

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Paul McLeod,
Petitioner,

No. CR-22-625

Dated: December 15, 2023

v.

Malden Retirement System,
Respondent.

Appearance for Petitioner:
Laurel Goldstein, Esq.

Appearance for Respondent:
Michael Sacco, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

A police officer’s “hazardous duty pay” was ordinary, recurrent, predetermined, non-discretionary compensation for services performed in the course of his employment. That pay was therefore regular compensation for purposes of computing the officer’s retirement allowance.

DECISION

Petitioner Paul McLeod appeals from a decision of the Malden Retirement System declining to treat his “hazardous duty pay” as regular compensation for retirement purposes. An evidentiary hearing took place by WebEx on December 13, 2023. Lieutenant Evan Tuxbury of the Malden Police Department was the only witness. I admitted into evidence exhibits marked 1-14.

Findings of Fact

I find the following facts.

1. Mr. McLeod served as a police officer for thirty years. He retired effective September 2022. (Exhibits 7, 8, 13.)

2. The compensation paid to Malden’s police officers included “hazardous duty pay.” Parallel CBA provisions awarded hazardous duty pay to the city’s patrol officers and superior officers. Mr. McLeod was a superior officer. (Exhibits 1-3, 12.)

3. The superior officers’ CBA defined the amount of the hazardous duty pay as a single annual sum: \$750 beginning in mid-2020; \$1,500 beginning in mid-2021; and \$2,285 beginning in mid-2022. The CBA provided that each officer’s biweekly paycheck would include 1/26th of his annual hazardous duty pay. (Exhibit 12.)

4. In late 2021, PERAC issued a draft report about its audit of the board’s records. The draft report took the position that hazardous duty pay is not regular compensation for retirement purposes.¹ The board adopted PERAC’s guidance, instructing the City of Malden to stop making retirement deductions from hazardous duty pay. (Exhibits 1, 2, 4-6.)

5. The board computed Mr. McLeod’s retirement allowance based on his pay in October 2019-September 2022. It declined to treat Mr. McLeod’s hazardous duty pay as part of his regular compensation. Mr. McLeod promptly appealed. (Exhibits 1, 2, 4-8, 13.)²

¹ PERAC declined to file a brief in this appeal. It is not necessary to determine here whether the recommendations of its audit reports are binding on the local boards under *Grimes v. Malden Ret. Bd.*, No. CR-15-5, at *13-14 (CRAB Nov, 18, 2016).

² The case’s pre-appeal history is atypical. Mr. McLeod asked the board simultaneously to treat his hazardous duty pay as regular compensation and to provide him with a breakdown of the board’s pension calculations. The board declined both requests without reciting Mr. McLeod’s appellate rights. See *Barnstable Cty. Ret. Bd. v. PERAC*, No. CR-07-163 (CRAB Feb. 17, 2012). An interlocutory order tentatively determined that the board’s failure to issue an “appealable” decision in these circumstances amounted to a “failure . . . to act,” making Mr. McLeod’s appeal premature but within DALA’s jurisdiction. See G.L. c. 32, § 16(4); *Mackin v. MTRS*, No. CR-21-265, at *4-6 (DALA Oct. 7, 2022). The parties have not disagreed with that analysis, which would prevent decisions in certain circumstances from evading appellate review. During the appeal’s pendency, the board disclosed its calculations to Mr. McLeod; ordinarily, a member should not be required to pursue a § 16(4) appeal in order to receive such information.

Analysis

The retirement allowance of a Massachusetts public employee is derived from the employee's "regular compensation." G.L. c. 32, §§ 1, 5(2)(a). Since 2009, the retirement law has defined regular compensation as "wages . . . for services performed in the course of employment." G.L. c. 32, § 1. In turn, wages are "the base salary or other base compensation of an employee . . . for employment by an employer." *Id.* Overall, regular compensation is intended to embrace all "ordinary, recurrent, or repeated payments," while disregarding "extraordinary ad hoc amounts," with their potential to "place untoward, massive, continuing burdens on the retirement systems." *Pelonzi v. Ret. Bd. of Beverly*, 451 Mass. 475, 479 (2008).

