COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Patricia Lovering**,

Petitioner

v. Docket No. CR-13-435

 Date: August 31, 2018

**Massachusetts Teachers’ Retirement System**,

Respondent

**Appearance for Petitioner**:

 Patricia Lovering, *pro se*

 20 Windsor Road

 West Walpole, MA 02031

**Appearance for Respondent**:

 Christina I. Keefe, Esq.

 Teachers Retirement System

500 Rutherford Ave.

Suite 210

Charlestown, MA 021291628

**Administrative Magistrate**:

 Edward B. McGrath, Esq.

 Chief Administrative Magistrate

**SUMMARY OF DECISION**

The Petitioner failed to prove that the payments at issue were “regular compensation” as defined by M.G.L. c. 32, § 1. The Respondent’s decision to exclude those payments from her three-year salary average when calculating her retirement benefit is, therefore, affirmed. *Jane Sheehan v. Massachusetts Teachers Retirement System*, CR-07-609 (Div. Adm. Law App. Dec. Jul. 1, 2010, CRAB Dec. Feb. 17, 2011).

**DECISION**

 Patricia Lovering appeals, under M.G.L. c. 32, § 16(4), from the August 21, 2013 exclusion by the Massachusetts Teachers’ Retirement System (“MTRS”) of certain payments from the calculation of her three-year salary average, because the payments were not “regular compensation” as defined by M.G.L. c. 32, § 1.[[1]](#footnote-1) The parties submitted pre-hearing memoranda. The Petitioner’s was marked “A” for identification and the Respondent’s was marked “B”. I presided at an evidentiary hearing held on February 1, 2017. It was digitally recorded. At the hearing, the parties submitted a joint exhibit list which was marked “C” for identification. Lovering was the only witness. I admitted eleven documents into evidence. At the conclusion of the hearing, I left the record open to give the Petitioner an opportunity to review Exhibit 11, which she had not seen before, and so the parties could submit post-hearing briefs. I received the closing briefs and closed the administrative record on March 7, 2017.

**Findings of Fact**

 Based on the evidence submitted by the parties, reasonable inferences drawn from it, and my assessment of the witness’s credibility I make the following findings of fact:

1. Lovering is a retired member of MTRS. The effective date of her retirement was

June 30, 2013. (Ex. 1, Test.)

1. Lovering worked for the Stoughton Public Schools as the Director of

Guidance/Testing K-12 from 2007 to 2009. (Ex. 1, Test.)

1. The position of Director of Guidance was governed by the Unit A Teachers

Collective Bargaining Agreement between the School Committee of the Town of Stoughton and the Stoughton Teachers Association dated from September 1, 2007 through August 3, 2010 (“Agreement”). (Ex. 4, Test.)

1. Article XXIX of the Agreement provided that: “The work year for all directors… shall

be ten months. The Directors shall also work an additional two weeks as needed and funded.” (Ex. 4)

1. In 2008 and 2009, Lovering received $7,797.00 as Director of Guidance. Those payments were included in calculating Lovering’s retirement benefit and there is no dispute as to those payments. (Ex. 1)
2. Article XXX of the Agreement defines the Stoughton High School guidance counselors’ work year. Section E of that article states: “two counselors will be employed at the senior high school level for a four-week period beyond the negotiated work year of school counselors at 1/52 of their annual salary.” (Ex. 4)
3. Lovering, as Director of Guidance, was responsible for assigning one or more guidance counselors to the summer guidance work defined by section E of Art. XXX of the Agreement. Lovering offered the work to the other Guidance Counsellors who split one position three ways in 2008 and 4 ways in 2009. (Test.)
4. During the summer months in 2008 and 2009, Lovering worked extra days beyond the ten months two weeks specified in Art. XXIX, § 2 to perform summer guidance work. (Test., Exs. 1, 9, 10)
5. In addition to management duties, Lovering performed the work of a Guidance Counselor during the summer. (Test.)
6. Guidance Counselors performing summer guidance work were required to fill out time cards and were paid a daily rate. (Ex. 8, Test)
7. In 2008, Lovering received a payment of $5,435.00 for summer guidance work and, in 2009, she received a payment of $6,452.76 for that work. (Exs. 1, 7)
8. On February 25, 2013, the Stoughton Public Schools Financial Coordinator completed Part 2 section 5 of Lovering’s retirement application describing the work at issue as “Guidance Summer Work (Article XXX).” (Ex. 1)
9. Barbara Regan, the Director of Guidance after Lovering, did not mention the Summer Guidance work when she described her job duties in an email dated July 15, 2013. (Ex. 6)
10. In a letter dated July 25, 2013 concerning Lovering, Marguerite C. Rizzi, Ed.D., the Stoughton Public Schools Superintendent, stated that the “Director of Guidance in the Stoughton Public Schools is required to work hours during the Summer months.” (Ex. 10)
11. On August 21, 2013 the MTRS informed Lovering that it was excluding the two payments for summer guidance work from the calculation of her three-year salary average when calculating her retirement benefit. (Ex. 2)
12. Lovering timely appealed the MTRS’s decision on August 27, 2013. (Ex. 4)

