

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Nancy Peterson,**  
Petitioner,

No. CR-23-0122

Dated: August 16, 2024

v.

**State Board of Retirement,**  
Respondent.

**Appearances:**

For Petitioner: Nancy Peterson (pro se)

For Respondent: Yande Lombe, Esq.

**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The respondent board improperly applied an “anti-spiking” adjustment under G.L. c. 32, § 5(2)(f), to the petitioner’s regular compensation for retirement purposes. The petitioner’s increase in salary resulted from a “bona fide change of position.” Such salary increases are exempt from anti-spiking adjustments even if they materialize some time after the member’s change in position.

**DECISION**

Petitioner Nancy Peterson appeals from the State Board of Retirement’s determination that her regular compensation for retirement purposes is subject to a downward adjustment under the anti-spiking provision of G.L. c. 32, § 5(2)(f). The appeal was submitted on the papers without objection. *See* standard rule 10(c).<sup>1</sup> I admit into evidence exhibits marked 1-10 in DALA’s case file.<sup>2</sup>

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<sup>1</sup> In accordance with G.L. c. 30A, § 9, the “standard rules” in this context are the provisions of 801 C.M.R. § 1.01.

<sup>2</sup> Exhibits 1-6 were offered and marked by the board. Exhibits 7-10 were offered by Ms. Peterson but not originally marked.

**Findings of Fact**

I find the following facts.

1. Ms. Peterson began working for the University of Massachusetts medical school in 2001. Her original position was corporate librarian. Her original duties focused on providing standard library services. She was subsequently given the role of associate director, administrative services, which entailed limited managerial duties. (Exhibits 1, 7.)

2. In 2005, Ms. Peterson was promoted to the position of deputy director, NESCSO.<sup>3</sup> Her duties underwent a significant shift. She began to serve in practice as chief of staff of a library facility in Shrewsbury. She became responsible for independently managing the facility’s day-to-day operations. At that time, and throughout the years 2001-2009, Ms. Peterson’s compensation increased only by recurrent annual sums of approximately \$2,000. (Exhibit 8.)

3. As of early 2010, Ms. Peterson’s annual salary was \$85,775. In April of that year, she received a raise to \$100,500 annually. In a contemporaneous email, a human resources officer explained that the impetus for the raise was Ms. Peterson’s promotion to deputy director in 2005:

[Ms. Peterson] . . . actually serves as Deputy Director of NESCSO . . . function[ing] independently, leading the organization . . . . As her role has expanded to include additional responsibilities for the day to day operations in addition to her previous research responsibilities, her pay is extremely low . . . . I recommended up to a new salary of \$100,500 . . . . I was supportive of [the raise] given her . . . expanded responsibilities and the fact that she functions so independently in a Deputy Director capacity.

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<sup>3</sup> Apparently NESCSO denotes the New England States Consortium Systems Organization. See NESCSO, <https://nescso.org> (last visited June 24, 2024).

Ms. Peterson was not copied on this email. She was not then nearing retirement age. The record suggests no alternative explanation for her 2010 raise. It appears to be undisputed that the human resources officer's explanation was true, and in any event I so find. (Exhibit 6.)

4. Ms. Peterson received additional promotions later in 2010 (to interim executive director) and in 2011 (to executive director). She left her state position in 2012. (Exhibit 10.)

5. In 2022, Ms. Peterson applied to retire for superannuation. The board derived her retirement allowance from her salaries in the years 2010-2012. It determined that Ms. Peterson's pay raise in 2010 required an adjustment to her regular compensation under the anti-spiking provision of G.L. c. 32, § 5(2)(f). Ms. Peterson timely appealed. (Exhibits 1, 2.)

### **Analysis**

The retirement allowance of each Massachusetts public employee is derived from the employee's compensation in certain years. G.L. c. 32, § 5(2)(a). Retirement programs structured in this manner suffer financially whenever an employee's compensation rises sharply during his or her retirement-facing years. Such compensation increases are known as "spiking."

