

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Melvin A. Kleckner,
Petitioner

v.

Docket No. CR-23-0692
Date issued: August 28, 2026

**Brookline Retirement Board
and PERAC,**
Respondents

Appearance for Petitioner:

Timothy J. Smyth, Esq.

Appearances for Brookline Ret. Bd.:

Gerald F. McDonough, Esq.
Uyen Tran, Esq.

Appearance for PERAC:

Felicia Baruffi, Esq.

Administrative Magistrate:

Kenneth J. Forton

SUMMARY

Deferred compensation of \$850 per month received by a town administrator under contracts negotiated pursuant to G.L. c. 32, § 108N, was regular compensation because G.L. c. 44, § 67 specifically provides that deferred compensation “shall continue to be included as regular compensation.” Later payments in the same amount paid directly to the town administrator under the same contracts were also regular compensation. The town administrator’s choice how to be paid did not make the payments “non-discretionary.” 840 CMR 15.03(3)(b).

DECISION

Petitioner Melvin A. Kleckner appeals from the decision of the Public Employee Retirement Administration Commission (PERAC) not to treat certain payments he received under his individual employment contracts as regular compensation when calculating his retirement allowance. *See* G.L. c. 32, §§ 1, 16(4). On May 22, 2024, the Division of Administrative Law Appeals (DALA) ordered the parties to submit a joint pre-hearing memorandum and proposed exhibits. On August 29, 2024, the parties submitted their memorandum and 11 agreed upon exhibits. After two requests for rescheduling, I held an evidentiary hearing on May 21, 2026. It was digitally recorded. Mr. Kleckner testified on his own behalf. Neither the board nor PERAC called any other witnesses. I admitted into evidence the 11 agreed upon exhibits that the parties jointly proposed. (Exs. 1-11.) Mr. Kleckner and PERAC filed closing briefs in June 2026. The Board chose not to submit a brief.

FINDINGS OF FACT

Based on the testimony and documents in evidence, I make the following findings of fact:

1. Melvin A. Kleckner served as the Town of Brookline's Town Administrator from 2010 through 2022, when he retired for superannuation. (Stipulation; Testimony.)
2. Before he worked in Brookline, he held similar positions in Wilbraham, Belmont, and Arlington. (Testimony.)

3. Pursuant to G.L. c. 41, § 108N, Mr. Kleckner and the Town negotiated a series of individual employment contracts. The contracts covered four time periods: September 15, 2010, through September 14, 2013; September 15, 2013, through September 14, 2016; September 15, 2016, through September 14, 2019; and September 15, 2019, through September 14, 2022. (Stipulation; Testimony; Exs. 5-8.)

4. Each of the four contracts contained the following language:

Additional Compensation. The Town shall continue to make monthly payments in the amount of \$850 either:

- On behalf of the Town Administrator to any deferred compensation program for which payroll deductions are authorized; or
- At the option of the Town Administrator, directly to him as regular compensation subject to withholdings for taxation and other requirements applicable to regular compensation.

(Exs. 5-8.)

5. From the beginning of Mr. Kleckner's employment with Brookline until August 20, 2018, the Town paid \$850 per month to Mr. Kleckner's deferred compensation account. Retirement deductions were not withheld from the deferred compensation payments. (Stipulation; Testimony; Exs. 9, 10.)

6. On August 20, 2018, Mr. Kleckner notified the Town that he no longer wanted the \$850 monthly payments to be made to his deferred compensation account but rather wanted them paid directly to him in his weekly paychecks. From then until his retirement, Mr. Kleckner received the payments directly. Retirement deductions were withheld from the direct payments. (Stipulation; Testimony; Exs. 9, 10.)

7. The Brookline Select Board and Mr. Kleckner viewed his election to change the \$850 payments from deferred compensation to direct pay as one-time and irrevocable. This view was based, at least in part, on their mistaken understanding that payments made to deferred compensation accounts were not “regular compensation” under the contributory retirement law, G.L. c. 32, § 1. (Testimony; Ex. 11.)

8. During all times relevant to this appeal, there is no evidence that the Town was aware of Mr. Kleckner’s retirement plans, including when the parties negotiated the deferred compensation and when Mr. Kleckner decided to receive the payments directly. (Testimony.)

9. In 2023, after Mr. Kleckner had retired, PERAC audited the Brookline Retirement System. It published the results of the audit on December 6, 2023. One of the findings of the audit was that the \$850 payments made directly to Mr. Kleckner were not regular compensation “because the member has a choice between direct and indirect payments.” PERAC recommended that the Board return the retirement deductions taken on the direct payments and then recalculate Mr. Kleckner’s retirement allowance without treating the direct payments as regular compensation. (Stipulation; Ex. 1.)

10. The Board responded to PERAC’s recommendation. It conceded that Mr. Kleckner had a choice to receive the payments as deferred compensation or along with his regular weekly pay but pointed out that the payments themselves were not discretionary. The remainder of the Board’s response was based upon its mistaken

impression that the deferred compensation payments were not regular compensation.

