COMMONWEALTH OF MASSACHUSETTS

CONTRIBUTORY RETIREMENT APPEAL BOARD

RICHARD WILLETTE AND MARYANN HEUSTON,

Appellees-Petitioners

v.

SOMERVILLE RETIREMENT BOARD AND PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION,

Appellants-Respondents

CR-20-282 and CR-20-381

DECISION

On May 7, 2021, an administrative magistrate from the Division of Administrative Law Appeals (DALA) issued a decision reversing SRB's decision to apply the "anti-spiking" provision of G.L. c. 32 § 5(2)(f) in the calculation of petitioners Richard Willette's and Maryann Heuston's retirement allowance. Willette and Heuston initially challenged SRB's decision to apply the anti-spiking provision in the calculation of their retirement benefits to DALA, which consolidated the two appeals on November 16, 2020 and permitted Willette and Heuston to name PERAC as a respondent. On May 11, 2021, the Contributory Retirement Appeal Board (CRAB) issued an Order For Review of the DALA decision.

After considering the evidence in the record and the arguments presented by the parties, we incorporate the DALA decision by reference and adopt the DALA magistrate's findings of facts 1-9 as our own. DALA determined that the phrase "specified by law"[1] in the anti-spiking

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[1] Chapter 165, section 68 of the Acts of 2014 amended G.L. c. 32, § 5(2)(f) as follows:

> In calculating the average annual rate of regular compensation for purposes of this section, regular compensation in any year shall not include regular

provision encompasses the municipal ordinances that set petitioners' salaries and therefore, the calculations of petitioners' retirement benefits are not subject to the anti-spiking provision. For the reasons discussed below, we affirm.

Background. From 2016-2017, the City of Somerville's Municipal Compensation Advisory Board conducted a large-scale review of compensation for non-union city employees.[2] The Advisory Board collected compensation from various entities comparable to Somerville and issued two reports, both recommending increases to the compensation of certain municipal employees.[3] The Somerville Board of Aldermen raised the salaries of certain municipal employees in response to the Board's recommendation in Ordinances 2016-09 and 2017-08.[4] Ordinance 2016-09 raised petitioner Maryann Heuston's salary in the years 2016 and 2017 by over ten percent.[5] Ordinance 2017-08 raised petitioner Richard Willette's salary by over ten percent in the years 2018 and 2019.[6] When both Willette and Heuston sought to retire, the SRB applied the anti-spiking rule and subsequently adjusted downward the compensation amounts it used to compute their retirement benefits.[7] On November 10, 2020, the SRB expressly denied both petitioners' requests not apply the anti-spiking rule in the calculation of their retirement allowances.[8] Both Willette and Heuston appealed.

Discussion. Chapter 32 § 5(2)(f) requires that in calculating a state employee's regular compensation, retirement boards cannot include regular compensation that exceeds the average

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> compensation that exceeds the average of regular compensation received in the 2 preceding years by more than 10 per cent. This paragraph shall not apply to an increase in the annual rate of regular compensation that results from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary or salary schedule negotiated for bargaining unit members under chapter 150E, ***from an increase in salary for a member whose salary amount is specified by law***, or in the case of a teacher, from the performance of any services set forth in the third sentence of the first paragraph of the definition of "regular compensation" in section 1…(emphasis added).

[2] Finding of Fact #1; Exhibits 1, 3.
[3] Findings of Fact #2-4, Ex. 1-4.
[4] Findings of Fact #3, #4; Ex. 1-4.
[5] Finding of Fact #6; Ex. 2. 7-8.
[6] Finding of Fact #8; Ex. 4-6.
[7] Findings of Fact #6, #8; Ex. 2, 4-8.
[8] Finding of Fact #9; Ex. 12.

of regular compensation received in the two preceding years by more than ten percent. There are, however, several exceptions. Regular compensation can include "an increase in the annual rate of regular compensation that results from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary or salary schedule negotiated for bargaining unit members under chapter 150E, [or] from an increase in salary for a member whose salary amount is specified by law[.]" G.L. c. 32 § 5(2)(f). We conclude that under Ch. 32 § 5(2)(f), the term "law" includes a municipal ordinance. A plain reading of the statute's language, the context of Chapter 32 and the General Laws, and policy considerations support the incorporation of ordinance-set salaries as an exception to the application of the anti-spiking provision of G.L. c. 32, § 5(2)(f) in the calculation of a member's retirement allowance.

