

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Diane McGuire,
Petitioner

v.

Docket No. CR-22-0374
Date: April 12, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Diane McGuire, *pro se*

Appearance for Respondent:

Jennifer Hunt, Esq.
State Board of Retirement
One Winter Street
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

In applying the “anti-spiking” law, G.L. c. 32, § 5(2)(f), the State Board of Retirement properly applied the exception for a bona fide change in position by using the salary that Petitioner received when she was promoted to her new position and properly excluded from the calculation the salary increases that she received six months later. *See* PERAC Memo #16/2014.

DECISION

Petitioner Diane McGuire 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, G.L. c. 32, § 5(2)(f), to the calculation of her retirement allowance.

On September 8, 2023, Ms. McGuire waived her right to a hearing, requesting the appeal to be resolved on written submissions. That same day, Ms. McGuire submitted a memorandum along with two exhibits. On February 26, 2024, the Board filed its brief with six additional exhibits. I have admitted the proposed exhibits into evidence as marked. (Exs. 1-8.)

FINDINGS OF FACT

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

1. Diane McGuire was employed at the Office of the Treasurer and Receiver General (“Treasury”) from on or around July 6, 1983 until her retirement on July 16, 2022. (Exhibit 3.)
2. Effective September 16, 2018, Ms. McGuire was promoted to the position of “Help Desk Manager” at a salary of \$80,000.00. This promotion was a bona fide change in position under the anti-spiking law. (Exhibit 4.)
3. Her salary prior to the promotion was \$69,687.58. (Exhibit 5)
4. Effective April 1, 2019, Ms. McGuire’s salary was adjusted to \$82,400.00. (Exhibit 6.)
5. The April 1, 2019 salary increase was not due to a change in position. (Exhibit 8.)
6. At some point after April 1, 2019, her salary adjustment was increased to \$90,000.00 retroactive to April 1, 2019. This salary adjustment was the result of a settlement of a claim that she had filed at the Massachusetts Commission Against Discrimination (MCAD). (Petitioner’s brief; Exhibits 5, 8.)

7. Ms. McGuire continued to receive regular annual salary adjustments until her retirement. (Exhibit 5.)

8. On July 16, 2022, Ms. McGuire retired for superannuation. (Exhibit 8.)

9. The Board determined that Ms. McGuire’s salary for the five years before her retirement was as follows:

- a) Year One: \$98,265.99 (7/17/21 - 7/16/22)
- b) Year Two: \$95,067.75 (7/17/20 - 7/16/21)
- c) Year Three: \$92,781.27 (7/18/19 - 7/16/20)
- d) Year Four: \$81,389.47 (7/18/18 - 7/17/19)
- e) Year Five: \$67,175.04 (7/18/17 - 7/17/18)

(Exhibit 5.)

10. The Board determined that spiking occurred in Year Three. (Exhibit 5.)

11. Ms. McGuire’s regular compensation for year three was \$92,781.27. The Board calculated that the maximum salary limit allowed under the anti-spiking provision was \$88,000.00. This meant Ms. McGuire’s Year Three salary exceeded the limit by \$4,781.27. The Board adjusted it accordingly. (Exhibit 5.)

12. In a letter dated August 24, 2022, the Board notified Ms. McGuire that it had applied the anti-spiking provision to her retirement calculation. (Exhibit 7.)

13. On September 7, 2022, Ms. McGuire timely appealed MTRS’s decision. (Exhibit 7.)

CONCLUSION AND ORDER

The Board’s application of the “anti-spiking” provision, which required it to reduce Ms. McGuire’s 2019-2020 regular compensation when calculating her retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Ms. McGuire, who were members of a retirement system before 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. For Ms. McGuire, these were the years 2019-2020, 2020-2021, and 2021-2022.

Section 5(2)(f), referred to as the “anti-spiking” statute, 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. McGuire’s salary in the 2019-2020 year exceeded the average of the prior two years by over 10 percent. However, Ms. McGuire qualified for an exception to the anti-spiking provision because her raise to \$80,000.00 was because of a bona fide change in position, one of the five recognized exceptions to the application of the anti-spiking provision.¹

The exception to the anti-spiking statute applies only in the year that the bona-fide change of position occurs. This can create an issue during the year following a change in

¹ “This paragraph shall not apply to an increase in the annual rate of regular compensation that results from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary or salary schedule negotiated for bargaining unit members under chapter 150E, from an increase in salary for a member whose salary amount is specified by law, or in the case of a teacher, from the performance of any services set forth in the third sentence of the first paragraph of the definition of ‘regular compensation’ in section 1.” G.L. c. 32, § 5(2)(f).

position, when the average salary of the prior two years includes the lower pre-change of position salary as well as the post-change of position salary. PERAC provides clear guidance to retirement boards how to apply the change of position exemption. PERAC Memo #16/2014 provides:

This exemption is applicable **only** in the year the member changes position. It does not provide relief for pay increases earned after (or before) the member changes position. Any pay increases that occur after (or before) the change in position are still subject to anti-spiking review. *In performing the anti-spiking review, for the year of the position change and the year after the position change, the average of the previous two years compensation will be set equal to the annual rate of the new position.*”

(Emphasis in original). To determine whether spiking occurred in the 2019-2020 year, the Board used the salary that Ms. McGuire received when she was promoted to her new position on September 16, 2018 as her 2018-2019 salary: \$80,000.00. The salary limit under the statute for that year was thus \$88,000.00 (10% more than the salary).

Ms. McGuire argues that the Board should have used \$90,000.00, the salary she received after her MCAD settlement, instead of \$80,000.00 as her 2018-2019 salary. This argument would make more sense if the MCAD settlement was retroactive to the date of her promotion to her new position. But, her original raise to \$82,400.00, eventually adjusted to \$90,000.00 after the MCAD settlement, did not happen when she was promoted to her new position. She received these raises effective six months *after* her change in position. Unfortunately for Ms. McGuire, under PERAC’s guidance, her salary adjustment to \$82,400.00 and eventually to \$90,000.00 cannot be attributed to her change in position. The exemption “does not provide relief for pay increases earned after (or before) the member changes position.” PERAC Memo #16/2014. The Board

therefore correctly applied the anti-spiking law to Ms. McGuire's 2019-2020 year by using the \$80,000.00 salary she received when she was promoted in its calculation of her 2018-2019 salary, and not her salary increases six months later.

For the above stated reasons, the Board's calculation is therefore affirmed. The Board is directed to return to Ms. McGuire, with interest, any excess withholdings.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: April 12, 2024