

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

John Miller,
Petitioner

v.

Docket No. CR-21-0099

Date: February 9, 2024

North Attleboro Retirement Board,
Respondent

Appearance for Petitioner:

Derek Moitoso, Esq.
10 Monroe Drive
Acton, MA 01720

Appearance for Respondent:

James H. Quirk, Jr., Esq.
P.O. Box 268
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Administrative Magistrate:

James P. Rooney

Summary of Decision

Retired member who had waived his pension in 2020 was ineligible to take advantage of a 2020 act of the legislature that waived for that year the hours and earnings limitation on retired employees who had resumed work in the public sector because the exemption was limited to retired employees "receiving a pension," which this retired employee was not.

DECISION

John Miller, who retired from a municipal electric department and later returned to work for that department under a pension waiver, sought to have the North Attleboro Retirement Board allow him to retroactively remove his waiver to take advantage of a Covid-era provision that allowed retired public employees who were receiving a pension to resume public employment

during the public health crisis Governor Baker had declared and not be subject to the earnings limitations in M.G.L. c 32, § 91(b). The Retirement Board declined Mr. Miller's request. He filed a timely appeal.

I scheduled this matter for a hearing on April 26, 2023. Prior to the hearing, the parties agreed to have the appeal decided on the papers. The parties had already filed a joint prehearing memorandum that contained a stipulation of facts. They attached four exhibits to the memo. (Exs. 1-4). I mark this memo as Pleading A. I gave the parties an opportunity to supplement this filing. Board counsel declined the invitation. Mr. Miller's attorney filed an additional memorandum of law; he did not add any additional exhibits. I mark this document as Pleading B.

Findings of Fact

Based on the exhibits presented, the stipulations of fact, and reasonable inferences from them, I make the following findings of fact:

1. John Miller worked for the North Attleboro Electric Department from 1971 to 1999 when his position was eliminated. He took superannuation retirement with a termination allowance. (Stipulations 1-3.)
2. In August 2007, Mr. Miller was re-employed by the Electric Department. He filed a waiver of his retirement allowance once he reached the 960 hours he was allowed to work as a retiree and continued to do so every year from 2008 to 2019.¹ (Stipulations 4-5.)

¹ This aspect of Mr. Miller's approach to his re-employment is not a subject of this appeal. I note that when his attorney asked PERAC's opinion on the legitimacy of Mr. Miller working up to the hours limitation placed on re-employed retirees at M.G.L. c. 32, § 91(b) and

3. On March 10, 2020, Governor Baker declared a public health emergency because of the Covid epidemic. That same day, the legislature passed a bill providing that the hours and earnings limitation of Sections 91(b) and (c) would not apply during 2020 to “any person who has been retired and who is receiving a pension or retirement allowance.” Acts of 2020, Chapter 53, § 14. Members on disability retirement would not be allowed to take advantage of this enactment. *Id.*

4. Mr. Miller had waived his 2020 pension before the March 10, 2020 effective date of Chapter 53, § 14.² (Stipulation 7.) Mr. Miller asked the North Attleboro Retirement Board to retroactively reinstate his pension for 2020 to the effective date of Chapter 53, § 14. (Stipulation 8.)

5. In December 2020, Board counsel informed the Board that because Mr. Miller was not receiving a pension on March 10, 2020, he did not qualify under Chapter 53, § 14 for an exception from the hours and earnings limitations stated in Section 91(b). (Exs. 1 and 2.)

6. On January 13, 2021, Mr. Miller asked PERAC to opine on the impact of Chapter 53, § 14 to his situation. PERAC responded:

Mr. Miller is able to take advantage of Chapter 53, § 14 of the Acts of 2020, which was enacted in response to the Governor’s State of Emergency declared on March 10, 2020. . . . Mr. Miller is entitled to take advantage of this legislation, so long as he is not a

then waiving his pension, PERAC opined that “a retiree is not entitled to an annual waiver of their retirement allowance in order to avoid the earnings and hours restrictions of G.L. c. 32, § 91.” (Ex. 4.)

² It is hard to see how he could have run up against the 960 hour limit by early March. It may be that he had waived his pension from the beginning of the year. However it happened, the parties agree that he had waived his pension before March 10, 2020.

disability retiree.

(Ex. 4.)

7. The Retirement Board declined to grant Mr. Miller the exception he sought.³ (Exs. 1 and 2.) He appealed the Board's action. (Ex. 3.)

Discussion

When Mr. Miller retired, a retired public employee receiving a pension who resumed work for a public employer was limited to working 960 hours in any calendar year. Furthermore, the earnings he received that year from public employment when added to his pension could not exceed the salary that was being paid for the position from which the member retired plus \$15,000. M.G.L. c. 91(b). A retiree who wished to resume public employment that would take him beyond the allowable hours or the earnings limitation could do so by waiving his pension during the period of such work. M.G.L. c. 32, § 90B.

Chapter 53 of the Acts of 2020 waived the restriction of M.G.L. c. 91(b) for 2020 for two classes of persons: "any person who has been retired and who is receiving a pension or retirement allowance" and "any person whose [public] employment . . . has been terminated . . . by reason of having attained an age specified in said general or special law." Acts of 2020, Chapter 53, § 14.⁴

³ The record contains two nearly identical denial letters, one dated January 29, 2021 and the other dated February 10, 2021. The only difference is the address listed for Mr. Miller. I assume the address on the second letter is correct.

⁴ Similar acts were passed in 2021 and 2022. I offer no opinion on whether Mr. Miller qualified for an exemption in those years.

This Act did not mention those who had waived their pension benefits. This does not appear to be an oversight. The evident intent of Section 14 of Chapter 53 was to allow public employers to quickly fill empty positions that were vital to addressing the Covid epidemic. Therefore, the Act focused on retired employees who were receiving a pension and thus were either not working at all in the public sector or working only part-time and those who could no longer be employed in the public sector because they had reached the maximum age for their position. There was no evident need to lure someone like Mr. Miller back to work in the public sector because he had already waived his pension and was working full-time, or at least working in excess of 960 hours per year. Thus, the legislature had reason not to include retirees who had waived their 2020 pension in this Act.

PERAC has told Mr. Miller's attorney that it read the Act as applying to Mr. Miller, and thus he could work in excess of 960 hours in 2020 and still receive his full pension. While I respect PERAC's role administering the public employee retirement system, PERAC did not state any basis for reaching this conclusion. I can find no support in the language of the Act for this conclusion.

Mr. Miller's counsel, when quoting the Act in its entirety, includes a final paragraph of Chapter 53, § 14 that reads:

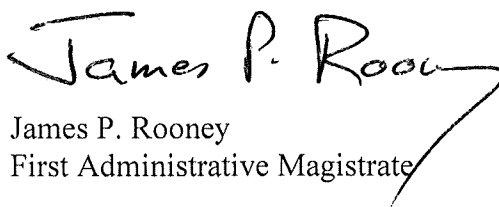
Therefore, during the Commonwealth's State of Emergency, the hours and earnings of retired public employees working in the public sector shall not be included in the calendar year 2020 restrictions found in Section 91 of Chapter 31 of the Massachusetts General Laws.

I have reviewed the text of the Act on the Commonwealth's website and do not see this

paragraph included in Section 14.⁵ Assuming that it is somewhere in the Act, it does not support PERAC's position. Read literally, it would appear to apply the exemption from the hours and earnings limits of M.G.L. c. 32, § 91(b) to any retired public employee working in the public sector in 2020. But such a reading would vitiate the legislature's decision to allow only two categories of former public employees to resume full-time work in the public sector without running afoul of the hours and earnings restriction of Section 91(b) and to exclude employees retired on disability from eligibility at all for this temporary benefit. This general statement cannot thus be read as a back door to allow Mr. Miller to take advantage of the exemption from Section 91(b)'s hours and earning limitations when the specific language allows the exemption only to retirees receiving a pension in 2020. This excluded Mr. Miller because he waived his pension for 2020.

Accordingly, I affirm the North Attleboro Retirement Board's decision.

DIVISION OF ADMINISTRATIVE LAW APPEALS


James P. Rooney
First Administrative Magistrate

Dated: February 9, 2024

⁵ <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter53>.