COMMONWEALTH OF MASSACHUSETTS

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

James Lutz,
Petitioner

v. Docket No. CR-21-0075

Massachusetts Teachers' Retirement System,
Respondent

Appearance for Petitioner:

James Lutz, *Pro Se*

Appearance for Respondent:

Lori Curtis Krusell, Esq.
Massachusetts Teachers' Retirement System
500 Rutherford Ave, Suite 210
Charlestown MA 02129

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Petitioner appeals the decision of the Massachusetts Teachers' Retirement System ("MTRS") to omit stipends he received for certain additional services from the calculation of his superannuation retirement allowance. The appeal must be dismissed as untimely. Even if the appeal had been timely filed, the stipends for the Petitioner's additional services were not included in the applicable collective bargaining agreement. An agreement that purported to amend the collective bargaining agreement to include the stipends retroactively does not change the result – this agreement was executed after the collective bargaining agreement expired and after the MTRS had already rendered its decision. Although the failure to contemporaneously include the stipends in the governing collective bargaining agreement may have been an oversight, it is the fact that they were omitted and not the reason for the omission that governs here.

DECISION

The Petitioner, James Lutz, appeals the decision of the Massachusetts Teachers' Retirement System ("MTRS") to omit stipends he received for his service as "Instrumental Band Coordinator" from the calculation of his superannuation retirement allowance.

I held a hearing on June 8, 2023, at the Division of Administrative Law Appeals ("DALA"), 14 Summer Street, 4th Floor, Malden, MA 02148. The hearing was recorded. I admitted into evidence Petitioner's Exhibits 1-4 and Respondent's Exhibits 1-10. Mr. Lutz was the sole witness. On June 29, 2023, Mr. Lutz filed a post-hearing submission, at which point the record was closed.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. Mr. Lutz served as a High School Band Director/Instrumental Music Teacher at Lowell High School. (Testimony).
2. In 2016, he was appointed Instrumental Band Coordinator, which was a citywide position. This work was in addition to his position at the high school and required him to work many nights and weekends. (Testimony).
3. In June 2017, Lowell Public Schools ("LPS") and the United Teachers of Lowell ("the Union") entered into a collective bargaining agreement ("CBA") with a term of July 1, 2017 through June 30, 2020. (Respondent's Exhibit 4).
4. In March and December of 2017 and in October of 2019, LPS and the Union executed various memoranda of agreement that amended the CBA. These amendments concerned, among other things, stipends for advising various student

activities. (Respondent's Exhibit 5).

5. The CBA does not identify the "Instrumental Band Coordinator" position or the associated stipends. (Respondent's Exhibit 4). Nor do the memoranda of agreement referenced in the preceding paragraph. (Respondent's Exhibit 5).
6. Mr. Lutz retired from LPS on June 30, 2020. (Respondent's Exhibit 2).
7. In a letter dated September 9, 2020, the MTRS informed Mr. Lutz that it was excluding from the calculation of his superannuation salary allowance a $7,500 stipend that he received for the 2017/2018, 2018/2019, and 2019/2020 school years for his service as Instrumental Band Coordinator. This letter included a notice of Mr. Lutz's right to appeal and instructions on how to do so. (Respondent's Exhibit 1).
8. Mr. Lutz's retirement allowance did include stipends for "Spring Band," which had been referenced in agreements amending the CBA. (Respondent's Exhibits 5, 7, and 10).
9. On September 28, 2020, MTRS received a copy of Mr. Lutz's Notice of Estimated Retirement Benefits, which bore various handwritten notes written by Mr. Lutz. (Respondent's Exhibit 8). This document was intended by Mr. Lutz to serve as his appeal. (Petitioner's Post-Hearing Submission).
10. I do not find that Mr. Lutz mailed a copy of this document to DALA in September 2020. There is no record of DALA having received this document in or about September 2020, and although Mr. Lutz suggests in some of his testimony that he may have sent the document to DALA in September 2020, on balance his testimony was vague and uncertain. (Testimony). Given the absence of documentation and Mr. Lutz's difficulty in clearly testifying that he timely mailed an appeal to DALA (as opposed to just MTRS), I do not find that he filed his appeal with DALA in

September 2020.[1]

11. Mr. Lutz also testified that he had never seen the September 9, 2020 letter from MTRS and that he knew about its decision because of e-mail communication with the author of the letter. (Testimony). I find that Mr. Lutz's statement that he had never seen the letter is mistaken. The letter was sent to his address, and he included the letter in his appeal submission to DALA in February 2021, so he had to have seen it at some point.[2] (I note that there is no evidence that he received the denial letter on or after January 28, 2021 – fifteen days prior to his eventual February 12, 2021 filing with DALA).
12. In September 2020, Mr. Lutz was dealing with medical issues in his family. (Testimony).
13. At some point after September 2020, Mr. Lutz spoke with First Magistrate James Rooney, who advised him to submit (or resubmit) his appeal to DALA. (Testimony.)
14. On November 18, 2020, LPS and the Union entered into a Memorandum of Agreement ("MOA"), in which they agreed that "The position of Instrumental Band Coordinator will be made part of the Collective Bargaining Agreement, retroactive to June 2016." (Respondent's Exhibit 6).
15. On February 12, 2021, DALA received an appeal letter from Mr. Lutz.

