COMMONWEALTH OF MASSACHUSETTS

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

**Susan Fay,**

 Petitioner

v. Docket No. CR-11-770

**Massachusetts Teachers’ Retirement**

**System,**

 Respondent Dated: November 25, 2016

**Appearance for Petitioner:**

Daniel O’Connor, Esq.

Shaevel & Krems, LLP

141 Tremont Street

Boston, MA 02111

**Appearance for Respondent:**

James O’Leary, Esq.

Massachusetts Teachers Retirement

System

500 Rutherford Avenue, Suite 210

Charlestown, MA 02129

**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

# SUMMARY OF DECISION

The Respondent’s refusal to include payments made to the Petitioner as Summer School Director in calculating her retirement benefits is reversed, because the Petitioner proved that the Waltham summer school program was meaningfully related to the regular school experience and the payments at issue otherwise qualified as regular compensation.

# DECISION

# The Petitioner, Susan Fay, timely appealed Respondent Massachusetts Teachers’ Retirement System’s refusal to include payments for work she performed as Summer School Director in calculating her retirement benefits. Each party submitted a pre-hearing memorandum. The Petitioner’s was marked “A” and the Respondent’s “B.” I held a hearing on October 8, 2015, which I recorded digitally. The Petitioner was the only witness to testify. I accepted the parties’ proposed exhibits into evidence without objection and marked them as the parties had marked them. Following the hearing, I issued an Order outlining the parties’ stipulations and identifying the exhibits. The parties subsequently stipulated that the payments for the services at issue were $7,500.00 and Petitioner’s Exhibit 10 was entered into evidence by agreement.

# Both parties submitted closing briefs. The Petitioner’s Closing Brief was marked “C” and the Respondent’s “D.” On February 22, 2016, I closed the administrative record.

# Findings of Fact

 Based on the testimony and exhibits presented at the hearing and reasonable inferences from them, I make the following findings of fact:

