COMMONWEALTH OF MASSACHUSETTS

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

Richard Willette and **Maryann Heuston**,
Petitioners,

v.

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

Nos. CR-20-282, CR-20-381

Dated: May 7, 2021

Appearance for Petitioners:
Gerald A. McDonough
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Appearance for the Public Employee Retirement Administration Commission:
Felicia McGinniss
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Administrative Magistrate:
Yakov Malkiel

Summary of Decision

Under the "anti-spiking" rule of G.L. c. 32, § 5, an employee's compensation is adjusted downward for pension-computation purposes if that compensation increased by more than 10% into the years that generate the computation. Salary amounts "specified by law" are excluded from the anti-spiking rule. That exception encompasses salary amounts specified by municipal ordinances.

DECISION

Background

The petitioners in these two proceedings applied, separately, for retirement allowances. To calculate the allowances, the Somerville Retirement Board (SRB) applied the "anti-spiking" rule of G.L. c. 32, § 5(2)(f). The petitioners appealed, each arguing that the anti-spiking rule is inapplicable to salaries prescribed—as theirs were—by city ordinances.

On November 16, 2020, DALA consolidated the two dockets, and permitted each of the petitioners to name the Public Employee Retirement Administration Commission (PERAC) as a respondent.

On March 26, 2021, the petitioners filed a joint motion for summary decision, which PERAC opposed. The petitioners and PERAC filed a 22-paragraph statement of stipulated facts (the "Stipulations"). They also submitted fourteen agreed-upon exhibits, attached to the Stipulations and listed in them (at page 5). I admit into evidence both the Stipulations and the agreed-upon exhibits.

While these appeals were pending, DALA decided *Marlborough Retirement Board v. PERAC*, No. CR-19-14 (DALA Apr. 9, 2021). In *Marlborough*, the retirement board lodged an appeal from a PERAC advisory letter, which stated that salaries prescribed by city ordinances are not exempt from the anti-spiking rule. Administrative Magistrate Kenneth J. Forton dismissed the appeal for lack of jurisdiction, but proceeded to outline several reasons to doubt PERAC's position. PERAC addressed the *Marlborough* decision in its brief.

Findings of Fact

Having considered the Stipulations and exhibits, I find the following facts.

1. In 2016-2017, 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. (Exhibits 1, 3.)

2. The Compensation Advisory Board collected and studied compensation data from various entities comparable to Somerville. It then made its recommendations in two phases, releasing one report in each phase. (Stipulations ¶¶ 9-16; Exhibits 1, 3.)

3. The Compensation Advisory Board released its first report in June 2016. The report recommended increases to the compensation of certain non-union municipal employees. The Somerville Board of Aldermen took responsive action later that month, raising the salaries of certain employees in Ordinance 2016-09. (Stipulations ¶¶9-10; Exhibits 1-2.)

4. The Compensation Advisory Board released its second report in July 2017, recommending salary increases for additional non-union employees. In response, the Somerville Board of Aldermen raised the salaries of additional employees in Ordinance 2017-08. (Stipulations ¶¶ 13-14; Exhibits 3-4.)

5. Petitioner Maryann Heuston worked for the City of Somerville from 2000 to 2017. She retired in 2020. Her three highest-compensated years of service for pension-computation purposes were the fiscal years ending in 2015, 2016, and 2017. (Stipulations ¶¶ 5-6; Exhibits 7-8.)

6. Ordinance 2016-09 increased Ms. Heuston's salary in the years 2016 and 2017. Her salary increase in each of those years exceeded 10%. The SRB applied the anti-spiking rule of G.L. c. 32, § 5, and adjusted downward the compensation amounts it used to compute Ms. Heuston's retirement allowance. This adjustment reduced Ms. Heuston's annual allowance from $14,489.54 to $12,501.84. (Stipulations ¶¶ 7-8, 12; Exhibits 2, 7-8.)

7. Petitioner Richard Willette worked for the Commonwealth and the City of Somerville from 1991 to 2020. He retired in 2020. His three highest-compensated years of service were the fiscal years ending in 2017, 2018, and 2019. (Stipulations ¶¶ 1-2; Exhibits 5-6.)

8. Ordinance 2017-08 increased Mr. Willete's salary in the years 2018 and 2019. His salary increase in each of those years exceeded 10%. The SRB applied the anti-spiking rule and adjusted downward the compensation amounts it used to compute Mr. Willette's retirement

allowance. The adjustment reduced Mr. Willette's annual allowance from $74,776.97 to $73,270.80. (Stipulations ¶¶ 3-4, 16; Exhibits 4-6.)

9. On November 10, 2020, the SRB wrote to the petitioners to expressly deny their requests for retirement allowances unaffected by the anti-spiking rule. (Exhibit 12.) Both petitioners had by then appealed to DALA from the SRB's determinations of their benefits.

Analysis

I

General Laws chapter 32, section 5 governs the computation of Massachusetts public employees' retirement allowances. The usual basis for that computation is an "'average' rate of 'regular compensation' over . . . three years." *Boston Ass'n of Sch. Administrators & Sup'rs v. Boston Ret. Bd.*, 383 Mass. 336, 340 (1981) (citing §5(2)(a)). The relevant three years are essentially an employee's three highest-compensated years of service.

Retirement systems that calculate pensions by averaging a few short years are vulnerable to sharp compensation increases, known as "spiking," in those particular years. Spiking can yield retirement benefits disproportionate to the employees' contributions into the retirement system over the longer durations of their careers. *See Final Report of the Special Commission to Study the Massachusetts Contributory Retirement Systems* 8 (2009); Robert Clark, *Evolution of Public-Sector Retirement Plans: Crisis, Challenges, and Change*, 27 ABA J. Lab. & Emp. L. 257, 268 (2012).

In 2011, Massachusetts became one of a number of states that seek to counteract spiking head-on by curbing the compensation increases that pension computations take into account. *Evolution of Public-Sector Retirement Plans*, *supra*, at 268. The Commonwealth's anti-spiking provision, in its first sentence, excludes from the pension-generating compensation amounts any

compensation "that exceeds the average of . . . the 2 preceding years by more than 10 per cent." § 5(2)(f). In effect, the statute is not troubled by compensation spikes of 10% or less leading into an employee's computation-generating years. Amounts exceeding a 10% spike, however, are disregarded in the pension computation.

Section 5(2)(f) is not entirely rigid: in its second sentence, it establishes a series of exceptions to the anti-spiking rule. From the time of the section's enactment, it has stated exceptions for compensation increases 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.

The Legislature added another exception to the anti-spiking provision in 2014. Under this newer exception, the anti-spiking rule does not apply to compensation increases resulting "from an increase in salary for a member whose salary amount is specified by law." Acts 2014, c. 165, § 68.

The instant dispute turns on the meaning of the word "law" in the 2014 exception. PERAC adheres to its published guidance, according to which the term "law" includes only "a state or federal general or special law." PERAC Memo No. 29 / 2014 (Aug. 13, 2014). The petitioners, on the other hand, maintain that the term "law" is flexible enough to reach municipal ordinances, including Somerville's Ordinances 2016-09 and 2017-08.

II

"[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 prototypical gauges of plain meaning are dictionary definitions: according to Merriam Webster, the word "law" includes any

"binding custom or practice of a community." *Merriam Webster's Collegiate Dictionary* 659 (10th ed. 1994). Similarly, an often-cited definition from *Black's* states that "in common usage law refers to both legislative and court made law, as well as to administrative rules, regulations and ordinances." *Black's Law Dictionary* 798 (5th ed. 1979). An ordinance plainly is a "law" under both of these definitions.

Two opinions of the United States Supreme Court point in the same direction. In *John P. King Mfg. Co. v. City Council of Augusta*, the petitioners attacked an Augusta city ordinance. 277 U.S. 100 (1928). The Supreme Court took the case under a provision granting the Court jurisdiction where the validity of "a statute of any state" is at stake. *Id.* at 106. Writing for the Court, Justice Van Devanter explained that the term "statute" is "often regarded as an equivalent" to the term "law," and that the latter term includes any "exertion of legislative power." *Id.* at 103. An extensive survey of prior opinions led the Court to conclude that "the ordinance . . . is a statute of the state." *Id.* at 114. *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975) (*John P. King* remains good law).

Justices Brandeis and Holmes dissented, in the sense that they drew a distinction between "the word 'laws' . . . [and] the narrower term 'statute.'" 277 U.S. at 116 (Brandeis, J., dissenting). In the dissenting Justices' view, "all regulations established by competent authority are laws," *id.* at 126, but "[l]aws . . . adopted by a municipality are called . . . either ordinances or by-laws, not 'statutes.'" *Id.* at 116. All of the Justices thus agreed that "ordinances" are at least "laws" (if not also "statutes").

Two years later, the Court examined the scope of the term "fixed by law." *U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 36 (1930). An insurance policy in that case limited coverage to drivers compliant with minimum driving ages "fixed by law." The parties' dispute

was whether that term encompassed a Cleveland city ordinance. This time the Court was unanimous, finding the insurance policy "free from any ambiguity." *Id.* at 37. The Court explained that the disputed language was not "fixed by '*a* law,' a specific phrase frequently limited in a technical sense to a statute." *Id.* (emphasis added). Rather, the word "law" without an accompanying article was "used in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force; including valid municipal ordinance as well as statutes." *Id.*

In support of its position that the phrase "specified by law" in § 5(2)(f) eschews ordinances, PERAC relies principally on G.L. c. 4, § 7, a catalog of default definitions for Massachusetts statutes. That section does not define the term "law." It does provide that "Ordinance"—a word not used in the anti-spiking provision—"shall be synonymous with by-law"; and the premise of PERAC's argument is that a "by-law" cannot be a "law." But that premise is unsound: the readings of the term "law" in all of the authorities discussed thus far encompass *both* ordinances *and* by-laws.

III

A proper interpretation of the term "specified by law" in § 5(2)(f) also must consider "the aim of the Legislature." *Hatch*, 438 Mass. at 622. In PERAC's view, the purpose of § 5(2)(f) is to shield retirement systems from the disproportionate burdens of late-breaking upsurges in compensation. And that is true so far as it goes—which is as far as the end of the provision's first sentence.

Section 5(2)(f)'s second sentence, on the other hand, builds expansive exceptions to the anti-spiking rule. Its exceptions share a common denominator: PERAC has referred to "spiking" as pay increases designed "to artificially inflate" retirement benefits. PERAC Memo

No. 38 / 2012 (June 21, 2012). In each of § 5(2)(f)'s exceptions, circumstances attendant to an employee's compensation increase suggest that the increase was *not* the product of an artificial pension-inflation scheme.

An uptick in an employee's hours or overtime, for instance, is likely to cause a non-artificial compensation increase. So is a genuine promotion. When a union negotiates a raise for its members, that group-oriented raise is less likely to reflect an artificial manipulation of an individual pension. The same is true when a legislative body amends a legally mandated salary.

In each of these situations, the increase in compensation may well yield retirement benefits disproportionate to the employee's contributions into the system. And each exception could, conceivably, shelter compensation increases that *do* reflect intentional pension inflation. Even so, the exceptions' generic indicia of non-artificiality suffice, in the Legislature's eyes, to unseat the justification for the anti-spiking rule's hardline compensation adjustment.[1]

These features of the legislative purpose support an interpretation of the word "law" that embraces municipal ordinances. When a municipality-level ordinance increases an employee's salary, it is unlikely—even if not impossible—that this increase reflects a pension-driven artifice. In this respect, an ordinance resembles a state-level statute or a collective bargaining agreement. Indeed, the instant case evidences the non-artificial reasons that may motivate municipality-level compensation adjustments: Somerville increased Ms. Heuston's salary and Mr. Willette's as a byproduct of its efforts to attract talent into the city's workforce.

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[1] In accord with this reading of the statute is a letter from the Governor transmitting to the Legislature the act that established the anti-spiking provision (Acts 2011, c. 176): the Governor wrote that the act's "anti-spiking measures" were intended to "[e]liminate abuses." Letter from Deval L. Patrick, Governor, to the Senate and House of Representatives (January 18, 2011) (on file at the Massachusetts State Archives).

All of this is not to say that it would be illogical to distinguish between state and local lawmaking. But PERAC identifies nothing in § 5(2)(f)'s language, context, history, or other attributes that indicates a legislative intent to draw such a distinction.[2]

IV

PERAC's interpretations of the retirement statute are important. *Barnstable Cty. Ret. Bd. v. CRAB*, 43 Mass. App. Ct. 341, 345 (1997). But CRAB and DALA review PERAC's determinations de novo, *MTRS v. Haverhill Retirement System*, No. CR-06-51, slip op. at 5 (CRAB July 22, 2010), *aff'd*, 82 Mass. App. Ct. 129 (2012), and "[a]n erroneous interpretation of a statute . . . is not entitled to deference." *Herrick v. Essex Reg'l Ret. Bd.*, 77 Mass. App. Ct. 645, 648 (2010). PERAC's position here is supported too sparingly to persuade.

Conclusion and Order

The term "law" in the anti-spiking provision encompasses municipal ordinances. Accordingly, the petitioners' compensation amounts should not be adjusted downward under that provision for purposes of computing their retirement allowances. The Somerville Retirement Board's contrary determinations are REVERSED.

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[2] The context and history of the anti-spiking provision tend to suggest, instead, that the Legislature did *not* mean to restrict the word "law" to particular types of laws, namely federal and state statutes. Several other provisions of the retirement law refer explicitly to "general or special laws." *E.g.*, G.L. c. 32 §§ 1, 4(1)(h), 5(4)(i). Section 5(2)(f) does not. Moreover, before it enacted the exception for salaries "specified by law," the Legislature jettisoned a similar proposal that used the phrase "specified by statute." H.B. 4001, 188th Gen Ct. § 26G (2014).

SO ORDERED.

Division of Administrative Law Appeals

Yakov Malkiel
Administrative Magistrate

Dated: May 7, 2021