CONCLUSION AND ORDER

[1] I hasten to note that I found Mr. Lutz to be honest and candid. His difficulty in reconstructing what he may or may not have done is quite understandable given the passage of time and the fact that he was dealing with family medical concerns around this timeframe.

[2] I note that there is no evidence that he received the denial letter on or after January 28, 2021 – fifteen days prior to his eventual February 12, 2021 filing with DALA.

1. Appeal Period

Under M.G.L. c. 32, § 16(4), an individual aggrieved by a decision by a retirement board must file a notice of appeal within fifteen days of receiving the decision. DALA lacks jurisdiction to consider appeals filed outside the statutory time-frame. LaRocco v. Norfolk County Ret. Sys., CR-08-175, at *8 (DALA Feb. 10, 2012) (citing Flynn v. CRAB, 17 Mass. App. Ct. 668 (1984)) ("Statutory time periods to appeal from an administrative agency decision are jurisdictional."). The notice of appeal must be filed with DALA; filing with the MTRS will not suffice. Sanphy v. MTRS, CR-11-0510, at *3 (CRAB March 029, 2013).

Mr. Lutz's appeal was not filed until February 12, 2021. Even if Mr. Lutz had not received the MTRS's decision until September 28, 2020 (the date on which the MTRS received his appeal submission), his appeal to DALA was filed well after the fifteen day window for doing so had elapsed.

The fact that First Magistrate James Rooney told Mr. Lutz to submit (or resubmit) his appeal to DALA does not shield this appeal from the operation of § 16(4). First, I do not find that First Magistrate Rooney in any way stated, opined, or promised that the appeal would be deemed timely. Rather, the advice to submit the appeal was pragmatic: it would not place Mr. Lutz's appeal in a worse position, and it left open the *possibility* that the record might establish that the appeal was, in fact, timely. Moreover, and in any event, the magistrates of this Division are not authorized to waive jurisdictional requirements or otherwise excuse the failure to timely appeal an adverse decision by a retirement board. Baumann v. State Bd. of Ret., CR-21-0626, 2023 WL 4052395, at *3 (DALA June 9, 2023) ("It is well established that DALA has no equitable powers.") (citations omitted).

I acknowledge and credit Mr. Lutz's statement that he was dealing with a serious family medical situation during the relevant time-frame. Unfortunately, this Division lacks the authority to waive or otherwise extend the limitations period, even in sympathetic circumstances. McLaughlin v. Boston Ret. Bd., CR-12-115, at *4 (CRAB Nov. 16, 2012) (citation omitted).

In sum, Mr. Lutz's appeal must be dismissed as untimely. Nevertheless, in case a subsequent tribunal concludes that I am incorrect, I will also discuss the substantive merits of Mr. Lutz's appeal. Unfortunately, for the reasons set forth below, Mr. Lutz's appeal is unavailing on the merits as well.

2. Regular Compensation

When a member of MTRS retires, he is entitled to a superannuation retirement allowance based in part on the "average annual rate of regular compensation received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest." M.G.L. c. 32, § 5(2)(a). "Regular compensation" is defined as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." M.G.L. c. 32, § 1. "Wages" are defined as an employee's "base salary or other base compensation" paid to the employee by the employer for his employment. Wages do not include bonuses, overtime, and other additional forms of payment. Id.

The definition of wages contains an exception for teachers:

> [N]otwithstanding the foregoing, in the case of a teacher employed in a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for additional services in such school . . . shall be regarded as "regular compensation" rather than as bonus or overtime and shall be included in the salary on which deductions are to be paid to the annuity savings fund of the teachers' retirement system.

M.G.L. c. 32, § 1

> "Annual contract" is defined in MTRS regulations as follows:
>
> > In the case of a member covered by a collective bargaining agreement, the annual contract is the collective bargaining agreement for the unit which governs the rights of that member whether it is a one year or multi-year agreement.

807 CMR 6.01.

The requirements for additional services to be deemed regular compensation are encapsulated in MTRS regulation 807 CMR 6.02(1):

> Regular Compensation shall include salary payable under the terms of an annual contract for additional services so long as:
>
> > (a) The additional services are set forth in the annual contract;
> > (b) The additional services are educational in nature;
> > (c) The remuneration for these services is provided in the annual contract;
> > (d) The additional services are performed during the school year.