1. Susan Fay (“Petitioner”) was born in 1947. (Res. Ex. 5)
2. The Petitioner is a retired member of the Massachusetts Teachers’ Retirement System (“MTRS”). (Stip.)
3. The Petitioner’s retirement was effective December 12, 2011. (Stip.)
4. Prior to her retirement, the Petitioner worked as a full time history teacher in the Waltham Public Schools. (Test./Stip.)
5. For all times material to this appeal, the Petitioner performed the additional duties of the Summer School Director and received a stipend for that work. (Stip.)
6. The Summer School Director position was provided for in the collective bargaining agreement between the School Committee of the City of Waltham and the Waltham Education Association. (Stip.)
7. The Summer School had two independent components. (Stip.)
8. The first component was the “Make Up and Review Program,” wherein courses were available to students in grades 6 to 12. All courses were 20 days in length. Students who received a final failing grade in English, Math, Science, or History could regain credit for those courses by successfully completing the Summer School course. (Test./Res. Ex. 8)
9. Per course tuition was charged. The program was not limited to Waltham residents, but Waltham residents received a discount on the fee charged per course. (Stip.)
10. The second component was the “Summer Enrichment Program” wherein children could take non-academic courses (e.g., Rock Band Camp, the Art of Comic Books, etc.) Per course tuition was charged. The Program was not limited to residents of Waltham, but residents of Waltham received a discount on the fee charged per course. (Stip.)
11. Students ordered to attend summer school by a court and Waltham residents who demonstrated significant financial hardship did not have to pay tuition. (Test.)
12. The Enrichment Program was the smaller program. At least fifty per cent of summer students took courses to get the credit and at times it was sixty-sixty-five per cent. Some Enrichment Program courses supported students from academically regressing during the Summer. (Test.)
13. Summer courses in Athletic Enrichment were used for gym credit required for graduation. (Test./Res. Ex. 8)
14. Summer School was usually held in July. The Petitioner managed the Summer School. At one point, Summer School was held on 26 half days. The program changed to 20 full days. (Test.)
15. The Summer School student passing rate averaged about 96%. (Test.)
16. The Petitioner performed duties required by the Summer School Director position every month of the year. Preparation for the Summer School program started in December. There was some fluctuation in the schedule because of vacations. (Test.)
17. The Petitioner used her free period and time before students arrived and after they left during the school day to perform her Summer School duties. (Test.)
18. Preparation of the Summer School program started in December with reviewing current high school curriculum and modifying the Summer School curriculum so it would be consistent with the requirements of the regular school curriculum. The Petitioner would then start writing the summer school course catalogue. (Test.)
19. In January, the Petitioner would review the calendar to determine the last day of school to ensure that students would have to review their grades and determine if they should attend summer school. The Petitioner met with the high school principal and janitor to coordinate availability of buildings and rooms. The Petitioner continued the design of the catalogue. (Test.)
20. In February, the Petitioner started arranging for faculty. This required checking availability of teachers and meeting with the English Language Learners (“ELL”) Director to determine the needs of English language learners in the school district. The Summer School materials had to be translated into Spanish and Creole. (Test.)
21. The Petitioner would arrange for a grant from the state to pay two teacher aides to support students enrolled in the Make Up and Review Program. (Test.)
22. In February, the Petitioner filed the necessary building permits with room descriptions. (Test.)
23. In March, the Petitioner met with house masters and assistant principals. She also met with special education instructors. The purpose of these meetings was to review the number of Summer School students and to assess the number of students with Individualized Education Plans (“IEPs”). The Petitioner also assessed the subjects required for those students. (Test.)
24. The Petitioner also meet with the Director of Food Services to determine the number of students using the reduced food program and used that information to modify tuitions as necessary. This information was available only to those working in Waltham Public Schools. (Test.)
25. In March and April, the Petitioner implemented steps to support homeless students with scholarships and transportation for summer school under the McKinney**-**Vento Homeless Education Assistance Improvements Act. (Test.)
26. One hundred per cent of Summer School staff were Massachusetts certified teachers. (Test.)
27. In April, the Petitioner reviewed returns on job postings, and interviewed and hired staff. She finalized the Summer School Catalogue. She met with representatives of the vocational program at the high school to have the catalogue printed. (Test.)
28. In May, the Petitioner distributed the catalogues. She met with the school attendance officer to arrange for school dropouts to attend Summer School. She also arranged for court-mandated students to attend Summer School and determined those affected by restraining orders. In May the Petitioner ordered supplies through the assistant superintendent of the school district. The school district paid for summer school supplies. (Test.)
29. In June, the Petitioner accepted registrations and deposited tuition payments in Waltham bank accounts. The Petitioner met staff and prepared their packets. The Petitioner obtained books and materials to have shipped. (Test.)
30. In August, the Petitioner posted grades, prepared a detailed report for the school committee. She also dealt with finances and staff attendance. (Test.)
31. In September, the Petitioner returned textbooks, met with faculty about grades and collected outstanding tuitions. She also made some payments to vendors and processed requests for overtime payments. (Test.)
32. In October, the Petitioner made payments on lingering accounts, collected outstanding tuition and completed grades. The Petitioner met with the high school principal and middle school assistant principals about necessary changes in handbooks for the upcoming summer school. For example, at one point middle school students who took five major subjects had to pass at least three to be promoted. That requirement was raised to four subjects and the Summer School handbook had to be changed to reflect the credit requirement changes. (Test.)
33. In November, the Petitioner would wind up the Summer School Program. (Test.)
34. At least fifty per cent of the Petitioner’s work as Summer School Director was done during the regular school year. (Test.)
35. The Summer School did not pay rent to the school district. (Test.)
36. The Petitioner received two or three pay checks over the summer. On occasion, she received a pay check in September. (Test.)
37. The Summer School Director position was listed as one of the positions in “Appendix D: stipends” of the collective bargaining agreement. It was listed as: Summer School Director with a stipend of $6,900. (Stip.)
38. The Petitioner was paid by the City of Waltham via payroll check for her work as the Summer School Director. Retirement contributions were taken from the check. (Stip.)
39. The Petitioner was supervised in the role of Summer School Director by the Assistant Superintendent of Schools. (Test)
40. On February 11, 2011, the Assistant Superintendent of Administration of the Waltham Public Schools sent a letter confirming the Petitioner’s employment as the Summer School Director and confirming that a “great deal of the work done for this position was done during the school year.” (Stip.)
41. While the Waltham School Department Operating Budget for 2008-2009 and 2009-2010 showed school department expenditures for its regular programs such as Mathematics, English, History and even Administration, no such expenditures appear for the Summer School Program. (Stip.)
42. These budgets also show that Summer School expenses were offset by the amount of tuition it received for its programs. (Stip.)
43. On December 19, 2011, the MTRS issued a decision refusing to include the payments the Petitioner received as Summer School Director as regular compensation for inclusion in her three year salary average. (Stip.)
44. On December 27, 2011, the Petitioner filed her timely appeal with the Division of Administrative Law Appeals. (Stip./Pet. Ex 8)

