COMMONWEALTH OF MASSACHUSETTS

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

William A. White,
Petitioner,

v.

Somerville Retirement Board and **Public Employee Retirement Administration Commission**,
Respondents.

No. CR-22-95

Dated: September 2, 2022

Appearance for Petitioner:
William A. White, Jr. (pro se)
403 Highland Avenue
Somerville, MA 02144

Appearance for the Somerville Retirement Board:
Mathew L. Feeney
300 Crown Colony Drive
Quincy, MA 02169

Appearance for the Public Employee Retirement Administration Commission:
Felicia McGinniss
5 Middlesex Avenue
Somerville, MA 02145

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

Pay raises "specified by law" are exempt from the "anti-spiking" provision of G.L. c. 32, § 5(2)(f). That exception covers pay raises specified by municipal ordinances. *Willette v. Somerville Ret. Bd.*, No. CR-20-282 (DALA May 7, 2021). Because the raise at issue here was specified by a city ordinance, the respondent retirement board should not have adjusted the petitioner's compensation for retirement purposes. Its decision is reversed accordingly.

DECISION

Petitioner William A. White appeals from a decision of the Somerville Retirement Board applying the "anti-spiking" rule of G.L. c. 32, § 5(2)(f) to his compensation for retirement purposes. PERAC was impleaded, and the appeal was submitted on the papers. *See* 801 C.M.R.

§ 1.01(10)(c). The parties filed joint memoranda and exhibits in July and August 2022. I admit into evidence stipulations numbered 1-13 and exhibits numbered 1-10.

Findings of Fact

I find the following facts.

1. During 2016-2017, the City of Somerville's Municipal Compensation Advisory Board conducted a large-scale review of the wages of non-union city employees. A major concern animating the review was that Somerville was losing talent to higher-paying employers. (Stipulation 3; Exhibits 2, 3.)

2. The Compensation Advisory Board studied compensation data from various entities comparable to Somerville. It issued reports dated June 2016 and July 2017. Each report recommended increases to the salaries of various positions. (Stipulations 4-6; Exhibits 2-3.)

3. The Somerville Board of Aldermen responded to the two reports by enacting city ordinances numbered 2016-09 and 2017-08. Each ordinance made upward adjustments to the city's pay scales. (Stipulations 5-6; Exhibits 4-5.)

4. Mr. White served on Somerville's Board of Aldermen for twenty-four years, from 1998 through 2021. At some point he became president of that body. Ordinance 2016-09 increased his annual compensation from $25,000 to $45,000. The increase took effect as of July 2016. (Stipulations 1, 2, 7-9; Exhibit 1.)

5. In 2018, Mr. White ceased to serve as the Board of Aldermen's president. He continued to serve as an alderman until the end of 2021. In that role, his annual compensation declined to $40,000. (Stipulations 9-10; Exhibit 1.)

6. In November 2021, Mr. White applied to retire for superannuation. Applying published guidance from PERAC, the board informed Mr. White that his compensation in 2016 could not be included in his retirement calculation without being adjusted under the "anti-

spiking" provision of G.L. c. 32, § 5(2)(f). Mr. White timely appealed. (Stipulations 11, 12; Exhibits 6, 7, 9, 10.)[1]

Analysis

The retirement allowance of each Massachusetts public employee is driven by the employee's compensation during a few short years. Retirement programs structured in this manner suffer financially whenever an employee's compensation rises sharply during his or her retirement-facing years. Such compensation increases are known as "spiking."

One provision designed to counteract spiking is G.L. c. 32, § 5(2)(f), which caps the pay raises countable in retirement-allowance computations. More specifically, § 5(2)(f) excludes from these computations any pay amount "that exceeds the average of regular compensation received in the 2 preceding years by more than 10 per cent."

This rule is subject to substantial exceptions. It has always passed over pay raises resulting "from an increase in hours of employment, from overtime wages, from a bona fide change in position, [or from] a modification in the salary or salary schedule negotiated for bargaining unit members." Acts 2011, c. 176, § 18. Since 2014, § 5(2)(f) also does not apply to "an increase in salary for a member whose salary amount is specified by law." Acts 2014, c. 165, § 68.

The question in this appeal is whether a salary amount set by a city ordinance is "specified by law" within the meaning of § 5(2)(f). This question was previously addressed in

---

[1] The parties' initial memorandum and exhibits did not make clear that Mr. White had decided to retire. The parties were therefore afforded an opportunity to show that he was "aggrieved" by a "decision" within the meaning of G.L. c. 32, § 16(4). *See Bretschneider v. PERAC*, No. CR-09-701 (DALA Nov. 13, 2009). As the result of a clerical error, the appeal was subsequently dismissed even though the parties had made a timely submission clarifying Mr. White's situation. The order of dismissal was vacated on the parties' ensuing motion.

Willette v. Somerville Ret. Bd., No. CR-20-282 (DALA May 7, 2021). *Accord Marlborough Ret. Bd. v. PERAC*, No. CR-19-14 (DALA Apr. 9, 2021). A paraphrasing of *Willette*'s reasoning follows.

Every statute must be implemented in accordance with its "plain meaning" and "the aim of the Legislature." *Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 648 (2012). Dictionary definitions reveal that the plain meaning of the word "law" covers ordinances. *See Merriam Webster's Collegiate Dictionary* 659 (10th ed. 1994) (law includes any "binding custom or practice"); *Black's Law Dictionary* 798 (5th ed. 1979) (law includes "administrative rules, regulations and ordinances"). Likewise, the United States Supreme Court has read the terms "law," and even "statute," as inclusive of ordinances. *See U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 36 (1930) (the term "fixed by law" includes matters regulated by a Cleveland city ordinance); *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928) (the term "a statute of any state" includes an Augusta city ordinance). *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975) (*John P. King* remains good law).

As for the aim of the Legislature, § 5(2)(f) reflects mixed motivations. To an extent, the provision worries about *all* pension-impacting pay spikes, because they all tend to imbalance the retirement system's finances. *See DeGiacomo v. State Bd. of Ret.*, No. CR-20-116, at 7 (DALA Dec. 17, 2021). On the other hand, the statute's various exceptions reflect a particular interest in combatting abusive, pension-oriented artifices. *See Willette*, *supra*, at 7-8 (citing sources). Simultaneously, in the interest of administrability, § 5(2)(f) deals in broad categories, declining to inquire into an individual member's subjective intentions and personal history. *See DeGiacomo*, *supra*, at 7.

Within this system of purposes, an exception from the anti-spiking rule for ordinance-prescribed raises parallels the exceptions for raises effected by the general court's statutes and by collective bargaining agreements. Each pension-impacting raise within these categories hurts the retirement system's balance sheet. Each such raise could conceivably result from a plot to increase a decision maker's retirement allowance. Yet in categorical terms—individual circumstances aside—raises prescribed by statewide statutes, collective bargaining agreements, and municipal ordinances all bear substantial indicia of legitimacy. They all *tend* not to reflect pension-oriented artifices.

In addition to plain meaning and legislative purpose, *Willette* addressed PERAC Memo No. 29 / 2014 (Aug. 13, 2014). PERAC stated there that the term "law" in § 5(2)(f) means "a state or federal general or special law." In appellate proceedings, PERAC memoranda are treated as "'interpretive rule[s],' entitled to persuasive weight." *Grimes v. Malden Ret. Bd.*, No. CR-15-5, at 13 (CRAB Nov. 18, 2016). Their sway depends on such factors as their thoroughness, logic, and consistency. *Alexander v. State Bd. of Ret.*, No. CR-19-452, at 4 (DALA Nov. 5, 2021). The memorandum at issue here has limited persuasive power. It does not even make clear whether PERAC evaluated the possibility that municipal ordinances may count as "laws."

Turning to Mr. White's case, it may be that his circumstances test the limits of *Willette*'s reasoning. Mr. White was one of Somerville's key decision makers when the city enacted the ordinance that increased his salary. But § 5(2)(f) does not hold such individual circumstances against a member, just as—in countless cases—a member's subjective good faith does not shield her from an anti-spiking adjustment. *See, e.g.*, *Levine v. State Bd. of Ret.*, No. CR-17-224, at 8 (DALA July 15, 2022). More generally, an undue focus on the unusual features that make a

particular case "hard" would promise to generate bad law. *See Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

It also may be, as PERAC suggests,[2] that objectionable enactments can pass more easily and quietly in small municipal governments. But Massachusetts law is not generally suspicious of municipal ordinances. They are presumed to be valid, and enforced as binding. *See* Art. 89 of the Amendments to the Massachusetts Constitution; G.L. c. 40, § 21; *Springfield Pres. Tr., Inc. v. Springfield Libr. & Museums Ass'n, Inc.*, 447 Mass. 408, 418 (2006); *Beard v. Town of Salisbury*, 378 Mass. 435, 439-40 (1979); *Town of Canton v. Bruno*, 361 Mass. 598, 608-09 (1972). It therefore makes sense that § 5(2)(f) would treat municipal ordinances as presumptively sound legislative exercises, not artificial maneuvers on behalf of insiders.

Lastly, PERAC relies on a statute that defines the word "ordinance" as "synonymous with by-law." G.L. c. 4, § 7. Missing from the argument is a reason to believe that by-laws cannot be "laws" or "law." *Cf. Black's Law Dictionary* (11th ed. 2019) (a bylaw is "a law made by a local government"). PERAC cites a constitutional provision that contrasts "local ordinances or by-laws" with "the constitution or laws enacted by the general court." Art. 89, § 6, of the Amendments to the Massachusetts Constitution.[3] But that provision addresses the divergent roles of local and state legislatures. In that setting, only a drafter unconcerned with readability would use the same word (i.e., "laws") to denote both local and state enactments. Fairly read, the provision does not shed light on the meaning of the phrase "specified by law" in other contexts.

---

[2] The board sides with Mr. White on the merits, though its decision conformed to PERAC's guidance. *See Grimes*, *supra*, at 13.

[3] "Any city or town may, by . . . local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . . ."

Conclusion and Order

Mr. White's pay increase resulting from Ordinance 2016-09 was exempt from adjustment under G.L. c. 32, § 5(2)(f). The board's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate