

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Michael Kane,
Petitioner

v.

Docket No. CR-23-0508
Date issued: Nov. 29, 2024

**Wellesley Retirement Board and
Public Employee Retirement
Administration Commission,**
Respondents

Appearance for the Petitioner:

Michael Kane, *pro se*

Appearance for Wellesley Retirement Board:

Michael Sacco, Esq.
Sacco & Collins, P.C.
P.O. Box 479
Southampton, MA 01073-0479

Appearance for PERAC:

Felicia McGinniss, Esq.
PERAC
5 Middlesex Avenue, Suite 304
Somerville, MA 02145

Administrative Magistrate:

Kenneth J. Forton

SUMMARY

The parties agree on the amount of Petitioner's G.L. c. 32, § 91A excess earnings for 2022. Petitioner challenges how the Board decided to collect the excess. The Board's decision to withhold Mr. Kane's full retirement allowance, and not just the annuity portion, was proper, as was the Board's decision to continue to collect statutorily mandated deductions for child support, while not similarly withholding deductions for his health insurance. PERAC is an appropriate party to this action because it administers the excess earnings program.

DECISION

Petitioner Michael Kane appeals timely under G.L. c. 32, § 16(4) the decision of Respondent Wellesley Retirement Board to withhold his entire retirement allowance, and not just his annuity payment, to recoup Mr. Kane’s 2022 excess earnings. Mr. Kane also appeals the Board’s decision to continue to collect statutorily mandated deductions for child support while failing to withhold amounts sufficient to pay for his health insurance through the Town of Wellesley.

On October 30, 2023, the Board moved to join the Public Employee Retirement Administration Commission (PERAC) as a necessary party. DALA granted the motion. On January 9, 2024, DALA suggested that the appeal could be decided on written submissions and ordered the parties to file legal memoranda and proposed exhibits. On March 11, 2024, PERAC filed its memorandum and seven proposed exhibits.

On May 16, 2024, Mr. Kane filed his memorandum and no further proposed exhibits. He requested a “live hearing.” Mr. Kane also moved DALA to withdraw or seal from the public record PERAC’s proposed statement of facts and seven proposed exhibits. Mr. Kane clarified that his appeal was not about whether he had excess earnings or the amount of the excess earnings. He explained that he was challenging two decisions of the Board. First, he claimed that the Board was not authorized to withhold his entire monthly retirement allowance until the excess earnings were collected because it was not empowered to withhold the annuity portion of his allowance. Second, the Board continued to collect child support payments that Mr. Kane owed, but not premiums for his health insurance through the Town of Wellesley.

On May 30, 2024, I ordered the Board and PERAC to address the issues in Mr. Kane's memorandum. PERAC and the Board filed their responses. The Board proposed three additional exhibits. On July 4, 2024, Mr. Kane filed a reply brief arguing that PERAC should withdraw from the appeal.

I make the following rulings on the issues raised by Mr. Kane. PERAC is an appropriate party to this appeal and is not required to withdraw as a party. Neither PERAC's statement of facts nor its exhibits should be excluded from the appeal, but this file is hereby sealed from public disclosure. Although Mr. Kane has requested an evidentiary hearing, after carefully reviewing the evidence presented by the parties, I have determined that there are no disputed issues of material fact and that the Petitioner has failed to state a claim for which relief may be granted. I therefore decide this matter pursuant to 801 CMR 1.01(7)(g)(3). I hereby enter the parties' ten proposed exhibits into evidence. (Exs. 1-10.) I also enter Mr. Kane's appeal letter as Exhibit 11.

FINDINGS OF FACT

The following facts are not in dispute:

1. Michael E. Kane is a retiree of the Wellesley Retirement System. He was awarded accidental disability retirement benefits in 2007.
2. Since 2009, pursuant to orders of the Probate and Family Court and the Department of Revenue, the Board has been deducting from Mr. Kane's retirement allowance child support payments of \$537.34 per month, the monthly equivalent of \$124.00 per week. (Ex. 10.)
3. As an accidental disability retiree, Mr. Kane is subject to the earnings restrictions in G.L. c. 32, § 91A. After an adjustment, PERAC determined, and all parties

agree that, under § 91A, Mr. Kane had \$31,428.34 of excess earnings in calendar year 2022. (Exs. 1, 2, 3, 4, 5, 6, 7.)

4. On September 28, 2023, the Board voted to adopt PERAC's calculation and offset Mr. Kane's full retirement allowance up to the full amount minus court-ordered child support payments. (Exs. 8, 9.)

5. The Board did not exempt Mr. Kane's insurance premiums, which were usually deducted from his monthly allowance check, from its offset calculation. This meant that he had to pay for his insurance separately while the Board recouped his excess earnings. (Ex. 9.)

6. On October 16, 2023, Mr. Kane filed a timely appeal of the Board's decision. (Ex. 11.)

CONCLUSION AND ORDER

This is not a typical § 91A excess earnings appeal. Usually, the dispute is over whether there were excess earnings, how much business income should be allocated to a retiree, or tax treatment of some expenses, among other regularly recurring issues. In the instant appeal, however, the Petitioner filed the necessary annual statement of income, PERAC performed an excess earnings calculation, after an adjustment the Petitioner agreed with the calculation, and then the Board adopted the calculation. Mr. Kane agrees with the final number. In this appeal, Mr. Kane instead raises two issues that have to do with how the Board decided to recoup his excess earnings.

First, Mr. Kane asserts that the Board is not allowed to withhold the portion of his retirement allowance known as an annuity payment. The Board counters that it is entitled to withhold the entire retirement allowance until the full excess earnings are collected. A

retirement allowance consists of an annuity portion, which is funded by the member's annuity savings account, and an additional pension portion. *See* G.L. c. 32, § 1.

Section 91A excess earnings are calculated as post-accidental disability retirement earnings from work plus the member's retirement allowance minus the regular compensation that the member would have been paid if he continued in the position minus an additional \$15,000.00. G.L. c. 32, § 91A. If a member has excess earnings, he must refund them to his retirement board. Section 91A describes the refund this way: "said member shall refund the portion of his retirement allowance for such preceding year equal to [his excess earnings] *and until such refund is made, his pension or retirement allowance shall be held as security therefor.*" (Emphasis added.) The clause "his pension or retirement allowance shall be held as security therefor" essentially means that the retirement board "pays" the retiree his monthly retirement check and then claws back the payment to reduce the debt owed to the retirement system. *See Brophy v. Plymouth Cty. Retirement Sys.*, CR-16-410/CR-17-021/CR-20-0643, at *25 (DALA Apr. 15, 2022) ("[T]he Board was obligated to withhold [petitioner's] allowance until he refunded the excess earnings."). The monthly claw backs continue until the debt is discharged.

The same clause gives the retirement system the option of withholding the entire retirement allowance or just the pension portion of the member's allowance. The statute does not place any additional restrictions on the retirement system's exercise of its discretion over which option it chooses. Mr. Kane does not even challenge the Board's discretion. Instead, he briefly mentions that if he had suspended his retirement allowance during the period of his overearnings, he would still have been entitled to monthly

annuity payments. While it is true that G.L. c. 32, § 90B permits a member to “waive and renounce for himself, his heirs and legal representatives any portion of the pension or retirement allowance payable to him from the commonwealth,” there is no provision that exempts the annuity portion from being suspended to pay back overearnings under § 91A. Moreover, this argument is merely hypothetical, as Mr. Kane did not, in fact, waive any portion of his retirement allowance under § 90B. I must therefore conclude that it was well within the Board’s power to withhold Mr. Kane’s entire retirement allowance (less deductions for child support payments, discussed *infra*) until he had fully repaid his 2022 excess earnings.

Mr. Kane next argues that, if the Board was going to exempt his child support deductions from the withholding of his retirement allowance, it should have either (1) also withheld premiums for health insurance that he has through the Town of Wellesley, or (2) withhold neither child support nor insurance payments.

Not withholding child support payments was not a valid option for the Board. G.L. c. 32, § 19 provides that a retirement allowance is exempt from bankruptcy proceedings and cannot be attached or taken upon execution or other process. However, the last paragraph of § 19 also specifically states:

Nothing in this section shall prevent a member’s annuity pension, retirement allowance or return of accumulated total deductions from being attached, taken on execution, assigned, or subject to other process to satisfy a support order under *chapter two hundred and eight*, two hundred and nine, two hundred and nine A, two hundred and nine C, two hundred and seventy-three, or *received, entered or registered pursuant to chapter 209D*, or an assignment of marital property under chapter two hundred and eight.

(Emphasis added.) Child support payments, governed by G.L. c. 208, § 28 and G.L. c. 209D (the Uniform Interstate Family Support Act), are specifically provided for in § 19

as a support order that can be deducted from a member's retirement allowance. Section 19 thus requires retirement boards to comply with and ensure that child support payments are deducted from the retirement allowance. As the Contributory Retirement Appeal Board explained in *Borin v. MTRS*, CR-14-53, at *6-7 (CRAB Oct. 18, 2017), "[t]hese exceptions exist to ensure that children and former spouses, who may be relying on these funds for their basic needs, receive them promptly and reliably, without the need to rely on the retiree to forward the funds out of his or her retirement benefit."

The Board has been withholding child support of \$537.34 per month, from Mr. Kane's monthly retirement allowance since 2009, and his obligation continues to this day. Mr. Kane has not sought modification of the support order. The Department of Revenue has not relieved the Board of its withholding obligation. Therefore, the Board must continue to make the deductions. *See* G.L. c. 119A, § 14(g) (employer who fails to comply with child support orders subject to fine). If, as Mr. Kane alleges, the child support deductions should cease because his child has turned 18, it is up to him to provide documentation to the court, the Department of Revenue, and the Board that his obligation has terminated. There was simply no cognizable way for the Board to disregard the mandatory child support deductions owed by Mr. Kane.

Withholding for child support and withholding for insurance premiums are not treated the same under the law. As discussed above, retirement boards must make deductions for child support, but it is left to the boards' discretion whether they withhold health insurance premiums. Mr. Kane again argues that he could have had his insurance taken care of if he had waived his retirement allowance. And, again, this is a purely academic argument because Mr. Kane did not in fact waive his retirement allowance

during the period that he had excess earnings. He also argues that the child support payments cover only one person, while the health insurance payments cover 5 people. This is not a wholly unsympathetic notion, but the fact remains that the retirement board validly exercised its discretion not to exempt Mr. Kane's insurance payments from withholding until he paid back all of his excess earnings. Nothing Mr. Kane has pled rises to an allegation of abuse of discretion.

For the reasons stated above, the Board's decision to withhold Mr. Kane's entire retirement allowance, minus deductions for child support payments, until his excess earnings were repaid is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Nov. 29, 2022