COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Ellen Welsh,
Petitioner,

v.

Massachusetts Teachers' Retirement System,
Respondent.

No. CR-22-402

Dated: September 8, 2023

Appearance for Petitioner:
Kathryn Waters, Esq.
Braintree, MA 02184

Appearance for Respondent:
Ashley Freeman, Esq.
Charlestown, MA 02129

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner received recurring, unchanging, predetermined stipends for teaching an extra class each year. The stipends likely were within the petitioner's "base compensation," and the extra classes likely were within her "core duties." Regardless, the extra classes also satisfied the requirements applicable to teachers' "additional" services.

DECISION

Petitioner Ellen Welsh appeals from a decision of the Massachusetts Teachers' Retirement System declining to treat her annual stipends for teaching an extra class as regular compensation for retirement purposes. The parties filed written submissions and agreed that no testimony was necessary. *See* 801 C.M.R. § 1.01(10)(c). I admit Ms. Welsh's proposed exhibits marked 1-8 and exclude MTRS's proposed exhibit as duplicative.

Findings of Fact

I find the following facts.

1. Ms. Welsh worked as a teacher for the Clinton Public School District. She taught "business." (Exhibits 7, 8.)

2. Ms. Welsh's employment was governed by a series of collective bargaining agreements. CBAs identical in all material respects governed the time period relevant to this appeal. (Exhibits 5, 6.)

3. The standard teaching workload for Ms. Welsh and her colleagues was 25 hours per week. Article III.I of each relevant CBA prescribed the stipends to be paid to teachers for any "extra academic class." The annual stipend for an extra yearlong class of more than 18 students was $5,400. The CBAs stated that "[a]ll dollar amounts . . . will be pro-rated based on the number of days taught." They did not spell out the exact eventualities that this provision was intended to address. (Exhibits 5-8.)

4. Ms. Welsh is now retired for superannuation. The relevant school years for purposes of calculating her retirement allowance are 2019, 2020, and 2021. During each of those years, Ms. Welsh taught an extra business class on top of her usual teacher's workload. For that extra class, Ms. Welsh was paid an extra annual stipend of $5,400. (Exhibit 8.)

5. In September 2022, MTRS notified Ms. Welsh that it would not treat her stipends for teaching an extra class as "regular compensation." MTRS explained that regular compensation does not include "variable pay" or "per-diem payments." Ms. Welsh timely appealed. (Exhibits 1, 2.)

Analysis

I

A

The retirement allowance of a Massachusetts public employee typically is derived from his or her "regular compensation." G.L. c. 32, § 5. Overall, regular compensation is intended to

include all "ordinary, recurrent, or repeated payments," while disregarding "extraordinary ad hoc amounts." *O'Leary v. Contributory Ret. Appeal Bd.*, 490 Mass. 480, 484 (2022).

For periods after mid-2009, the statutory definition of regular compensation is "wages . . . for services performed in the course of employment." G.L. c. 32, § 1. The term "wages" has its own definition, namely:

> [T]he base salary or other base compensation of an employee . . . . [P]rovided . . . that notwithstanding the foregoing, in the case of a teacher . . . salary payable under the terms of an annual contract for additional services . . . shall be regarded as "regular compensation" rather than as bonus or overtime . . . .

Id. *See also* 840 C.M.R. § 15.03(3)(b). MTRS regulations implement the statutory proviso concerning "salary . . . for additional services," in part by stating that both the "services" and the corresponding "remuneration" must be stated in the applicable CBA. 807 C.M.R. §§ 6.01, 6.02.

The modifier "additional" implies the existence of a complementary category of *non*-additional services. CRAB first tackled this point explicitly in *Marletta v. MTRS*, No. CR-10-347 (CRAB Mar. 31, 2016). At issue there were payments to a teacher for her work as "Dean of Academic Affairs." CRAB held that those payments were not required to be stated in the member's CBA, because:

> [The member's] duties as Dean of Academic Affairs were not "additional services"—they were the core duties of her position. . . . [T]his was her *regular job*. Thus, it is not accurate to describe her pay for this work as pay for "additional services"—her *base compensation* was her "teacher" salary plus the stipend for working as Dean.

Id. at *4-6 (emphases added).

A close reading of the foregoing sources reveals that the distinction between "core duties" and "additional services" flows from the following set of ideas. In general, an employee's pensionable wages are his or her "base compensation." § 1. A certain set of employment obligations entitles each employee to that base compensation. Those obligations

are the employee's "regular job," *Marletta*, *supra*, at *6, which CRAB also calls her "core duties," *id.* at *4.

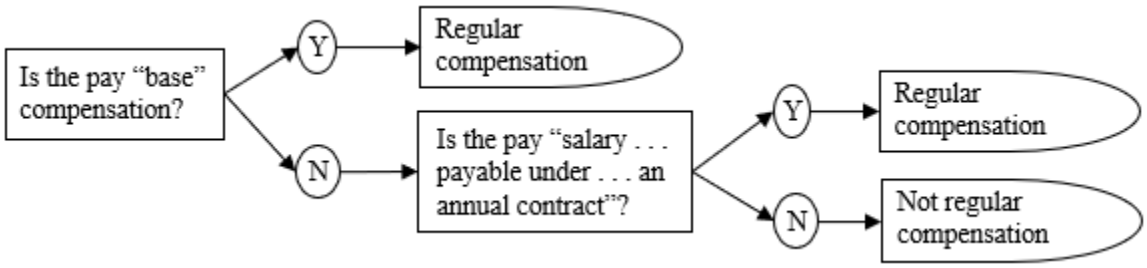
When most public employees perform additional work on top of their regular jobs, the resulting extra pay is non-pensionable "overtime." *See* 840 C.M.R. § 15.03(3)(f); *Doherty v. Revere Ret. Bd.*, No. CR-16-363, at *4-5 (DALA Oct. 22, 2021). The teacher-specific proviso to the definition of "wages" constructs an exception to this rule. When a *teacher* performs "additional" services on top of the work that generates the teacher's "base compensation," the resulting extra pay is not "regarded as . . . bonus or overtime," as long as the pertinent services are covered by the applicable CBA. § 1. Presumably, this special proviso is intended to address some atypical feature of the manner in which teachers are paid.[1]

Prior decisions often have observed with puzzlement that the retirement law does not define the phrase "additional services." See the cases cited *infra* p. 5-6. The foregoing reading of that phrase's statutory context explains why. The words "salary . . . for additional services" are not a term of art. *See* G.L. c. 4, § 6, 3d. They are an ordinary-language contrast to the words "base salary or other base compensation" earlier in the same paragraph. "Additional" in this context means, "in addition to the services that earn base compensation."

To restate these points: "Core" duties are the duties of a teacher's "regular job," namely the duties that entitle the teacher to his or her "base compensation." *Marletta*, *supra*, at *4-6. Any other services, i.e., services that generate a teacher's *non*-base compensation, are what the

[1] *See also* Acts 1952, c. 423 (enacting the "additional services" language and bearing the title, "An Act granting full credit . . . for compensation earned by teachers . . . under annual salary contracts"). In practice, the impact of the teacher-specific proviso to the definition of "wages" is curtailed by *Hallett v. Contributory Ret. Appeal Bd.*, 431 Mass. 66 (2000), discussed *infra*. In essence, non-base compensation often does not count as pensionable "salary" within *Hallett*'s reading of that word.

retirement statute means when it speaks of "additional" services. *Id.*; § 1. Despite being non-base compensation, the salary for a teacher's additional services is pensionable if it is payable under the teacher's CBA. The statutory decision tree with respect to whether a teacher's pay amount counts as regular compensation is thus the following:



B

It is fair to acknowledge that much of the case law has not spoken in exactly these terms about "additional services" and "core duties."

Many "additional services" cases have not discussed at all what the services were "additional" to. *E.g.*, *Hallett*, *supra*; *Kozloski v. Contributory Ret. Appeal Bd.*, 61 Mass. App. Ct. 783 (2004); *Evans v. Contributory Ret. Appeal Bd.*, 46 Mass. App. Ct. 229 (1999).[2] Certain administrative decisions have identified particular factors or paradigms that may cause services to be treated as "additional." *E.g.*, *Pace v. MTRS*, No. CR-17-895, at *6 (DALA Aug. 21, 2020); *Pereira v. MTRS*, No. CR-17-136, at *7-8 (DALA July 31, 2020); *Hogan v. MTRS*, No. CR-09-105 (DALA Jan. 27, 2012). *See also Fonseca v. MTRS*, No. CR-12-164, at *4 (CRAB Aug. 10, 2020); *Moresi v. MTRS*, No. CR-07-410, at *9 (DALA Aug. 5, 2011). Other decisions have described the law in this area as hopelessly indeterminate. *Rafferty v. MTRS*, No. CR-14-391, at

[2] The court in *Evans*, 46 Mass. App. Ct. at 232, described competing accounts of how the specific services at issue there might have been viewed as "additional," but did not offer a more general analysis of the pertinent statutory concepts.

*9 (DALA July 22, 2016); *Fonseca v. MTRS*, No. CR-12-164, 2022 WL 16921431 (DALA Jan. 28, 2022) (decision on remand).[3]

The nub of the current decision's view is that "core" duties are those that generate "base" compensation, whereas "additional" services are those that generate "non-base" compensation. *See supra* p. 3-5. This view derives primarily from the statutory language and from *Marletta*'s brief remarks. Still, it is not without additional support.

