

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Edith Smith,
Petitioner

v.

Docket No. CR-22-0375
Date: Jan. 26, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Edith Smith, *pro se*

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
One Winter Street
Boston, MA 02108-4747

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 the years 2020-2021 and 2021-2022 for the purpose of calculating her retirement allowance. Petitioner, an Operations Manager at the Department of Career Services, did not qualify for any of the enumerated exceptions to the anti-spiking provision. Petitioner’s salary was increased under the Massachusetts Equitable Pay Act, which does not qualify for any exception, and neither DALA nor the Board can give equitable relief.

DECISION

Petitioner Edith Smith 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. Smith's regular compensation for the years 2020-2021 and 2021-2022 must be reduced.

On September 27, 2022, Ms. Smith waived her right to an evidentiary hearing and requested that this matter be resolved on written submissions under 801 CMR

1.01(10)(c). On June 29, 2023, the Board submitted a memorandum and seven proposed exhibits, labeled 1-7. On July 27, 2023, Ms. Smith offered a letter with her arguments and three proposed exhibits labeled 8-10. Upon DALA's request for clarification, the Board submitted an additional proposed exhibit. I have entered the parties' proposed exhibits into evidence as marked. (Exs. 1-11.)

FINDINGS OF FACT

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

1. From September 4, 2007 until January 13, 2013, Edith Smith worked at the Franklin Hampshire Career Center. During this period, she was not a member of a contributory retirement system. (Exs. 1, 3.)
2. From January 14, 2013 until her retirement on April 8, 2022, Ms. Smith was employed by the Commonwealth's Department of Career Services. (Exs. 1, 3.)
3. Ms. Smith became a member of the Massachusetts State Employees Retirement System on June 2, 2013 and remained a member until she retired. (Ex. 1.)
4. Ms. Smith applied to the State retirement system to purchase her Franklin Hampshire service. She completed the purchase over a five-year period. (Ex. 11.)
5. On February 7, 2021, Ms. Smith applied for retirement with an effective date of April 8, 2022. At the time of her retirement, Ms. Smith's job title was Operations Manager. (Ex. 1.)

6. To determine Ms. Smith's retirement allowance, the Board used the average annual rate of regular compensation of the last five years that she worked (2017-2018, 2018-2019, 2019-2020, 2020-2021, and 2021-2022), which were also her highest annual salary years. (Ex. 4.)

7. The Board determined that Ms. Smith's salary for the period of April 10, 2017 through April 9, 2018 was \$68,792.17. (Exs. 3, 8.)

8. The Board determined that Ms. Smith's salary for the period of April 10, 2018 through April 9, 2019 was \$70,173.47. (Exs. 3, 8.)

9. The Board determined that Ms. Smith's salary for the period of April 10, 2019 through April 8, 2020 was \$71,997.82. (Exs. 3, 8.)

10. The Board determined that Ms. Smith's salary for the period of April 9, 2020 through April 8, 2021 was \$87,391.22. (Exs. 3, 8.)

11. The Board determined that Ms. Smith's salary for the period of April 9, 2021 through April 8, 2022 was \$89,246.07. (Exs. 3, 8.)

12. The reason that her pay increased so much in the 2020-2021 year was that her pay was adjusted under the Massachusetts Equal Pay Act. (Ex. 5.)

13. The Board calculated Ms. Smith's salary for the year April 9, 2020 – April 8, 2021 as \$87,391.22. The average of the prior two years, April 10, 2018 - April 8, 2020, plus 10 percent equals \$78,194.21. (Ex. 4.)

14. The Board calculated Ms. Smith's salary for the year April 9, 2021 – April 8, 2022 as \$89,246.07. The average of the prior two years, April 10, 2019 - April 8, 2021, plus 10 percent equals \$87,663.97. (Ex. 4.)

15. On August 24, 2022, the Board informed Ms. Smith that her five-year average regular compensation had been affected by the “anti-spiking” provision under G.L. c. 32, § 5(2)(f) because her regular compensation for the years 2020-2021 and 2021-2022 exceeded the average of the preceding two years by more than 10 percent. Ms. Smith’s regular compensation for the years 2020-2021 and 2021-2022 was consequently reduced by \$9,197.01 and \$1,582.10, respectively. (Exs. 4, 6, 8.)

16. On September 6, 2022, Ms. Smith timely appealed. (Ex. 7.)

CONCLUSION AND ORDER

The Board’s application of the “anti-spiking” provision, which required it to reduce Ms. Smith’s regular compensation for the years 2020-2021 and 2021-2022 when calculating her retirement allowance, is affirmed. *See* G.L. c. 32, § 5(2)(f).

The Board applied the anti-spiking law to Ms. Smith’s five highest consecutive years of regular compensation. She argues that the Board should have applied the anti-spiking law to only her highest three years of regular compensation. Whether a member’s retirement allowance is based on three or five years of regular compensation is based upon when the member joined the retirement system. If she became a member before April 2, 2012, it is three years; if on or after April 2, 2012, it is five years. G.L. c. 32, § 5(2)(a). Ms. Smith first became a member on June 2, 2013. Therefore, her retirement allowance calculation is based on her highest five years.

Ms. Smith maintains that her membership date should not be the date she initially became a member, but rather the first day of the service that she purchased, which was in 2007. The Board correctly points out, however, that service purchases do not create retroactive membership and consequently do not change the membership date. *See*

Manning vs. Contributory Retirement Appeal Bd., 29 Mass App. Ct. 253, 255-56 (1990) (“An entitlement to ‘creditable service,’ G.L. c. 32, Section 3(3), or to ‘credit’ as referred to in G.L. c. 32, Sections 3(5) and 4(2)(c), does not create retroactive membership.”) Consequently, June 2, 2013 remains her membership date, and Ms. Smith’s retirement calculation is based on the highest five consecutive years of regular compensation.

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.

For the years 2016-2017, 2017-2018, and 2018-2019, Ms. Smith’s annual compensation did not exceed the average of the prior two years. But, her last two years did exceed this limit. The Board calculated Ms. Smith’s salary for the year April 9, 2020 – April 8, 2021 as \$87,391.22. The average of the prior two years, April 10, 2018 - April 8, 2020, plus 10 percent equals \$78,194.21. This means that her 2020-2021 compensation exceeded the 10 percent limit by \$9,197.01. The Board calculated Ms. Smith’s salary for the year April 9, 2021 – April 8, 2022 as \$89,246.07. The average of the prior two years, April 10, 2019 - April 8, 2021, plus 10 percent equals \$87,663.97. (Ex. 4.) This mean that her 2021-2022 compensation exceeded the 10 percent limit by \$1,582.10. The Board correctly reduced Ms. Smith’s regular compensation accordingly.

There are several exceptions to the anti-spiking provision's limits.¹ Ms. Smith does not argue that she qualifies for any of these exceptions. Instead, she argues that her pay raises in 2020-2021 and 2021-2022 pursuant to the Equal Pay Act, G.L. c. 149, § 105A should not trigger the anti-spiking provision, and seeks equitable relief.

Under the Equal Pay Act, Ms. Smith received a large increase to her salary to address pay inequity. The irony in this situation is that the larger the pay inequity was, the more likely the member's pay would exceed the anti-spiking law's limitations. It would be logical for the Legislature to address this by amending either the anti-spiking provision or the Equal Pay Act, but it has not yet done so and there is no exception in the anti-spiking law for such raises. *See Shor v. State Bd. of Retirement*, CR-21-0331 (DALA May 12, 2023); *Kidd v. State Bd. of Retirement*, CR-21-0313 (DALA May 12, 2023); *Healy v. MTRS*, CR-18-0515 (DALA June 14, 2019).

DALA and CRAB have no authority to provide equitable relief that contradicts specific statutory language. *Petrillo v. PERAC*, CR-92-731 (DALA Feb. 15, 1993), *aff'd* (CRAB Oct. 22, 1993); *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Healy, supra*.

For the above-stated reasons, the Board correctly applied G.L. c. 32, § 5(2)(f) in its calculation of Ms. Smith's retirement allowance. The decision of the Board is

¹ The enumerated exceptions to the anti-spiking provision are: (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. G.L. c. 32, § 5(2)(f).

therefore affirmed. The Board is directed to return to Ms. Smith any excess withholdings with interest.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Jan. 26, 2024