

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kevin O'Brien,
Petitioner

v.

Docket No. CR-19-0632
Date Issued: July 21, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

John O. Killian, Esq.
McDonald Lamond Canzoneri
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Appearance for Respondent:

James H. Salvie, Esq.
State Board of Retirement
One Winter Street, 8th Floor
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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

Petitioner, a retired correctional officer, appeals the State Board's exclusion of holiday pay from the calculation of his accidental disability retirement (ADR) allowance. Petitioner's allowance was based on the annual rate of regular compensation on his date of injury. G.L. c. 32, § 7(2)(a)(ii). While holiday pay to correctional officers is now considered regular compensation, *see* G.L. c. 32, § 1, it was excluded from regular compensation until the law was changed approximately two months before his last day of work. *See* Acts 2011, c. 176, § 7. Petitioner received no holiday pay during those two months. Holiday pay received before the change in the law does not qualify and was therefore properly excluded from Petitioner's allowance calculation.

DECISION

Petitioner Kevin O'Brien appeals from Respondent State Board of Retirement's decision to exclude holiday pay from the calculation of his accidental disability retirement allowance. On February 25, 2020, Mr. O'Brien requested that DALA expedite his appeal, attaching several supporting documents. On September 3, 2020, DALA allowed the request, mistakenly joined PERAC as a party (assuming that this appeal was regarding excess earnings under G.L. c. 32, § 91A), and suggested that the matter could be decided on written submissions under 801 CMR 1.01(10)(c). On Nov 20, 2020, the Board moved to dismiss PERAC, which DALA allowed. On December 18, 2020, Mr. O'Brien submitted a pre-hearing memorandum and 9 proposed exhibits, pre-marked A through I. On January 14, 2021, the Board submitted its pre-hearing memorandum. DALA scheduled a hearing for November 15, 2022. On October 27, 2022, Mr. O'Brien elected to waive the hearing and proceed on the papers. On October 31, 2022, the parties submitted 12 stipulated facts. On December 16, 2022, the parties each submitted additional memoranda of law. Mr. O'Brien re-submitted his nine proposed exhibits. The Board submitted no additional proposed exhibits. I entered the 9 proposed exhibits into evidence as marked. (Exs. A-I.) I have additionally marked the Board's decision letter and Mr. O'Brien's appeal letter as Ex. J.

FINDINGS OF FACT

Based on the parties' stipulations and written submissions, I make the following findings of fact:

1. Kevin O'Brien was born in 1963. He started working as a correctional officer with the Massachusetts Department of Corrections in 1986 when he also became a member of the State Employees' Retirement System. (Stipulation.)

2. Mr. O'Brien suffered an accident at work on April 12, 2012 shortly before 7:00 a.m. while he was working the 11:00 p.m. to 7:00 a.m. shift. It was not a holiday. It was Mr. O'Brien's last day at work. (Stipulation; Ex. B.)

3. Mr. O'Brien filed an application for accidental disability retirement on October 1, 2013. (Stipulation; Ex. B.)

4. The Department supplied payroll information for Mr. O'Brien. In addition to his base salary, Mr. O'Brien received "extra" pay in his last several years of active service: shift differential, longevity, roll call, and holiday pay. (Stipulation; Ex. C.)

5. On May 29, 2014, the State Board of Retirement approved Mr. O'Brien's application for accidental disability retirement. (Ex. A.)

6. The Board based its calculation of Mr. O'Brien's retirement allowance on the annual rate of regular compensation he was receiving on the date the injury was sustained. Petitioner disputed the calculation. After some adjustments to its original calculation, the Board's calculation now *includes* longevity pay, shift differential, and roll call pay (compensation at a regular rate for arriving ten minutes before the assigned shift to ensure the timely relief of officers working preceding shifts). It *does not*, however, *include* holiday pay. Consequently, the only dispute left is over holiday pay. (Exs. E, F, G, H, I.)

7. The controlling collective bargaining agreement has several provisions that address holiday pay. Holiday pay is an extra day's pay, which a correction officer

could receive if either (a) a holiday occurred on a day that he was not scheduled to work; or (b) if a holiday occurred on a day he was scheduled to work, and he was therefore not allowed to take that day off. (Ex. I, Article 10, §§ 4, 5.)

