

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Joseph Solomon,
Petitioner

v.

Docket Nos. CR-21-0371; CR-21-0274
Date: Sept. 8, 2023

Methuen Retirement Board,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

Neither G.L. c. 48, § 57G, which sets a minimum police chief salary, nor G.L. c. 41, § 108O, which authorizes police chiefs and municipalities to negotiate compensation, set a specific salary amount. The salaries negotiated under their authority, therefore, do not qualify for the exception to the anti-spiking law for “salary amounts specified by law.” G.L. c. 32, § 5(2)(f). Petitioner is not entitled to the exceptions for a bona fide change in position or collectively bargained salary increases.

DECISION

This decision arises from two related appeals. Petitioner Joseph Solomon timely appealed under G.L. c. 32, § 16(4) the June 24, 2021 decision of Respondent Methuen Retirement Board. The Board determined that Mr. Solomon’s regular compensation exceeded the 10% limit imposed under the anti-spiking provision, G.L. c. 32, § 5(2)(f), and issued him a refund for excess contributions. This appeal was assigned docket number CR-21-0274. Additionally, Petitioner appealed the Board’s September 30, 2021 final calculation of his retirement allowance after spiking adjustments. This appeal was assigned docket number CR-21-0371. On April 11, 2022, DALA determined that both appeals involved the same retirement benefits and same application of the anti-spiking law and consolidated them. DALA also informed the parties that the appeals appeared to be ones 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. On May 20, 2022, the Board submitted a memorandum and offered seven exhibits, labeled 1 through 7. On August 22, 2022, Mr. Solomon submitted a memorandum, his own affidavit, and six additional exhibits, labeled A through F. I have admitted these exhibits into evidence as proposed.

FINDINGS OF FACT

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

1. Joseph Solomon worked in the Methuen Police Department from February 1987 until his retirement on January 15, 2021. During this time, he was a member of the Methuen Retirement Board. (Ex. 3.)

2. During all times relevant to this appeal, Mr. Solomon served as Methuen Police Chief. (Ex. 3.)

3. On February 16, 2017, Mr. Solomon signed an employment contract for a term beginning March 1, 2017 and ending February 28, 2022. (Ex. B.)

4. The 2017 contract added two new titles: “emergency management director” and “harbor master.”¹ However, the duties listed in the 2017 contract were exactly the same as his last contract, signed in 2014. (Exs. A, B.)

5. G.L. c. 48, § 57G provides that a police chief’s “annual base rate of compensation” shall not be less than 2.0 times “the highest annual rate of compensation of a . . . permanent, full-time police officer or patrolman.” During all times relevant to this appeal, Methuen had opted into this statutory minimum police chief salary provision. *See* Methuen Resolution #988, Oct. 18, 1982.

6. For his 2017 contract, Mr. Solomon negotiated a higher rate than the minimum provided in G.L. c. 48, § 57G.² The contract provided him base compensation of 2.5 times the maximum salary of a patrol officer, beginning on March 1, 2017. Beginning July 1, 2017, Mr. Solomon’s compensation then increased to 2.6 times the maximum patrol officer salary. (Ex. B.)

¹ Methuen does not have a harbor. It has a single boat ramp. *See* discussion, *infra*.

² Mr. Solomon claims that G.L. c. 41, § 108O gave the City authority to negotiate base compensation higher than the minimum provided under G.L. c. 48, § 57G. Section 108O merely gives municipalities and police chiefs the authority to negotiate an individual contract.

7. In September 2017, the City and the Methuen Police Patrolmen's Association signed a collective bargaining agreement (CBA) that included increases in pay. The CBA went into effect retroactive to July 1, 2017. (Ex. C.)

8. Several of the pay increases under the new Patrolmen's CBA, including a longevity increase of up to \$5,100.00 and a technology stipend of \$1,000.00, were made effective July 1, 2018, and added to base pay. (Ex. C.)

9. Under the compensation formula in his 2017 contract, Mr. Solomon's FY 2019 base salary would have been \$375,458.00. (Ex. D.)

10. In a letter dated July 19, 2018, Methuen Mayor James Jajuga informed Mr. Solomon that his employment contract was subject to annual appropriation and unenforceable in its negotiated form. Mayor Jajuga informed Mr. Solomon that instead of setting his salary at 2.6 times the maximum patrol officers' salary, his FY 2019 salary was going to be increased to \$291,442.27, a 2.56% increase over his FY 2018 salary of \$284,153.94. (Ex. D.)

11. In a letter dated July 3, 2019, Mayor Jajuga informed Mr. Solomon that his FY 2020 salary was going to be \$297,271.12, a 2.0% increase over his FY 2019 salary of \$291,442.27. (Ex. E.)³

12. On January 8, 2021, Mr. Solomon applied for retirement effective January 2021. (Ex. 3.)

³ This letter also states that Mr. Solomon's FY 2019 salary would actually total more than \$291,442.27 after education incentive, nightshift differentials, and various additions were considered.

13. The Board performed calculations to determine whether Mr. Solomon was subject to the limitations of the anti-spiking law, G.L. c. 32, § 5(2)(f). (Ex. 4.)

14. The Board determined Mr. Solomon’s salary for the period of January 22, 2016 through January 21, 2017 was \$204,137.60. (Ex. 4.)

15. The Board determined Mr. Solomon’s salary for the period of January 22, 2017 through January 21, 2018 was \$208,739.17. (Ex. 4.)

16. The Board determined Mr. Solomon’s salary for the period of January 22, 2018 through January 21, 2019 was \$246,899.47. (Ex. 4.)

17. The Board determined Mr. Solomon’s salary for the period of January 22, 2019 through January 21, 2020 was \$284,029.20. (Ex. 4.)

18. The Board determined Mr. Solomon’s salary for the period of January 22, 2020 through January 21, 2021 was \$301,868.64. (Ex. 4.)

19. To determine Mr. Solomon’s yearly retirement allowance, the Board used the average annual rate of regular compensation during the last three years (2018-2019, 2019-2020 and 2020-2021) that he worked, which were also his highest three years of regular compensation. (Ex. F.)

20. The Board considered the G.L. c. 48, § 57G police chief salary minimum to be a “salary set by law,” one of the exceptions to the anti-spiking law. Accordingly, when determining whether the anti-spiking provision applied to Mr. Solomon, the Board looked at the higher of (1) a 10% increase over the prior two-year average salary or (2) the minimum salary required under § 57G. If Mr. Solomon’s salary exceeded both of these figures, it would trigger the anti-spiking provision and the Board would calculate

the excess by comparing his actual pay to the higher of the last two years' average or his statutory minimum salary. (Ex. 4.)

21. For the period of January 22, 2018 – January 21, 2019, the Board determined Mr. Solomon's salary was \$246,899.47. A 10% increase to the average of his prior two-year salary is \$227,082.23. The § 57G minimum salary was \$290,576.00. Because Mr. Solomon's actual salary was below the § 57G minimum salary, the Board did not apply the anti-spiking provision. (Ex. 4.)

22. For the period of January 22, 2019 – January 21, 2020, the Board determined Mr. Solomon's salary was \$284,029.20. A 10% increase to the average of his prior two-year salary is \$250,601.25. The § 57G minimum salary was \$289,203.14. Because Mr. Solomon's actual salary was below the § 57G minimum salary, the Board did not apply the anti-spiking provision. (Ex. 4.)

23. For the period of January 22, 2020 – January 21, 2021, the Board determined Mr. Solomon's salary was \$301,868.64. A 10% increase to the average of his prior two-year salary is \$292,010.77. The § 57G minimum salary was \$288,114.32. Because Mr. Solomon's salary was greater than the higher of the two figures (\$292,010.77), the Board applied the anti-spiking provision and reduced Mr. Solomon's pensionable salary for the year by \$9,857.87. (Ex. 4.)

24. In a letter dated June 24, 2021, the Board informed Mr. Solomon that the regular compensation used to calculate his average salary was being reduced under the anti-spiking law, G.L. c. 32, § 5(2)(f). The Board returned the excess contributions that had been withheld. (Pleadings.)

25. On July 7, 2021, Mr. Solomon timely appealed the Board's June 24, 2021, decision. (Pleadings.)

26. In a letter dated September 30, 2021, the Board informed Mr. Solomon that the three-year average rate of regular compensation being used to calculate his retirement benefits after spiking adjustments was \$274,313.15, and that this was a final decision and thus appealable. (Ex. 6.)

27. On October 4, 2021, Mr. Solomon appealed the Board's September 30, 2021, decision. (Pleadings.)

CONCLUSION AND ORDER

This appeal arises from a dispute over the calculation of Mr. Solomon's retirement allowance. G.L. c. 32, § 5(2)(a) directs that a member's yearly retirement allowance be calculated based, in part, on his highest average three-year period of regular compensation. Section 5(2)(f), also 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 per cent.

The Board determined that spiking occurred in the 2020-2021 year. To determine whether the regular compensation for any year violates the anti-spiking provision, a retirement board must calculate the percentage increase of that year over the average of the regular compensation from the previous two years. G.L. c. 32, § 5(2)(f). Mr. Solomon's regular compensation from 2020 to 2021 was \$301,868.64. The average compensation from the two prior years, was \$265,464.34 (2018-2019 regular compensation of \$246,899.47 plus 2019-2020 regular compensation of \$284,029.20,

divided by two). The 2020-2021 increase over that two-year average was \$36,404.30, or 13.71%. This increase in compensation exceeds the 10% limit imposed by the anti-spiking provision. *Id.* The Board determined that spiking did not occur in the 2018-2019 and 2019-2020 years.

There are several exceptions to the anti-spiking law: (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).

When the Board performed its anti-spiking calculations it applied the exception for increases in salary that are “specified by law.” The Board determined that the police chief salary minimum contained in G.L. c. 48, § 57G was a salary “specified by law.” G.L. c. 48, § 57G provides that a police chief’s “annual base rate of compensation” shall not be less than 2.0 times “the highest annual rate of compensation of a . . . permanent, full-time police officer or patrolman.” Methuen opted into this law in 1982. *See* Methuen Resolution #988, Oct. 18, 1982.

Mr. Solomon contends that the Board erred when it used the G.L. c. 48, § 57G minimum salary as his salary specified by law. He suggests instead that his entire salary in all the relevant years was “specified by law” because, in addition to the salary minimum, a separate statute, G.L. c. 41, § 108O, provides municipalities and police chiefs with authority to negotiate salaries and benefits without any maximum limit. According to Mr. Solomon’s theory, the fact that he negotiated his salary with Methuen makes the salary amount “specified by law” and impervious to the anti-spiking law.

For the reasons stated below, the Board’s application of the “salary specified by law” exception was incorrect, but so is Mr. Solomon’s argument. His salary amount is *not* specified by law; that’s why he had to negotiate his salary with Methuen. Therefore, his entire annual regular compensation is the correct figure to use when determining whether his pay exceeds the anti-spiking law’s limitations.

The anti-spiking law was enacted by the legislature in 2011. Acts 2011, c. 176, § 18. It did not originally include the exception based on salary amounts specified by law; that exception was added in 2014. Acts 2014, c. 165, § 68. The parties cite statutes, or “laws,” as the basis for concluding that Mr. Solomon’s salary amount is specified by law. But, the remaining question is whether those laws *specify* a salary amount for the Methuen police chief.

“[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature” *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003) (quoting *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001)). The classic source of plain meaning is dictionary definitions. Merriam Webster defines “specify” as “to name or state explicitly or in detail.” Merriam Webster’s Collegiate Dictionary (10th ed. 1994). Black’s Law Dictionary provides a similar definition of “specify”: “to state in full and explicit terms; to point out; to tell or state precisely or in detail.” Black’s Law Dictionary (rev. 4th ed. 1968). Following these definitions, for a salary to be “specified by law,” the law must precisely and explicitly state the position’s salary. While G.L. c. 48, § 57G provides a minimum salary for a police chief, it does not explicitly state a salary amount. G.L. c. 41, § 108O is even worse; it sets no limitations at all on the negotiations over the police chief salary, it merely empowers the parties to negotiate.

Thus, under the dictionary definitions fairly read, neither statute the parties used *specifies* a salary amount. *Compare, e.g.*, G.L. c. 6, § 1(a) (setting governor salary at \$185,000.00 plus an annual defined adjustment); G.L. c. 11, § 1(a) (setting state auditor salary at \$165,000.00 plus an annual defined adjustment).

PERAC has also offered some guidance. “Th[e] amendment [adding salary amounts specified by law] would address those positions, including certain elected and appointed officeholders, whose salary amount is statutorily set out in a state or federal general or special law. Therefore, raises received through a change in that salary-setting law would receive the same protection as raises received through Chapter 150E contracts.” PERAC Memo #29/2014, issued Aug. 13, 2014. This guidance reasonably assumes that the laws would list specific salaries for particular positions. Consistent with this understanding, if the law that set the salary did not change, then any increased salary provided is not protected by the exception. Neither G.L. c. 48, § 57G nor G.L. c. 41, § 108O changed during the relevant period. Any fluctuations in Mr. Solomon’s annual salaries were based on factors outside those statutes.

As for the aim of the legislature, “[i]n PERAC’s view, the purpose of § 5(2)(f) is to shield retirement systems from the disproportionate burdens of late-breaking upsurges in compensation.” *Willette and Heuston v. Somerville Retirement Bd. and PERAC*, CR-20-282, CR-20-381, at *7 (May 7, 2021). The exceptions to anti-spiking in § 5(2)(f) also must be read with this purpose in mind. *Id.* at *7-8. Neither G.L. c. 48, § 57G nor G.L. c. 41, § 108O specify a particular salary or even a maximum salary. Thus, they do nothing to govern or limit “late-breaking upsurges in compensation.” *Willette and Heuston*, *supra*.

The necessary conclusion is that Mr. Solomon's annual salaries during the years in question were not specified by law. Consequently, he is not entitled to that exception to the anti-spiking law and his retirement allowance must be recalculated taking that into account.

Mr. Solomon argues that he qualifies for two other exceptions to the anti-spiking law: (1) he had a bona fide change in position, and (2) his compensation was derived from a collective bargaining agreement.

Mr. Solomon argues that he had a bona fide change in position in 2017. A bona fide change in position occurs when "the essential duties of the position change." *See* PERAC Memorandum #16/2014, issued Apr. 25, 2014. Mr. Solomon's 2017 employment contract added two titles: emergency management director and harbormaster. These titles were added to the first page of the contract, but they are not included elsewhere in the contract and no new duties are listed. A title change without a change in duties is not enough to be considered a bona fide change in position. *See* PERAC Memo #16/2014, *supra*; *see also Lam v. MTRS*, CR-17-170 (DALA Feb. 26, 2021). Mr. Solomon has not shown that his duties changed, only that he was given the two new titles in his 2017 contract.

Even if Mr. Solomon was given additional duties in connection with these two titles, the duties would not likely rise to the level of a bona fide change of position. Emergency Management Director is a position created under the Civil Defense Act. Acts 1950, c. 639. Under the Act, municipalities are required to have an emergency management director. *Id.* § 13. According to the Massachusetts Emergency Management Agency, this position is often held by the chief or another member of

municipal fire or police departments. *See* www.mass.gov/find-your-local-emergency-management-director-emd. The position has no regular duties. The emergency management director acts only during “disasters caused by attack, sabotage or other hostile action; or by riot or other civil disturbance; or by fire, flood, earthquake or other natural causes.” Acts 1950, c. 639, § 1. During these emergencies, the emergency management director is given the power to enter into contracts, incur obligations, employ temporary workers, rent equipment, purchase supplies to combat disasters, protect health and safety of persons and property, and provide emergency assistance to victims. *Id.* § 13. These duties center around community leadership and protection during times of crisis, duties that overlap significantly with the duties of a police chief.

The contract likewise only listed the harbormaster title on its cover page and included no additional duties. Moreover, Methuen does not have a public dock or a marina. It has a single boat ramp. *See* www.cityofmethuen.net/191/Methuen-Riverside-Boat-Ramp. If Mr. Solomon performed any additional duties as harbormaster, they are not in the record and were likely de minimis.

Finally, Mr. Solomon contends that he qualifies for the anti-spiking exception based on “modification of a salary or salary schedule negotiated for bargaining unit members.” Mr. Solomon’s logic here, as elsewhere, is attenuated. Mr. Solomon contends that because his contract is based on percentages of pay in collective bargaining units, his pay is by extension also included. This exception is not meant for persons who negotiate individual employment contracts. PERAC Memo #16/2014, issued Apr. 25, 2014. To qualify for this exemption, the salary schedules need to have been bargained for by bargaining unit members, and the retirement system member must himself be a

member of the bargaining unit. *Id.* Mr. Solomon was not a member of any collective bargaining unit. His salary during the relevant years was based on a percentage increase to his prior salary. Even if his salary was determined using the highest patrol officer's salary, under § 57G, he would not qualify for this exception because he still was not a member of a bargaining unit.

For the foregoing reasons, Mr. Solomon's retirement allowance must be recalculated using his actual regular compensation. No exception to the anti-spiking law applies to him. "Any withholdings excluded from the calculation of [Mr. Solomon's] average annual rate of regular compensation . . . shall be returned to [him] with interest at the assumed actuarial rate." G.L. c. 32, § 5(2)(f).

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

Dated: Sept. 8, 2023