The Board concluded by asking PERAC to reconsider its conclusion regarding Mr.

Kleckner's payments. (Stipulation.)

11. On December 18, 2023, PERAC notified the Board that it declined to change its conclusion and issued its final decision with appeal rights. Mr. Kleckner timely appealed. (Exs. 1, 2.)

CONCLUSION AND ORDER

Upon retirement, members may receive a superannuation retirement allowance that is based in part on their "regular compensation" during certain years. G.L. c. 32, §§ 1, 5(2). Regular compensation for the relevant period is defined as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." G.L. c. 32, § 1. "Wages" are defined in turn as "base salary or other base compensation of an employee paid to that employee for employment by an employer," not including overtime, bonuses, and other additional ad hoc forms of payment. *Id.*

The parties have framed the question in this appeal as whether the \$850 per month "additional" compensation that Mr. Kleckner received in his last three years, 2019-2022, as Brookline Town Administrator should be treated as regular compensation. Before 2018, the same payments were made to Mr. Kleckner's deferred compensation account. As explained *infra*, this approach loses the forest for the trees.

Because he was a retirement system member before April 2, 2012, Mr. Kleckner's retirement allowance calculation is based on his highest three consecutive years of regular compensation. See G.L. c. 32, § 5(2)(a). An employee's highest three years of compensation tend to be his last three years, but from the record evidence it is not clear that is the case for Mr. Kleckner. (Exs. 5-8, 10.) Moreover, which three years are the highest regular compensation depends, in part, on whether Mr. Kleckner's deferred compensation or direct pay, or both, or neither is regular compensation. In these circumstances, I am therefore compelled to also decide whether his deferred compensation payments were regular compensation.

I begin with the deferred compensation payments. I confronted this exact question in *Stinehart and Landis v. Hampden Cty. Ret. Bd. and PERAC*, CR-24-0605 and CR-24-0625 (Div. Admin. L. App. April 17, 2026). There, I concluded that deferred compensation payments negotiated under the same statute and received under the same statute were regular compensation. For the same following reasons, I conclude that Mr. Kleckner's deferred compensation payments were regular compensation.

Mr. Kleckner and the Town negotiated his contract under G.L. c. 41, § 108N, which authorizes any municipality, by approval of its legislative body, to

establish an employment contract for a period of time to provide for the salary, fringe benefits, and other conditions of employment . . . for its town manager, town administrator, executive secretary . . . or the person performing such duties having a different title.

Section 108N also provides that nothing contained in that section shall "abridge the provisions" of G.L. c. 44, § 67.

In turn, under G.L. c. 44, § 67,¹ a city or town may

contract with an employee to defer a portion of that employee's compensation and may, for the purposes of funding a deferred compensation program for said employee, established in accordance with the U.S. Internal Revenue Code . . . , invest the deferred portion of the employee's income in a life insurance or annuity contract, mutual fund, or a bank investment trust.

Mr. Kleckner's contracts provided that \$850 per month would fund a deferred compensation account held for his benefit. To remove any doubt, section 67 specifically provides that compensation deferred under this program "shall continue to be included as regular compensation, as defined in section one of said chapter thirty-two."

Therefore, under the plain language of G.L. c. 44, § 67, Mr. Kleckner's deferred compensation is regular compensation.

PERAC contends, however, that section 67's definition of deferred compensation as regular compensation has been superseded by Acts 2009, c. 21, § 23, a provision of the 2009 reforms to the contributory retirement law, which provides:

Notwithstanding any special or general law to the contrary, any amount, benefit or payment included in the definition of "regular compensation" by law or by regulation prior to the effective date of this act and included in any applicable collective bargaining agreement or individual contract for employment in effect on May 1, 2009, shall continue to be included in the definition of "regular compensation" during the term of that

¹ G.L. c. 29, § 64B provides the same deferred compensation program for government employees "not otherwise subject to any general or special law authorizing deferred compensation contracts with its employees,"—in other words, the tens of thousands of other Massachusetts government employees. Section 64B likewise provides that "[a]ny compensation deferred under such a plan shall continue to be included as regular compensation, as defined in section 1 of said chapter 32, for the purpose of computing any retirement and pension benefits earned by any such employee." *Id.*

collective bargaining agreement or contract; provided, however, that any such amount, benefit or payment received after June 30, 2012 shall not be considered regular compensation.

According to PERAC, section 67 is a general law that is contrary to the amended definition of regular compensation; therefore, at the latest, post-2012 deferred compensation is no longer regular compensation unless it satisfies the 2009 amended definition.

