she defer filing the retirement application until her breach of contract action concluded in her favor, making certain her right to have the additional two years of service as Superintendent under the contract extension counted toward her retirement allowance, and also the amount of regular compensation she would have been paid for those two years.

Without question, Dr. Johnson filed her retirement application with MTRS more than 60 days after her separation from service as Sandwich's Superintendent of Schools. Under the employment contract extension, her last day of work as School Superintendent would have been June 30, 2013 under the employment contract extension had it not been breached. 60 days from that date would have been August 30, 2013, and that would have been her retirement date had she filed a

retirement application by then. Because she did not do so, M.G.L. c. 32, § 10 required that her retirement date be set no earlier than 15 days after she filed her retirement application. She filed the application on October 15, 2014. MTRS correctly set the retirement date as early afterward as it could during the statutorily- prescribed time—15 days later, which was on October 30, 2014.

M.G.L. c. 32, § 10(3) makes no provision for varying the 60-day period for computing the retirement date relative to the last day of the public employee's service. Essentially, Dr. Johnson argues that because she relied reasonably upon advice by MTRS personnel that she defer filing her retirement application until her breach of contract action concluded, the 60-day period should be tolled until that event occurred.

It is not certain that this is a time period subject to tolling. Tolling generally suspends a time limitation on the right to initiate a legal proceeding, and typically this time starts to run when a cause of action accrues. Tolling stops this time from running and the associated cause of action from expiring as a result. *See Shaw's Supermarkets, Inc. v. Melendez*, 488 Mass. 338, 345, 173 N.E.3d 356, 362-63 (2020). M.G.L. c. 32, § 10 imposes no deadline for initiating an action upon a claim or loss of right for not acting within the period of time it prescribes. The consequence of not filing a retirement application within 60 days of terminating public service is not the loss of a pension or the right to claim one. It is a deferment of the retirement date and, as a result, a deferment of retirement benefits payments. There is an associated price, which is a delay in commencing retirement payments and, as a result, a limited loss of pension benefits payments that would have commenced earlier. However, there is no bar on seeking or receiving retirement benefits.

Even if the 60-day time period prescribed by M.G.L. c. 32, § 10 is subject to tolling (a

proposition Dr. Johnson has not supported with any authority), the latest date on which the 60-day clock would have started to run would have been 60 days after the Barnstable Superior Court's judgment awarding Dr. Johnson damages on her breach of contract claim became unquestionably final. There are several possible dates on which that can be said to have occurred for tolling purposes here—March 18, 2014, the date on which the Court issued its original partial summary judgment confirming Dr. Johnson's damages award for breach of contract, the dates on which this summary judgment was amended (April 24, and May 1, 2014); or the date on which the Court denied Dr. Johnson's final motion to alter or amend the summary judgment with an award of motion-related attorneys fees and costs to the School Committee (June 6, 2014). (*See* Finding 23.) Under the assumption that the 60-day period prescribed by M.G.L. c. 32, § 10 was subject to tolling, the most reasonable choice of date on which the tolled 60-day period started to run would have been the date on which the partial summary decision and damages award became unquestionably final.

That date appears to have been May 1, 2014, when the Court issued its last amendment of the summary judgment in Dr. Johnson's favor. Picking the subsequent date on which the Court denied Dr. Johnson's last motion to alter or amend the partial summary judgment in her favor would be generous to a fault, even under the assumption that Dr. Johnson was entitled to a tolling of the 60-day period that the statute prescribes for computing a retirement date relative to the date on which public employee ceases working. In denying that motion on June 6, 2014, the Court awarded the School Committee motion-related attorneys' fees and costs, suggesting strongly that the Court regarded the motion as having been entirely without merit. Stated another way, the finality of the Court's summary judgment in Dr. Johnson's favor was never really in doubt on account of her last

motion to alter or amend it, a point underscored by the denial of that motion on June 6, 2014.