**Discussion**

 The Respondent’s decision to exclude the $5,435 and $6,452.76 payments for summer guidance work from being factored into Lovering’s three-year average salary is affirmed. Lovering failed to prove that the raises were “regular compensation” as defined by M.G.L. c. 32, § 1.

I note that DALA and CRAB dealt with the same Director of Guidance position and

contract provisions in *Jane Sheehan v. Massachusetts Teachers Retirement System*, CR-07-609 (Div. Adm. Law App. Dec. Jul. 1, 2010, CRAB Dec. Feb. 17, 2011). Like the Magistrate in *Sheehan*, I start with G.L. c. 32, § 1 which defines regular compensation as:

Salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives . . . . In the case of a teacher employed in a public day school . . . salary payable under the terms of an annual contract for additional services in such a school . . . shall be regarded as regular compensation rather than as a bonus or overtime....

807 CMR 6.02(2)(b) of the Teachers’ Retirement System regulations specifically excludes from the definition of regular compensation the following:

Any amounts paid for work performed during the summer months unless the member's position in which he/she works for 11 or 12 months and the annual contract provides for the same.

Like Ms. Sheehan before her, Lovering maintains that she is entitled to the additional compensation, because she was being paid for work she was doing as a summer guidance counselor pursuant to Art. XXX of the Agreement. Unlike Ms. Sheehan’s case, there is evidence in this case to support that position, but I do not find that evidence persuasive. While Lovering testified that she was required to do the Summer Guidance work by the principal, there was no other evidence offered to corroborate this self-serving assertion. *See* *Patricia Boornazian-MacDonald v. Massachusetts Teachers Ret. Assoc.,* CR-07-240 \* at 7 (Div. Adm. Law App. Dec. Nov. 18, 2011) (uncorroborated testimony insufficient). In addition, while the Financial Coordinator for the Stoughton Public Schools filled out part of the retirement application and described the payments as related to *“*Article XXX,”I was not persuaded by that evidence. Barbara Regan, the Director of Guidance after Lovering, did not mention the Summer Guidance work when she described her job duties. I note that, when addressing Lovering’s work, the Superintendent of Schools wrote that the “Director of Guidance” was required to work during the summer months, but he did not address Lovering’s Summer Guidance counselor work. Lovering, in her post-hearing brief, argued that is because the Superintendent was not asked about the Summer Guidance work, but this was her case to prove and she failed to meet her burden. *See* *Baker v. Massachusetts Teachers' Retirement Sys.,* CR-08-51 at 8 (DALA July 20, 2012) (claimant has burden of proving entitlement to c. 32 benefits); *citing Narducci v. Contributory Retirement Appeal Bd*., [68 Mass. App. Ct. 127](http://sll.gvpi.net/document.php?id=sjcapp:68_mass_app_ct_127), 136 (2007); *Lisbon v. Contributory Retirement Appeal Bd*., [41 Mass. App. Ct. 246](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_246), 255 (1996).

 There is another reason Lovering’s claim must be denied. The payment she received for the work was hourly and, therefore, did not constitute regular compensation. Summer Guidance Counselor’s filled out time cards and were paid for the time they worked. As the Supreme Judicial Court said,

Nothing in the text or the title of the act persuades us that the Legislature intended to include periodic hourly payments as part of regular compensation for teachers for the purpose of determining retirement benefits.

*Hallett v. Contributory Ret App Bd*. 431 Mass.66, 68 (2000).

**CONCLUSION AND ORDER**

The Respondent’s decision to exclude the payments at issue is affirmed and the Petitioner’s appeal is dismissed.

SO ORDERED.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Edward B. McGrath, Esq.

 Chief Administrative Magistrate

Dated: August 31, 2018

1. Lovering also appealed a decision of the MTRS excluding certain other payments from her three year average salary calculation. That appeal was given docket number CR-13-441 and consolidated with this case. The Petitioner withdrew that appeal at the hearing. [↑](#footnote-ref-1)