THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

George Randall,

 **Petitioner**

v. Docket No. CR-12-277

 DATED: February 24, 2017

Franklin Regional Retirement Board,

 **Respondent**

**Appearance for Petitioner:**

James H. Quirk, Jr., Esquire

P.O. Box 268

Yarmouthport, MA 02675-0268

**Appearance for Respondent:**

Michael Sacco, Esquire

P.O. Box 479

Southampton, MA 01073-0479

**Administrative Magistrate:**

Judithann Burke

 **Case Summary**

The Petitioner is not entitled to receive member-survivor benefits pursuant to G.L. c. 32, § 12(2)(d) in an amount greater than the salary his late wife was being paid at the time of her death. Further, there is no evidence that the Respondent has abused its discretion in denying the Petitioner’s request for a waiver of repayment of the overpaid benefits pursuant to G.L. c. 32, § 20(5)(c)(3).

 **DECISION**

The Petitioner, George Randall, is appealing from the May 31, 2012 decision of the Respondent, Franklin Regional Retirement Board (FRRB) denying his request to waive repayment of overpaid benefits in the amount of $20,310.71. (Exhibit 1.) The appeal was timely filed on June 11, 2012. (Exhibit 2.) I held a hearing on June 13, 2016 in Room 305 at 436 Dwight Street, Springfield, MA. I marked Exhibits 1-18. No testimony was presented. Both parties submitted pre-hearing and post- hearing memoranda of law. (FRRB-Attachments A and C; Petitioner-Attachments B and D.) The hearing was digitally recorded.

 **FINDINGS OF FACT**

 Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, George Randall, was lawfully married to Ellen Randall for several years until her untimely death on April 28, 2000. (Exhibits 4 & 9.)
2. Ellen Randall was employed as an Assessor’s Clerk for the Town of Colrain from July 24, 1992 through December 31, 1997, and for the Town of Shelburne Board of Assessors from May 1, 1999 until the date of her death. She was 48 years and 4 months old when she passed away. At the time of her death, Mrs. Randall’s annual salary from the Town of Shelburne was $1,551.00. (Exhibits 5 & 8 and Stipulation.)
3. On or about May 8, 2000, the Petitioner filed with the FRRB an election for member-survivor benefits pursuant to G.L. c. 32, § 12(2)(d). The FRRB allowed the Petitioner’s election and on October 2, 2000, the Public Employee Retirement Administration Commission (PERAC) approved same. The Petitioner’s retirement allowance at that time was based on the $3,000. statutory minimum. (Exhibits 12 & 13 and Stipulation.)
4. From 2000 through 2012, the Petitioner’s member-survivor benefits were consistently calculated based on the annual $3,000.00 statutory minimum plus cost of living increases. (Exhibits 15 & 16 and Stipulation.)
5. In a letter dated April 26, 2012, the FRRB informed the Petitioner that the member-survivor benefits that had been paid to him since April 28, 2000 were in excess of the allowable benefit under Section 12(2)(d). The FRRB informed the Petitioner that his member-survivor benefits were paid in excess due to the fact that his benefits were consistently calculated based on the $3,000.00 statutory minimum, and, according to Section 12(2)(d), the initial benefit cannot exceed the amount of the member’s actual salary at the time of death. The FRRB noted that, in this case that annual salary was $1,550.00 per year. Accordingly, the FRRB concluded that the Petitioner’s benefits should have been consistently calculated based on the annual $1,550.00 salary and not the $3,000.00 statutory minimum. The FRRB notified the Petitioner that he had received overpayments in the amount of $20, 310.71 for the period from April 28, 2000 through May 31, 2012. (Exhibit s 17 &19.)
6. The FRRB further informed the Petitioner that, pursuant to G.L. c. 32, § 20(5)(c)(2), it was obligated to seek reimbursement of the overpaid funds, options of repayment were available, and, that if he wished that the FRRB forgive the debt, he would need to petition for a waiver pursuant to G.L. c. 32, § 20(5)(c)(3). (*Id*.)
7. Through his counsel, the Petitioner requested a waiver on May 8, 2012. (Exhibit 18.)
8. On May 31, 2012, the FRRB notified the Petitioner that his request for a waiver had been denied. He was also notified of his right to appeal pursuant to G.L. c. 32, § 16(4). (Exhibit 1.)
9. The Petitioner filed a timely appeal on June 8, 2012. (Exhibit 2.)
10. The parties stipulate that the Petitioner meets the criteria for a waiver as set forth in G.L. c. 32, § 20(5)(c)(3).

**CONCLUSION**

 The Petitioner is not entitled to prevail in this appeal. The record reflects that he was paid in excess of what the controlling statute permitted for the period from April 28, 2000 through May 31, 2012.

 The pertinent sections of G.L. c. 32, § 12(2)(d) read as follows:

At any time a member, upon written notice on a prescribed form filed with the board prior to his death, may nominate an eligible beneficiary as set forth under option (c) of this section, who if such member dies before being retired shall receive the yearly amount of the option (c) allowance to which such member would have been entitled had his retirement taken place on the date of his death.

If such member dies before attaining age 55 and before being retired, such nominated eligible beneficiary shall receive the Option (c) allowance to which such member would have been entitled had the member attained age 55 at the time of the member’s death and had the member’s retirement taken place on the date of the member’s death. Notwithstanding the previous sentence, if a member of Group 1 who became a member on or after April 2, 2012 dies before attaining age 60 and before being retired, such nominated eligible beneficiary shall receive the Option (c) allowance to which such member would have been entitled had the member attained age 60 at the time of the member’s death and had the member’s retirement taken place on the date of the member’s death.

The normal monthly member-survivor allowance provided for under this option to a spouse of a deceased member shall not be less than $250 or $500 a month, whichever is applicable to said spouse, subject to the provisions of paragraph e of section one hundred and two; provided, however that the deceased member was a member in service as described in subparagraph *i* of section 3 on the date of death and that the member had not less than two full years of creditable service and had been married to such spouse for not less than one year.

The final paragraph of Section 12(2)(d) provides:

*The total annual allowance derived from* *and payable under the provisions of this option, together with any allowance payable under the provisions of section twelve B, shall at no time be greater than the annual rate of regular compensation, payable to such member on the date of death of such member.*

(Emphasis added.)

 In this case the FRRB paid the Petitioner the annual $3,000 statutory minimum until the discovery of the error. The benefit reduction/request for re-payment was based on the plain language in the final paragraph of Section 12(2)(d). Contrary to the Petitioner’s contention that the final paragraph of Section 12(2)(b) contains an ambiguity, the language in the statue is straightforward and unambiguous. *Bulger v. Contributory Retirement Appeal Board,* 447 Mass. 651, 658, 856 N.E. 2d 799 (2006). If the legislature had intended that there be no limitation on the $3,000 annual minimum member-survivor allowance, it would not have drafted the final paragraph and applied it to the total allowance derived from and payable under the provisions of Option (C) together with any allowance payable under section twelve B.

 Any statute should be interpreted so as to render it a “consistent and harmonious” whole, so far as reasonably practicable. *Vining Disposal Service, Inc. v. Selectmen of Westford,* 416 Mass. 35, 38, 616 N.E. 2d 1065 (1993). A statute is interpreted to give effect to the Legislature’s purpose. *Sterilite Corp. v. Continental Gas Co.*, 397 Mass 837, 839, 494 N.E. 2d 1008 (1986). See also *Commonwealth v. Brown,* 431 Mass. 772, 775 (2000), citing *Victor V. v. Commonwealth,* 423 Mass. 793, 794 (1996.)

 Next, the parties are in agreement that the Petitioner meets the statutory criteria for a waiver set forth in Section 20(5)(c)(3). No analysis of this issue is necessary. However, it must be noted that the decision to grant or deny a waiver of a repayment obligation that arose as a result of board error is within the discretion of the retirement board. The FRRB is correct in its contention that, if the waiver denial can be reviewed at all, it is only for an assessment of any abuse of that discretion. See *Bristol County Retirement Board v. Contributory Retirement Appeal Board,* 65 Mass. App. Ct. 443, 451-52 (2006.) In this case, no arbitrary or capricious activity on the part of the FRRB has even been alleged by the Petitioner, let alone proven. Both DALA and CRAB have upheld a retirement board’s absolute discretion whether or not to grant a waiver. See *George Moonoogian v. Teachers’ Retirement Board,* CR-04-565 (Division of Administrative Law Appeals January 5, 2006; no Contributory Retirement Appeal Board Decision).

 Based on the foregoing, the decisions of the FRRB both determining that the Petitioner was paid member-survivor benefits in an amount in excess of that allowed by the statute, and, denying the Petitioner’s request for a waiver of repayment, are affirmed.

So ordered.

BY:

Division of Administrative Law Appeals,

Judithann Burke

Administrative Magistrate

DATED: February 24, 2017