COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Richard Ormond,
Petitioner,

v.

Greenfield Retirement Board,
Respondent.

No. CR-23-0412

Dated: September 13, 2024

Appearances:
For Petitioner: Mr. Sol Fedder
For Respondent: Thomas F. Gibson, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner's employer terminated his employment. A subsequent settlement agreement rescinded the termination, required the petitioner to resign, and awarded him four months' worth of backpay. Because the petitioner's backpay was tied into his resignation and retirement, it did not qualify as regular compensation for retirement purposes.

DECISION

Petitioner Richard Ormond appeals from a decision of the Greenfield Retirement Board (board) declining to grant him retirement credit for the period August-December 2022. The appeal was submitted on the papers without objection. *See* standard rule 10(c).[1] I admit into evidence exhibits marked 1-9.

Findings of Fact

I find the following facts:

[1] In accordance with G.L. c. 30A, § 9, the "standard rules" in this context are the provisions of 801 C.M.R. § 1.01.

1. The city of Greenfield employed Mr. Ormond in its department of public works. On August 8, 2022, the city terminated Mr. Ormond's employment. He was then sixty-three years old. He had accumulated nine years and eight months of creditable service for retirement purposes. (Exhibits 5, 7.)

2. Mr. Ormond grieved the termination decision. In March 2023, he and the city entered into a settlement agreement. Neither party admitted wrongdoing. The agreement required Mr. Ormond to withdraw his grievance, resign, and refrain from working for the city in the future. In return, the agreement said: "Mr. Ormond's termination will be reversed and he will have voluntarily retired from employment." The agreement entitled Mr. Ormond to a sum described as the equivalent of the "wages, earned leave amounts and any other compensation that Mr. Ormond would have earned during the period from August 9, 2022 to December 10, 2022." (Exhibit 4.)

3. In contemporaneous correspondence, the city's counsel asked the board to consider "whether there is a legally compliant way for the parties' settlement agreement to allow for Mr. Ormond to be eligible for retirement benefits." The city's counsel explained: "[T]he Mayor has authority to rescind and reverse a termination decision . . . . Mr. Ormond is entitled to backpay and to be made whole. . . . This agreement provides for only four months of pay to someone who had already intended to retire at that time." (Exhibit 7.)

4. On July 18, 2023, the board through its counsel issued a decision stating that Mr. Ormond is not entitled to retirement credit for the period August-December 2022. The board

took a vote to the same effect at a formal meeting on July 25, 2023. This timely appeal followed. (Exhibits 1, 2, 7.)[2]

Analysis

A public employee's benefits and eligibility to retire depend on the duration of the employee's "creditable service." Each employee is credited with the "service rendered by him as an employee . . . after becoming a member of [a pertinent] system." *Id.* § 4(1)(a). "Service" means "service as an employee . . . for which regular compensation is paid." *Id.* § 1.

The question in this appeal is whether the sum paid to Mr. Ormond under his settlement agreement counts as four months' worth of "regular compensation." This question entails two distinct lines of inquiry, both revolving around *Tarlow v. Massachusetts Teachers' Retirement System*, No. CR-10-793, 2013 WL 12629448 (CRAB Nov. 26, 2013), *aff'd*, 32 Mass. L. Rptr. 487 (Suffolk Super. 2015).

I

Generally speaking, regular compensation means "wages . . . for services performed in the course of employment." G.L. c. 32, § 1. During the period August-December 2022, Mr. Ormond did not report for work. The board therefore reasons that his settlement agreement did not compensate him "for services performed." *Id.*

The same argument was presented in *Tarlow*, where a settlement between the member and his employer "included a payment to [the member] for lost wages." *Tarlow*, *supra*, at *3.

---

[2] Mr. Ormond is justified in questioning why the board's decision letter predated its formal vote. But the de novo proceedings before DALA "cure any of the . . . agency's procedural missteps." *Wakefield Ret. Bd. v. Massachusetts Teachers' Ret. Syst.*, No. CR-22-573, 2023 WL 7018539, at *3 n.2 (DALA Oct. 20, 2023). *See* G.L. c. 30A, § 11, 2d para. The remainder of Mr. Ormond's litany of accusations against the board's counsel is unsupported and inappropriate.

The board and the DALA magistrate took the view that such a payment cannot count as regular compensation. The Contributory Retirement Appeal Board (CRAB) disagreed, writing:

> [A] back pay award . . . recognizes that the employee *should have* continued to be "regularly employed" and so the employee receives pay and benefits *as if* she had been so employed. . . . [T]he employee is treated *as if* he or she was regularly employed and earning membership service.

2013 WL 12629448, at *2 (emphases added). In this special context, the retirement law thus looks beyond the historical facts and gives effect to those that *should have* transpired. Employees may receive creditable service for periods during which they *should have* been paid for employment services. *See also Van Deventer v. State Bd. of Ret.*, No. CR-05-1370, at *3 (CRAB June 12, 2009); *Lombardini v. State Bd. of Ret.*, No. CR-18-475, at *6 (DALA July 2, 2021); PERAC Memorandum No. 28 / 2001 (Apr. 30, 2001).

