

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Diane Kidd,
Petitioner

v.

Docket No. CR-21-0313
Date: May 12, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

Diane Kidd, *pro se*

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The State Board of Retirement properly applied the “anti-spiking” provision of G.L. c. 32, § 5(2)(f) when it reduced Petitioner’s regular compensation in the years 2019-2020 and 2020-2021 for the purpose of calculating her retirement allowance. Petitioner, a branch manager at the Department of Employment and Training, did not qualify for an “increase in hours of employment” exception because, as a manager, she did not have fixed hours. She did not qualify for the “bona fide change in position” exception because, while she had an increased workload, the character of her position remained the same. Petitioner’s salary was increased under the Pay Equity Act, which does not qualify for any exception, and neither DALA nor the Board can give equitable relief.

DECISION

Petitioner Diane Kidd timely appeals under G.L. c. 32, § 16(4). She seeks to overturn the State Board of Retirement’s application of the anti-spiking law to the calculation of her retirement allowance. The Board concluded that Ms. Kidd’s regular compensation in fiscal years 2019-2020 and 2020-2021 must be reduced.

On March 22, 2022, DALA informed the parties that Ms. Kidd’s appeal appeared to be one that could be resolved on written submissions under 801 CMR 1.01(10)(c). Neither party objected to the magistrate’s order. On April 22, 2022, the Board submitted five proposed exhibits, labeled 1-5. On August 7, 2022, Ms. Kidd offered a two-page letter with her arguments. On September 9, 2022, the Board offered five more documents, labeled 6-10. I have admitted the Board’s submissions into evidence as marked. (Exs. 1-10.)

FINDINGS OF FACT

For the purposes of this decision, I accept as true Petitioner’s description of her job duties and hours. Based on the documents in evidence, I make the following findings of fact:

1. From July 11, 1976 until February 28, 1982, Diane Kidd was employed with the Department of Employment and Training. (Exs. 1, 6.)
2. From March 29, 1987 until her retirement on April 02, 2021, Diane Kidd was employed by the Registry of Motor Vehicles. (Exs. 1, 6.)
3. Ms. Kidd was a member of the State Retirement System at all times relevant to this appeal. (Ex. 1.)

4. At the time of her retirement, Ms. Kidd's job title was Branch Manager.
(Ex. 3.)

5. Ms. Kidd was promoted from her union position to a non-union managerial position around 2010. (Petitioner's Letter.)

6. After she was promoted, her unionized supervisees received bargained-for salary increases that outpaced Ms. Kidd's raises. Eventually, her supervisees were making comparable, or even higher salaries, than she did. (Petitioner's Letter.)

7. Some of the other managers in positions similar to Ms. Kidd's returned to their unionized positions, creating managerial job vacancies after they transferred. To deal with these vacancies Ms. Kidd and other managers had to manage additional service centers. Eventually, Ms. Kidd managed an additional service center permanently.
(Petitioner's Letter.)

8. Ms. Kidd often worked 10.5 hours per day. (Petitioner's Letter.)

9. On November 8, 2018, Ms. Kidd was given a salary increase from \$62,124.09 to \$69,360.00. (Ex. 2.)

10. On July 7, 2019, Ms. Kidd's salary was further increased to \$70,747.20.
(Ex. 2.)

11. On March 29, 2020, Ms. Kidd's salary increased to \$76,101.43. This increase was paid under the Massachusetts Equal Pay Act.¹ (Exs. 1, 2.)

¹ It is likely that the November 2018 pay increase was also a result of the Massachusetts Equal Pay Act. Petitioner presented no evidence to prove it, however. As explained below, it is immaterial because increases under MEPA do not qualify as an exception to the anti-spiking law.

12. On February 7, 2021, Ms. Kidd applied for retirement with an effective date of April 2, 2021. (Ex. 6.)

13. The Board determined that Ms. Kidd's salary for the period of April 4, 2016 through April 3, 2017 was \$60,030.29. (Ex. 1.)

14. The Board determined that Ms. Kidd's salary for the period of April 4, 2017 through April 3, 2018 was \$61,348.82. (Ex. 1.)

15. The Board determined that Ms. Kidd's salary for the period of April 4, 2018 through April 3, 2019 was \$64,878.18. (Ex. 1.)

16. The Board determined that Ms. Kidd's salary for the period of April 4, 2019 through April 2, 2020 was \$70,463.29. (Ex. 1.)

17. The Board determined that Ms. Kidd's salary for the period of April 3, 2020 through April 2, 2021 was \$76,101.43. (Ex. 1.)

18. To determine Ms. Kidd's yearly retirement allowance, the Board used the average annual rate of regular compensation of the last three years (2018-2019, 2019-2020, and 2020-2021) that she was working, which were also her years of highest annual salary. (Ex. 1.)

19. The Board calculated Ms. Kidd's salary for the year April 4, 2019 – April 2, 2020 as \$70,463.29. The average of the prior two years, April 4, 2017 - April 3, 2019, plus 10 percent equals \$69,105.24. (Ex. 5.)

20. The Board calculated Ms. Kidd's salary for the year April 3, 2020 – April 2, 2021 as \$76,101.43. The average of the prior two years, April 4, 2018 - April 2, 2020, plus 10 percent equals \$74,118.20. (Ex. 5.)

21. On July 23, 2021, the Board informed Ms. Kidd that her three-year average had been affected by the “anti-spiking” provision under G.L. c. 32, § 5(2)(f). The Board concluded that her regular compensation for the years 2019-2020 and 2020-2021 exceeded the average of the preceding two years by more than 10 percent. Ms. Kidd’s regular compensation for the periods of 2019-2020 and 2020-2021 was consequently reduced by \$1,358.06 and \$1,983.23, respectively. (Exs. 5, 9.)

22. On August 6, 2021, Ms. Kidd timely appealed. (Ex. 10.)

CONCLUSION AND ORDER

The Board’s application of the “anti-spiking” provision, which required it to reduce Ms. Kidd’s regular compensation for the years 2019-2020 and 2020-2021 when calculating her retirement allowance, is affirmed.

First, Respondent’s request that the appeal be dismissed because it was not timely filed is denied. G.L. c. 32, § 16(4) provides that “any person when aggrieved by any action taken or decision of the retirement board . . . may appeal to the contributory retirement appeal board by filing therewith a claim in writing within 15 days of notification of such action or decision by the retirement board” The Board’s letter of decision was dated July 23, 2021. Ms. Kidd’s appeal letter was postmarked on August 6, 2021, 14 days after the Board’s decision. Under the mailbox rule, an appeal is considered received on the day it was mailed. Her appeal was therefore timely under G.L. c. 32, § 16(4).

On the merits, for members like Ms. Kidd who were members of a retirement system prior to April 2, 2012, § 5(2)(a) directs that a member’s yearly retirement allowance be calculated based, in part, on the highest average three-year period of regular

compensation. This period took place from 2018 through 2021, during which time Ms. Kidd’s average annual compensation in the last three years was \$64,878.18, \$70,463.29, and \$76,101.43.

Section 5(2)(f), referred to as the “anti-spiking” provision, provides, in relevant part:

In calculating the average annual rate of regular compensation for purposes of this section, regular compensation in any year shall not include regular compensation that exceeds the average of regular compensation received in the 2 preceding years by more than 10 percent.

Ms. Kidd’s salary for the year April 4, 2019 – April 2, 2020 was \$70,463.29. The average of the prior two years, April 4, 2017 - April 3, 2019, plus 10 percent equals \$69,105.24. Her salary for the year April 3, 2020 – April 2, 2021 was \$76,101.43. The average of the prior two years, April 4, 2018 - April 2, 2020, plus 10 percent equals \$74,118.20. Her regular compensation during these two periods exceeded the 10% limit imposed by the anti-spiking provision, so the Board reduced the regular compensation by \$1,358.06 for 2019-2020 and \$1,983.23 for 2020-2021. These mathematical calculations are not disputed.

There are several exceptions to the anti-spiking provision’s limits.² In Ms. Kidd’s letter, she urged that she fits the exceptions of an increase in hours of employment and/or a bona fide change in position. Additionally, Ms. Kidd has stated that the pay raises

² The enumerated exceptions to the anti-spiking provision are: (1) an increase in regular compensation due to an increase in hours of employment; (2) a bona fide change in position; (3) a modification of a salary or salary schedule negotiated for bargaining unit members; (4) an increase in salary for a member whose salary is specified by law; and (5) an exception exclusive to teachers. G.L. c. 32, § 5(2)(f).

under MEPA were meant to match her compensation to her male counterparts and she seeks equitable relief.

Ms. Kidd worked long hours. She noted that before the increases in compensation that triggered the anti-spiking law, she worked 10- to 10.5-hour days with no overtime or other additional compensation beyond her salary. DALA has held that the “increase in work hours” exception does not apply to management or other employees whose hours of employment are not fixed. *Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021).

Ms. Kidd asserts that the additional duties she took on after other managers went back to their unionized jobs amounted to a bona fide change in position, even though she remained in the same position. In order for a bona fide change in position to occur, the character of the work must change in an essential way. An increase in responsibilities and duties alone is insufficient. *See, e.g., Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021); *Jenal v. State Bd. of Retirement*, CR-17-1054 (DALA May 29, 2020); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Dacri v. State Bd. of Retirement*, CR-17-627 (DALA May 31, 2019). Doing additional duties and working longer hours for no additional pay is lamentable, but this is not a listed exception to the anti-spiking law. Those circumstances do not qualify as a bona fide change in position.

Finally, Ms. Kidd argues that she should not be penalized in her retirement for the pay raises that she received under MEPA, G.L. c. 149, § 105A. Again, it is unfortunate that Ms. Kidd’s pay was inequitable until MEPA was enacted and implemented. She consequently received relatively large increases in her salary to make up for her prior pay, however there is no evidence that the Legislature, when it passed MEPA, exempted

from the anti-spiking law raises that were the result of the application of the Act.³ *See also Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019) (increases in pay given to reach pay equity are not an exception to the anti-spiking law).

If Ms. Kidd is asking for an equitable remedy, it cannot be provided in this forum because neither CRAB nor DALA have equitable powers. *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Petrillo v. PERAC*, CR-92-731 (DALA Feb. 15, 1993), *aff'd* (CRAB Oct. 22, 1993).

The Board correctly applied G.L. c. 32, § 5(2)(f) in its calculation of Ms. Kidd's retirement allowance. The decision of the Board is therefore affirmed. The Board is directed to return to Ms. Kidd any excess withholdings with interest.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: May 12, 2023

³ This appeal's outcome leaves us with the anomalous result that a woman like Ms. Kidd ends up with a slightly smaller retirement allowance than a man paid the same nominal rate during the "spike" year. Perhaps the Legislature ought to address this by amending either the anti-spiking provision or MEPA.