

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Paul Rhude,
Petitioner

v.

Docket No. CR-22-0244

Dated: Jan. 26, 2024

**Barnstable County
Retirement Board,**
Respondent

Appearance for Petitioner:

Paul Rhude, *pro se*

Appearance for Respondent:

James H. Quirk, Jr., Esq.
James H. Quirk, Jr. P.C.
Post Office Box 268
Yarmouthport, MA 02675-0268

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The salary supplement that a Fire Chief was paid in lieu of health insurance coverage is not regular compensation under G.L. c. 32, § 1 and 840 CMR 15.03(3) because it was not base salary or other base compensation. It was an indirect payment for insurance premiums. Whether retirement deductions were taken from this payment or the parties agreed on the regular compensation status of the payments is irrelevant.

DECISION

Petitioner Paul Rhude appeals under G.L. c. 32, § 16(4) the decision of Respondent Barnstable County Retirement Board to exclude from regular compensation

pay that he received in lieu of health insurance coverage from his employer, the Town of Nantucket.

On March 27, 2023, DALA ordered the parties to file prehearing memoranda and proposed exhibits. On May 18, 2023, Mr. Rhude filed his memorandum and two proposed exhibits. (Exs. A, B.) On June 5, 2023, the Board filed its memorandum and nine additional proposed exhibits. (Exs. C-K.) On January 2, 2024, I ordered Mr. Rhude to submit additional evidence to prove that he timely filed his appeal. He replied that same day and submitted an additional proposed exhibit. (Ex. L.)

I held a hearing by Webex on January 10, 2024, at the Division of Administrative Law Appeals, 14 Summer Street, 4th Floor, Malden, Massachusetts. I admitted all 12 proposed exhibits into evidence. (Exs. A-L.) The Petitioner testified on his own behalf. The Respondent called no witnesses. The parties gave oral closing arguments.

FINDINGS OF FACT

Based on the evidence presented by the parties, I make the following findings of fact:

1. Paul Rhude worked at the COMM (Centerville-Osterville-Marston's Mills) Fire District for approximately 19 years. He left in 2015 at the rank of Captain. (Testimony.)

2. Mr. Rhude had accrued enough service at COMM to be entitled to a unique health insurance benefit: lifetime insurance through the Fire District. Under this benefit, Mr. Rhude was required to pay only 5% of the cost of his premium, while COMM paid the other 95%. (Testimony.)

3. From approximately September 2015 through July 2017, Mr. Rhude served as the Fire Chief for the Town of Nantucket. (Testimony.)

4. When Mr. Rhude took the Nantucket job, he was worried about the high cost of living on the island. The town understood Mr. Rhude's concerns, but, when he negotiated his contract with the town, it was reluctant to pay him significantly more than other high-ranking town officials. (Testimony.)

5. Mr. Rhude suggested that, in addition to his salary, he could be paid an additional sum contingent on maintaining health insurance for himself and his family through COMM. That would mean significant cost savings for both parties—less expensive health insurance for Mr. Rhude and no insurance premium for Nantucket—that could, in part, be passed on to Mr. Rhude. (Testimony.)

6. Mr. Rhude ultimately negotiated a three-year contract. It provided him with a salary of \$140,000 in his first year, \$144,200 in the second year, and \$148,526 in the third year. It also provided an additional payment contingent upon maintaining health insurance through COMM, thus not requiring Nantucket to pay for his insurance:

During the period of this Agreement, the TOWN shall provide RHUDE participation in any medical, dental, life and disability insurance and retirement programs generally available to TOWN employees, as they now exist or may hereafter be amended or changed, or which may in the future become available, the costs of which shall be borne by the TOWN and/or RHUDE, in accordance with the standard practice in effect for TOWN employees. If RHUDE elects to forgo group health and medical insurance coverage financed in any part by the TOWN for him, his spouse, and dependents RHUDE shall have his annual salary increased by an amount equal to (50) percent of the annual premium cost to the TOWN for the least expensive family plan offered by the TOWN. If RHUDE elects to re-enroll in Town-provided health care coverage, his salary would then be reduced by like amount.