The board theorizes that backpay may qualify as regular compensation "only where the employee first proves that the termination . . . was wrongful," and "not . . . where the employee voluntarily settled his claim . . . prior to any decision on the merits." As a practical matter, this theory would compel parties to litigate settleable disputes. *See Ferman v. Sturgis Cleaners, Inc.*, 481 Mass. 488, 494 (2019). In any event, the theory is foreclosed by *Tarlow*, which involved an equally voluntary settlement. CRAB explained there:

> There can be no question that a judgment entered by a court in a wrongful termination case may include an appropriate award of back pay . . . . *The same rationale applies when a governmental unit and a member of a retirement system reach a settlement agreement that includes an award of back pay.* Where the purpose of the award is to make the employee whole, the retirement system may award creditable service upon the payment of retirement contributions . . . .

2013 WL 12629448, at *2 (emphasis added). The settlement agreement between Mr. Ormond and the city was built to make Mr. Ormond whole for the four-month period that followed his

now-rescinded termination. The sum paid in connection with that period was backpay. Under *Tarlow*, such a payment may qualify as regular compensation.

II

The retirement law catalogues an array of payments that do not count as "wages" or, by extension, "regular compensation." G.L. c. 32, § 1. Included on the list are any "payment for termination, severance, [or] dismissal," as well as any "payment made as a result of the employer having knowledge of the member's retirement." *Id.* The board maintains that these provisions remove Mr. Ormond's payment under the settlement agreement from the ambit of regular compensation. On close examination, the argument is meritorious.

Tarlow is again the linchpin of the analysis. The agreement in that case paralleled Mr. Ormond's in the sense that it, too, ended the member's public employment. 2013 WL 12629448, at *1. That agreement entitled the member to two years' worth of backpay. *Id.* Two corresponding years of retirement credit would have taken the member's total amount of credit from eighteen years to twenty, thus qualifying him for a termination allowance under G.L. c. 32, § 10(2)(a). *See Tarlow*, 2013 WL 12629448, at *4.

The member in *Tarlow* specifically sought a § 10(2)(a) termination allowance. Despite *Tarlow*'s general holding that backpay may qualify as regular compensation, the member did not prevail there. For present purposes, the important reason for that result was CRAB's determination that the member's "removal or discharge was brought about by collusion," a disqualifying circumstance under G.L. c. 32, § 10(2)(c).[3] CRAB explained:

> We consider that collusion would be shown in the case where an employee and an employer cooperated to significantly extend a termination date so that the employee would . . . receive a termination allowance for which the

---

[3] The other reason was that the member was not actually terminated (involuntarily). *See Tarlow*, 2013 WL 12629448, at *3.

> employee would not otherwise have qualified. . . . [The member] and the [employer] were aware that reaching 20 years would qualify [the member] for a termination allowance. . . . [T]o the extent that [the settlement agreement] caused [the member] to reach almost exactly 20 years of creditable service, then agree to his own termination, we consider the circumstances sufficient to constitute collusion . . . .

Tarlow, 2013 WL 12629448, at *4. An implication of this analysis is that backpay will not *always* carry the same consequences that would have accompanied actual work. Rather, additional hurdles will tend to arise when a facially compensatory backpay arrangement is crafted by the negotiating parties in furtherance of a retirement-oriented goal. In *Tarlow*, the member's backpay was a component of a collusive termination scheme. Here, the critical question is whether Mr. Ormond was granted his backpay in connection with his concomitant resignation and retirement. *See Scalese v. Framingham Ret. Syst.*, No. CR-20-200, at *6 (DALA Feb. 4, 2022); *Roy v. State Bd. of Ret.*, No. CR-19-543, 2023 WL 4846317, at *10 (DALA July 21, 2023).

The issue of collusion in *Tarlow* was governed by § 10(2)(c). The controlling statute in the current context is § 1's definition of regular compensation. The considerations highlighted in *Tarlow* are nonetheless key here too. In order to qualify for superannuation retirement, Mr. Ormond needed to reach the threshold of ten years of service. *See* G.L. c. 32, §§ 5(1)(m), 10(1). At the time of his termination, he was four months shy. He and the city were laser focused on this problem. They crafted an agreement custom-built to facilitate Mr. Ormond's resignation and retirement. The agreement thus required Mr. Ormond to resign, prohibited his return to the city's employ, and selected a resignation date that carried Mr. Ormond's total retirement credit just past the ten-year mark. That date preceded the execution of the settlement agreement by four months; it would have made no apparent sense if not for the parties' wish to make Mr. Ormond retirement

eligible. *See Tarlow*, 2013 WL 12629448, at *4; *Scalese*, *supra*, at *6-7. The city's counsel was candid about these matters in his correspondence with the board.

The same fact pattern that led CRAB to discern collusion in *Tarlow* is thus present here. Its implications here are the following. To start with, Mr. Ormond's backpay was tied into his resignation and retirement; it was at least a "payment made as a result of the employer having knowledge of the member's retirement." G.L. c. 32, § 1. It follows that the backpay did not qualify as regular compensation for retirement purposes. By extension, Mr. Ormond is not entitled to creditable service in connection with the corresponding four-month period.

Conclusion and Order

In view of the foregoing, the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate