

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kenneth Walsh,
Petitioner

v.

Docket No. CR-21-0681
Date Issued: June 23, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

Pro se
57 Willard Street
Ayer, MA 01432

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

Petitioner's accidental disability retirement allowance was calculated correctly. The collectively bargained raise for persons occupying Petitioner's job title is irrelevant to the amount of his allowance because the allowance is based on regular compensation, which must be received for service to the employer, and the effective date of the raise was more than 3 years after Petitioner's last day of work. G.L. c. 32, § 7(2). The Board also correctly calculated Petitioner's effective date of retirement as the date six months prior to the filing of his accidental disability retirement application. *Id.*

DECISION

Petitioner Kenneth Walsh timely appealed, under G.L. c. 32, § 16(4), the December 14, 2021 decision of Respondent State Board of Retirement determining the amount and effective date of his retirement allowance. On July 1, 2022, DALA suggested that this appeal could be decided on written submissions under 801 CMR 1.01(10)(c), and issued a scheduling order. Neither party objected to the magistrate’s order. On July 12, 2022, Petitioner submitted his argument and 11 proposed exhibits. On September 16, 2022, the Board filed a memorandum and 8 proposed exhibits. I have entered the parties’ proposed exhibits into evidence, as marked. (Exs. P1-P11, R1-R8.)

FINDINGS OF FACT

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

1. Mr. Walsh injured his right elbow in the performance of his job duties as a Motor Equipment Mechanic III with the Department of Transportation (DOT) on April 25, 2016. (Ex. R4.)
2. Mr. Walsh worked light duty until his last day of work on February 7, 2017. (Exs. R1, R3.)
3. Mr. Walsh submitted an application for accidental disability retirement on June 6, 2018, which was received at the Board on June 12, 2018. As part of this application process, on October 1, 2018, the DOT submitted a Salary Request and Release form to the Board, providing Mr. Walsh’s monthly salary for the 12 months prior to his last day of work on February 7, 2017. (Exs. R4, R5.)

4. Mr. Walsh's application for accidental disability retirement was approved by the Board on June 26, 2020 and by PERAC on August 19, 2020. (Ex. R6.)

5. The Board determined the effective date of Mr. Walsh's retirement under G.L. c. 32, § 7(2) to be December 12, 2017, six months prior to the filing of his application on June 12, 2018. (Ex. R7.)

6. Using the monthly salary Mr. Walsh received for the 12 months prior to his last day of work on February 7, 2017, the Board calculated his annual weighted salary average as \$58,233.46. (Ex. R7.)

7. Mr. Walsh's retirement allowance was first paid January 29, 2021, retroactive to December 12, 2017, his effective retirement date. (Ex. R7.)

8. On July 1, 2019, after Mr. Walsh applied for disability retirement and before his application was approved, the DOT and the Coalition of MassDOT Unions completed a collective bargaining agreement titled the Master Labor Integration Agreement (MLIA). (Ex. P4.)

9. Part of the MLIA addressed a large study that dealt with how employees were classified in job titles, and therefore how they were compensated. In subsequent negotiations between the parties to the MLIA, employees designated Motor Equipment Mechanic III, like Mr. Walsh had been, were moved to a different bargaining unit with a significantly higher salary. The reclassification went into effect on February 26, 2020, more than three years after Mr. Walsh's last day of work. (Exs. P1, P2, P3, P4, P5, P6, P7.)

10. As a result of the reclassification, Mr. Walsh received a letter from the DOT on November 1, 2020 indicating that his new annual salary as a Motor Equipment

Mechanic III would be \$73,097.63 (representing a 19.97% increase). The record does not reflect why Mr. Walsh received this notice after he had already retired. (Exs. P3, P4.)

11. Perhaps it was because the new salary triggered some small adjustments to payments (listed below) that Mr. Walsh received after he stopped working. (Exs. P10, P11.)

12. On April 2, 2021, Mr. Walsh received an adjustment to workers' compensation payments that he had already received from the DOT. (Ex. P11.)

13. On April 10, 2021, Mr. Walsh received an adjustment to his sick leave buy back and compensation for unused vacation. (Ex. P10.)

14. On September 3, 2021, Mr. Walsh requested that the Board adjust his accidental disability retirement allowance to reflect the salary increase. (Ex. R3.)

15. On December 14, 2021, the Board denied Mr. Walsh's request. (Ex. R1.)

16. On December 22, 2021, Mr. Walsh timely appealed. (Ex. R2.)

17. After he filed his appeal, on June 10, 2022 Mr. Walsh received an additional \$35.85 of retroactive pay from the DOT. It was titled "Retro Regular Pay RET." (Ex. P8.)

18. In June 2022, Mr. Walsh received an additional minor adjustment to his vacation and sick leave buyback payments. (Ex. P9.)

CONCLUSION AND ORDER

Mr. Walsh seeks an increase to his accidental disability retirement (ADR) allowance based on a collectively bargained salary increase paid to persons in his former job title after he stopped working. Mr. Walsh does not base his argument on any

particular legal theory, but the following discussion addresses the possible arguments under the retirement law.

Mr. Walsh injured his right elbow on April 25, 2016. After going out on leave and trying to come back to work, Mr. Walsh's last day of work was February 7, 2017. He collected workers' compensation for a while, but eventually applied for ADR on June 12, 2018. While the Board was considering his application, his union and his employer completed a collective bargaining agreement that included the reclassification of Mr. Walsh's former position to a different bargaining unit with a concomitant nearly 20% increase in salary. The effective date for the change was February 26, 2020. After the Board approved Mr. Walsh's ADR application on June 26, 2020, PERAC approved it on August 19, 2020. The Board determined that December 12, 2017 (the date 6 months prior to the filing of his application) was his effective date of retirement.

The yearly amount of an ADR allowance is either (1) "72 per cent of the annual rate of [Mr. Walsh's] regular compensation on the date [his] injury was sustained," or (2) "72 per cent of the average annual rate of his regular compensation for the 12-month period for which he last received regular compensation immediately preceding the date his retirement allowance becomes effective, whichever is greater" G.L. c. 32, § 7(2)(a)(ii).

The increase in pay for Mr. Walsh's old position does him no good under the first option, as it is calculated based on his rate of regular compensation on the date he sustained his injury, which was April 25, 2016, nearly 4 years before the effective date of the pay raise. It similarly does him no good under the second calculation option, because, as discussed below, the last 12-month period that he received regular compensation

ended no later than his last day of work, February 7, 2017, which is approximately 3 years before the effective date of the raise.

It is also possible that Mr. Walsh's allowance would need to be adjusted if the Board selected the wrong effective date of retirement. When a member is granted accidental disability retirement, the retirement becomes effective on the latest of three dates: the date the injury occurred or hazard was undergone, the date six months prior to the filing of the application, or the last date regular compensation was received. G.L. c. 32, § 7(2). It is not clear from his pleadings, but it may be that Mr. Walsh is suggesting that the latest of the three possible effective dates is some date after December 12, 2017, perhaps one of the days he received small pay adjustments to workers' compensation, sick leave and vacation pay, and/or "regular pay" after he stopped working. Under this scenario, his retirement allowance might be at least partially based on the significantly higher salary that a Motor Equipment Mechanic III receives after adjustment under the MLIA.¹

This is all to say that, boiled down, there is one dispute in this case: when Mr. Walsh last received regular compensation.

"Regular compensation," during the relevant period is defined as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." G.L. c. 32, § 1. "Wages" is defined as "the base salary or

¹ Of course, this would also mean that Mr. Walsh would owe back to the retirement system the retirement allowance that he received from December 12, 2017 through the last date that he received a pay adjustment, which was actually in June 2022, after he filed the instant appeal. This would require Mr. Walsh to refund well over \$250,000.00 in retirement allowance that he has already received. I doubt this outcome would appeal to him.

other base compensation of an employee paid to that employee for employment by an employer.” *Id.* “‘Wages’ shall not include . . . lump sum buyouts for workers’ compensation . . . [or] 1-time lump sum payments in lieu of or for unused vacation or sick leave or the payment for termination.” *Id.*

Workers’ compensation is not “regular compensation” for purposes of calculating an effective retirement date because it is an ad hoc payment intended to substitute for an employee’s regular salary, rather than being regular salary itself. *Zelesky v. Comm’r of the Div. of Pub. Employee Ret.*, 30 Mass. App. Ct. 106, 109-10 (1991); *see also Pub. Employee Retirement Admin. Comm’n v. Contributory Retirement Bd.*, 478 Mass. 832 (2018). Additionally, payments made from a member’s accumulated sick time and vacation time used to supplement workers’ compensation payments are not regular compensation. *Pub. Employee Retirement Admin. Comm’n, supra*; *see also Gendron v. Worcester Regional Retirement Bd.*, CR-06-1126 (DALA 2008).

The \$35.85 payment to Mr. Walsh labeled “Retro Regular Pay RET” was for a pay period during which Mr. Walsh did not work for the DOT. It is unclear why the DOT paid this to Mr. Walsh. Regardless, the payment is not regular compensation because Mr. Walsh did not perform any services for the DOT during the pay period covered by the payment. G.L. c. 32, § 1. Since workers’ compensation, sick and vacation pay used to supplement workers’ compensation, and the other retroactive payment Mr. Walsh received are not regular compensation, the last date that Mr. Walsh received regular compensation was his last day of work: February 7, 2017. The date six months prior to the filing of the accidental disability retirement application, December

12, 2017 is later than February 7, 2017 and is the latest of the three effective date options, so December 12, 2017 remains the effective date of Mr. Walsh's retirement.

For the above-stated reasons, the Board's decision not to adjust the amount or effective date of Mr. Walsh's ADR allowance is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: June 23, 2023