One provision designed to counteract spiking is G.L. c. 32, § 5(2)(f), which caps the pay increases countable in the retirement-allowance calculations. More specifically, § 5(2)(f) excludes from the calculations any pay amount "that exceeds the average of regular compensation received in the 2 preceding years by more than 10 per cent." Exempted from this general rule are pay raises resulting from: longer working hours, overtime, a renegotiated collective bargaining agreement, a statutory increase of statutory pay, or a "bona fide change in position." *Id.* These exceptions reflect the Legislature's "particular interest in combatting abusive, pension-oriented artifices." *White v. Somerville Ret. Bd.*, No. CR-22-95, 2022 WL 16921475, at \*2 (DALA Sept. 2, 2022), *aff'd*, 2023 WL 11806181 (CRAB Nov. 16, 2023).

The question in this appeal is whether Ms. Peterson’s pay rise in 2010 resulted from a “bona fide change in position.” The straightforward answer is yes. The 2010 raise was the belated consequence of Ms. Peterson’s promotion to deputy director in 2005. That change of position entailed the new duties of independently overseeing a library facility’s operations. Those new duties were well outside the “sphere” of Ms. Peterson’s previous role. *See Stanton v. State Bd. of Ret.*, No. CR-18-399, 2023 WL 11806178, at \*3 (CRAB Oct. 11, 2023).

The board’s argument is that the change-in-position exception arises only if the member’s pay increased during the same year of her change in position. The statutory language does not pose this demand. That language is typically conclusive. *Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012). But a PERAC memorandum cited by the board describes the change-in-position exception as “applicable only in the year the member changes position.” PERAC Memo No. 16 / 2014 (Apr. 25, 2014).

PERAC’s memoranda are binding on the local boards; in appellate proceedings, they are non-binding “‘interpretive’ rule[s].” *Grimes v. Malden Ret. Bd.*, No. CR-15-5, at \*13 (CRAB Nov. 18, 2016). Regardless, a close reading of the memorandum cited by the board suggests that it does not truly address the issue presented here. In its context, the pertinent passage states:

[The change-in-position exception] is applicable only in the year the member changes position. It does not provide relief for pay increases earned after (or before) the member changes position. Any pay increases that occur after (or before) the change in position are still subject to anti-spiking review . . . .

Proceeding from this foundation, the memorandum analyzes the hypothetical case of a promotion-based raise followed by additional raises “which *do not* reflect a bona fide change in position.” The memorandum cautions the boards to avoid “the incorrect assumption that if a member receives a bona fide change in position in 2011 then he/she is exempt from the anti-spiking review in 2012 and 2013.”

With the broader context in mind, PERAC’s point seems to be that an employee who received one pay raise resulting from a promotion is not exempt from anti-spiking adjustments to *other* pay raises. PERAC’s statement that the anti-spiking rule overlooks only “the year the member changes position” may be rephrased as restricting the exception to “the year the member [receives a raise due to] chang[ing] position.” It appears that the memorandum’s less-fussy language reflects a working *assumption* that a promotion and a resulting raise are likely to be simultaneous; and that the memorandum does not intend to pronounce any rules about the circumstances of a raise that follows the precipitating promotion by a year or more.

The current appeal demonstrates that such circumstances, though very rare, can occur. *See also DeGiacomo v. State Bd. of Ret.*, No. CR-20-116, 2021 WL 9697050, at \*2-3 (DALA Dec. 17, 2021). A member seeking to prove a link between a promotion and a significantly belated raise faces an uphill battle. But when that link *is* established, the policy considerations that drive the change-in-position exception are presented: a delayed promotion-based pay spike is not the type of abusive artifice that troubled the Legislature most acutely. *See White*, 2022 WL 16921475, at \*2. There is therefore no reason to interpret § 5(2)(f) as withholding the change-in-position exception from a member who waited for her raise longer than usual.

### **Conclusion and Order**

Ms. Peterson’s pay increase in April 2010 resulted from a bona fide change in position. That pay increase was therefore exempt from a downward adjustment under G.L. c. 32 § 5(2)(f). The board’s contrary decision is REVERSED. The matter is REMANDED to the board for a recalculation of Ms. Peterson’s retirement allowance.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate