

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

**Division of Administrative Law Appeals**

**David Reilly,**  
Petitioner

v.

Docket No. CR-21-0103  
Date: May 12, 2023

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

David F. Reilly, *pro se*

**Appearance for Respondent:**

Yande Lombe, Esq.  
State Board of Retirement  
One Winter Street, 8th Floor  
Boston, MA 02108

**Administrative Magistrate:**

Kenneth J. Forton

**SUMMARY OF DECISION**

The State Board of Retirement properly applied the “anti-spiking” provision, G.L. c. 32, § 5(2)(f), when it reduced Petitioner’s regular compensation in 2017-2018, for the purpose of calculating his retirement allowance. Petitioner, a Sherriff’s Department Assistant Superintendent, did not have a bona fide change in duties because, even if he took on additional work during the relevant years, those duties would be expected of a person in his position.

**DECISION**

Petitioner David F. Reilly timely appeals under G.L. c. 32, § 16(4). He seeks to overturn the State Board of Retirement’s application of the anti-spiking law, G.L. c. 32, §

5(2)(f), to the calculation of his retirement allowance. The Board concluded that Mr. Reilly's regular compensation in the year 2017-2018 must be reduced.

On March 17, 2021, DALA informed the parties that Mr. Reilly's appeal appeared to be one that could be resolved on written submissions under 801 CMR 1.01(10)(c) and ordered them to submit legal memoranda and proposed exhibits. Neither party objected to the magistrate's order. Mr. Reilly did not proffer any exhibits or make any argument beyond his appeal letter. The Board has offered six exhibits, numbered 1 through 6. I have admitted these exhibits into evidence as proposed. (Exs. 1-6.)

**FINDINGS OF FACT**

Based on the documents in evidence, I make the following findings of fact:

1. From August 19, 1985, until his retirement on November 20, 2020, David F. Reilly was a member of the State Retirement System. (Ex. 1.)
2. At the time of his retirement, Mr. Reilly was an Assistant Superintendent with the Norfolk Sheriff's Department. (Ex. 2.)
3. Mr. Reilly's salary for the period of November 23, 2015 through November 21, 2016 was \$103,574.50. (Ex.1.)
4. Mr. Reilly's salary for the period of November 22, 2016 through November 21, 2017 was \$106,742.77. (Ex. 1.)
5. Mr. Reilly's salary for the period of November 22, 2017 through November 21, 2018 was \$117,404.28. (Ex. 1.)
6. Mr. Reilly's salary for the period of November 22, 2018 through November 21, 2019 was \$124,220.83. (Ex. 1.)

7. Mr. Reilly’s salary for the period of November 22, 2019 through November 20, 2020 was \$123,976.49. (Ex. 1.)

8. Mr. Reilly applied for retirement with an effective date of November 20, 2020. (Ex. 1.)

9. To determine Mr. Reilly’s yearly retirement allowance, the Board used the average annual rate of regular compensation of his last three years (2017-2018, 2018-2019 and 2019-2020), which were also highest average three-year period of his annual salary. (Ex. 1.)

10. On January 22, 2021, the Board notified Mr. Reilly that it had applied the anti-spiking provision to the years 2017-2018, which reduced his regular compensation for that period by \$1,729.78. (Ex. 3.)

11. On February 1, 2021, Mr. Reilly timely appealed the Board’s decision. (Ex. 4.)

**CONCLUSION AND ORDER**

The Board’s request that the appeal be dismissed because it was not timely filed is denied. G.L. c. 32, § 16(4) provides that “any person when aggrieved by any action taken or decision of the retirement board . . . may appeal to the contributory retirement appeal board by filing therewith a claim in writing within 15 days of notification of such action or decision by the retirement board . . . .” The Board’s letter of decision was dated January 22, 2021. Mr. Reilly’s appeal letter was postmarked on February 1, 2021 and is considered filed on the date that it was mailed under the mailbox rule. *Barker v. State Bd. of Retirement*, CR-15-72 (DALA June 26, 2015). Accordingly, his appeal was timely.

The Board's application of the "anti-spiking" provision, which required it to reduce Mr. Reilly's 2017-2018 regular compensation when calculating his retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Mr. Reilly, who were members of a Chapter 32 retirement system before April 2, 2012, § 5(2)(a) directs that a member's yearly retirement allowance be calculated based, in part, on the highest average three-year period of regular compensation. For Mr. Reilly, this period was during the years 2017-2018, 2018-2019, and 2019-2020, during which time his regular compensation was \$117,404.28, \$124,220.83, and \$123,976.49 for each respective period.

Section 5(2)(f), referred to as the "anti-spiking" provision, provides, in relevant part:

In calculating the average annual rate of regular compensation for purposes of this section, regular compensation in any year shall not include regular compensation that exceeds the average of regular compensation received in the 2 preceding years by more than 10 percent.

The only year in dispute is 2017-2018. Mr. Reilly's regular compensation from November 22, 2017 through November 21, 2018 was \$117,404.28. The average regular compensation for the two prior years, November 23, 2015 through November 21, 2017, was \$105,158.64, making the 10% increase to this average \$115,674.50. Mr. Reilly's 2017-2018 regular compensation exceeded the 10% limit imposed by the anti-spiking provision. Accordingly, the Board reduced his regular compensation for the period by \$1,729.78. These mathematical calculations are not in dispute.

There are several exceptions to the anti-spiking provision's limits, however. Mr. Reilly argues that he qualifies for one of the exceptions because his increased pay was

connected to a bona fide change in position. For the reasons explained below, Mr. Reilly does not qualify for this exception. *See* G.L. c. 32, § 5(2)(f).

“The Petitioner has the burden of proving by a preponderance of the evidence that the [Retirement Board] has applied the law and or its regulations incorrectly or has been culpable in perpetrating a correctible administrative mistake.” *Byrne v. MTRS*, CR-15-609 (DALA Jan. 6, 2018). The only filing that DALA has received from Mr. Reilly is his appeal letter, which contains a one-paragraph explanation of his position. Even if I accept this description as true, the change in duties that Mr. Reilly describes does not qualify as a bona fide change in position.

Mr. Reilly claims that he was involved in the supervision of 300 officers and 500 inmates before his duties changed. His new duties included supervision of about a dozen additional employees in the civil process division and the sheriff’s response team. He also assumed the duty of office liaison to a law enforcement collaborative. Finally, he periodically and briefly assumed the role of acting superintendent when the superintendent was unavailable. Taking on additional responsibilities alone does not constitute a bona fide change in position unless the character of the work has changed in an essential way. *See, e.g., Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021); *Jenal v. State Bd. of Retirement*, CR-17-1054 (DALA May 29, 2020); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Dacri v. State Bd. of Retirement*, CR-17-627 (DALA May 31, 2019). Supervising more employees and inmates, covering during a supervisor’s absence, and taking on an additional communication role do not fall outside the sphere of the duties typical of an assistant superintendent, and therefore do not qualify as a bona fide change in position.

The Board correctly applied G.L. c. 32, § 5(2)(f) in its calculation of Mr. Reilly's retirement allowance. The decision of the Board is therefore affirmed. The Board is directed to return to Mr. Reilly, with interest, any excess withholdings.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*/s/ Kenneth J. Forton*

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Kenneth J. Forton  
Administrative Magistrate

DATED: May 12, 2023