THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS
14 SUMMER STREET, 4TH FLOOR
MALDEN, MA 02148

EDWARD B. MCGRATH
CHIEF ADMINISTRATIVE MAGISTRATE

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March 16, 2020

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PERAC
5 Middlesex Ave. Suite 304
Somerville, MA 02145

RE: *Francis Goode v. Middlesex County Retirement System*, CR-18-0633

Dear Sir or Madam:

Enclosed is a final Decision in the above-captioned appeal. M.G.L. c. 32, § 16(4) provides that both parties must comply with the Decision unless: (1) either party objects in writing to the Contributory Retirement Appeal Board, or (2) CRAB orders that it will review the decision on its own.

If you object, **within fifteen (15) days of this decision** you must mail specific objections to the Decision to Uyen M. Tran, Assistant Attorney General, Chair, Contributory Retirement Appeal Board, Office of Attorney General Maura Healey, One Ashburton Place, 20th Floor, Boston, MA 02108. Copies of the objections must be sent to the Division of Administrative Law Appeals, 14 Summer Street, 4th FL, Malden, MA 02148 and to the other party involved in this case.

The objecting party has an additional 25 days after the 15-day period to forward a memorandum and copies of the Exhibits (three sets of exhibits and three copies of memorandum to CRAB c/o Uyen M. Tran and a set to the other party. Do not send a set to the Division of Administrative Law Appeals.) The objecting party should number the exhibits as they were numbered at the hearing and include a Table of Contents. CRAB will not put any case on its agenda until the exhibits and memorandum have been received.

DIVISION OF ADMINISTRATIVE LAW APPEALS
Edward B. McGrath
Edward B. McGrath
Chief Administrative Magistrate

EBM/jb
cc: Uyen M. Tran

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Francis Goode,
Petitioner

v.

Docket No. CR-18-0633
Date: Mar. ~~13~~, 2020
16

Middlesex County Retirement System and PERAC
Respondents

Appearance for Petitioner:

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Appearance for Middlesex County Retirement System:

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Appearance for PERAC:

[redacted], Esq.
Senior Associate General Counsel
PERAC
5 Middlesex Ave., Ste. 304
Somerville, MA 02145

Administrative Magistrate:

Kenneth J. Forton, Esq.
Administrative Magistrate

SUMMARY OF DECISION

Respondents Middlesex County Retirement Board and PERAC erred in their determination that the 6% incentive payment for being EMT-certified along with at least 50% of the other superior officers provided for in the Collective Bargaining Agreement between the Town of Chelmsford and Chelmsford Superior Officers failed to constitute "regular compensation" under G.L. c. 32, § 1. The 6% payment was within the definition of "other base compensation" under 840 CMR 15.03(3)(b) because it was an educational incentive which was "pre-determined, non-discretionary [and] guaranteed." It is therefore wages and regular compensation. G.L. c. 32, § 1.

DECISION

Petitioner Francis Goode timely appealed under G.L. c. 32, § 16(4) the Middlesex County Retirement Board's November 19, 2018 decision that an incentive payment of an additional 6% of Petitioner's salary for being EMT-certified where more than half of his fellow superior officers were also EMT-certified, that was provided for by his Collective Bargaining Agreement, was not "regular compensation."

On June 14, 2019, DALA allowed the Board's motion to add PERAC as a necessary party. On October 17, 2019, the parties filed a Joint Pre-Hearing Memorandum, which I have marked as "Pleading A," and proposed exhibits. After reviewing the memorandum, DALA determined that the sole issue in the case was a matter of law and that it may be decided on the papers. Accordingly, on November 5, 2019, DALA ordered the parties to file any objections to the Petitioner's proposed stipulations and any additional documents no later than January 10, 2020. None of the parties filed a response.

I consider the following exhibits in rendering this decision:

Ex. 1: Collective Bargaining Agreement between the Town of Chelmsford and Chelmsford Superior Officers;

Ex. 2: PERAC letter dated October 22, 2018;

Ex. 3: Affidavit of Francis Goode dated November 6, 2018;

Ex. 4: Letter from the Middlesex County Retirement Board dated November 19, 2018;

Ex. 5: Petitioner's letter of appeal dated November 20, 2018; and

Ex. 6: Memorandum and Order in the matter entitled *O'Leary v. CRAB, Lexington Ret. Bd., and PERAC*, Suffolk Superior Court No. 1884-CV-02624 (consolidated with 1884-CV-02661) (Sept. 26, 2019).

FINDINGS OF FACT

Based on the evidence in the record and reasonable inferences drawn from it, I make the following findings of fact:

1. Francis Goode is a police sergeant employed by the Town of Chelmsford. He is the President of the Police Supervisor's Union, NEPBA Local 20. (Ex. 3.)

2. Under the Collective Bargaining Agreement between the Town of Chelmsford and Chelmsford Superior Officers, each unit member receives 2.5% additional compensation for holding EMT certification. (Exs. 1, 2.)[1]

3. Under the CBA, when more than 50% of the bargaining unit holds EMT certification, the compensation increase is 6%. (Exs. 1, 2.)

4. The 6% payment went into effect on January 19, 2016. (Ex. 1, 2.).

5. 100% of Petitioner's bargaining unit has been EMT-certified since fiscal year 2015; thus, 100% of the bargaining unit currently receives the 6% payment. (Ex. 3.)