That point aside, running M.G.L. c. 32, § 10's 60-day period from either date results in an expiration of the 60-day period before Dr. Johnson filed her retirement application—either on July 2, 2014 (if the date of the last summary judgment amendment started the tolled 60-day period running) or on August 6, 2014 (if the date on which the Court denied Dr. Johnson's last motion to alter or further amend the amended summary judgment started the tolled 60-day clock running). Picking an even later date to start the 60-day clock running makes no legal sense —for example, the date of the final entry on the Court docket, July 14, 2014, when a notice of satisfaction of Dr. Johnson's judgment was filed with the Court, which related to payment of the damages she was awarded rather than to the damages award or partial summary judgment granting it. Even if that date cold be selected justifiably as the date that started the 60-day clock running, however, this time period would have expired on September 14, 2014, a month before Dr. Johnson actually filed her retirement application.

M.G.L. c. 32, § 10 makes no provision for varying the 60-day period on any ground, including breach of the employee's public employment contract, or a retirement system's suggestion that a retirement application be deferred until a pending breach of contract action was concluded so that elements material to her creditable service and its purchase could be resolved by the court. Even if the time period is assumed to be subject to tolling, however, Dr. Johnson's retirement application was filed more than 60 days afterward under any of the tolling scenarios I have considered, making the tolling issue an academic one.

MTRS had no choice under M.G.L. c. 32, § 10 but to set her retirement date no less than 15

days after the retirement application was filed on October 15, 2014. Having set that date 15 days later, on October 30, 2014, MTRS complied fully with the statute's requirements. Beyond the mootness of the argument that Dr. Johnson's 60-day filing period under M.G.L. c. 32, § 10(3) was "tolled" by MTRS staff advice to await the outcome of her breach of contract action, DALA is without jurisdiction to amend the statute's directive regarding how the date of retirement is to be set if the retirement application is not filed within 60 days after a public employee's service ends, or to grant equitable relief from this requirement. *See, e.g., Mello v. Executive Office of Veterans' Services*, Docket No. VS-21-0028, Decision at 47-48 (Mass. Div. of Admin. Law App., Sept. 18, 2023), *reconsideration denied* (Oct. 20, 2023)(same jurisdictional principle applied with respect to the Massachusetts statutory definition of "veteran" for state veterans' benefits eligibility purposes; and in rejecting the veteran's argument that Massachusetts imposed more restrictive eligibility requirements for state veterans' benefits than the United States Veterans' Administration imposed did for federal veterans' benefits qualification purposes, a situation that could be rectified in the veteran's favor only by an amendment of the Commonwealth's state militia and national guard statute, M.G.L. c. 33).

2. Exclusion of Grant Writing Stipends from Dr. Johnson's Regular Compensation

M.G.L. c. 32, § 1 defines "regular compensation" as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." Section 1 also states that wages are "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 . . ., bonuses . . ., amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term . . . ." For a teacher "employed by a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for additional services in such school . . . shall be regarded as 'regular compensation' rather than as bonus or overtime . . . ."[15]

The MTRS regulations provide," at 807 C.M.R. § 6.02(1)(a), that:

> Regular Compensation shall include salary payable under the terms of an annual contract for additional services so long as:
>
> (a) The additional services are set forth in the annual contract;
> (b) The additional services are educational in nature;
> (c) The remuneration for these services is provided in the annual contract;
> (d) The additional services are performed during the school year.

In determining whether compensation for additional services performed by a public school teacher (including a Superintendent) counts as regular compensation, it is of no legal consequence that the additional duties and compensation for performing them are the subject of "side agreements" or whether those side agreements are oral or written; all that matters is whether they are listed in an annual contract for additional services, and if they were not so listed, their omission is the only factor relevant in excluding them as part of the employee's regular compensation. *See Kozloski v.*

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[15]/ M.G.L. c. 32, § 1 defines "teacher" in pertinent part as "any person who is employed by one or more school committees or boards of trustees or by any combination of such committees and boards on a basis of not less than half-time service as a teacher, . . . [or] principal, supervisor or superintendent in any public school as defined in this section . . . ." Dr. Johnson was therefore a "teacher" for purposes of M.G.L. c. 32, § 1 when she served as School Superintendent under her original employment contract, and would have remained a "teacher" if her contract extension had not been breached.