I. Plain meaning interpretation of "law" and "ordinance."

PERAC argues that by defining "ordinance" in G.L. c. 4 § 7 as "synonymous with by-law," the Legislature intended to create an all-encompassing definition that precludes an ordinance from being considered a law. However, Section 7 is silent on the meaning of by-law and whether by-laws or ordinances are distinguishable from laws in general. PERAC's argument is not compelling, as the statute it cites does not define the word "law" or expressly preclude ordinances from falling within laws. An analysis of the words' ordinary meanings follows to aid in our decision.

When a particular word's meaning is at issue, we are to interpret language in a manner consistent with its plain meaning, unless it would yield a result clearly at odds with legislative intent. *Commonwealth v. Hatch*, 438 Mass. 618, 622. Here, nothing in the General Laws indicates that "law" is to be read outside of its ordinary meaning. However, a variety of dictionary entries and court cases have expounded upon the plain meaning of the words "law" and "ordinance," with the vast majority indicating that the word "law" includes municipal ordinances. Black's Law Dictionary defines "law" as "[t]he regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system." "Law," *Black's Law Dictionary*, 11th Ed. 2019. Black's Law Dictionary further elaborates that an ordinance is "an authoritative law or decree" which "carries the state's authority and has the same effect

within the municipality's limits as a state statute." "Ordinance," *Black's Law Dictionary,* 11th. Ed. 2019. Based on these definitions, an ordinance is clearly a category of law.

Merriam-Webster's definition of "ordinance" goes even further, explicitly defining the term as "a law set forth by a governmental authority, *specifically*: a municipal regulation." "Ordinance," *Merriam-Webster Dictionary,* 2023. "Law" is defined as "a binding custom or practice of a community," a definition that clearly includes municipal ordinances and incorporates a variety of other binding customs outside traditional statutory law. "Law," *Merriam-Webster Dictionary*, 2023.

The Supreme Court of the United States has also determined that an ordinance constitutes a law under the plain meaning of the word "law". In *U.S. Fid. & Guar. Co. V. Guenther,* 281 U.S. 34, 36 (1930), the Court unanimously held that the phrase "fixed by law" was "free from any ambiguity" and clearly included municipal ordinances. While the term "fixed by *a law*" could impose more ambiguity because the term is often used to refer narrowly to written state and federal statutes, "fixed by law" uses the term "law" in a generic sense and includes valid municipal ordinances. While *Guenther* was a case on contract interpretation, the Court determined the case on the rule that contract terms "are to be taken and understood in their plain, ordinary, and popular sense" if they are not ambiguous. *Id*. This rule of contract interpretation is nearly identical to the standard the Commonwealth uses in statutory interpretation, as the Supreme Judicial Court (SJC) has held that "when the text of a statute is clear and unambiguous, we construe language in accordance with its plain and ordinary meaning." *Commonwealth v. Hatch*, 438 Mass. at 624 (citing *Commonwealth v. Roy*, 435 Mass. 249, 252 (2001). As a result, the Supreme Court's decision that an ordinance is included in the meaning of the word "law" applies to this case and serves as strong evidence in support of DALA's decision.

In support of the determination that an ordinance is included in the meaning of law, SCOTUS also ruled in *John P. King Mfg. Co v. City Council of Augusta,* 277 U.S. 100 (1928), that it had jurisdiction over a dispute regarding a municipal ordinance under a provision granting the Court jurisdiction in cases questioning the validity of "a statute of any state." A divided court held that even the word "statute" can encompass municipal ordinances.

Furthermore, PERAC has the general responsibility of administering the public employee retirement system under Chapter 32. G.L. c. 7, § 50. While PERAC's interpretation of Chapter 32 is entitled to substantial deference, PERAC's interpretation of clause 22 of Section 7 of Chapter 4 is not entitled to such deference since it has no responsibility for the administration of G.L. c. 4, § 7(22). (*Moore v. Boston Retirement Bd.*, CR-12-73, at *9 (DALA Oct. 9, 2015) (citing Alves 's Case, 451 Mass. 171, 173 (2008))(substantial deference is given to the reasonable interpretation of a statute by the administrative agency charged with its administration). The provisions of G.L. c. 4, § 7(22) applies to all of the statutes of the Commonwealth in the General Laws of Massachusetts. To follow PERAC's argument and its reading of G.L. c. 4, § 7(22) under this circumstance would have implications beyond Chapter 32, which we do not endorse. Consequently, we do not find PERAC's argument here compelling.

II. Legislative intent.

The anti-spiking provision established in G.L. c. 32, § 5(2)(f) was enacted in 2011 pursuant to the Acts of 2011, c. 176, § 18. The provision also explicitly provided exceptions to its application.[9] The particular exception at issue here was added three years later in 2014 by Chapter 165, section 68 of the Acts of 2014, which amended § 5(2)(f) by adding, "*from an increase in salary for a member whose salary amount is specified by law*." As the appellants-petitioners pointed out in their Memorandum that a proposal was made by the House Ways and Means Committee to amend § 5(2)(f) by adding to the anti-spiking provision to reflect the exception "salary amount specified by **statute**" during the process of enacting the Fiscal Year 2015 budget for the state budget. See House Journal p. 1325 (April 30, 2014). Contrastingly, the Senate Ways and Means Committee nor the Senate included this provision or any similar provision in their version of the Fiscal Year 2015 Budget. Nevertheless, the Legislature's budget conference committee, upon releasing its version of the Fiscal Year 2015 budget, included an amendment to § 5(2)(f), substituting the phrase "salary amount specified by **statute**" with "salary amount specified by **law.**" See House Bill No. 4242, §68. We agree with the appellants-

[9] G.L. c. 32, § 5(2)(f) initially provided that the anti-spiking provision would not apply "to an increase in the annual rate of regular compensation that results from an increase in hours of employment, from overtime wages, from a bona fide change in position, from a modification in the salary or salary schedule negotiated for bargaining unit members under chapter 150E…" (emphasis added).

petitioners that substituting "statute" with "law" is certainly suggestive that the Legislature intended this exception to be broad in scope, contrary to PERAC's view. While legislative history is not always precise in interpreting statutes, it is particularly useful in discerning the Legislature's intent.

Nevertheless, PERAC contends that other sections of Chapter 32 mention specific laws, so the Legislature's failure to specifically incorporate ordinances into Section 5(2)(f) indicates an intent that ordinances be excluded. Specifically, PERAC cites Section 8(2)(d) (indicating that nothing in Section 8 exempts employers from compliance with the ADA or any state or federal law) and Section 5(3)(f) (clarifying that federal laws related to the topic of the section still apply in addition to the language of the statute).

The Legislature's mention of specific related statutes in Sections 8(2)(d) and 5(3)(f), however, does not create a blanket mandate for the Legislature to mention every possible form of a law when discussing the law in general. Unlike Section 5(2)(f), Sections 5(3)(f) and 8(2)(d) both exist in a legal sphere where they are likely to intersect with federal or other state laws. Adding that the federal law still applies ameliorates confusion and makes clear that both sets of law govern. In addition, because federal law preempts or overrides conflicting state law, the stipulations of 8(2)(d) and 5(3)(f) would apply even if they were not specifically written into the statute. The absence of references to federal law would not imply that the Legislature intends that agencies ignore applicable laws. In the phrase "specified by law" in Section 5(2)(f), no similar overlap with a specific ordinance exists. Thus, the reference to specific laws in other sections of the General Laws does not suggest that the Legislature must list out each kind of law encompassed by the anti-spiking exception.

Section 8(2)(d) also contains a prime example of how the Legislature excludes ordinances from a law when it intends to do so. After stating that nothing in this chapter excuses noncompliance with the ADA and Chapter 93 of the Massachusetts General Laws, the clause adds, "or of any other state or federal law." This language clearly excludes municipal ordinances while indicating that statutes passed at the state and federal level continue to apply. The phrase "state or federal law" appears quite frequently in the General Laws. *See, e.g.*, Ch. 167A § 3A; Ch. 112 § 215, Ch. 25C § 8. Had the Legislature intended to exclude ordinances from Section 5(2)(f), they had a well-known mechanism for doing so. The Legislature has also explicitly

referenced municipal laws in the General Laws, which suggests a recognition that municipal ordinances are laws. *See, e.g.* G.L. c. 149 § 192 ("violation of any state or municipal law"); G.L. c. 149 § 193(c) ("rights under federal, state, local, or municipal law").

PERAC makes a similar interpretive argument based on the state constitution, citing Article of Amendment 2 § 6. The Article states that municipalities may enact bylaws not inconsistent with laws enacted by the general court. According to PERAC, the use of "bylaws" and "laws" in the same sentence indicates some level of separation between the two concepts. However, the General Laws do not define the word "bylaw" or expressly indicate that bylaws and ordinances cannot be considered a subcategory of law. In fact, the addition of the phrase "enacted by the general court" clarifies that the Legislature refers here to a specific type of law—namely, a state statute. If the Legislature believed that ordinances and bylaws were *not* laws, they would have no reason to include the phrase "enacted by the general court" to differentiate between state and municipal law. Thus, the context of the word "law" in the state constitution and the General Laws provides little reason to divert from its plain meaning and provides support for DALA's interpretation.

III. Policy implications.

Chapter 176 of the Acts of 2011 was part of "[t]he Governor's Phase Two pension reform legislation proposing additional systemic reforms necessary to ensure the sustainability and credibility of [our] pension system." FY 2011 House 2 Budget Recommendation: Issues in Brief.[10] A pension plan that bases benefits on only a few years of earnings generates a strong incentive for workers to raise earnings in those last years to earn a larger pension than intended by the system. As part of this pension reform, St. 2011, c. 176, § 18 added section (f) to Section 5(2), which addressed such circumstance. Further, the original statute establishes a series of exceptions in which the member's pay increase in the last few years before retirement of over ten percent may be pensionable. Pay increases that arise from an increase in hours, overtime payments, changes in position, modification of salary schedules for bargaining unit members are all pensionable, and in 2014, the Legislature added that compensation "from an increase in salary

[10] The Budget Navigation Guide for FY 2011 can be found at: https://budget.digital.mass.gov/bb/h1/fy11h1/prnt_11/exec_11/pbudbrief5.htm.htm.

for a member whose salary amount is specified by law" is exempt from the anti-spiking provision.

PERAC argues that, in theory, municipalities could pass new ordinances each year to permanently exempt their employees from application of the anti-spiking provision.[11] Unlike union negotiations or promotions, municipal ordinances are passed with "just a simple vote" and more subject to artificial inflation as a result. We disagree. City councilors, like legislators, are elected officials whose meetings and actions are subject to public scrutiny. Residents may speak on these issues and hold members accountable. Moreover, increasing compensation to spike the pension payment of one employee (or a handful) would be difficult for municipalities to accomplish in almost all circumstances. Pay increases must come out of a municipality's budget, providing a strong incentive not to artificially increase salaries. It would be difficult to target a raise of over 10% only to positions where an individual is about to retire in order to "spike" salaries without paying higher wages for an extended period of time. The municipality would then have to pass a new ordinance decreasing pay to its original level as soon as the prior employee retires. Such a practice would be difficult to justify to constituents.

Moreover, salary spiking is just as feasible under state law. For instance, Chapter 3 § 9B creates additional regular compensation for members of the General Court who occupy leadership positions. Faced with a retiring member of leadership, the Legislature has the ability to increase these allowances by law at any point and could easily spike the salary of a Speaker, Senate President, or member of leadership. Like municipalities, the Legislature is prevented from actually spiking salaries by public scrutiny and the democratic process. Unlike the Legislature, municipalities are also subject to the Open Meeting and Public Records Law, adding another measure of protection against abuse. The policy reasons to exclude ordinances from Section 5(2)(f) are nearly identical to, if not weaker than, the policy reasons to exclude *all* salaries set by state law, and the Legislature clearly rejected these arguments in its 2014 amendments to the statute.

Conclusion. The DALA decision determining that an ordinance is a law is affirmed. Willette and Heuston's salary increases were established by law and therefore, the anti-spiking provision

[11] PERAC Memorandum at *5-7.

pursuant to G.L. c. 32, § 5(2)(f) does not apply. Their salary increases are regular compensation for the purposes of calculating their retirement benefits. ***Affirm***.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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