6. The bargaining unit became aware that the Town of Chelmsford was not making retirement deductions for any of the EMT certification pay. It submitted the

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[1] The parties have not submitted a copy of the CBA. But the relevant portions are quoted at length in the PERAC letter dated October 22, 2018. (Ex. 2.)

issue for review to the Middlesex County Retirement Board, and subsequently to PERAC. (Pleading A.)

7. On October 22, 2018, PERAC concluded that while the 2.5% increased compensation constituted "regular compensation," the 6% compensation increase did not. (Ex. 2.)

8. By letter dated November 19, 2018, the Board notified Petitioner of its intent to implement the opinion issued by PERAC. (Ex. 4.)

9. By letter dated November 20, 2018, the Petitioner appealed the decision of the Board. (Ex. 5.)

CONCLUSION AND ORDER

The Board's decision is reversed. The 6% payment for EMT certification provided for by the relevant CBA is "regular compensation" under G.L. c. 32, § 1 and 840 CMR 15.03(3)(b).

At the center of this dispute is PERAC's regulation on regular compensation, 840 CMR 15.03(3)(b). It provides that:

> "[W]ages" shall mean the base salary or other base compensation of an employee paid to that employee for employment by an employer including pre-determined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees, provided, that "wages" shall include payments made by the employer to the employee . . . because of educational incentives, and payments for holding the training, certification, licensing or other educational incentives approved by the employer for the performance of services related to the position the employee holds.

(Emphasis added.) The parties focus on whether the words, "provided, that," are bound up with those which appear afterwards. They dispute whether payments made "because of educational incentives, and payments for holding the training, certification, licensing

or other educational incentives" can constitute "wages" without constituting "base salary or other base compensation" which is "pre-determined, non-discretionary [and] guaranteed."

But this inquiry is unnecessary here. Not only were the 6% payments educational incentives and payments for holding a certification, they were also "predetermined, non-discretionary, guaranteed payments paid by the employer to similarly situated employees." 840 CMR 15.03(3)(b). This means that the payments meet the definition of "other base compensation." The payments were "predetermined" because they were stipulated in advance through a CBA. And under the CBA, the Town of Chelmsford has no discretion to deny these payments once more than 50% of a bargaining unit obtains EMT certification. The payments are therefore "non-discretionary" and "guaranteed."

This is analogous to the DALA magistrate's reasoning in *Ferris v. Mass. Teachers' Retirement Sys.*, CR-13-503 (DALA, Apr. 13, 2018). In *Ferris*, the fact that educational incentives for teachers were stipulated in a CBA meant that they were "predetermined." *Id.* at 3. Under the CBA, the Teachers' Retirement System "did not have the discretion whether to pay" those teachers who acquired master's degrees. *Id.* And thus, the payments were "guaranteed" to Petitioner. *Id.* The same analysis applies here.

That Respondents reached opposite determinations for the 2.5% and 6% payments is unsupported by the evidence. PERAC explained that, on the one hand, the 2.5% EMT payment constitutes regular compensation because "it would be wages for 'holding the training, certification, licensing or other educational incentives.' " (Ex. 2.) But, so would the 6% payment. Conversely, PERAC determined that the 6% payment could *not*

be regular compensation because it "is contingent upon whether something occurs or does not occur" and therefore "is not 'pre-determined, non-discretionary [and] guaranteed.' " This reasoning is problematic for two reasons. First, the same reasoning would apply just as well to the 2.5% payment. Second, as explained above, both payments are "predetermined, non-discretionary [and] guaranteed." The Town of Chelmsford was *required* to provide the payments under the terms laid out in the CBA.

Respondents argue in the alternative that the 6% EMT payment is not "wages" because 840 CMR 15.03(3)(f) excludes "amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term." However, when 840 CMR 15.03(3)(f) refers to "salary enhancements or salary augmentation plans," it is referring specifically to deferred compensation schemes. This was made clear, for example, in *Booker v. Hull Retirement Board*, CR-05-1324, (DALA, Feb. 22, 2007), *aff'd* (CRAB, Mar. 14, 2008): " 'salary augmentation plans' or 'salary enhancement programs' . . . are contractual provisions that allow employees to elect to receive a temporary salary increase, often for a three year period, in some cases in exchange for giving up a longevity payment or a sick leave buy-out at retirement." The 6% payment is not a salary enhancement or salary augmentation plan under 840 CMR 15.03(3)(f).

Respondents also cite *O'Leary v. CRAB, Lexington Ret. Bd. and PERAC*, Memorandum and Order, Civil Action No. 1884-CV-02624 (consolidated with 1884-CV-02661) (Superior Ct., Sept. 26, 2019). But *O'Leary* was about vacation buyback payments, not educational incentives. And it emphasizes this very distinction:

> [Petitioner] argues that the vacation buyback payments are wages because they are comparable to other payments which PERAC regulations include

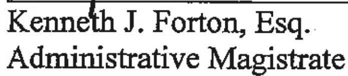
> in the definition of wages, such as educational incentives . . . . This contention refutes, rather than affirms, his position because those other types of pay are *explicitly included in PERAC's definition of wages.*"

Id. at 6 (emphasis added.). *O'Leary* does not help Respondents because it accepts explicitly that educational incentives are within the definition of "wages."

For the reasons stated above, the Board's decision is reversed and the full 6% incentive payment shall be treated as regular compensation.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

Dated: Mar. ~~13~~ 16, 2020