# Discussion

When a member retires from public service, she is entitled to a superannuation retirement allowance that is based in part on "the average annual rate of regular compensation received by such member during any period of three consecutive years of creditable service for which such rate of compensation was the highest." M.G.L. c. 32, § 5(2)(a). "Regular compensation" is defined as "compensation received exclusively as wages by an employee for services performed in the course of employment for his employer." M.G.L. c. 32, § 1. "Wages" is defined as "the base salary or other base compensation of an employee paid to that employee for employment by an employer," with certain exceptions. *Id.* This definition has been interpreted to mean recurrent or repeated amounts of compensation not inflated by extraordinary ad hoc payments:

"regular" as it modifies "compensation" imports the idea of ordinariness or normality as well as the idea of recurrence. All this contrasts with "overtime" and with the compendious "bonus" which are to be excluded from the compensation that figures in computing retirement benefits. *Boston Assoc. of Sch. Administrators & Sup'rs v. Boston Ret. Bd*., [383 Mass. 336](http://sll.gvpi.net/document.php?id=sjcapp:383_mass_336), 341 (1981).

The definition of wages also includes an additional provision for teachers:

* In the case of a teacher employed in a public day school who is a member of the teachers' retirement system, salary payable under the terms of an annual contract for additional services in such school. . . shall be regarded as "regular compensation" rather than as bonus or overtime...

M.G.L. c. 32, § 1.

A regulation promulgated by the MTRS provides that "annual contract" in the case of a teacher shall mean "the collective bargaining agreement for the unit which governs the rights of the members whether it is a one year or multiyear agreement." 807 CMR 6.01. Another regulation provides that:

(1) The term regular compensation as defined by M.G.L. c. 32, § 1 and further defined by 840 CMR 15.03: *Regular Compensation* shall include salary payable under the terms of an annual contract for additional services so long as:

(a) The additional services are set forth in the annual contract;

(b) The additional services are educational in nature;

(c) The remuneration for these services is provided in the annual contract;

(d) The additional services are performed during the school year.

(2) During such period the term regular compensation as so defined shall not include:

(a) Any amounts paid for special projects involving tasks which are not performed on a year to year basis;

(b) Any amounts paid for work performed during the summer months unless the member's position in which he or she is employed during the school year requires that he or she work for 11 or 12 months and the annual contract provides for same…

807 CMR 6.02.

 The parties do not dispute that the services at issue are set forth in the annual contract and, while there was some confusion over the amount of the compensation, the remuneration is set forth in the annual contract. Nor is there a dispute that the services at issue are educational in nature.

The Massachusetts Appeals Court has had the opportunity to consider whether summer school salary should be considered as regular compensation. In *Evans v. Contributory Retirement Appeal Board*, the Appeals Court held that “regular compensation” did not include a teacher’s summer school salary. 46 Mass. App. Ct. 229, 234 (1999). In *Evans,* unlike the case at hand, no retirement withholdings were withheld from the Petitioner’s summer school salary. A fact which resulted in the “suggestion that the summer school period has not been regarded as an extension of the normal period, but as a separate period of service outside the category of ‘regular compensation.’” *Evans*, supra at 232

In 2002, the Appeals Court after discussing the statutes and regulations set out above and the court’s opinion in *Evans*, held:

Our reading of the statute convinces us that it is the Legislature's intention that only compensation paid for services that affect the educational experiences of students enrolled in regular public school programs is to be included in the retirement benefit calculation. That is why compensation for services in a school lunch program or as an athletic coach qualifies,but summer school teaching does not.

*Varella v. Contributory Retirement Appeal Board*, 46 Mass App. Ct. 384, 390. If the Appeals Court believed that the legislature intended that summer school salary could never qualify as regular compensation, it would have so held, but it did not hold that. In *Varella*, the court noted that:

The Easton Evening program was not meaningfully related to the regular high school experience. It was essentially an adult education or extension program and the fact that high school students might occasionally attend for credit did not render it an adjunct of the high school.

*Varella, supra* at 389.

In the instant case, unlike *Varella*, the Summer Program was meaningfully related to the regular public school program. The Petitioner’s credible testimony was that students attended the Make Up and Review Program to earn credits needed for promotion and graduation in the Waltham Public Schools. She also testified that her job duties included meeting with the attendance officer to obtain information concerning students who had dropped out of school so that the students could re-enroll in school and attend summer school. In addition, according to the Petitioner’s credible testimony, the Summer Enrichment Program’s athletic programs provided public school students who needed gym credit to graduate an opportunity to earn that credit. Other Summer Enrichment programs provided students with the opportunity to continue academic pursuits to avoid “regressing” and tuitions received for the Summer Enrichment Program and payments received from non-residents of Waltham paid for the Summer School Program.

I also found the Petitioner’s testimony concerning her work schedule credible. Combined with the evidence that regular retirement withholdings were taken from the summer school payments she received, I am persuaded that the Petitioner’s work as Summer School Director was done over the course of 11 or 12 months. *Compare Evans supra* at *232* (no retirement withholdings left suggestion summer school period outside normal period); *Costanza v Massachusetts Teachers’ Retirement System*, CR-02-73 (DALA 3/13/2015) (Petitioner’s testimony unpersuasive) *with* *Conlin v. Teachers’ Retirement System*, CR-95-933 \* 5 (DALA 2/10/1997; CRAB 9/19/1997). The nature of the Petitioner’s position as Summer School Director required her to work for 11 or 12 months as required by 807 CMR 6.02 (b). This is a critical distinction between the Petitioner’s position of Summer School Director and Summer School Teacher. *See Conlin supra* \* 5 (DALA decision).

 The Respondent argues that the facts tuition was paid for the courses and students who did not live in Waltham attended the Summer School makes that program distinct from the “Normal Waltham Public Schools.” Respondent’s Post-Hearing Brief p. 6. The Respondent cites *Varella* as “cited in *Fitzpatrick v. MTRS* CR-02-73 (DALA 2/19/2003)” for that proposition. I do not agree that *Varella* stands for the proposition argued by the Respondent and *Fitzpatrick* does not cite *Varella* for that proposition. *Fitzpatrick,* in dicta, does state the proposition put forward by the Respondent. Based upon the record of this case, I disagree. There was no persuasive evidence as to the numbers of students from outside the district that attended the Summer School Program. Moreover, programs like Metco and out of district placement of children with special needs provide for students to attend public schools outside their own school districts. In addition, the growth of athletic fees and transportation charges has made the public schools charging of user fees common.

**CONCLUSION AND ORDER**

The Petitioner established that the Summer School Program was meaningfully related to the regular school experience and otherwise qualified as regular compensation. The Respondent’s decision not to include the payments at issue as regular compensation is reversed and the Respondent is instructed to include those payments and recalculate the Petitioner’s retirement benefits.

SO ORDERED.

DIVISON OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

Dated: November 25, 2016