Contributory Retirement Appeal Board, 61 Mass. App. Ct. 783, 814 N.E.2d 730 (2004), *rev. denied*, 442 Mass. 1112, 816 N.E.2d 1222 (table) (2004); *see also Brunell v. Massachusetts Teachers' Retirement System*, Docket No. CR-15-764, Decision (Mass. Div. of Admin. Law App., Aug. 25, 2017).

Kozloski affirmed the rejection of a claim by a public high school science teacher, whose teaching position was covered by a collective bargaining agreement, that an additional $1,500 per year stipend he received as extra compensation for serving as the school's "audio-visual coordinator" qualified as "regular" compensation to be included in the computation of his retirement allowance under M.G.L. c. 32, § 1. Neither the audio-visual coordinator position, nor the stipend paid for it, were mentioned in the collective bargaining agreement in effect when the teacher retired. In fact, while the CBA listed "Co–Curricular Stipend, Extra Paid Assignments" showing "many other extra work positions" for which teachers were paid stipends, "audio-visual coordinator" and the related stipend were not on the list. It was therefore immaterial that while the teacher was appealing the exclusion of the stipend from his retirement calculation to the Contributory Retirement Appeal Board, representatives of the teachers' union and the school board signed a "memorandum of agreement" stating that "certain stipend positions were inadvertently omitted in the drafting of collective bargaining agreements," including the position of audio-visual coordinator." Other legal infirmities of this side agreement aside (such as its execution six years after the CBA became effective), whether or not the omission of the teacher's audio-visual coordinator position from the CBA had been inadvertent did not matter; all that mattered was that the extra paid assignment and related stipend were not included in the CBA when the teacher worked in this position. *Kozloski*;

61 Mass. App. Ct. at 788-89, 814 N.E.2d at 734-35.

Applying *Kozloski*, DALA Administrative Magistrate Judithann Burke affirmed, in *Brunell*, MTRS's decision to not include as "regular compensation" for retirement purposes an $8,500 per year stipend paid during three school years to a public high school Family/Consumer Science teacher covered by a collective bargaining agreement who performed additional services as "Coordinator of Elementary Enrichment" for grades K-4. That was because (1) the collective bargaining agreement then in effect did not mention this position or the stipend a teacher was paid for performing this additional work; and (2) although the teachers' union and the public school system in question had signed a letter of intent to include the Coordinator of Elementary Enrichment position and its associated stipend in the collective bargaining agreement, the CBA that both parties signed and that the union membership ratified did not list them.

Dr. Johnson concedes the applicable definition of "regular compensation" for retirement purposes under M.G.L. c. 32, but she requests "special consideration" on account of the breach of her employment contract extension, as a result of which she was unable to earn compensation, and contribute to her retirement system, as she would have for two years (2011-12 and 2012-13) had the extension not been breached. Dr. Johnson emphasizes that the Barnstable Superior Court (and the School Committee in its damages proposal to the Court) had recognized that she was entitled to compensation for her grant writing work. *See* Petitioner's Response to First Prehearing Order - Prehearing Memorandum (Mar. 28, 2018) at 3, 10-12.

Dr. Johnson is correct that the Court found her entitled to compensation for this additional service. She is not correct in asserting (or implying) that this payment was therefore found to have

been part of her regular compensation for the work she performed under her employment contract. What comprises here "regular compensation" for retirement purposes is based upon the retirement statute's definition of this phrase, *see* M.G.L. c. 32, § 1, as interpreted by MTRS's regulations, *see* 807 C.M.R.§ 6.02(1), and not upon the Court's computation of damages for the breach of her employment contract extension.

In computing those damages, the Court sought to make Dr. Johnson "whole" for what she lost as a result of the extension contract breach. In doing so, the Court looked to her reasonable expectation of "benefit of the bargain" she had made with the School Committee, per the Superior Court's civil jury instructions the Court cited in its November 14, 2013 Interim Order. (*See* Finding 20.) The objective of the "benefit of the bargain" standard in computing damages is to put the person wronged by breach of contract "in as good a position as [s]he would have been in had the contract been performed." *See* RESTATEMENT (SECOND) OF CONTRACTS § 344. As a result, the Court included, in computing Dr. Johnson's damages, not only the regular (or base) compensation she would have earned for two years as Superintendent of Schools under her contract extension, but also performance-based incentive payments she expected reasonably to earn in accordance with her employment contract, which included provisions regarding these incentive payments. The Court also included, as an element of Dr. Johnson's damages, potential payment for additional services that were not mentioned in her employment contract or its extension, but that Dr. Johnson reasonably anticipated earning if she had continued to serve as Sandwich School Superintendent through June 30, 2013. Per the Court's December 31, 2013 Final Memorandum of Damages and Order for Judgment, grant writing was an additional, compensable service that was included in a breach of

contract damages award. As the School Committee had proposed, the stipend amounts included in the damages award were based upon the stipends Dr. Johnson had received for grant writing while she worked under her original employment contract, not as part of the salary she was paid for her work as School Superintendent, but for performing an additional service. That was because she had reasonably anticipated further grant writing, in addition to performing her duties as School Superintendent, and receiving additional payment in the form of stipends for this additional work, if her contract extension had not been breached.

None of this has anything to do with what meets the definition of "regular compensation" under the retirement statute. Applying the M.G.L. c. 32, § 1 definition of "regular compensation" and what can and cannot be included as regular compensation under this definition, per 807 C.M.R.§ 6.02(1), the stipends Dr. Johnson received under her original employment contract (and that she might have received under the contract extension had it not been breached) were neither regular nor mentioned in her employment contract or the contract extension.

The regular compensation on which Dr. Johnson's retirement benefit was based included her base salary, its increase based upon the 20 percent of prior-year incentive-based additional compensation, and lost insurance benefits. All of these elements of regular compensation were mentioned in her employment contract and, as a result, were "regular" compensation for the duties she was expected to perform under her employment contract. What cannot be included in her regular compensation for retirement purposes, however, are the stipends for performing an additional service (grant writing) that Dr. Johnson anticipated earning in addition to her regular salary if the employment contract extension had not been breached. Neither her employment contract nor the

breached extension agreement mentioned the stipends or the additional grant writing work for which the stipends were paid.

As *Kozloski* and *Brunell* both held, all that matters is the omission of this additional service and stipend from the employment contract. The employee's involuntary loss of benefit of the bargain resulting from a breached employment contract does not matter in computing the regular compensation on which her retirement benefit is based. Here, compensation for that loss was a matter of damages for breach of contract that the Court's partial summary decision and damages award resolved in Dr. Johnson's favor by applying a "benefit of the bargain" damages computation standard. In contrast, no remedy for any element of loss related to the additional stipend lies under M.G.L. c. 32—for example by including the stipends in Dr. Johnson's regular compensation. As neither the employment contract nor its extension mentioned the stipend or the additional grant-writing service associated with it, the stipends were not part of Dr. Johnson's regular compensation as Sandwich School Superintendent.

That said, I note that the record presents insufficient proof that grant writing became a regular part of Dr. Johnson's job as School Superintendent so as to have transformed the stipends she received for performing this additional work into an element of her regular compensation. For the purpose of determining the benefit of the employment contract bargain Dr. Johnson lost when her contract extension was breached, the Barnstable Superior Court determined no more than that Dr. Johnson had reasonably anticipated receiving further stipends for her additional grant writing work if the extension had not been breached. This was a finding of lost opportunity to receive additional compensation beyond her regular salary under the employment contract extension. This additional

compensation paid to Dr. Johnson via stipends, although it was not part of her regular compensation, had occurred during the last two years of her original employment compensation, and the circumstances suggested that this type of additional payment for additional service would therefore have likely continued had the contract extension not been breached. To justify including this additional compensation in Dr. Johnson's "make whole" damages award, the Court did not need to find that grant writing had become part of Dr. Johnson's regular duties for which she received regular compensation, and it did not do so. As a result, the Barnstable Superior Court's award of damages to Dr. Johnson does not compel including her grant writing stipends in computing her regular compensation for retirement purposes. On this point the Court's breach for contract damages judgment and award are not issue-preclusive in the retirement context.