807 CMR 6.02(1).

The Appeals Court has noted that the "obvious purpose" of requiring additional services to be set forth in the annual contract is to "provide clear records of approved stipends so as to avoid confusion and uncertainty at some later time when retirement boards are called upon to calculate pension benefits and would be in an untenable position if they had to sift through a multiplicity of alleged oral or side agreements about which memories might well be hazy." Kozloski v. CRAB, 61 Mass. App. Ct. 783, 787 (2004).

It is well-recognized that, under Kozloski, side agreements between a teacher and a superintendent, or other such agreements outside of the collective bargaining agreement approved by both the union and the local school system, may not be considered when calculating a superannuation retirement allowance. As another magistrate of this Division recently noted, however, it is not clear whether Kozloski necessarily forecloses

consideration of *amendments* to a collective bargaining. Rumbolt v. MTRS, CR-21-0057, at *4 (DALA Sept. 29, 2023). In fact, in this case, LPS and the Union executed several memoranda of agreement that amended the CBA, and MTRS included at least one stipend added via amendment when it calculated Mr. Lutz's retirement allowance.

But the MOA at issue in this appeal was executed *after* the MTRS had made its determination and *after* Mr. Lutz had performed his additional services and the CBA had expired. That difference is critical, and fatal to Mr. Lutz's claim in this appeal.

Kozloski provides, "as a purely technical matter," that if an amendment to a collective bargaining agreement post-dates a retirement board's decision, a tribunal charged with reviewing the correctness of the board's decision may understandably conclude that the decision of the board was correct when it was made.[3] 61 Mass. App. Ct. at 788. Although the Court described this consideration as a "purely technical" matter, I do not understand the Court to be suggesting it is "merely" technical. It isn't.

First, the efficient administration of the public retirement system would be ill-served by requiring retirement boards to consider post-decision revisions to the applicable collective bargaining agreement. After all, if requiring retirement boards to "sift through" multiple agreements would place them in an "untenable position," id., at 787. so, too, would requiring them to re-do their decisions in the wake of after-the-fact amendments. [4]

[3] The Court in Kozloski was referring specifically to CRAB, but it would apply with equal force to DALA.

[4] This is not to deny the obvious fact that retirement boards sometimes need to revisit their decisions, but *minimizing* the likelihood of such revisions is a proper and salutary policy goal.

Second, the actuarial and administrative predictability of the system might well be undermined by after-the-fact adjustments. Just as retirement boards "need to know with reasonable certainty which cases are still subject to appeal in order to anticipate their potential liability for benefits," McLaughlin v. Boston Ret. Bd., CR-12-115, at *3 (CRAB Nov. 16, 2012), they also need to be able to reliably identify the controlling agreements that will give rise to their future liability.

The "technical" point to one side, in Kozloski, the "[c]onclusive" fact was that "the position [] was simply not included in the relevant collective bargaining agreements under which Kozloski worked for the three-year period that was the basis for his pension calculation." Although there was a memorandum of agreement purporting to "clarify" that the parties to the collective bargaining agreement had intended to include the stipend, the Court rejected Kozloski's contention that this clarification was "an adequate substitute for the contemporaneous inclusion" of the stipend in the governing agreement. 61 Mass. App. Ct. at 787-88.[5]

Here, the MOA sought to "amend" rather than "clarify" the CBA, but I do not think the distinction changes the outcome. Under Kozloski, it appears the relevant agreement is the one under which the member *actually* worked, rather than an agreement that comes into being after the work had been performed. In fact, in the case of a

[5] In Kozloski, the Appeals Court also identified issues with the identity of the signatories to the memorandum of agreement and their knowledge of the negotiation of the collective bargaining agreement. 61 Mass. App. Ct. at 788. Because of these issues, and the fact that the memorandum of agreement was executed six years after the collective bargaining agreement period had concluded, "CRAB was properly skeptical about the effect to be given to the memorandum of agreement." Id. The skepticism, I gather from the opinion, was whether the memorandum of agreement was actually "clarifying" the intention of a collective bargaining agreement executed years ago by different individuals. The present decision does not rely on that line of analysis from Kozloski.

clarification there is at least some argument (albeit unavailing) that the parties are simply trying to make plain a contractual term that was already there. An amendment, by contrast, tends to underscore the point that the previously existing version of the contract did *not* encompass the change brought about by the amendment.[6]

The exclusion of the Instrumental Band Coordinator stipend is an unfortunate result. LPS and the Union had apparently intended to include the Instrumental Band Coordinator position, and the failure to include it appears to have been an oversight. Unfortunately, the "reasons why some additional stipend was omitted from the collective bargaining agreement" are, essentially, irrelevant to the analysis. Kozloski, 61 Mass. App. Ct. at 789.

For the foregoing reasons, the decision of the MTRS is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: November 17, 2023

[6] I do not decide here whether the stipends were also excludable as payments "made as a result of the employer having knowledge of the member's retirement." G.L. c. 32, § 1.