

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Richard Melillo,
Petitioner

v.

Docket No. CR-21-0550

Date: June 23, 2023

**Massachusetts Teachers’
Retirement System,**
Respondent

Appearance for Petitioner:

Richard Melillo, *pro se*

Appearance for Respondent:

James C. O’Leary, Esq.
MTRS
500 Rutherford Avenue, Suite 210
Charlestown, MA 02129

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Massachusetts Teachers’ Retirement System properly applied the “anti-spiking” provision of G.L. c. 32, § 5(2)(f) when it reduced Petitioner’s regular compensation in 2017-2018 and 2018-2019 for the purpose of calculating his retirement allowance. Petitioner, a Director of Student Services, did not qualify for any of the enumerated exceptions to the anti-spiking provision. He did not qualify for the “hours of employment” exception because he was a manager and did not have fixed hours of employment. He did not have a bona fide change in position because, even though he took on additional duties, these duties were not outside the sphere of duties expected from his position.

DECISION

Petitioner Richard Melillo timely appeals under G.L. c. 32, § 16(4). He seeks to overturn the Massachusetts Teachers’ Retirement System’s (MTRS) application of the anti-spiking law, G.L. c. 32, § 5(2)(f), to the calculation of his retirement allowance. MTRS concluded that Mr. Melillo’s regular compensation in fiscal years 2017-2018 and 2018-2019 must be reduced when it made this calculation.

On November 26, 2021, DALA suggested that Mr. Melillo’s appeal could be resolved on written submissions pursuant to 801 CMR 1.01(10)(c) and ordered the parties to submit legal memoranda and proposed exhibits. Neither party objected to the magistrate’s order. On July 11, 2022, MTRS filed a brief along with two exhibits, labeled R1 and R2. On August 8, 2022, Mr. Melillo filed a response as well as 18 additional proposed exhibits. I have admitted the proposed exhibits into evidence as P1 through P18 and R1 and R2.

FINDINGS OF FACT

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

1. For over forty years, until his retirement on June 28, 2019, Richard Melillo was employed by Somerville Public Schools (the “District”). (Ex. P7.)
2. Mr. Melillo was a member of the Massachusetts Teachers’ Retirement System at all times relevant to this appeal. (Ex. R2.)
3. At the time of his retirement, Mr. Melillo was the Director of Student Services. (Ex. P7.)

4. Mr. Melillo was subject to the Somerville Administrators Association (SAA) Collective Bargaining Agreement until the 2015-2016 school year, when his position was removed from the SAA, and he switched to individual contracts. (Ex. P6.)

5. In his 2015 employment contract, his duties included those “outlined in the job description . . . or . . . assigned by the Superintendent.” The contract provided that the

work day shall consist of at least eight (8) hours, which shall include the hours of the normal school day and such times as the Superintendent may schedule. The Director shall be expected to perform, without additional compensation, the duties of the job as may be required in the evening or otherwise outside of the typical work day.

(Ex. P8.)

6. During the 2015-2016 school year, a new superintendent, Mary Skipper, began. She added new initiatives focusing on mental health and put Mr. Melillo in charge of building, managing, and supporting “Social and Emotional Learning” programs. (Ex. P3.)

7. Mr. Melillo’s salary for the period of July 1, 2015 through June 30, 2016 was \$113,174.00 plus a \$4,000.00 longevity bonus, for a total salary of \$117,174.00.

(Ex. R2.)

8. For the 2015-2016 school year, Mr. Melillo’s work year was increased from 213 workdays to 260 workdays each year. For the remainder of his employment at Somerville, his year consisted of 260 workdays. (Ex. P6.)

9. Mr. Melillo’s salary for the period of July 1, 2016 through June 30, 2017 was \$120,000.00 plus a \$4,000.00 longevity bonus, for a total salary of \$124,000.00. (Ex.

R2.)

10. In the June 22, 2016 Somerville School Committee meeting, Superintendent Skipper requested a 3% salary increase for all non-union employees. She also asked for a larger salary adjustment for several positions “to attract and retain employees” and for internal equity issues. (Ex. P12.)

11. According to the salary recommendations presented to the committee, the reason for the Director of Student Services’ July 2016 pay adjustment being larger than 3% was: “internal/external equity; JD¹ tweaks.” (Ex. P11.)

12. During the 2016-2017 school year, Mr. Melillo began to work as the “closer” for the after-school program. This duty required him to close out the day and ensure that all students were dismissed and delivered to their homes and buses. It required Mr. Melillo to remain in the district until at least 6:30 P.M., adding 1 to 2 hours per workday. (Ex. P3.)

13. Mr. Melillo’s salary for the period of July 1, 2017 through June 30, 2018 was \$132,000.00 with a \$4,000.00 longevity bonus, for a total salary of \$136,000.00. (Ex. R2.)

14. In the May 22, 2017, Somerville School Committee meeting, Superintendent Skipper requested a 3% salary increase across the board for non-union members, as well as permission to negotiate a higher salary with employees who have “increased workloads and responsibilities.” (Ex. P13.)

¹ There is no explanation in the three salary recommendations as to the meaning of “JD” in the reasoning column. In his letter to MTRS, Somerville Director of Operations Joseph Tringale states that the non-union adjustment recommendations “were made for various reasons (i.e. internal / external equity, recruitment, retention, reorganization, merit, job description changes, etc.)” (Ex. P6.) This suggests that “JD” may mean that there was a change in job description.

15. In the May 31, 2017, Somerville School Committee meeting, Superintendent Skipper's salary adjustment request was approved. In the minutes of the meeting the reason listed for the specified adjustments was that "most were very underpaid and that work responsibilities have already changed and many will continue to change." (Ex. P14.)

16. According to the salary recommendations presented to the School Committee, the Director of Student Services received a pay adjustment larger than 3% "to maintain internal and external equity/competitiveness." (Ex. P15.)

17. On June 7, 2017, the Director of Student Services job description was updated. It had been last updated in May 2010. The 2017 job description listed 26 bulleted duties and responsibilities compared to the 2010 description's 13. (Ex. P2.)

18. The 2017 job descriptions bulleted duties and responsibilities were:

- ***Under the direction of Superintendent of Schools, monitor, support and enforce district goals relative to student health and safety and monitor facilities safely;***
- Coordinates Mental Health Supports including: PETRA assessment, clinical assessments, and referrals to outside vendors for embedded therapy and group therapy;
- Coordinates and supports weekly school based Student Support Teams ensuring consistency with policy, procedures, agenda and norms;
- Coordinates and supervises .4 Substance Abuse Counselor. Providing the District with initial assessments referrals and group counseling;
- ***Supports district personnel and building principals with all issues related to attendance and discipline;***
- ***Supervises and supports the Assistant Director of Student Services and Supervisors of Attendance;***
- ***Addresses and responds to parent complaints;***
- Acts as District coordinator for 504 Accommodation Process, including eligibility, plans, policies and procedures;
- ***Prepare and presents reports concerning student attendance for appropriate school and state agencies;***
- Coordinates DESE mandated Truancy Prevention Program;

