COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

JOHN OTERI, *Petitioner*	:	Docket No. CR-21-0365
	:	Date: January 26, 2024
v.	:	
MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM, *Respondent*	:	

Appearance for Petitioner:

John Oteri, *pro se*

Appearance for Respondent:

Lori Krusell, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, the Superintendent of the Malden Public Schools, notified the school committee that he would be retiring. After he gave that notification, the committee voted to give all non-union employees (which included the Petitioner) a retroactive cost of living adjustment ("COLA") for 2020-2021. Previously, the committee had also voted to give all non-union employees a retroactive COLA for 2019-2020. In that vote, they had inadvertently excluded the Petitioner. When they realized their oversight, they voted to give the Petitioner that COLA too. That vote took place one day after the Petitioner had retired. Nevertheless, his contract was amended, and his last paycheck reflected the COLA adjustment. The 2019-2020 COLA should be considered regular compensation. The 2019-2020 COLA was not given to the Petitioner "as a result of giving notice of retirement." G.L. c. 32, § 1. And whether or not he was an "employee" when the vote was taken is irrelevant.

INTRODUCTION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, John Oteri, timely appeals a decision by the Massachusetts Teachers' Retirement System ("MTRS") excluding a cost-of-living adjustment ("COLA") as "regular compensation." I held a virtual hearing on November 1, 2023 through the WebEx platform with the consent of both parties. The Petitioner was the only witness to testify. I admitted exhibits A-N into evidence without objection. The parties submitted closing memoranda on January 17, 2024 at which point I closed the administrative record.

FINDINGS OF FACT

1. The Petitioner has been a member of the MTRS since 1999. (Testimony.)
2. He worked as the Superintendent of the Malden Public Schools from July 2017 until June 2021. (Testimony; Exs. H & L.)
3. As the Superintendent, he had an individual contract with the Malden school committee ("the committee") that governed his employment. (Ex. H.)
4. In November 2020, he submitted a letter indicating he would be retiring when his contract expired in June 2021. (Ex. I.)
5. In May 2021, the committee voted to approve a 2.5% retroactive COLA for non-union employees from July 1, 2020 through June 3, 2021. The Petitioner was included in this group. (Ex. C.)
6. The next day, the Petitioner and the Chairperson of the committee signed an amendment to his contract reflecting this change. The agreement amended the section of the contract for "regular compensation" to reflect a salary increase by 2.5% effective July 1, 2020. (Ex. J.)

7. Following that May meeting, the Petitioner realized that he had not been given a COLA for the year 2019-2020 that had been provided to non-union employees. (Testimony.)

8. He was not sure whether he was the only person who did not receive this, or none of the non-union employees received it. A letter from the Mayor, who is also a member of the committee, explained that the Petitioner was the only one who did not receive this raise. He explained that the failure to give the Petitioner a COLA was "through inadvertence of the committee" and, had the committee known about the oversight when it approved other non-union COLAs in June 2021, "it seems clear that the raise would have been approved at that time." (Ex. B.)

9. The Petitioner reasonably surmises that the oversight was likely attributable to the changes on account of the COVID-pandemic. Raising the COLA was routine as evidenced by the fact that the committee had raised it for all non-union employees for 2020-2021 and for all but the Petitioner for 2019-2020. But during this time, he explained that committee meetings were virtual and there were other more pressing priorities. (Testimony.)

10. After the Petitioner brought this oversight to the committee's attention, the matter was placed on the committee's agenda. Because the committee did not have the correct documentation, it postponed a vote in June 2021 and was unable to vote on the matter until July 1, 2021. (Testimony; Exs. B, D, & E.)

11. Before they could meet, the Petitioner formally retired on June 30, 2021. (Testimony; Ex. L.)

12. The committee did meet on July 1, 2021 and voted to approve the retroactive COLA for 2019-2020. The vote was unanimous. The record reflects the COLA was "not based on merit." (Testimony; Exs. B, D, & E.)

13. The day after that, on July 2, 2021, the Petitioner and the Chairperson of the committee signed another amendment to his contract reflecting this change. The agreement amended the section of the contract for "regular compensation" to reflect a salary increase by 2.5% effective July 1, 2019. (Ex. K.)

14. After he retired, the Petitioner received one final paycheck for the last week or two of his employment. That final check included the COLA adjustment for 2019-2020. (Testimony; Ex. A.)

15. As it was processing the Petitioner's application for retirement, MTRS noticed the last salary adjustment. It declined to include the 2.5% increase in salary for the 2019-2020 school year as "regular compensation." It explained the "2.5% increase was approved after your effective retirement date and is not considered regular compensation." (Ex. M.)

DISCUSSION

MTRS makes two arguments as to why the Petitioner is not entitled to have the 2019-2020 COLA included as regular compensation: 1) it claims the payment was made "as a result of [the Petitioner] giving notice of retirement," G.L. c. 32, § 1; and 2) the payment was approved after the effective date of the Petitioner's retirement and when he was no longer an "employee."