In *Rafferty*, *supra*, a teacher received additional pay in connection with her appointments as "secondary team chair" or "team chairperson." The magistrate described essentially the decision tree depicted *supra*: "If the . . . additional compensation payments . . . were wages or base compensation, then they were regular compensation . . . . However, if the . . . additional compensation payments were for 'additional services,' then the CBA had to memorialize them for them to count as regular compensation." *Id.* at *9.

Likewise, the teacher in *Cadigan v. MTRS*, No. CR-13-447 (DALA May 4, 2018), received extra pay for ten extra days of work each year. The magistrate's analysis recognized that "core services" are those resulting in "base pay," stating: "Ms. Cadigan was compensated for performing 'the core duties of her position.' . . . [I]t was base compensation and it was not necessary for it to have been included as additional services in the CBA." *Id.* at *9.

---

[3] Some of the factors identified in cases such as *Pereira* align well with the instant decision, in that they reveal whether the pertinent pay amounts are base or non-base compensation. *See also Kelley v. MTRS*, No. CR-17-75, at *6 (DALA Feb. 14, 2020). As for the concern about indeterminacy, expressed especially in *Fonseca*'s most recent iteration, some pay amounts are sure to land uncomfortably close to the border between base and non-base compensation. But the distinction between base and non-base compensation is governed by the well-worn catalogue of regularity's attributes. *See infra* p. 8.

Another instructive decision is *Whitmore v. MTRS*, No. CR-06-625 (CRAB June 12, 2009, *S.C.*, CRAB July 22, 2010). The petitioners there were paid for work as guidance counselors in between school years. CRAB's analysis proceeded in two stages. First, CRAB determined that the pertinent pay amounts were "recurrent," "regular," and "ordinary." *Id.* at *4-5. Next, CRAB tackled MTRS's argument "that petitioners' summer work constitutes 'additional services' . . . not . . . payable under the terms of an annual contract." CRAB swiftly disposed of the argument by stating that it had already "concluded . . . that the work at issue does not constitute additional services." *Id.* at *6. Some readers of *Whitmore* might have wondered where exactly that prior conclusion had been drawn. The simple explanation is that CRAB's determination that the pertinent pay amounts were "recurrent," etc., meant that those sums were "base" compensation, with the result that the corresponding services were not "additional." *Cf. Nadeau v. MTRS*, No. CR-07-18, at *11 (DALA May 27, 2011) (explaining that the *Whitmore* petitioners "were paid 'ordinary remuneration' . . . and not . . . a stipend"); *Marzelli v. MTRS*, No. CR-06-668, at *6 (DALA May 6, 2010) (same).

One alternative construction of the pertinent statutory provisions warrants discussion. As a matter of language, it would have been possible to read the statute's reference to a teacher's "additional" services as denoting services other than teaching. *Cf. Varella v. Contributory Ret. Appeal Bd.*, 56 Mass. App. Ct. 384, 387 (2002) (describing the impetus for the teacher-specific rule as "the fact that teachers typically perform numerous functions, not all of which are easily subsumed within traditional notions of 'teaching'"). This may be approximately MTRS's theory: while MTRS does not offer a full-fledged definition of "additional services," its brief observes that "[a]dditional services typically include leading after-school clubs and extracurricular activities."

It is important to recall that the proviso for "additional services" is designed to excuse those services from the usual requirements of the definition of "wages." *See supra* p. 4 & note 1. With that premise in mind, it would be puzzling for the Legislature to have granted preferential treatment to non-teaching work over teaching work. In any event, *Marletta* forecloses the theory that "additional" means "non-teaching." CRAB there did not ask at all whether the member's duties as Dean of Academic Affairs were instructional or otherwise "teaching"-related. *See* G.L. c. 32, § 1 ("teacher"). The analysis prescribed by *Marletta* focuses instead on whether the pertinent duties were within the member's "regular job," i.e., whether the pay for those duties was "base compensation." *Marletta*, *supra*, at *4-6.

II

Under the foregoing framework, the logical first step in a case like Ms. Welsh's is to determine whether the pertinent pay amounts were "base compensation" (and, correspondingly, whether the pertinent duties were "core" duties). "[P]ay amounts are *some* kind of 'base compensation' if they are ordinary, recurrent, repeated, predetermined, non-discretionary, guaranteed, and indefinite in term." *Twohig v. Braintree Ret. Bd.*, No. CR-18-505, 2022 WL 16921472, at *3 (DALA May 20, 2022) (collecting cases). *See also Whitmore*, *supra*, at *4-5; *Nadeau*, *supra*, at *11; *Marzelli*, *supra*, at *6.

It is likely that Ms. Welsh's stipends for extra classes were indeed part of her base compensation. Throughout the pertinent period, the stipends remained recurring and unchanging each year. *O'Leary*, 490 Mass. at 484. They "continued for an indefinite time." *Marletta*, *supra*, at *6; *Twohig*, 2022 WL 16921472, at *3. As in *Rafferty* and *Cadigan*, the stipends were predetermined on an annual basis, with no room for fluctuations, discretion, or manipulation. *Rafferty*, *supra*, at *10; *Cadigan*, *supra*, at *9. In *Marletta*, the member's "base compensation was her 'teacher' salary plus the stipend for working as Dean," *id.* at 6; here, Ms. Welsh's base

compensation was likely her salary for a standard teaching workload plus the stipend for an extra class.[4]

Still, there is room for uncertainty on this score. Although the amounts of Ms. Welsh's stipends did not fluctuate in fact, they *could have* fluctuated from year to year, if Ms. Welsh had taken on different extra workloads in different schoolyears. Likewise, the amounts that Ms. Welsh received were only conditionally "guaranteed" and "predetermined": they so became once Ms. Welsh agreed to teach each year's extra class.

It is therefore prudent to analyze Ms. Welsh's rights on the alternative assumption that her stipends were *not* "base" compensation (or, otherwise stated, on the assumption that the services that generated the stipends *were* "additional" services). It is undisputed that Ms. Welsh received her stipends pursuant to the applicable CBAs. MTRS's theory in this context is that the stipends were not "*salary* . . . for additional services," but rather "per diem" payments. This argument invokes the dichotomy envisioned in *Hallett*, *supra*, between a "fixed annual . . . amount of pay," which counts as salary, and "periodic hourly payments," which do not. 431 Mass. at 68-70. MTRS contends that Ms. Welsh's stipends were "periodic" and non-"annual" because the CBA allowed its stated stipend amounts to be "pro-rated based on the number of days taught."

Bearing in mind the retirement law's overarching aspirations for the regular compensation rubric, the case law has viewed stipends like Ms. Welsh's as countable "salary." An instructive precedent is *Hidenfelter v. TRB*, No. CR-03-395 (DALA Aug. 2, 2004, *S.C.*,

---

[4] MTRS observes that Ms. Welsh and her colleagues could have been "docked for any days that they didn't teach or days that they were out sick." But the same is true in the majority of circumstances in which wages are considered "guaranteed." 840 C.M.R. § 15.03(3)(b).

DALA Sept. 3, 2004). The teacher there received additional pay for unforeseen, extra teaching duties. The applicable CBA stated that the supplemental pay would equal "one-fifth . . . of [the teacher's] per diem pay for each period assumed." *Id.* The DALA magistrate viewed that supplemental pay as regular compensation, explaining that the teacher received a "particular amount of pay" that "would not vary week to week or month to month." *Id. See also Foley v. MTRS*, No. CR-04-1098, 2006 WL 4211522, at *3 (DALA July 24, 2006); *Beford v. MTRS*, No. CR-18-493, 2021 WL 9583593, at *3 (DALA Oct. 15, 2021). *Cf. Whitmore*, *supra*, at *4-5 (extra pay calculated on a "per diem" basis was "ordinary").

The same analysis applies to Ms. Welsh's stipends, with the added wrinkle that her stipends during the relevant years were *not* prorated in fact. Those pay amounts were sufficiently "fixed" and "annual" to count as "salary." *Hallett*, 431 Mass. at 68-70.[5] As a result, even if Ms. Welsh's extra-class stipends were not "base" compensation, they satisfied the requirements applicable to "additional" services.[6]

Conclusion and Order

The stipends at issue here were "regular compensation" for purposes of calculating Ms. Welsh's retirement allowance. MTRS's contrary decision is REVERSED.

---

[5] To an extent, the analyses of cases such as *Hidenfelter* tend to confirm that Ms. Welsh's extra pay for extra classes was within her base compensation. *See supra* pp. 8-9. Still, it is clear from the definition of "wages" that some pay amounts will count as "salary . . . for additional services" *without* amounting to base compensation. *See supra* pp. 3-5. That said, it is fair to wonder whether *Hallett* now requires "salary . . . for additional services" to be more base-compensation-like than the statute's drafters would have envisioned. *See supra* note 1.

[6] MTRS does not argue that, because Ms. Welsh's CBA allowed for proration, it failed to state the "remuneration" for her extra classes. *See Beford*, 2021 WL 9583593, at *5 (when CBAs make use of formulas such as proration, the pertinent "remuneration" is adequately "provided in the annual contract").

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate