

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

William Mulcahy,
Petitioner

v.

Docket No. CR-09-441
Dated: May 6, 2016

Teachers' Retirement System,
Respondent

Appearance for Petitioner:

Pro se
57 Knollwood Road
Quincy, MA 02171

Appearance for Respondent:

Cristina Galica, Esq.
Associate General Counsel
Massachusetts Teachers' Retirement System
One Charles Park
Cambridge, MA 02142-1206

Administrative Magistrate:

James P. Rooney, Esq.

Summary of Decision

Enhanced longevity payments made to an employee were not regular compensation under 840 C.M.R. § 15.03(2)(c), which allowed certain enhanced longevity payment made under a collective bargaining agreement in effect on January 26, 2006 to be treated as regular compensation. The first enhanced longevity payment to Petitioner was made before a collective bargain agreement in effect on January 26, 2006 expired, but it does not qualify to be treated as regular compensation because that payment was not actually due until the 2006-2007 school year, after the 2003-2006 collective bargaining agreement had expired.

DECISION

William Mulcahy, a retired teacher, appeals, under M.G. L. c. 32, § 16(4), the refusal of

the Massachusetts Teachers' Retirement System to include in its calculation of his regular compensation three enhanced longevity payments he received from the Quincy Public School System. I stayed this appeal to await my decision in *Mateu v. Teachers' Retirement System*, which involved a similar claim by a Quincy teacher. Following the issuance of that decision, the Teachers' Retirement System filed a motion for summary decision (Pleading A) to which Mr. Mulcahy filed a brief response (Pleading B).

In ruling on the motion for summary decision, I take into account the following exhibits:

1. Collective bargaining agreement between the Quincy School Committee and the Quincy Education Association, Inc. for 2003-2006.
2. Collective bargaining agreement between the Quincy School Committee and the Quincy Education Association, Inc. for 2006-2011.
3. Plan B longevity payment application form completed by Mr. Mulcahy on October 14, 2005.
4. Letter from Quincy Public Schools to Mr. Mulcahy dated May 24, 2006.
5. Email from Quincy Public Schools Human Resources Division to Cristina Galica dated March 24, 2015.
6. Mr. Mulcahy's retirement application.
7. Emails between Quincy Public Schools Human Resources Division and Cristina Galica dated March 26-27, 2015.
8. Teachers' Retirement System's denial of longevity payments to Mr. Mulcahy as regular compensation (July 1, 2009)
9. Mr. Mulcahy's appeal.

Findings of Fact

Based on the documents submitted by the parties and reasonable inferences from them, I find the following facts to be undisputed:

1. William Mulcahy became a member of the Teachers' Retirement System in 1974 and taught in the Quincy Public Schools until his retirement in 2009. (Pleading A.)
2. From September 1, 2003, to August 31, 2006, his employment was subject to a collective bargaining agreement between the Quincy School Committee and the Quincy Education Association. Thereafter, his employment was subject to a similar collective bargaining agreement that was effective from September 1, 2006 to August 31, 2011.¹ (Exs. 1 and 2; Pleading A.)
3. Article XXX of the 2003-2006 collective bargaining agreement provided for two alternative longevity payments, Plan A and Plan B. Plan A granted specific annual payments depending on years of service. A teacher with 15 years of service would receive a \$400 annual payment, while a teacher with 20 years of service would receive a \$500 annual payment. These payments were to be made in December of each school year. Eligibility for these payments was to be "based upon a member's years of service as of September 10th of the work year of payment." (Ex. 1.) The same provision was contained in the 2006-2011 collective bargaining agreement. (Ex. 2.)
4. Plan B of both collective bargaining agreements allowed teachers who had completed 20 years of service in the Quincy Public Schools to elect three consecutive payments of \$5,000 for

¹ The 2006-2011 collective bargaining agreement combined 2006-2008 and 2008-2011 agreements. (Ex. 2.)

the first two years and \$5,500 for the last year in lieu of the annual longevity payments provided for in Plan A. Up to fifty teachers could elect Plan B in any given year with applications due by January 30th of the "school year prior to the school year in which payments are to begin." (Exs. 1 and 2.)

5. On October 14, 2005, Mr. Mulcahy completed a Plan B application form and requested that "the first payment of five thousand (\$5,000) dollars be made during the contract year 2006-2007." (Ex. 3.) By then, he had over 30 years of service in the Quincy Public Schools. (Pleading A.)

6. The Public Employee Retirement Administration Commission promulgated a regulation effective April 7, 2006 that barred payments made under supplemental longevity plans, such as Plan B of the Quincy Public School System, from being considered regular compensation for purposes of calculating retirement benefits in the future, but allowed payments begun during a collective bargaining agreement in effect on January 25, 2006 to be treated as regular compensation. 840 C.M.R. § 15.03.²

7. On May 24, 2006, the Quincy Public Schools approved Mr. Mulcahy's Plan B election. Thomas J. Walsh, the Director of Personnel, told him to expect his first payment in July or August 2006. (Ex. 4.)

8. Mr. Mulcahy received his first \$5,000 Plan B longevity payment on August 18, 2006. (Ex. 5.) He received another \$5,000 longevity payment in December of the 2007-2008 school year and a final \$5,500 longevity payment in December of the 2008-2009 school year. (Exs. 6-7.)

² I take administrative notice of the effective date of 840 C.M.R. § 15.03.

9. In 2009, Mr. Mulcahy filed an application for superannuation retirement. The Quincy Public Schools, in verifying his salary, attributed a \$5,000 longevity payment to the 2006-2007 school year, another \$5,000 longevity payment to the 2007-2008 school year, and a \$5,500 longevity payment to the 2008-2009 school year. (Ex. 6.)

10. The Teachers' Retirement System, when calculating Mr. Mulcahy's retirement benefit, considered his salary in the last three school years he worked. It did not include the \$15,500 in Plan B longevity payments he received in those years. (Ex. 8.)

11. On July 1, 2009, the Retirement System informed Mr. Mulcahy that it would not be including his Plan B longevity payments in the calculation of his retirement benefit. (Ex. 8.) Mr. Mulcahy timely appealed. (Ex. 9.)

Discussion

The retirement benefit of a public employee who retires for superannuation depends in part on his average annual rate of "regular compensation" received "during any period of three consecutive years of creditable service for which such rate of compensation was the highest, or on the average annual rate of regular compensation received by such member during the period or periods, whether consecutive or not, constituting his last three years of creditable service preceding retirement, whichever is the greater." M.G.L. c. 32, § 5(2)(a). Regular compensation means:

the salary, wages or other compensation in whatever form, lawfully determined for the individual service of the employee by the employing authority, not including bonus, overtime, severance pay for any and all unused sick leave, early retirement incentives, or any other payments made as a result of giving notice of retirement.

M.G.L. c. 32, § 1.

Annual longevity payments may qualify as regular compensation. *See* 840 C.M.R. § 15.03(1)(d)(v). Enhanced longevity payments that are paid for only a limited time are more problematic. In *Christensen v. Contributory Ret. App. Bd.*, 42 Mass. App. Ct. 544, 678 N.E.2d 863 (1997), the Appeals Court held that three consecutive \$3,000 annual longevity payments in lieu of smaller annual longevity payments were regular compensation because the payments were not linked to retirement. The Public Employee Retirement Administration Commission (PERAC) responded to *Christensen* by adopting a regulation that treated payments that “will recur for only a limited or definite term” as a bonus and therefore not as regular compensation. 840 C.M.R. § 15.03(2)(c).

The regulation included a grandfathering provision that allowed payments under a salary enhancement program “provided for in . . . a collective bargaining agreement in effect on or before January 26, 2006” to be treated as regular compensation. *Id.* So long as payments were begun under a collective bargaining agreement in effect on January 26, 2006, they could continue under another collective bargaining agreement and still be considered regular compensation. *Id.*

While questions have been raised about the continuing viability of *Christensen* in light of later Supreme Judicial Court decisions on regular compensation, *see Ouellette v. Teachers' Ret. Sys.*, Docket No. CR-09-210, Decision at 8 n. 2 (Mass. Divis. of Admin. Law App., Jun. 21, 2013), neither the validity of *Christensen* nor the validity of PERAC's regulatory response is before me. A properly promulgated retirement regulations has the force of law and must be adhered to in these administrative proceedings. *See Massachusetts Teachers' Ret. Sys. v.*

Contributory Ret. Appeal Bd., 466 Mass. 292, 297, 994 N.E.2d 355, 358 (2013)³.

The sole issue, then, is whether the Plan B longevity payments received by Mr. Mulcahy qualify as regular compensation under the grandfathering clause of 840 C.M.R. § 15.03(2)(c). For that to be the case, the first payment to Mr. Mulcahy must have been made during the period covered by the 2003-2006 collective bargaining agreement and in accordance with its terms.

Similar issues were presented in *Oullette* and in *Mateu*. *Oulette* addressed enhanced longevity payments made to Fall River teachers under a 2003-2006 collective bargaining agreement. Each petitioning teacher received an initial longevity payment in August 2006, before the 2003-2006 collective bargaining agreement expired, but for the 2006-2007 school year, which was governed by a later collective bargaining agreement. These payments were held not to be regular compensation because the petitioners, who had elected enhanced longevity benefits in the 2005-2006 school year, were not entitled under the collective bargaining agreement to receive such payments until the following school year. The election form they signed stated as much. That the actual payment was accelerated into the final month of the 2003-

³ *MTRS v. CRAB* concerned a regulation adopted by MTRS that CRAB declined to follow. The Supreme Judicial Court, when commenting on its role in reviewing the regulation, declared:

Because it is undisputed that MTRS has the authority to promulgate regulations interpreting G.L. c. 32, § 4(1) (h ½), subject to PERAC approval, and there is no claim that the regulation was not properly promulgated, our focus is on whether 807 Code Mass. Regs. § 14.05 reflects a reasonable interpretation of the statute. If the regulation provides a reasonable resolution, an adjudicating agency such as CRAB has an obligation to follow it.

466 Mass. at 297, 994 N.E.2d at 358 (citations omitted). The reasonableness of a regulation is something for the courts to consider when a regulation is challenged. DALA does not have the jurisdiction to rule on challenges to regulations.

2006 collective bargain agreement did not benefit petitioners because, per 840 C.M.R. § 15.03(1)(c), lump sum payments are to be allocated to the period when the services they are payment for were actually rendered rather than the period when the payment was made. *Oullette* at 11 and 12.

Mateu dealt with the Quincy Public Schools' Plan B. Ms. Mateu signed up for Plan B longevity payments in January 2006 with her first payment due in the 2006-2007 school year. That first payment was made in August 2006 while the 2003-2006 collective bargaining agreement was still in force. Nevertheless, I held that this payment was not regular compensation because it did not comply with the terms of the collective bargaining agreement. First, she would not have been eligible for the Plan B program until she had completed twenty years of service, which would not have been the case until the 2006-2007 school year. Second, the contract called for the first payment to be made in the school year following the year in which the member signed up for the plan. *Mateu v. Teachers' Retirement System*, Docket No. CR-08-808 (Mass. Divis. of Admin. Law App., July 14, 2014).

Here, Mr. Mulcahy, like Ms. Mateu, received his first Plan B longevity payment on August 18, 2006, during the term of the 2003-2006 collective bargaining agreement. Although the timing of this payment meets one of the terms of the grandfathering clause, Mr. Mulcahy cannot prevail because the payment was not made consistent with the collective bargaining agreement, which is the other prerequisite to eligibility under the grandfathering clause. Unlike Ms. Mateu, there is no question that Mr. Mulcahy was eligible for a Plan B longevity payment when he signed up because he had already completed 20 years of service in the Quincy Public Schools. But this alone does not help him for, per the collective bargaining agreement, when he

signed up during the 2005-2006 school year, he was not eligible to receive a Plan B longevity payment until the following school year. This first payment would properly have come after the collective bargaining agreement in effect on January 26, 2006 had expired, and hence would have been made too late to meet the terms of the grandfathering clause. That it was actually paid early does not change the result. As explained in *Mateu*:

The grandfathering clause does not specifically address whether a payment accelerated into a period covered by a collective bargaining agreement in effect on January 26, 2006 would count as regular compensation. I take the requirement in the grandfathering clause that the payment be one provided for in the collective bargaining agreement to mean that the payment must be fully consistent with the bargaining agreement's terms. Given the general proposition that an exception to a statutory or regulatory provision should be read narrowly, if the collective bargaining agreement provided that certain payments were due in a particular school year and it did not include a provision allowing accelerated payment, then the payment, whenever made, should, under the collective bargaining agreement, be attributed to the school year in which it was due.

Decision at 8, n. 2. Consequently, the acceleration of the first payment to August 2006 does not affect the proper attribution of this payment to the 2006-2007 school year, and thus the ineligibility of any of the longevity payments made to Mr. Mulcahy from 2006 through 2009 to be treated as regular compensation. I thus must grant summary decision to the Teachers' Retirement System and affirm its decision to decline to treat the \$15,500 in enhanced longevity payments to Mr. Mulcahy received during 2006-2009 as regular compensation.

Mr. Mulcahy objects that he was not given notice of this possible consequence when he made his decision to seek Plan B longevity payments, and that, had he been aware that these payments might not count as regular compensation, he might have retired at a different time. (Pleading B.) Mr. Mulcahy's objection is understandable for the PERAC regulation that precludes the longevity payment made to him from treatment as regular compensation went into

effect after he signed up for Plan B. Still, it was in effect by the time his participation in Plan B was approved by the Quincy Public Schools. Mr. Mulcahy could have contacted the Teachers' Retirement System to ask how it intended to approach the new regulation and whether it intended to consider payments made under an enhanced longevity plan as regular compensation.⁴ The Quincy Public Schools had informed him that he had until June 23, 2006 to change his mind and opt out of Plan B. (Ex. 4.) He could also have contacted the Retirement System later and asked whether it intended to treat the longevity payments as regular compensation, and taken any response he had received into account when making his decision about when to retire.

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James P. Rooney
First Administrative Magistrate

Dated: May 6, 2016

⁴ The decision of the Quincy Public Schools to make the first Plan B payment to Mr. Mulcahy in August 2006, rather than in December when the other two payments were made, suggests that the school system was trying to find a way for Plan B longevity payments to qualify as regular compensation. Members would be well advised to consult with their retirement boards about such questions, rather than their employers, for it is the boards that administer the retirement statute. The enhanced longevity payment situation is illustrative. Not only has Quincy's effort to comply with the grandfathering clause failed, another employer's effort to comply with the grandfathering clause by amending an existing collective bargaining agreement to provide for receipt of the first payment in the year when a request for enhanced longevity payments was made failed as well. *See Russell v. Mass. Teachers Retirement System*, Docket No. CR-09-695 (Mass. Divis. of Admin. Law App. Nov. 21, 2014).