The Court did not decide, and Dr. Johnson did not prove here, that writing grants for curriculum or instruction development became a regular part of her work as School Superintendent so as to transform her stipends for performing this additional service into regular compensation. Per Finding 2(b), above:

> Under a subheading entitled "Administration and Supervision," the employment contract provided that "Dr. Johnson shall administer and supervise the Public Schools as provided by applicable State laws and the policies and directives of the [School] Committee as they may be promulgated from time to time." (Exh. P4 at para. 23.) The employment contract included no other provision specifying her duties as School Superintendent, or distinguishing or differentiating her duties as Superintendent from those of an assistant superintendent. The contract did not state that the work for which Dr. Johnson would receive regular compensation included stipends for grant writing related to curriculum and program development (or for any other additional service).
>
> This definition of Dr. Johnson's regular duties as School Superintendent shows that her job

as chief executive of the Sandwich public schools was to supervise and administer it, rather than to perform specific work tasks typically delegated to subordinate managers and staff, such as grant writing and/or developing curricula and educational instruction materials. The Assistant Superintendent may have performed this work as part of his or her regular duties before that position was eliminated by the School Committee (*see* Finding 10), although the record includes no job description for the Assistant Superintendent position. Even if the Assistant Superintendent did so, Dr. Johnson's duties as School Superintendent, as her employment contract described them, do not suggest (or show) that grant writing related to curriculum and instructional development became part of her regular duties as School Superintendent.

When Dr. Johnson agreed to perform this additional service, the School Committee agreed to compensate her via a stipend payment in addition to her regular salary, rather than consider the grant writing work to be service for which Dr. Johnson was already being paid a salary. (*See* Finding 10(b).) Possibly, this arrangement was intended to maintain consistency with cost savings measures implemented by the School Committee. Dr. Johnson had already "agreed to waive an increase in her salary for the 2009-10 school year and for the 2010-11 school year, in view of budget constraints that the Sandwich Public Schools faced, including reduced school funding by the Commonwealth, and a School Department staff reduction." (Finding 5.)

Regardless of the underlying motivation, however, the arrangement was to pay Dr. Johnson a stipend for additional service neither included in her regular duties nor compensated by increasing her regular salary. This arrangement suggests that the additional grant writing was not regarded as a regular duty Dr. Johnson was to perform under her employment contract as School Superintendent.

Instead, both the School Committee and Dr. Johnson appeared to have regarded the grant writing as an additional service she might need to perform irregularly, if and when needed, and for which she was entitled to additional payment if she did—at least until the budget constraints that the Sandwich Public Schools faced at the time were rectified by increased state funding, and there was again sufficient funding available to pay an Assistant Superintendent to perform this work or supervise other staff hired to perform it.

As it was arranged and paid via stipend, Dr. Johnson's grant writing work was more consistent with additional paid service related to a short-term project, not to a redefined work role for her as School Superintendent, with new regular duties not related to school system management and supervision whose performance was to be compensated as part of her regular salary. It is possible for a School Superintendent and a School Committee to make such an arrangement; however, Dr. Johnson did not prove that this was done here. As a result, the stipends she received for grant writing were not made part of her regular duties so as to bring the stipends within the four corners of "regular compensation" for retirement purposes.

Conclusion and Disposition

For the reasons stated above:, I *affirm* the MTRS decisions the petitioner appealed here.