PERAC regulations reiterate that regular compensation must be received "for services performed in the course of employment." 840 C.M.R. § 15.03(3)(a). The regulations add that wages include "pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees." § 15.03(3)(b). They specify that wages cover pay amounts resulting from "the character of the work," "the employee's length of service," and "the time at which the work takes place." *Id.*

Mr. McLeod's hazardous duty pay obviously satisfied regularity's defining attributes. It was disbursed once every pay period. Its amount was predetermined and unvarying throughout each fiscal year. It was not in any way extraordinary, adventitious, or ad hoc. The right to hazardous duty pay did not depend on any discretion or contingency. And the same hazardous duty pay was available to all similarly situated employees, i.e., all superior officers.

The dispute concentrates on the statutory and regulatory requirement that regular compensation must be received "for services performed in the course of employment." G.L. c. 32, § 1; 840 C.M.R. § 15.03(3)(a). Although employment services are the reason for the great majority of payments from employer to employee, there are exceptions. For example,

reimbursement for expenses does not count as pay “for services.” *Parente v. State Bd. of Ret.*, 80 Mass. App. Ct. 747 (2011). *Cf. Pereira v. Fall River Ret. Bd.*, No. CR-17-015 (DALA May 28, 2020). Workers’ compensation is available precisely when employees are incapable of providing their usual services. *Zelesky v. Commissioner of Div. of Pub. Emp. Ret. Admin.*, 30 Mass. App. Ct. 106 (1991). Incentives for early retirement also clearly are not pay for services. *Boston Ass’n of Sch. Administrators & Sup’rs v. Boston Ret. Bd.*, 383 Mass. 336, 341 (1981).

The board does not contend that Malden’s police officers received their hazardous duty pay in exchange for anything other than employment services. The board in fact acknowledges that the “hazardous duty” implicated here was “being a police officer.” The board’s argument concentrates on the fact that hazardous duty pay was assigned its own CBA provision, paycheck line, and accounting code. Given that fact, the board theorizes that hazardous duty pay qualifies as regular compensation only if “the employee provid[ed] *additional* services or duties in return” (emphasis added).

This theory is unsupported by the text and purpose of the regular compensation provisions. *See generally Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012). The pertinent statutory language concentrates on whether employees receive their pay “for services performed in the course of employment.” There is no hook in that phrase for a demand that each component of an employee’s total pay must correspond to a discrete set of services. *See Twohig v. Braintree Ret. Bd.*, No. CR-18-505, 2022 WL 16921472, at *4 (DALA May 20, 2022). The nonexistence of such a requirement is also reflected in the PERAC regulations stating that regular compensation includes pay for “the character of the work,” “the employee’s length of service,” and other circumstances that do not entail specific job duties. 840 C.M.R. § 15.03(3)(b).

As for statutory purpose, the point of the retirement law's insistence on regularity is to prevent extraordinary, adventitious, ad hoc pay amounts from imposing disproportionate burdens on the retirement systems' finances. *See Pelonzi*, 451 Mass. at 479; *Boston Ass'n of Sch. Administrators & Sup'rs*, 383 Mass. at 341. That purpose focuses on substance, not wording. The Legislature's worries are not implicated by ordinary, recurrent, predetermined, non-discretionary payments for employment services, whether they are accounted for as one line item or as several. *Cf. Barnes v. Essex Reg'l Ret. Syst.*, No. CR-21-469, 2023 WL 8526444, at *3 (DALA Dec. 1, 2023). The retirement law expresses neither favor or disfavor for the commonplace practice of breaking down employee pay into a series of separately labeled items.³

Conclusion and Order

Mr. McLeod hazardous duty pay was regular compensation for retirement purposes. The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

³ A plausible explanation for this practice was offered at the hearing by Lieutenant Tuxbury, president of the superior officers' union. Lieutenant Tuxbury observed that employers such as cities bargain separately with multiple unions who are aware of each other's contractual terms. He explained that, when such an employer increases one union's core salary amount, other unions are sure to demand similar raises. But when an employer introduces or increases a pay amount tailored to a feature of a particular union's work (e.g., hazardousness), the employer may reasonably withhold similar raises from unions whose work does not share that feature.