- ***Performs quality assurance reviews of documentation, reports and files assembled by others that are used for formal hearings and proceedings;***
- Provides Administrator and Staff Trainings regarding Federal and State Mandates including: Bullying Prevention and Intervention, Lockdown, 51A, Chapter 222, OCR 504 Accommodation procedures, Child Find, SST and SEL related;
- ***Acts a liaison to Law Enforcement agencies and other agencies;***
- ***Investigates complaints of student absence, neglect or abuse from public agencies and others;***
- ***Reviews, revises, recommends and disseminates system-level goals and objectives as they pertain to student services;***
- Supports the Superintendent of Schools in District discipline appeals for 37H, 37H1/2 and 37H3/4 hearings in compliance with Chapter 222;
- Acts as Appellate for all intra-district residency investigative hearings;
- Acts as coordinator for Emergency Preparedness, including safety, lockdowns and fire drills, District is committed to 80 individual school safety drills;
- Coordinates Drop-out Prevention Program, including submission for all DESE SIMS reporting in October, March and June, of known drop-outs and potential drop-outs. Prevention Program includes daily student tracking, monitoring and re-engagement procedures; Implemented 2016-2017
- RE Extended Learning Program management.; process all applications, placement, screening, student & parent interviews. Managed program enrollment;
- Registration and Enrollment: assists Parent Information Director with new students and inter-district transfers. Conducts parent and student interviews and assist with school placement;
- Food Services support: regarding ineligible applicants for free or reduced lunch. Conducts all free and reduced lunch appeals;
- Coordinate all General Education Referrals to alternative programming, including ELP, FC and NW;
- Provides and facilitates, along with SST staff, District Professional Development Trainings, including: Bullying, 51A, 504, Child Find, Lockdown, SST meetings, De-escalation, SEL, Cyber-safety, Vaping education and prevention;
- Building Security: consult with DPW, SPD and outside security vendors to ensure safe and secure building access through updated technology support i.e. Cameras, buzzers, monitors
- ***Perform other tasks as assigned by Superintendent of Schools or his/her designee***

(Exs. P4, P5.) (Bold, italicized duties were also included in the 2010 job description.)

19. The 2010 job description listed the following duties that were not specifically included in the 2017 job description:

- Act as liaison with City Health Department officials and School Nurses
- Act as liaison with City Crossing guards and School Officials
- Serve as team facilitator on projects or task forces designed to enhance student services.

(Exs. P4, P5.)

20. Mr. Melillo’s July 1, 2017 employment contract listed job duties as: “those outlined in the job description that is attached . . . or are assigned by the Superintendent.” The 2017 job description was attached. His “Work Day” was stated as:

The regular work day shall consist of at least eight (8) hours, which shall include the hours of the normal school day and such times as the Superintendent may schedule. The Director shall be expected to perform, without additional compensation, the duties of the job as may be required in the evening or otherwise outside of the typical work day.

(Ex. P16.)

21. Mr. Melillo’s salary for the period of July 1, 2018 through June 30, 2019 was \$145,200.00 with a \$5,000.00 longevity bonus, for a total salary of \$150,200.00.

(Ex. R2.)

22. According to the salary recommendation list submitted to the School Committee, the reason for the Director of Student Services 2018-2019 pay adjustment was: “Internal equity; JD.” (Ex. P17.)

23. On March 12, 2019, Mr. Melillo informed Superintendent Skipper of his intention to retire on June 28, 2019. (Ex. P7.)

24. To determine Mr. Melillo’s yearly retirement allowance, MTRS used the average annual rate of regular compensation for his last three years (2016-2017, 2017-

2018, and 2018-2019) that he worked, which were also his highest three years of salary.
(Ex. R1.)

25. On October 27, 2021, MTRS notified Mr. Melillo that his 2017-2018 regular compensation of \$136,000.00 exceeded the average of the prior two years (\$120,587.00) by more than 10% (110% of the prior two-year average being \$132,645.70). MTRS found that Mr. Melillo’s 2018-2019 regular compensation of \$150,200.00 exceeded the average of the prior two years (\$130,000.00) by more than 10% (110% of the prior two-year average being \$143,000.00). Accordingly, MTRS applied the anti-spiking limit, which reduced the regular compensation used to determine Mr. Melillo’s retirement allowance by \$3,354.30 in 2017-2018 and \$7,200.00 in 2018-2019.² (Ex. R1.)

26. On November 8, 2021, Mr. Melillo timely appealed MTRS’s decision.
(Ex. P1.)

CONCLUSION AND ORDER

MTRS’s application of the “anti-spiking” provision, G.L. c. 32, § 5(2)(f), which required it to reduce Mr. Melillo’s 2017-2018 and 2018-2019 regular compensation when calculating his retirement allowance, is affirmed.

For members like Mr. Melillo, 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 Mr.

² For the 2015-2016 school year, MTRS determined that Mr. Melillo had a bona fide change in position because his job required him to work the entire year instead of just the “school year” as he had before. Accordingly, when MTRS performed its anti-spiking calculation for 2016-2017, it used his actual salary of \$117,174.00 for 2015-2016 and assigned the same salary to 2014-2015. (Ex. R2.)

Melillo, these were the fiscal years 2016-2017, 2017-2018, and 2018-2019, during which time his regular compensation was \$124,000.00, \$136,000.00, and \$150,200.00, respectively.

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.

Mr. Melillo’s salary from July 1, 2017 to June 30, 2018 was \$136,000.00. The average regular compensation for the two prior years, July 1, 2015 to June 30, 2017, was \$120,587.00, a 10% increase to this average is \$132,645.70. Mr. Melillo’s salary from July 1, 2018 to June 30, 2019 was \$150,200.00. The average regular compensation for the two prior years, July 1, 2016 to June 30, 2018, was \$130,000.00, making the 10% increase to this average \$143,000.00. Both the 2017-2018 and 2018-2019 salaries exceed the 10% limit imposed by the anti-spiking statute. Accordingly, MTRS reduced the salary for those years by \$3,354.30 and \$7,200.00, respectively, when it calculated Mr. Melillo’s retirement allowance. These mathematical calculations are not in dispute.

There are several exceptions to the anti-spiking provision’s limits, however. Mr. Melillo argues that two of these exceptions, (1) an increase in regular compensation due to an increase in hours of employment and (2) a bona fide change in position, apply to him. For the reasons explained below, Mr. Melillo does not qualify for any of these exceptions. *See* G.L. c. 32, § 5(2)(f).

First, the exception to an “increase in work hours” generally does not apply to managers or other employees whose hours of employment are not fixed. *Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021). Mr. Melillo did not have fixed work hours. He was

the Director of Student Services, and his employment contract explicitly states that his workday was “at least eight (8) hours” and he was expected to perform “the duties of the job as may be required in the evening or otherwise outside of the typical work day.”

Second, because the changes in his duties did not amount to a “bona fide change in position,” that exception is inapplicable. A “bona fide change in position” can occur even without a change to an official, payroll title. *Stanton v. State Bd. of Retirement*, CR-18-399 (DALA Aug. 20, 2021). However, DALA has consistently held that merely assuming additional responsibilities is not sufficient to claim this exception unless the character of the work has changed in an essential way. *See, e.g., Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021); *Jenal v. State Bd. of Retirement*, CR-17-1054 (DALA May 29, 2020); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Dacri v. State Bd. of Retirement*, CR-17-627 (DALA May 31, 2019). Moreover, when there is a bona fide change in position, the exception applies only in the year the member changes position, not any preceding or following years. PERAC Memorandum #16/2014. Here, Mr. Melillo’s position underwent change several times. The question is whether the changes changed the character of his work in an essential way.

Looking at the 2010 job description, Mr. Melillo’s duties centered around attendance and discipline; health and safety; law enforcement and security; and review regarding hearings and proceedings. The 2017 job description included and expanded on these duties. These expansions included an increased focus on mental health, social and emotional learning, and the reduction of dropouts. The 2017 description also included an additional set of duties involving student enrollment and placement. It is unclear whether

Mr. Melillo took on the additional duties when he started working for the full year or at a later date.

Because the Director of Student Services position was removed from the SAA collective bargaining agreement and the position became a full-year position (increase from 213 to 260 days per year), MTRS determined that Mr. Melillo qualified for a bona fide change in position exemption in the 2015-2016 school year. From that point forward Mr. Melillo's duties may have expanded in subsequent years; however, his expanded duties were always consistent with the work of a Director of Student Services. Consequently, he did not have a bona fide change in position.

For the above-stated reasons, I conclude that MTRS correctly applied G.L. c. 32, § 5(2)(f) in its calculation of Mr. Melillo's retirement allowance. The decision of MTRS is therefore affirmed. MTRS is directed to return to Mr. Melillo, with interest, any excess withholdings.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: June 23, 2023