(1) In Docket No. CR-15-482, I affirm MTRS's August 4, 2015 decision to exclude, from its computation of Dr. Johnson's regular compensation for retirement purposes, the amount of stipends she had received for additional service (grant writing related to curriculum and program development) during the time she worked as School Superintendent under her original employment

contract, and that she anticipated receiving if her employment contract extension had not been breached by the Sandwich School Committee. The additional service and the stipends paid for it were not mentioned in the contract or its extension, and there is insufficient proof that this additional service and the stipends paid for performing it became a part of Dr. John's regular duties and regular compensation for performing them, as "regular compensation" is defined by M.G.L. c. 32, § 1 and 807 C.M.R. § 6.02(1); and

(2) In Docket No. CR-15-483, I affirm MTRS's August 12, 2015 decision denying her request to change the date of her retirement from October 30, 2014 (fifteen days after MTRS received Part I of her retirement application) to July 1, 2013, the date on which Dr. Johnson had intended to retire after she had completed her service as Sandwich School Superintendent through the end of the 2012-13 school year under the two year extension of her employment contract, if the new School Committee had not breached it. Dr. Johnson's retirement application was filed more than 60 days after her separation from service as Barnstable's Superintendent of Schools. Even assuming that (as Dr. Johnson claimed) MTRS personnel advised her to defer filing a retirement application until her breach of contract action concluded, she filed her retirement application more than 60 days after her action concluded with an unquestionably final partial summary decision and damages award. That makes moot any argument that the applicable 60-day period was tolled in Dr. Johnson's favor. MTRS properly applied, therefore, a retirement date within the time prescribed by M.G.L. c. 32, § 10(3) when a retirement application is filed more than 60 days after public employment service terminates. DALA is without jurisdiction to amend this statutory requirement or provide equitable relief from it.

SO ORDERED.

Notice of Appeal Rights

This is the Final Decision of the Division of Administrative Law Appeals (DALA) in this matter. It may be appealed to the Contributory Retirement Appeal Board (CRAB) no later than fifteen (15) days following the date of the DALA Decision.

M.G.L. c. 32, § 16(4) provides in pertinent part that a retirement appeal decision such as this Decision:

> shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties, unless within *fifteen day*s after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board, or (2) the contributory retirement appeal board orders, in writing, that said board shall review such decision . . . .

(Emphasis added.)

A party objecting to this Decision shall mail specific objections to Uyen M. Tran, Esq., Assistant Attorney General, Chair, Contributory Retirement Appeal Board, Office of Attorney General, One Ashburton Place, 18th floor, Boston, MA 02108. Copies must be sent to the Division of Administrative Law Appeals, 14 Summer St., 4th floor, Malden, MA 02148, and to the other party or parties involved in the case.

Proceedings before CRAB are governed by CRAB Standing Orders, which may be found at: https://www.mass.gov/how-to/file-a-public-employment-retirement-appeal. Pursuant to CRAB Standing Order 2008-1, para. 4.a(2), the notice of appeal must include (a) the date of this DALA Decision; (b) a copy of the DALA Decision; and (c) a statement of the part or parts of the DALA

Decision to which objection is made.

The notice of objection must be postmarked or delivered in hand to CRAB no later than fifteen days following the date of the DALA decision. Electronic submissions do not satisfy this filing requirement.

Pursuant to CRAB Standing Order 2008-1, paragraph 4.a(3), within forty days following the date of the DALA decision, the appellant (the party who filed the Notice of Objection to the DALA Decision) must supplement the Notice of Objection by filing with the Chair of CRAB three copies each, and by serving on each other party one copy, of:

> (a) All exhibits admitted into evidence before DALA, numbered as they were numbered on admission;
>
> (b) A memorandum of no more than twenty pages containing a clear and precise statement of the relief sought and the findings of fact, if any, and legal conclusions to which objection is made, together with a clear and precise statement of the particular facts, with exact references to the record, and authorities specifically supporting each objection; and
>
> (c) If CRAB's passing on an objection may require a review of oral proceedings before DALA, the transcript of the relevant portion of those proceedings.

Do not send any such supplementary materials or exhibits to DALA. Failure to follow CRAB's procedures could lead to sanctions, including dismissal of the appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Mark L. Silverstein

Mark L. Silverstein
Administrative Magistrate

Dated: November 17, 2023