(Ex. B; Testimony.) (Emphasis in original.)

7. During the whole period of his employment with Nantucket, Mr. Rhude maintained health insurance with COMM, and Nantucket did not pay any part of his health insurance. (Testimony.)

8. Nantucket withheld retirement deductions from the additional payment. (Testimony.)

9. Mr. Rhude intended to draft the contract language regarding the additional payment so that the payment would be treated as regular compensation under the retirement law. To achieve this goal, he sent the contract language to the retirement board for review. If the board opined that the payment would not qualify as regular compensation, Mr. Rhude would have attempted to redraft the contract so that the payment would qualify. (Testimony.)

10. On July 8, 2015, the Board notified Mr. Rhude that it and its counsel agreed that the payment would qualify as regular compensation. (Exs. A, C; Testimony.)

11. Not long after he was hired, Mr. Rhude began to have some trouble with town officials and decided to leave his Nantucket position in July 2017. (Testimony.)

12. After Mr. Rhude left Nantucket, he served as Fire Chief in Cotuit from July 2017 through January 2022. He was paid a set salary that did not depend on his source of health insurance. He remained a member of the Barnstable County retirement system. (Testimony.)

13. On October 18, 2021, Mr. Rhude applied for superannuation retirement. He retired in January 2022. (Ex. D; Testimony.)

14. On December 20, 2021, Board counsel opined again that the payments qualified as regular compensation. (Ex. E.)

15. On December 22, 2021, relying on its counsel’s opinion, the Board submitted its pension calculation to PERAC for review. The Board’s treatment of the payments as regular compensation made the years 2015 through 2018 Mr. Rhude’s highest three consecutive years of regular compensation. (Ex. F.)

16. On February 24, 2022, PERAC rejected the Board’s calculation. That same day, the Board requested from PERAC a more formal opinion why it had rejected the calculation. (Ex. G.)

17. On May 12, 2022, PERAC notified the Board that it had determined that the additional payments were not regular compensation because the funds were not payment for services and because they were “essentially” payments for insurance premiums. (Ex. G.)

18. On May 26, 2022, the Board notified Mr. Rhude that, based on the PERAC opinion, the Board would have to exclude the additional payments from his retirement allowance calculation. The Board notified him of his right to appeal the decision. Mr. Rhude received the Board’s letter on June 1, 2022. (Exs. H, I, L.)

19. On June 16, 2022, Mr. Rhude timely appealed. (Petitioner’s appeal letter and postmarked envelope.)

20. On June 22, 2022, PERAC approved the Board’s revised calculation. (Ex. J.)

21. On June 28, 2022, Mr. Rhude received a refund of the retirement deductions that the Board withheld from the additional payments. (Ex. K; Testimony.)

CONCLUSION AND ORDER

Mr. Rhude seeks to have payments that he received when he was Nantucket Fire Chief treated as regular compensation. The payments were made contingent on Mr. Rhude purchasing health and other insurance from a source other than the town. He obtained insurance from another source and therefore qualified for, and was paid, the additional payments. If Mr. Rhude failed to obtain insurance from a source other than the town and was forced to re-enroll in Nantucket’s insurance programs, he would no longer be entitled to the payments in question.

When a member retires from public service, he may be entitled to a superannuation retirement allowance that is based in part on regular compensation. G.L. c. 32, § 5(2)(a). Regular compensation during the relevant period is defined as “compensation received exclusively as wages.” G.L. c. 32, § 1. Wages are an employee’s “base salary or other base compensation of an employee paid to that employee for employment by an employer,” G.L. c. 32, § 1, including “pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees.” 840 CMR 15.03(3)(b). Wages specifically exclude “salary enhancements or salary augmentation plans which will recur for a limited or definite term” and “indirect . . . payments for . . . insurance premiums.” G.L. c. 32, § 1; 840 CMR 15.03(3)(f). Additionally, as a guidepost, the courts have held that regular compensation must be recurrent, regular, and ordinary. *Rotondi v. Contributory Retirement Appeal Bd.*, 463 Mass. 644, 653 (2012).¹