8. Mr. O'Brien earned the following amounts of holiday pay for the last six years of his service as a correctional officer: \$1,297.87 in 2007; \$2,811.01 in 2008, \$1,672.23 in 2009; \$477.78 in 2010; \$721.45 in 2011; \$0.00 in 2012. The dates of the holidays Mr. O'Brien worked and the titles of those holidays are not in evidence. (Exs. C, E.)

9. On December 6, 2019, the Board sent a letter to Mr. O'Brien explaining how his accidental disability retirement allowance was calculated. It also discussed an issue of excess earnings under G.L. c. 32, § 91A unrelated to this appeal. The letter did not provide appeal rights. (Ex. F.)

10. On December 19, 2019, the Board issued a decision letter with appeal rights that covered the calculation of the retirement allowance. (Ex. G.)

11. On December 30, 2019, Mr. O'Brien filed a timely appeal.

CONCLUSION AND ORDER

The parties to this appeal dispute whether holiday pay should be included in the calculation of Mr. O'Brien's accidental disability retirement allowance.

The amount of an ADR allowance is determined by G.L. c. 32, § 7(2)(a)(ii), which provides that it is the higher of either (1) "the *annual rate* of his regular compensation *on the date such injury was sustained or such hazard was undergone*;" or (2) "the average annual rate of his regular compensation for the 12-month period for which he last received regular compensation immediately preceding the date his

retirement allowance becomes effective.” The first alternative pegged to the date of injury is usually the higher one because most employees’ compensation increases over time.

To be included in the calculation, holiday pay has to be regular compensation. G.L. c. 32, § 1 provides in the definition of “wages,” that wages, and therefore regular compensation, does not normally include “amounts paid as premiums for working holidays.” This definition provides an exception, however, for certain classes of employees, i.e. “police officers, firefighters, *correctional officers* and employees of [certain municipal departments]” for whom amounts paid “for working holidays” is regular compensation. (Emphasis added.) However, correctional officers were not included in this exception until they were added by Acts 2011, c. 176, § 7. This amendment was effective February 16, 2012.¹ Thus, holiday pay became regular compensation for correctional officers on or around February 16, 2012, roughly two months before Mr. O’Brien’s last day of work on April 12, 2012.

There is no dispute that the Board used the first alternative (pegged to the date he sustained his injury) to calculate Mr. O’Brien’s allowance, and the date it used was his date of injury: April 12, 2012. There is likewise no dispute that the Board used an annualized rate that included the three forms of “extra pay” that he received on the date of his injury—longevity, roll call, and shift differential—as well as his regular salary.

¹ Acts 2011, c. 176 was approved by the governor on November 16, 2011. Without an emergency preamble or specially designated effective date, legislative enactments become effective 90 days after approval by the governor. Mass. Const. art. 48, The Referendum, I; *see also Commonwealth v. Yee*, 361 Mass. 533, 537, 538-539 (1972). Since neither exception applies to c. 176, § 7, it became effective 90 days after November 16, 2011, which was February 16, 2012.

Mr. O'Brien does not dispute the Board's calculation except to the extent it did not include holiday pay. The parties also do not dispute that April 12, 2012 was not a holiday and that Mr. O'Brien did not get any holiday pay on that date or any day after February 16, 2012.

Mr. O'Brien's argument seems to be that the holiday pay of \$721.45 that he received in calendar year 2011 should be included in the "annual rate of his regular compensation" that is used when calculating the allowance based on the date that he sustained his injury. The problem with this argument is that it completely ignores the fact that holiday pay for correctional officers earned before February 16, 2012 is not regular compensation and therefore cannot be included in the annual rate that is part of the allowance calculation. Just because Mr. O'Brien received some holiday pay in his last 12 months at work does not mean that the "annual rate of regular compensation" should include that holiday pay when, as here, it is expressly excluded from regular compensation. While it was *possible* that Mr. O'Brien could have included holiday pay that he received after February 16, 2012 in his retirement calculation, he did not actually receive any holiday pay during that period.

For the above-stated reasons, the Board's exclusion of holiday pay from the calculation of Mr. O'Brien's retirement allowance is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: July 21, 2023