

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

**Division of Administrative Law Appeals**

**Ann Shor,**  
Petitioner

v.

Docket No. CR-21-0331  
Date: May 12, 2023

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

Ann Shor, *pro se*

**Appearance for Respondent:**

James H. Salvie, 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 of G.L. c. 32, § 5(2)(f) when it reduced Petitioner’s regular compensation in 2018-2019 for the purpose of calculating her retirement allowance. Petitioner’s salary was increased under the Pay Equity Act, which does not qualify for any of the statute’s exceptions.

**DECISION**

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

calculation of her retirement allowance. The Board concluded that Ms. Shor's regular compensation in fiscal year 2018-2019 must be reduced.

On September 8, 2021, DALA informed the parties that Ms. Shor's appeal appeared to be one that could be resolved on written submissions under 801 CMR 1.01(10)(c). Neither party objected to the magistrate's order. On May 12, 2022, Ms. Shor offered six documents, labeled 1-6. On July 18, 2022, the Board offered ten documents, labeled 1-10. I have admitted these exhibits into evidence as Exs. P1-6 and R1-10.

**FINDINGS OF FACT**

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

1. From April 27, 2008 until her retirement on May 08, 2021, Ann Shor was employed by the Massachusetts Rehabilitation Commission. (Ex. R7.)
2. Ms. Shor was a member of the State Retirement System at all times relevant to this appeal. (Ex. R7.)
3. At the time of her retirement, Ms. Shor's job title was Director. (Ex. R7.)
4. On July 1, 2018, an amendment to the Massachusetts Equal Pay Act (MEPA), G.L. c. 149, § 105A, went into effect. The statute states: "[n]o employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work." G.L. c. 149, § 105A(b). (Ex. P6.)
5. In a letter dated June 28, 2019, Ms. Shor was notified that her annual salary was increased from \$89,369.15 to \$100,548.73. (Exs. P3 and R3.)

6. The increase to Ms. Shor's salary was backdated to be effective July 1, 2018. (Ex. R8.)

7. After the MEPA salary adjustment, Ms. Shor's salary figures were the following: Ms. Shor's salary for the period of May 9, 2016 through May 8, 2017 was \$86,646.96. (Ex. R4.)

8. Ms. Shor's salary for the period of May 9, 2017 through May 8, 2018 was \$89,079.68. (Ex. R4.)

9. Ms. Shor's salary for the period of May 9, 2018 through May 8, 2019 was \$98,956.02. (Ex. R4.)

10. Ms. Shor's salary for the period of May 9, 2019 through May 8, 2020 was \$102,085.89. (Ex. R4.)

11. Ms. Shor's salary for the period of May 9, 2020 through May 8, 2021 was \$102,559.71. (Ex. R4.)

12. On March 8, 2021, Ms. Shor applied for retirement with an effective date of May 8, 2021. (Ex. R7.)

13. In an email on August 19, 2021, Ms. Shor received verification that the increase that was effective 2018 was due to the pay equity legislation. (Ex. P4.)

14. To determine Ms. Shor's yearly retirement allowance, the Board used the average annual rate of regular compensation of the last three years (2018-2019, 2019-2020, and 2020-2021) that she was working, which were also her highest three years. (Ex. R4.)

15. The Board calculated Ms. Shor's salary for the year May 9, 2018 - May 8, 2019 as \$98,956.02. The average of the prior two years, May 9, 2016 - May 8, 2018, plus 10 percent equals \$96,649.65. (Ex. R4.)

16. On August 24, 2021, the Board informed Ms. Shor that her three-year average had been affected by the "anti-spiking" provision under G.L. c. 32, § 5(2)(f). The Board concluded that her 2018-2019 regular compensation exceeded the average of the preceding two years by more than 10 percent. Ms. Shor's regular compensation for the period of 2018-2019 was consequently reduced by \$2,306.37. (Ex. R8.)

17. On September 4, 2021, Ms. Shor timely appealed. (Ex. R9.)

**CONCLUSION AND ORDER**

The Board's application of the "anti-spiking" provision, which required it to reduce Ms. Shor's 2018-2019 regular compensation when calculating her retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

For members like Ms. Shor, who were members of a retirement system prior to 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. This period took place in fiscal years 2018-2019, 2019-2020, and 2020-2021, during which time the average annual compensation in the last three years was \$98,956.02, \$102,085.89, and \$102,559.71.

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.

Ms. Shor's salary from May 9, 2018 through May 8, 2019 was \$98,956.02. Ten percent more than the average of the prior two years, May 9, 2016 through May 8, 2018, equaled \$96,649.65. This increase in compensation exceeds the 10% limit imposed by the anti-spiking provision, so the Board reduced the regular compensation for May 9, 2018 through May 8, 2019 by the difference of \$2,306.37.

There are several exceptions to the anti-spiking provision's limits: (1) an increase in regular compensation due to an increase in hours of employment; (2) a bona fide change in position; (3) a modification of a salary or salary schedule negotiated for bargaining unit members; (4) an increase in salary for a member whose salary is specified by law; and (5) an exception exclusive to teachers. *See* G.L. c. 32, § 5(2)(f). Ms. Shor does not contend that any of these exceptions apply. Instead, she suggests that the exceptions to the anti-spiking provision should not be read as an exhaustive list, and that pay raises under the Pay Equity Act should be included as an exception to the anti-spiking law as a matter of public policy.

"[W]here the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." *Allegaert v. Harbor View Hotel Owner LLC*, 100 Mass App. Ct. 483, 486 (2021). The Legislature enumerated specific exceptions, and only those specific exceptions, to its anti-spiking provision. There is nothing in the text of § 5(2)(f) or the rest of chapter 32 that implies an intention to broaden those exceptions into categories of more general application. *Bender v. State Bd. of Retirement*, CR-20-0279, at \*11 (DALA Feb. 18, 2022). The statutory language in the retirement statute is plain and thus conclusive as to the legislature's intent. There is no evidence that the legislature, when it

passed the Equal Pay Act, exempted from the anti-spiking law raises that were the result of the application of the Act.<sup>1</sup>

If Ms. Schor is asking for an equitable remedy, neither CRAB nor DALA have equitable powers. *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019); *Petrillo v. PERAC*, CR-92-731 (DALA Feb. 15, 1993), *aff'd* (CRAB Oct. 22, 1993).

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

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*/s/ Kenneth J. Forton*

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Kenneth J. Forton  
Administrative Magistrate

DATED: May 12, 2023

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<sup>1</sup> Ms. Shor notes that a publication of the Attorney General states that "retirement plans" are considered "wages" for the purpose of MEPA. It is my understanding that this means that there can be no discrimination based on gender in plans available, and that the terms of the plan cannot discriminate based on gender either. Chapter 32 meets those requirements and MEPA did not amend it in any way.

Of course, this appeal's outcome also leaves us with the anomalous result that a woman like Ms. Shor ends up with a slightly smaller retirement allowance than a man paid the same nominal rate during the "spike" year. Perhaps the Legislature ought to address this by amending either the anti-spiking provision or MEPA.