¹ While *Rotondi* interpreted the pre-2009 definition of regular compensation (G.L. c. 32, § 1; 840 CMR 15.03(1), (2)), the current definition “refines and narrows, but does

The payments Mr. Rhude received in lieu of Nantucket providing him with health and other insurance are not regular compensation. The first reason is that the payments were not base salary or other base compensation paid to Mr. Rhude for service to the town. The payments were not for Mr. Rhude's service. They were paid to him only because he was able to purchase insurance from his former employer, COMM Fire District, under a unique lifetime insurance benefit, which meant that the town did not have to pay for his insurance.

Second, the payments were not available to any other employees. They were a unique feature of Mr. Rhude's contract that he and the town manager arranged so that the town could justify paying him more than some other town officials. This was meant to entice Mr. Rhude to take the job by helping him pay the notoriously high cost of living on Nantucket. The payment's uniqueness contributes to its irregularity.

Third, the payments were not guaranteed. *See* 840 CMR 15.03(3)(b). A payment is not "guaranteed" if the employee has to do something to earn it. *See Scaduto v. Boston Retirement Bd.*, CR-07-493, at *10 (DALA July 24, 2009). For this reason, a payment contingent on passing a fitness test is not regular compensation. *Id.* at *11. For the same reason, a "lieutenant stipend" contingent on a police department not hiring a captain or deputy chief was not regular compensation. *Dudley v. Leominster Retirement Bd.*, CR-16-39, at *9-10. The payment Mr. Rhude received in lieu of insurance coverage from the town was contingent on his finding health insurance elsewhere. In fact, the agreement

not substantially alter," the previous one, and court decisions interpreting the previous definition are instructive in interpreting the current one. *Kelleher v. Barnstable County Retirement Bd.*, CR-10-794, at *5 (DALA Apr. 17, 2015).

specifically provided that if at any time Mr. Rhude was unable to obtain insurance elsewhere, he would no longer be entitled to the additional payments.

Finally, the payments were in essence indirect payments for Mr. Rhude's insurance premiums at COMM Fire District. If this extraordinary payment had not been negotiated by Mr. Rhude and the town, then the town would have paid for Mr. Rhude's insurance directly. If that were the case, it is indisputable that the town's payment of the insurance premium would not be regular compensation. In the instant case, when, rather than pay the insurance premium itself, the town paid Mr. Rhude so that he could pay for insurance elsewhere, the payment was still for insurance and is therefore an indirect payment of an insurance premium, which is specifically excluded from regular compensation.

At the hearing in this matter, Mr. Rhude focused most of his argument on representations that the Board made to him. A contemporaneous email from the Board stated that the Board and its counsel believed that the payments in question were regular compensation. Mr. Rhude contends that he would have altered the contract language to bring the payments within the definition of regular compensation if the Board had opined that they were not regular compensation. Now, based on the board's representations, he effectively argues that the board should be estopped from excluding the payments from regular compensation and an equitable remedy fashioned by DALA. Mr. Rhude's frustration is understandable, but neither the Board nor this tribunal can grant such requests. "Equitable considerations and the doctrine of estoppel do not alter the entitlements that an administrative agency must distribute under an unambiguous statute. The amount of the benefits is governed entirely by G.L. c. 32, and as such may not be

enlarged by a [government employee's] error.” *Leto v. State Bd. of Retirement*, CR-19-554, at *3 (DALA Nov. 19, 2021) (citations omitted). Likewise, whether the town took retirement deductions from these payments does not determine whether it is regular compensation; only the statute and regulations do. *Bulger v. Contributory Retirement Appeal Bd.*, 447 Mass. 651, 660 (2006).

For the above-stated reasons, the Board’s decision not to treat the payments in question as regular compensation is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

Dated: Jan. 26, 2024