1. <u>The payment was not as a result of giving notice of retirement.</u>

A member's retirement allowance is based, in part, on the amount of regular compensation they received prior to retiring. After June 30, 2009, regular compensation "shall be compensation received exclusively as wages by an employee for services performed in the

course of employment for his employer." G.L. c. 32, § 1. Wages, in turn are "the base salary or other base compensation of an employee paid to that employee for employment by an employer; provided, however, that 'wages' shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses." *Id.* However, wages do not include "amounts paid as early retirement incentives or any other payment made as a result of the employer having knowledge of the member's retirement." *Id.*; 807 Code Mass. Regs. § 6.02(2)(f). This exclusion is "a safeguard against the introduction into the [retirement] computations of adventitious payments to employees which could place untoward, massive, continuing burdens on the retirement systems." *Rowell, et al. v. MTRS*, CR-06-420, (DALA Mar. 13, 2009), *quoting Boston Assoc. of School Administrators & Supervisors v. Boston Ret. Bd.*, 383 Mass. 336, 341 (1981).

In the myriad cases in which DALA has excluded payments in this context, there have been factual findings tying the payments to the member's retirement. *See e.g. Ward v MTRS*, CR-15-150 (DALA Aug 9, 2019) (committee minutes indicated compensation was for "retirement purposes"); *McCaw v. MTRS*, CR-15-423 (DALA Jan. 12, 2018) (inferring payment was made as a result of giving notice); *Ryser, et al. v. MTRS*, CR-11-298, 300, 307, 320, 339, 353, 360 (DALA May 15, 2014)(CRAB Mar 31, 2016) ("teachers who confirmed that they were retiring at the end of the 2009-2010 school year received raises under an accelerated salary schedule, in effect, and teachers who were not about to retire received raises under a different schedule). But not all payments made after someone gives notice of retirement are excluded. Rather, it is only those payments made "as a result of" the employer having notice.

For example, in *Christensen v CRAB*, 42 Mass. App. Ct. 544 (1997), the teachers there received longevity bonuses after they gave notice of retirement; moreover, the amount was negotiated into the collective bargaining agreement ("CBA") also after they gave notice. Yet, the

timing of the payment and negotiation was irrelevant. What mattered, instead, was whether there was a "link between the payments and the plaintiffs' final years of employment." *Id*. at 548. Because there was no such link, the payments were considered regular compensation.

Here, the COLAs were regular, recurrent raises the committee normally gave to non-union employees. The evidence shows that these employees received the same amounts at the same time. And the amounts were not merit based. Failure to approve the Petitioner's 2019-2020 COLA was clearly an oversight. There is nothing in the committee minutes or evidence that the Petitioner's impending retirement was any consideration in approving this COLA. Moreover, this oversight took place during the beginning of the COVID pandemic. Because that caused such chaos in school systems everywhere, it corroborates the Mayor's statement that the committee would have given the Petitioner his COLA sooner had they been presented with the information. Accordingly, the committee's action was not "as a result" of having notice of the Petitioner's retirement.

MTRS asks I infer the committee ultimately approved the 2019-2020 COLA because the Petitioner gave notice of his retirement. I see no reason to draw such an inference on this record. MTRS only takes issue with the 2019-2020 COLA because the Petitioner specifically mentioned it to the committee after realizing he had not received it. If the only evidence supporting MTRS's argument is the timing of the payment, the same could be said for the 2020-2021 COLA. But MTRS does not dispute that COLA should be considered regular compensation.

2. <u>The Petitioner's status as an "employee" was irrelevant.</u>

MTRS also argues that, because the Petitioner was not an "employee" as defined by G.L. c. 32, § 1 when the committee approved the 2019-2020 COLA, the payment cannot be considered regular compensation. An employee "as applied to persons whose regular

compensation . . . is paid by any political subdivision of the commonwealth . . . shall mean any person who is regularly employed in the service of any such political subdivision[.]" MTRS agrees that, in the context of collective bargaining, an employee's entitlement to a retroactive wage increase vests when the work is performed, not when it is approved. *Carl Gunderson's Case*, 423 Mass. 642 (1996). However, it argues that because the Petitioner had an individual contract and was not part of collective bargaining, this rule excludes him.

The argument, which is not fully developed in its pleading, does not flow from the reasoning in *Gunderson*. If anything, the language in *Gunderson* supports the Petitioner's position. After Gunderson began receiving worker's compensation, his union entered into a CBA which granted union members a retroactive pay raise. The Court held the pay raise applied to Gunderson, even if he was not working when the raise was approved:

> The date on which wages are paid, therefore, must be distinguished from the date on which they are earned. The right to receive a retroactive wage increase vests when the work is performed not when the increase is ratified. That the wages earned were paid only retroactively at a later date does not make them any less a part of the employee's earnings for that period. Similarly, that the contract establishing the revised wage scale was not ratified until after the injury does not deprive [the agreed upon wages] of their nature as compensation earned for work performed prior to the injury.

Id. at 645 (citations omitted). Although *Gunderson* was about an amendment to a CBA, nothing in the decisions limits this logic to only CBAs.

Likewise, here, it does not matter what the definition of "employee" is or when the decisions about giving the Petitioner the COLA were made. All that matters is that he performed the work covered by the retroactive pay increase.

CONCLUSION AND ORDER

The Board's decision to exclude the Petitioner's 2019-2020 COLA as regular compensation is **reversed**.

SO, ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate