COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Division of Administrative Law Appeals

Revere Retirement Board,
Petitioner

v.

Docket Nos. CR-21-0159; CR-23-0521
Dated: Nov. 3, 2023

Public Employee Retirement Administration Commission,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

A member of two retirement systems to whom the dual membership provision, applies may choose different retirement options for his two retirement checks. *See* G.L. c. 32, § 5(2)(e). Choosing two options is not prohibited by a statute, regulation, or PERAC policy. A plain reading of the statute along with the history of its enactment support this conclusion.

DECISION

James Milinazzo was a member of both the Lowell Retirement System and the

Revere Retirement Board for approximately three years leading up to his retirement in 2020. This means he had to retire under the dual member law, G.L. c. 32, § 5(2)(e), which directs that he would in effect receive separate retirement allowances from each of his retirement systems. Mr. Milinazzo requested retirement Option B for his Lowell allowance and Option A for his Revere allowance. At first PERAC approved of the two different option selections but eventually withdrew its approval and informed Revere that it would have to pay Mr. Milinazzo under Option B because he had already chosen Option B for his Lowell allowance. Revere appealed PERAC's decision. This appeal was assigned docket number CR-21-0159.

On March 28, 2022, DALA ordered the parties to file a joint pre-hearing memorandum; the parties filed their memorandum on September 23, 2022, along with 8 proposed exhibits. A hearing was scheduled for August 29, 2023. On July 17, 2023, the parties requested that the appeal be decided on written submissions. DALA allowed the request and heard argument from the parties on the scheduled hearing day. I entered the 8 proposed exhibits into evidence as marked. Then, DALA ordered the parties to file any further argument no later than September 29, 2023. Both parties filed additional legal memoranda.

After a review of the exhibits, I saw that PERAC had not provided the Board appeal rights in its decision letter. I ordered PERAC to issue a new decision letter with appeal rights to the Board, which it did. The Board timely appealed. This appeal was assigned docket number CR-23-0521. I admitted PERAC's decision letter as Exhibit 9 and the Board's appeal letter as Exhibit 10. The appeals were consolidated upon receipt of the Board's appeal letter.

FINDINGS OF FACT

Based on the exhibits and the agreed facts in the prehearing memorandum, I make the following findings of fact:

1. James Milinazzo was a member of the Lowell Retirement System for almost 29 years. He worked for the City of Lowell from 1978 to 1984. Next, he served the Lowell Housing Authority from 1993 to 2002. Finally, he served as an elected official on the City Council from 2003 to 2011 and then from 2014 until his retirement from the Lowell system. (Stipulation.)

2. During his last three years of work, Mr. Milinazzo's City Council pay was $25,000.00 annually. (Ex. 5; Stipulation.)

3. Mr. Milinazzo joined the Revere Retirement System in February 2016 after he became the Executive Director of the Revere Housing Authority. (Ex. 3; Stipulation.)

4. On January 29, 2019, Mr. Milinazzo emailed PERAC to ask how his retirement allowance would be calculated in light of his membership in the Lowell and Revere retirement systems at the same time. (Ex. 5; Stipulation.)

5. On March 21, 2019, PERAC responded to Mr. Milinazzo. PERAC stated that he would be subject to the dual member law at G.L. c. 32, § 5(2)(e). PERAC explained:

> When you retire in 2020, you will need to retire under the provisions of Section 5(2)(e). This means you will receive two checks, one from the Lowell Retirement System (LRS) and the other from the Revere Retirement System (RRS). Your check from the LRS will be based solely on the service and salary in the LRS and the check from the RRS will be based solely on the service and salary in the RRS.

The letter did not address whether Mr. Milinazzo could select different § 12(2)(c)

retirement options for each check. (Ex. 5; Stipulation.)

6. On December 4, 2019, Mr. Milinazzo applied for superannuation retirement from the Revere system, effective late January 2020. (Ex. 6.)

7. On December 11, 2019, Mr. Milinazzo chose Option A as his retirement payment option for Revere. (Ex. 4; Stipulation.)

8. With the Lowell Retirement System, Mr. Milinazzo chose Option B as his retirement payment option. (Stipulation.)

9. The Revere Retirement System calculated Mr. Milinazzo's retirement allowance under Option A and submitted the proposed calculation to PERAC for approval. (Ex. 6; Stipulation.)

10. On May 27, 2020, PERAC issued its approval of the Revere system's calculation under Option A. (Ex. 7; Stipulation.)

11. After PERAC approved the Revere system's calculation under Option A, PERAC withdrew its approval of the calculation, and instead informed the Revere system that because Mr. Milinazzo had selected a different option—Option B—for payment of his Lowell retirement allowance, he was required to also retire under Option B for his Revere allowance. (Stipulation.)

12. Revere inquired of PERAC the grounds for its decision that dual members were required to select the same retirement options in both systems. (Stipulation.)

13. Nearly a year later, PERAC finally responded, explaining further:

> Under Section 5(2)(e) a dual member will receive "a" superannuation retirement allowance, meaning he or she will receive only one retirement allowance equal to the sum of the benefits from both systems. While Section 5(2)(e) further states that the member will be treated as if he or she were "retiring solely from each system" they are still only retiring once and they must have the same effective date of retirement for each system.

> Therefore, Mr. Milinazzo, in effect, is only making one choice at the time of retirement in relation to his option selection. Even though he is retiring from two systems, he must choose the same option from each retirement system.

This decision letter did not provide appeal rights to the Board. (Ex. 1.)

14. The Revere Retirement Board appealed. This appeal was assigned docket number CR-21-0159. (Ex. 2.)

15. Following DALA's request, on October 19, 2023, PERAC issued its decision letter again, this time with appeal rights. (Ex. 9.)

16. On October 25, 2023, the Board timely appealed. This appeal was assigned docket number CR-23-0521. (Ex. 10.)

CONCLUSION AND ORDER

Mr. Milinazzo is retiring from two retirement systems. He has chosen two different "retirement options" for his two retirement checks. *See generally* G.L. c. 32, § 12(1), (2); *Larsson v. Stoneham Retirement Bd.*, CR-10-779, at *6 n.1 (DALA Aug. 9, 2013) (comparison of retirement options). Under G.L. c. 32, § 12(1), a retiring member may choose any of the retirement options offered unless another provision of the retirement law prohibits it. Section 12(1) provides that

> [a]ny member who is retired for superannuation under the provisions of section five . . ., may elect to have his allowance paid in accordance with the terms of any one of the three options specified in subdivision (2) of this section.

For his larger allowance in Lowell, he chose Option B, which provides that the remainder of the member's annuity savings account at the member's death, if any, be paid to a beneficiary. *See* G.L. c. 32, § 12(2). For his smaller allowance from Revere, he chose Option A which pays a bit more than Option B but provides no benefit to a beneficiary;

when the member dies, that is the end of that benefit. *Id.* Presumably, Mr. Milinazzo chose Option B for his Lowell allowance because there would have been a substantial balance in his annuity savings account that could be distributed to a beneficiary if he died before it was depleted. In exchange for taking an allowance a bit smaller than an Option A, he can, in a sense, protect the funds in that account. Conversely, he likely chose Option A for his Revere allowance because his annuity savings account balance was much lower and, in his judgment, less worthy of protection.

PERAC rejected Mr. Milinazzo's Revere Option A choice because he had already chosen Option B for Lowell, and, in its view, he is required to choose the same retirement option for both allowances. PERAC's position is based on its interpretation of G.L. c. 32, § 5(2)(e), which, in some circumstances, governs superannuation retirement of members of more than one retirement system. Section 5(2)(e) provides in pertinent part:

> A person who has been a member of 2 or more systems and who, on or after January 1, 2010, has received regular compensation from 2 or more governmental units concurrently for greater than 60 days shall, upon retirement, receive *a superannuation retirement allowance to become effective on the date of retirement that is equal to the sum of the benefits calculated pursuant to this section as though the member were retiring solely from each system*; provided, however, that notwithstanding paragraph (c) of subdivision (8) of section 3, *each system shall pay the superannuation retirement allowance attributable to membership in that system to the member*; and provided further, that this section shall not apply to any member who has vested in 2 or more systems as of January 1, 2010 or to any position whose annual regular compensation was less than $5,000. Paragraph (d) of subdivision (7) of section 3 shall not apply if this paragraph applies. Upon retirement a member shall be considered a dual member if the member satisfies this paragraph. This paragraph shall only apply to the 5 years of creditable service immediately preceding a member's superannuation retirement under this section.

(Emphasis added.)

Although the section as a whole is complex, the dispute here is over only one

discrete portion of it. The parties agree that because Mr. Milinazzo worked in Lowell and Revere during his last five years of employment, § 5(2)(e) applies to him and he should be treated as if he retired from Lowell and Revere separately.[1] The root of their disagreement is in how they interpret the highlighted phrases above.

PERAC emphasizes that the statute states that the member will receive "*a*" superannuation allowance; it interprets "*a*" to mean one. PERAC contends that Mr. Milinazzo must choose the same retirement option for both retirement systems because he will receive just one retirement allowance under § 5(2)(e). The Revere board, relying on the rest of the highlighted statutory language, insists that its member will essentially collect two different allowances and is thus entitled to choose different retirement options for each allowance.[2]

PERAC's argument might be plausible if the rest of § 5(2)(e) did not provide that the amount of that (quasi-fictional) one allowance is to be calculated "as though the member were retiring solely from each system" and that "each system shall pay the superannuation retirement allowance attributable to membership in that system to the member." *Id.* PERAC even admitted this was the case in its 2019 letter to Mr. Milinazzo: "Your check from the LRS will be based solely on the service and salary in the LRS and the check from the RRS will be based solely on the service and salary in the

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[1] Neither party argues that any of the statutory exceptions applies here.

[2] Revere points out that there is no specific prohibition on choosing separate retirement options in § 5(2)(e) or any other part of the contributory retirement law. Nor has PERAC addressed the matter in a regulation. *See, e.g.,* 840 CMR 9.03 (covering benefit calculations). Additionally, PERAC has not addressed the issue through an opinion letter, advisory opinion, or any other informal method. PERAC has not even presented an internal memorandum announcing its position. *See Pulsone v. PERAC*, 60 Mass. App. Ct. 791, 795 n.7 (2004). There was therefore no PERAC guidance that the retirement boards were required to obey.

RRS." What this means in actual practice is that the member indeed receives two separate retirement allowances, with a separate monthly check from each system, separately based on the creditable service and regular compensation earned in each system. There is no transfer or other comingling of contributions or creditable service. Despite the statute's lone reference to "a" retirement allowance, I must conclude that this description of a single allowance is a term of art and does not reflect reality. Every other description in § 5(2)(e), along with the praxis described, makes it clear that affected members actually collect two separate retirement allowances.

The history of the contributory retirement law's treatment of dual members reinforces the conclusion that members subject to § 5(2)(e), in effect, collect two retirement allowances. Section 5(2)(e) was enacted in 2009 and amended in 2014. *See* Acts 2009, c. 21, § 7; Acts 2014, c. 165, § 67. Before § 5(2)(e)'s enactment, benefits under dual membership were governed by G.L. c. 32, § 3(7), which provides, under certain circumstances, that a dual member could collect a single retirement allowance based on summing the creditable service and regular compensation in each system for one sort of super-allowance. Before the enactment of § 5(2)(e), these circumstances potentially resulted in a single retirement allowance that was considerably larger than if the benefit had been calculated as two separate allowances. *See, e.g., Pereira v. State Bd. of Retirement*, CR-16-558, at *1-2 (CRAB June 8, 2023) (brief description of § 3(7) retirement allowance calculation).

The evident purpose of § 5(2)(e) is to eliminate those instances in the years leading up to retirement where a member, who worked two government jobs at the same time and was a member of two retirement systems, could combine the service credit and

compensation for an artificially inflated single allowance. The sensible method that the legislature chose to stop this practice was to force those affected members to retire from each system separately and thus avoid an artificially inflated single allowance. When examined in the light of this history, PERAC's argument that Mr. Milinazzo is receiving only one retirement allowance, and therefore can choose only one retirement option, makes little sense.

PERAC's only argument in addition to the "*a*" argument is that a veritable parade of horribles will result if the few members affected by § 5(2)(e) are allowed to choose different retirement options for their two allowances. According to PERAC, if a member chooses different options, possibly with different beneficiaries in each system, this could result in a beneficiary receiving a benefit they wouldn't otherwise be entitled to receive. For example, assume that a dual member retires from System 1 under Option B naming his wife as the beneficiary, and retires from System 2 under Option C also naming his wife as beneficiary. If the member dies before his annuity savings account is depleted, his wife would receive an Option B lump sum payment from System 1, and she would also receive an Option C allowance from System 2. These "two benefits," to PERAC, are unfathomable. What PERAC's argument does not account for, however, is that each of the Options A, B, and C are actuarily equivalent, meaning that the total payments based on the predicted death of the member are roughly equivalent. *See Larsson*, *supra*, at *6 n.1 ("Options A, B, and C are calculated so that they are the actuarial equivalent of each other.") Since that is the case, and the two benefits are calculated based on the service credit and regular compensation separately accumulated in each retirement system, then the beneficiary from this example would not end up with any more or less than if the

member had chosen the same retirement option for both allowances. Nor does this situation create any additional difficulty for either system in administering the pre- or post-death benefits because each system is only ever concerned with the service credit, compensation, and retirement option in that system.

PERAC offers a second example. What if a dual member retires from System 1 under Option C, naming his wife beneficiary, and from System 2 under Option C but naming his daughter as beneficiary? If the member passes away, and then his wife, and he had chosen the wife as his Option C beneficiary in both systems, then retirement benefits would terminate. But, when he chooses two different beneficiaries for his two retirement allowances, System 1 would stop payments, whereas System 2 must continue paying the daughter benefits. Again, this argument fails to account for some important facts. First, the two benefits are completely separate; when the wife dies and the daughter continues to collect a benefit, the daughter's benefit is based only on the System 2 allowance and has nothing to do with System 1. Additionally, this argument again does not account for the actuarial equivalence of the retirement options. If the member chose his daughter as his Option C beneficiary, for instance, his living allowance would be considerably lower than if he chose his wife because the total payout would be based on the actuarial death of his daughter who has longer to live than her mother. *See* G.L. c. 32, § 12(2)(c).

A plain reading of the statute, the history behind the statute's enactment, and the lack of any legal prohibition to do so, support the conclusion that Mr. Milinazzo may

choose different retirement options for his retirement allowances in Lowell and Revere. I therefore reverse PERAC's decision.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Nov. 3, 2023