

COMMONWEALTH OF MASSACHUSETTS  
CONTRIBUTORY RETIREMENT APPEAL BOARD

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JOSEPH O'LEARY,

Petitioner-Appellant

v.

LEXINGTON RETIREMENT BOARD AND PUBLIC EMPLOYEE  
RETIREMENT ADMINISTRATION COMMISSION,<sup>1</sup>

Respondents-Appellees.<sup>2</sup>

CR-15-30

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DECISION

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Petitioner Joseph O'Leary and Respondent Public Employee Retirement Administration Commission (PERAC) appeal from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming the decision of Respondent Lexington Retirement Board (LRB) that payments received by O'Leary for unused vacation time may not be considered "regular compensation" for purposes of calculating his retirement benefit. The magistrate considered the case based on the parties' written submissions following a motion for summary decision filed by the LRB. He

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<sup>1</sup> The Public Employee Retirement Administration Commission (PERAC) has appealed from the DALA decision and agrees with the position of the petitioner O'Leary. We designate PERAC as an appellee for convenience.

<sup>2</sup> We thank the Boston Police Patrolmen's Association for its amicus brief.

admitted nine exhibits.<sup>3</sup> The magistrate allowed the motion and affirmed the LRB's decision in an opinion dated October 21, 2016.<sup>4</sup> Both O'Leary and PERAC, which was joined at DALA as a necessary party, filed timely appeals to us.

We adopt the DALA magistrate's Findings of Fact 1-13 as our own.<sup>5</sup> We affirm the DALA decision because, consistently with our decision in *Fair v. Middlesex County Retirement Bd.*, CR-15-294 (CRAB 2016), payments for unused vacation time are not "regular compensation." We do not adopt the reasoning of PERAC in its Memorandum #39 2012 (July 11, 2012) that payments for unused vacation time may constitute regular compensation.

### *Background*

O'Leary worked as a Captain in the Lexington Police Department and retired on January 31, 2015 after more than forty-four years of service.<sup>6</sup> From July 1, 2010 until his retirement on January 31, 2015, O'Leary was subject to a collective bargaining agreement (CBA) between the Town of Lexington and Local

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<sup>3</sup> O'Leary has requested that the record be expanded to include the minutes of a Wellesley Retirement Board meeting at which a police chief was permitted to include payments for unused vacation time in regular compensation for purposes of calculating his retirement benefit. We deny the request because the actions of a different retirement board are not relevant to the legal question presented here.

<sup>4</sup> The DALA decision was originally dated September 16, 2016, but bore an incorrect mailing address for the petitioner, so it was not properly issued to the parties. It was re-released on October 21, 2016.

<sup>5</sup> We note that as to Finding 13, the petitioner has explained in his memorandum that the adjustment of his retirement benefit reflected in Exhibits 8 and 9 was due to the erroneous inclusion of compensatory time, rather than pay for unused vacation time. The issue does not affect our decision.

<sup>6</sup> Findings of Fact 1, 9.

501 of the International Brotherhood of Police Officers.<sup>7</sup> The CBA included a “Vacation Election” provision:

Annually, Captains and Lieutenants with at least 20 years of service as a police officer with the Lexington Police Department will have the option each December to choose to convert up to ten (10) unused vacation days to compensation (i.e., the Vacation Election), with such compensation paid on a bi-weekly basis in the ensuing fiscal year. The bi-weekly vacation election payment shall begin on July 1, 2009 (FY09) and shall be subject to all normal tax withholdings. The value of the vacation election payment will be based on the Officer’s daily rate as of the fiscal year in which it is paid. The daily rate is defined as the base wage, educational incentive and duty differential.

...  
Vacation Election payment shall not be considered regular income for the purposes of retirement, educational incentive payments, overtime calculation, holiday pay or duty differential pay.<sup>8</sup>

In each of the seven fiscal years prior to his retirement, O’Leary elected to convert ten unused vacation days, the maximum allowable under the CBA, to compensation.<sup>9</sup> The compensation for the unused vacation was paid in biweekly increments over the following fiscal year, beginning on July 1.<sup>10</sup> Although the

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<sup>7</sup> Findings 2-4. Article 18 of the CBA states that “This Agreement shall continue to be enforced in effect until a successor Agreement is reached,” and, because a replacement CBA was not executed, this CBA remained in effect through O’Leary’s retirement date.

<sup>8</sup> Finding 2; Ex. 2 (CBA Article 10, § 10, paragraph C).

<sup>9</sup> Finding 5. It appears that a predecessor CBA also permitted the conversion of vacation time to compensation.

<sup>10</sup> Ex. 2. O’Leary’s final election, for fiscal year 2014, was made in December 2013. Biweekly payments for that year began on July 1, 2014, seven months before O’Leary’s retirement. Our record does not show whether his compensation for unused vacation in fiscal year 2014 was fully paid during those seven months, or whether there was a balance due that may have been paid in a lump sum. O’Leary states in his memorandum that “[p]ayments were not made in lump

unused vacation had been saved from the previous year, O'Leary was paid for the unused time at the "daily rate" in effect for the following year.<sup>11</sup> The LRB informed O'Leary, prior to and following his retirement, that the vacation buy-back payments would not be considered regular compensation when calculating retirement allowance.<sup>12</sup>

### *Discussion*

We agree with the DALA magistrate and the LRB that O'Leary's vacation buy-back payments may not be included in regular compensation. In *Fair v. Middlesex County Retirement Bd.*, CR-15-294 (CRAB 2016), we held that payments for unused sick leave do not meet the definition of "regular compensation" under G.L. c. 32, § 1 because such payments are in addition to the employee's base wages or compensation – the employee is paid his full salary or compensation for the period of time in question, and then receives extra pay for not using the sick leave. *Id.* at \*4-6. In dicta, we applied the same reasoning to payments for unused vacation leave, stating that such payments were also not part of base compensation, but were paid in addition to the employee's regular hourly rate. *Id.* at \*7-8. We reaffirm our decision in *Fair* and hold that payments for unused vacation time do not qualify as "regular compensation."

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sums." Since the distinction does not affect the outcome of our decision, we assume that no lump sums were paid.

<sup>11</sup> Ex. 2.

<sup>12</sup> Findings 7, 10.

“Regular compensation” is defined as “compensation *received exclusively as wages* by an employee for services performed in the course of employment for his employer.”<sup>13</sup> “Wages” are defined as:

*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, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, . . . 1-time lump sum payments in lieu of or for unused vacation or sick leave . . . , and all payments other than payment received by an individual from his employing unit for services rendered to such employing unit . . . .*<sup>14</sup>

PERAC’s regulation also defines regular compensation as “compensation received exclusively as wages by an employee for services performed in the course of employment for his employer”<sup>15</sup> and similarly defines wages 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 . . . . “Wages” shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, . . . one-time lump sum payments in lieu of or for unused vacation or sick leave . . . and all payments other than payment received by an individual from his employing unit for services rendered to such employing unit . . . .*<sup>16</sup>

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<sup>13</sup> G.L. c. 32, § 1 (emphasis added). Although O’Leary elected to receive vacation buy-back payments from 2008 through his retirement in 2015, and there was a change to the definition of “regular compensation” in 2009, we do not need to consider the previous definition, as O’Leary is only relying on the last three years prior to his retirement. See G.L. c. 32, § 5(2)(a).

<sup>14</sup> G.L. c. 32, § 1 (in pertinent part) (emphasis added).

<sup>15</sup> 840 CMR § 15.03(3)(a).

<sup>16</sup> 840 CMR § 15.03(3)(b) & (f) (emphasis added).

Extra payments for not using vacation time cannot meet these definitions. If an employee chooses to forgo taking vacation during a particular year, he is still paid his regular salary or base pay for the entire year, including the days when he did not take vacation. Thus, the employee has already been paid his base compensation for working on those days. The extra payments for unused vacation are *in addition* to base pay – they are intrinsically “extra” pay not included in base compensation.

Employers may manage unused vacation time in different ways. Vacation time may be forfeited if not used, or carryover may be limited. If an employee resigns with unused vacation time and receives payment for the unused time in a lump sum, that payment is also in addition to his base pay and is not regular compensation.<sup>17</sup> If the employee instead chooses to “take” his vacation prior to resigning, his regular compensation is similarly not enhanced because he is simply receiving his regular pay – not any additional amount. Regardless of the ways in which unused vacation time is managed, however, if an employee is paid for unused time in a manner that exceeds his base pay, then the payment is, by definition, not part of the employee’s base compensation, but an “extra” payment. While we recognize the advantage to employees of being permitted to convert unused vacation time into extra compensation during their employment, rather than “using or losing” it, or waiting for compensation until they resign, such

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<sup>17</sup> See G.L. c. 32, § 1.

extra compensation is just that -- “extra” compensation. It is not part of base pay and -- as expressly stated in the CBA -- not regular compensation.<sup>18</sup>

One important element of regular compensation is that it must be “regular and recurrent.” *See Boston Ass’n of School Administrators and Supervisors v. Boston Retirement Bd.*, 383 Mass. 336, 341 (1981) (even under broader definition in effect prior to 2009, regular compensation was limited to “recurrent or repeated amounts of compensation not inflated by extraordinary ad hoc payments”). O’Leary argues that his pay for unused vacation time was “regular and recurrent” because he took advantage of his department’s vacation buyback option for senior officers for seven years in a row, each time electing to receive extra compensation in exchange for not using ten vacation days – the maximum number of days permitted.<sup>19</sup> But O’Leary had to make an election every December as to whether he would trade unused vacation for pay, and, if he did, how much vacation he would bank. That type of choice is subject to all sorts of contingencies. Extra vacation may be needed in a particular year for a special trip or event, or for personal reasons such as selling a home or helping a family member. We do not view an employee’s multiple, separate decisions to elect to participate in this type of salary enhancement program over the course of several years as the receipt of “regular and recurrent” compensation -- he may be making

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<sup>18</sup> See Ex. 2 at 14. In this regard, we agree with PERAC that vacation pay is “earned.” But earned vacation time, if used, does not act as a salary enhancement. It is only if it is banked and compensated separately that it results in extra pay.

<sup>19</sup> Finding 5.

a regular choice to participate, but the compensation offered is optional and contingent on the employee's choices. It is not "regular."<sup>20</sup>

We also do not view the explicit exclusion of "one-time lump sum payments in lieu of or for unused vacation or sick leave,"<sup>21</sup> as helpful to O'Leary's position. Lump sum payouts may have merited mention because they are more typical than the protracted process used here, where payments were spread out over the following year. But the exclusion of the one-time lump sum payments was "without limitation," and the character of a vacation buyback as an extra payment beyond base compensation remains the same, whether or not it is paid as a lump sum. Moreover, this phrase was enacted as part of the 2009 pension reform legislation, which narrowed the definition of regular compensation following what some considered to be abuses of the system.<sup>22</sup> Under the pre-2009 retirement law regulations, "any amounts paid in lieu of or for unused vacation,

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<sup>20</sup> That a benefit or form of compensation is utilized in a regular or recurrent manner by an employee is not enough to qualify it as "regular compensation." To be regular compensation, the compensation must be a base salary or wages. For instance, employees may have regular overtime, or repetitive bonuses, all of which are excluded from regular compensation, both expressly and because they are not part of base wages. See G.L. c. 32, § 1. The Appeals Court has held that allowances for expenses and travel and the value of parking were not "regular compensation" even though they were recurrent, since they were not paid for employee services. *Parente v. State Bd. of Retirement*, 80 Mass. App. Ct. 747, 751 (2011); *see also Pelonzi v. Retirement Bd. of Beverly*, 451 Mass. 475, 482 (2008) (value of a city-provided automobile not regular compensation).

<sup>21</sup> G.L. c. 32, § 1; 840 C.M.R. § 15.03(3)(f).

<sup>22</sup> *See* St. 2009, c. 21, §§ 2-3 (eff. July 1, 2009); *cf. Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 658, 661 (2006) (housing allowance included in regular compensation; noting negative publicity).



sick leave, or other leave” were excluded.<sup>23</sup> It would have been contrary to the purpose of the 2009 reforms to expand the payments included in regular compensation.

There are other reasons why pay for unused vacation time does not meet the requirements for inclusion in “regular compensation.” First, the employee is being paid the additional compensation for agreeing not to take vacation time -- he is not being paid for his work, which is already paid through base compensation. Thus, the extra pay for unused vacation is not “compensation received exclusively as wages by an employee *for services performed in the course of employment* for his employer.” G.L. c. 32, § 1.<sup>24</sup> While an employee may “earn” vacation benefits by working a certain number of weeks, or by reaching a particular level of longevity, or simply pursuant to an employer’s policy, the vacation is part of a benefits package and not “wages . . . for services performed.” If vacation days are then exchanged for compensation, that pay is also too remote from work to be considered pay for “services performed.”

Vacation buyback programs also are also a form of salary enhancement. In this case, the program was an annual one, with each election covering only a single year. Thus, the programs also fall under the retirement law’s exclusion of

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<sup>23</sup> 840 C.M.R. 15.03(2)(d) (as in effect prior to 2009 and as currently applied to periods of active service prior to July 1, 2009).

<sup>24</sup> The same language appears in the list of exclusions from regular compensation, excluding “all payments other than payment received by an individual from his employing unit for services rendered to such employing unit.” G.L. c. 32, § 1; 840 CMR § 15.03(3)(f).

“salary enhancements or salary augmentation plans which will recur for a limited or definite term.”<sup>25</sup> As they are contingent on annual elections, the vacation buybacks cannot be said to be indefinite in duration – each election lasts only one year. For the same reason, the payments also fail to satisfy PERAC’s regulation that includes in wages “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.”<sup>26</sup> Where the payments are subject to the employee’s yearly election, they cannot be pre-determined or guaranteed.

Although pay for not using vacation time is not included in regular compensation under the retirement law, extra holiday pay, to encourage police officers, firefighters, correctional officers, and certain signal employees to work on holidays, is included. G.L. c. 32, § 1.<sup>27</sup> It is evident that this is not a reflection of holiday pay meeting the normal criteria for inclusion in regular compensation, but is rather an incentive to encourage proper staffing of these critical positions on days when working can entail sacrifice of important personal and family time. No similar, explicit provision provides that vacation buyback payments are

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<sup>25</sup> G.L. c. 32, § 1; 840 CMR § 15.03(f).

<sup>26</sup> 840 CMR § 15.03(3)(b) (emphasis added).

<sup>27</sup> This provision was added by St. 1969, c. 84 (appr. Mar. 19, 1969). *See generally Tavares v. Contributory Retirement Appeal Bd.*, CR-09-342 (Sept. 4, 2012) (retirement law’s explicit designation of holiday pay as regular compensation applies regardless of whether the extra funds are paid in the same pay period as the holiday or at the end of the year); *cf. Carey v. New England Donor Bank*, 446 Mass. 270, 281 (2006) (expression of some limitations may imply the exclusion of others).

includable in regular compensation, nor does the option for employees to forfeit their vacation time appear to meet a similarly compelling public need.<sup>28</sup>

In light of the above analysis – and in particular the basic fact that vacation buyback pay is “extra” compensation, in addition to base pay – we cannot agree with the reasoning of PERAC in its Memorandum #39/2012, which states that payments for unused vacation leave may be considered regular compensation if they are (1) part of the employee’s base salary or base compensation and (2) paid for “services performed” and certain additional findings are made.<sup>29</sup> As discussed above, payments for unused vacation cannot be part of an employee’s base salary or base compensation, since they are paid in addition to base salary. And such payments are not for “services performed” because the employee has already received his base pay for performing his work. The payments are not for work but for the employee’s agreement not to use all his vacation time.<sup>30</sup> Thus, the two initial determinations listed in Memorandum

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<sup>28</sup> O’Leary points to the explicit inclusion in regular compensation of shift differential pay and educational incentive programs. These types of pay are not necessarily part of “base pay” (although a fixed shift differential might be sufficiently permanent to qualify as part of base compensation). As with holiday pay, however, inclusion of these types of pay was the result of a legislative decision. In contrast, the Legislature explicitly excluded overtime pay, which may also be earned on a regular basis, but – like the extra pay for unused vacation time – is added onto base compensation.

<sup>29</sup> Ex. 4. The additional findings relate to, among other factors, consistency, longevity, and existence of a written policy applicable to all similarly-situated employees. *Id.*

<sup>30</sup> Although an employee “earns” vacation time, the amount of vacation time that is earned or accrued varies depending on the employer’s policies. Whether all the accrued vacation can be taken also depends on whether the employer has imposed “use or lose” rules that limit carryover. Vacation leave is a fringe benefit

#39/2012 cannot be made. Payments for giving up unused vacation time are not regular compensation.<sup>31</sup>

*Conclusion*

The decision of the DALA magistrate is affirmed. The compensation received by O'Leary for unused vacation time may not be included in his regular compensation for purposes of calculating his retirement benefits.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

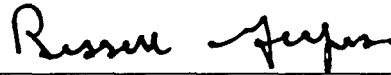


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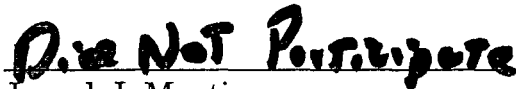
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and not part of base compensation. Thus, agreeing to forgo some leave time in exchange for compensation is simply the forgoing of this benefit in exchange for money – it is not a payment for “services performed.”

<sup>31</sup> We do not defer to PERAC when discharging our statutory duty to review decisions of PERAC and of retirement boards. G.L. c. 32, § 16(4). PERAC is charged with supervising and advising the over 100 retirement boards in the Commonwealth, and the retirement boards must comply with PERAC's directives, including its memoranda. See *Boston Retirement Bd. v. Contributory Retirement Appeal Bd.*, 441 Mass. 78, 84 (2004) (retirement board must comply with PERAC memorandum defining earned income, which CRAB upheld). The Contributory Retirement Appeal Board, however, is charged with reviewing PERAC's decisions and legal interpretations when they arise in the context of a retirement appeal. We thus apply our own expertise in interpreting the retirement law. As we are not a court reviewing an agency decision, but a separate agency charged with reviewing decisions of retirement boards and PERAC, we review the legal issues before us de novo, and are not subject to the narrow scope of review that courts must apply when reviewing agency action.



Russell W. Gilfus  
Governor's Appointee



Joseph I. Martin  
Public Employee Retirement Administration  
Commission Appointee

Date: July 23, 2018