This argument is ineffective for two reasons. First, Acts 2009, c. 21, § 23 is merely trying to *continue* certain benefits that members have come to rely on as regular compensation because they were provided for in their contracts and the benefits qualified under the old definition, despite what the new definition of regular compensation and any special or general law to the contrary says. It is not trying to prospectively *end* the treatment of certain payments—like injured-on-duty benefits under G.L. c. 41, § 111F, or deferred compensation under G.L. c. 44, § 67—as regular compensation. Section 67 is not a general or special law to the contrary of treating something as regular compensation—it is the law that affirmatively treats the payments at issue as such. Moreover, if the Legislature meant to abrogate the treatment of certain compensation as regular compensation outside of the core contributory retirement law, G.L. c. 32, §§ 1-28, it would have amended those statutes, not buried their termination in an uncodified session law like Acts 2009, c. 21, § 23.

Second, Mr. Kleckner's deferred compensation *does* meet the 2009 amended definition of regular compensation. So, even if G.L. c. 44, § 67 did not define Mr.

Kleckner's deferred compensation as regular compensation, it still meets the 2009 amended general definition of regular compensation. The 2009 definition is "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer," and wages are "base salary or other base compensation." G.L. c. 32, § 1. Mr. Kleckner's contracts consistently provided him a base salary plus "other base compensation" of \$850 per month that he and the Town initially agreed to have paid into his deferred compensation account.

PERAC also maintains that the deferred compensation payments were "indirect" or "in kind" payments like "annuities," which are excluded from the definition of regular compensation. G.L. c. 32, § 1. The deferred compensation payments were no more "indirect" than any of the other pay deductions, such as health and life insurance, that the average member has deducted from his pay. As a convenience, the employer sends those deductions to the various recipients at the request of the member without first transferring the money to the Petitioner. That fact does not exclude those payments from regular compensation. Nor were the payments to the deferred compensation account "in-kind" payments, which "consist[] of something (such as goods or commodities) other than money." [Merriam-Webster.com Dictionary](https://www.merriam-webster.com/dictionary) (last visited August 21, 2026). The deferred compensation payments were money payments, and therefore not in-kind payments. Moreover, there is no evidence that the deferred compensation was invested in an annuity.

I turn now to the direct payments made to Mr. Kleckner from 2018 to 2022.

PERAC argues that they are not regular compensation because they were not “non-discretionary.” PERAC came to this conclusion because Mr. Kleckner had the choice to receive the monthly payments as deferred compensation or paid directly to him in his paychecks.

The parties have spilled much ink over whether Mr. Kleckner’s choice to switch from deferred compensation to direct payments was a one-time, irrevocable option. The Town and Mr. Kleckner certainly believed this was so, but no such language is included in the contracts. The contracts merely provide that the payments will be deferred compensation and then “at [his] option” they could be received directly instead. According to Mr. Kleckner, if it was an irrevocable choice then the direct payments were regular compensation. PERAC asserts that the very fact that Mr. Kleckner had a choice at all is what makes the payments discretionary. As it turns out, resolving this question is not required to decide this appeal.

Regular compensation must be “pre-determined, non-discretionary, [and] guaranteed.” 840 CMR 15.03(3)(b). Mr. Kleckner’s \$850 per month direct payments meet these requirements. (Despite being listed in the contract as monthly payments, they were paid to him in his weekly paychecks.) The amount was pre-determined and unvarying throughout each fiscal year during his entire employment, and it was guaranteed by his employment contracts. To the extent that Mr. Kleckner had any “discretion” over how the payments were made, it had no practical effect. Certainly,

being consistently paid directly a certain sum each month for working for a government employer is regular compensation. And, as I have established *supra*, Mr. Kleckner's payments to deferred compensation for the same amount were regular compensation. Having the choice to be paid regular compensation in two different ways does not make it not regular compensation.

Moreover, the purpose of excluding "discretionary" and other types of pay from regular compensation is to prevent extraordinary, "adventitious" payments from imposing disproportionate burdens on retirement systems' finances. *See Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 652 (2012); *Pelonzi v. Ret. Bd. of Beverly*, 451 Mass. 475, 479 (2008); *Boston Ass'n of Sch. Adm'rs v. Boston Ret. Bd.*, 383 Mass. 336, 341 (1981). Discretion creeps in when an employer can choose whether or not to pay an employee. In that situation, the pay is essentially a bonus to be paid by the employer when it wants to. The employee ends up with unpredictable sums that can generate benefits disproportionate to his contributions. When the pay amount is pre-determined, as in Mr. Kleckner's case, none of this can happen. If the same predictable contributions continue to be made, it makes no difference to the retirement board if the employee can choose the form of payment.

Finally, although none of the parties pressed the issue in their closing briefs, I conclude that at no relevant time did the Town have any knowledge of Mr. Kleckner's retirement plans. G.L. c. 32, § 1 (payments "made as a result of the employer having

knowledge of the member's retirement" are excluded from wages, and therefore regular compensation).

For the reasons stated above, PERAC's decision is REVERSED. Both Mr. Kleckner's deferred compensation payments and his later direct payments in the same amount are regular compensation for the purpose of calculating his retirement allowance. The Board should deduct retirement contributions from Mr. Kleckner's deferred compensation payments dating back to the commencement of his Brookline employment. It shall recalculate his retirement allowance consistent with this decision.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: August 28, 2026