

STATE OF MICHIGAN
COURT OF APPEALS

MARLENE E. DAVIS,

Petitioner-Appellee,

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT
SYSTEM,

Respondent-Appellant.

UNPUBLISHED

July 17, 2012

No. 302896

Wayne Circuit Court

LC No. 10-009451-AA

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Respondent appeals by leave granted the circuit court's order reversing the decision of the Michigan Public Employees Retirement Board (the Retirement Board), which decided in favor of respondent with respect to the calculation of petitioner's final average compensation and monthly pension benefit. We reverse.

On appeal, respondent argues the circuit court should have affirmed the Retirement Board's decision because that decision was supported by competent, material, and substantial evidence. We agree.

"This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005); see also *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002). A finding of fact is clearly erroneous if this Court "is left with the distinct and firm conviction that a mistake has been made." *VanZandt*, 266 Mich App at 585.

When the lower court is reviewing a final agency decision, the court may not substitute its own judgment for the judgment of the agency. *VanZandt*, 266 Mich App at 584. The agency's decision should be upheld unless it is contrary to law; arbitrary, capricious, or a clear abuse of discretion; or not supported by competent, material, and substantial evidence. *Id.* at 583; *Dignan*, 253 Mich App at 576; see also Const 1963, art 6, § 28; MCL 24.306. Substantial evidence "is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *VanZandt*, 266 Mich

App at 584, quoting *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 218 Mich App 734, 736; 555 NW2d 267 (1996). The lower court should accord the agency's findings of fact deference, especially the agency's findings with respect to witness credibility and evidentiary questions. *VanZandt*, 266 Mich App at 588.

Petitioner served as superintendent of the Wayne Regional Educational Services Agency (Wayne RESA) from 2001 to 2007. The Wayne RESA is an intermediate school district (ISD) serving all of Wayne County. Under the Retirement Act, MCL 38.1301 *et seq.*, a public school employee's monthly pension is calculated by multiplying her years of service by 1.5 percent of her final average compensation. See MCL 38.1384(1). Petitioner's final average compensation is the average of the compensation she earned in her final 36 months of employment. See MCL 38.1304(12). Petitioner has the burden of proving that remuneration should be included as reportable compensation. See MCL 38.1303a(6).

MCL 38.1303a(3)(f) limits the definition of compensation:

(3) Compensation does not include any of the following:

* * *

(f) Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used.

Petitioner's normal salary schedule was determined by the Office of Retirement Services (ORS). The ORS compiled the pay rate information for all superintendents, omitted pay decreases and outliers, and then determined the average salary increase for all superintendents in reporting units with a payroll of between \$10 million and \$20 million (the payroll range of the Wayne RESA). The ORS then doubled the averages to allow for some fluctuation. The salary schedule applicable to petitioner was:

Fiscal Year ¹ Ending	Allowable Salary Increases for Superintendents
2001	8.66%
2002	9.52%
2003	8.60%
2004	7.46%
2005	5.14%
2006	7.84%
2007	5.15%

¹ A fiscal year is from July 1 to June 30.

The following table compares petitioner’s actual salary and her salary increases for her final 36 months of employment with the salary and salary increases that were permitted under the normal salary schedule developed by the ORS:

Fiscal Year	Petitioner’s Actual Salary Increase (from previous year)	Petitioner’s Actual Salary	Permitted Salary Increase (from previous year)	Permitted Salary
2004-2005	25.07%	\$198,166.00	5.14%	\$166,589.39
2005-2006	2.00%	\$202,129.32	7.84%	\$179,650.00
2006-2007	4.94%	\$212,104.97	5.15%	\$188,901.98

The dispute over petitioner’s final average compensation and monthly pension benefit arises from her 25.07 percent salary increase for the 2004-2005 fiscal year. Respondent used the recalculated “permitted salaries” to determine petitioner’s final average compensation and monthly pension benefit. The Retirement Board agreed with respondent’s recalculations and concluded that petitioner’s pay increases above the normal salary schedule should not be included in her final average compensation.

Petitioner argues that her salary increase was the result of a measurable and documented comparative salary study and so was permitted by a provision in respondent’s Reporting Instruction Manual (RIM). The RIM is a guide distributed by respondent to school districts to help the districts determine what constitutes reportable compensation and to instruct the districts on how to report the compensation on respondent’s website. The RIM section at issue states:

N. Pay Increases Over Normal Schedule

Wages over and above the normal salary schedule for your employees as a whole are considered nonreportable compensation. Reportable compensation may not include an amount over the compensation for the preceding year except increases provided by the normal salary schedule for your employees. Member’s wages are audited for any significant increases in salary that may not be recognized for retirement purposes.

Exception:

Some salary increases over and above the normal salary schedule may be recognized as reportable compensation. Increases generated by the following may be reportable:

* * *

- Comparative salary study of the surrounding area, if measurable and documented[.]

Petitioner claims that the Wayne RESA Board based its decision to increase her salary on a comparative salary study conducted in 2004. According to petitioner, the superintendent of the

Oakland ISD came under attack for financial decisions and, as a result, the salaries of several ISD superintendents were publicized in the media. This media coverage indicated that the Oakland ISD superintendent's salary was approximately \$270,000, and the salaries of the Macomb County ISD and Genesee County ISD superintendents were approximately \$200,000 and \$190,000, respectively. Petitioner explained that this information was somewhat embarrassing, because the Wayne ISD is the largest in the state and yet her salary was considerably lower than the salaries of these other ISD superintendents. The Wayne RESA Board ultimately voted to increase petitioner's salary.

Although petitioner's salary increase may have been based on a comparative salary study as contemplated by the RIM, the RIM is supplanted by the Retirement Act. Under the Retirement Act, the Retirement Board has the authority to determine if remuneration is part of an employee's compensation for purposes of calculating the employee's final average compensation and monthly pension benefit. See MCL 38.1303a(5). The Act also explicitly states that compensation does not include "[c]ompensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule" MCL 38.1303a(3)(f). An agency's interpretation "cannot overcome the plain language of a statute." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 130; 807 NW2d 866 (2011). Where the plain language of the Retirement Act conflicts with respondent's administrative rules and the RIM, the Act governs. See *id.* In fact, the RIM states on its first page that if there are "discrepancies between this manual and the actual law, the provisions of the law govern."² In addition, the language of this RIM section is permissive, not mandatory. The RIM provides that *some* salary increases over the normal salary schedule may be considered reportable compensation, and increases generated by comparative salary studies *may* be reportable. The RIM does not require the Retirement Board to include salary increases over the normal salary schedule in an employee's compensation. If the RIM's language did compel respondent to do so, it would directly conflict with MCL 38.1303a(3)(f), which excludes such salary increases from the definition of compensation.

In reversing the Retirement Board's decision, the circuit court seemed to give deference to the proposal for decision of Administrative Law Judge Mack:

The Court is satisfied Judge Mack looked at it. It clearly was measurable and documented. The study was complete. As a result of the study, they allowed Davis' increase in salary.

Judge Mack's proposal for decision was a recommendation for the Retirement Board, which the Retirement Board was free to accept or reject. See *Dignan*, 253 Mich App at 578.

² While respondent quotes this language in the brief on appeal, this page of the RIM was not included in the administrative record. However, the current version of the RIM, available at www.michigan.gov/orsrim, uses identical language. In addition, a statute's authority over administrative rules or manuals is well established. See *Mich Farm Bureau*, 292 Mich App at 130; *In re Complaint of Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008); *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007).

The circuit court also concluded that:

[T]he [Retirement] Board's decision not to follow the RIM exception is not supported by any competent, material, or substantial evidence because they don't deal with it on the record at all. At that, because they don't deal with it, the Court is satisfied it becomes arbitrary and capricious that they even have a final order to that end.

However, the Retirement Board explained why it did not follow the RIM exception, and this decision was supported by competent, material, and substantial evidence and was not contrary to law. The Retirement Board noted:

10. The RIM in effect at the time Petitioner entered into all of the relevant employment contracts in this case stated that a member's wages are audited for significant increases in salary and that remuneration that exceeds a normal salary increase in [sic] not recognized as compensation for inclusion in the member's FAC [final average compensation]. *The RIM does not state that increases generated by a comparative salary study are not subject to the increase provided in a normal salary schedule, but only that such increases may not be subject to the normal salary increase limitation.*

11. According to Petitioner and the witnesses testifying on her behalf, her salary was increased by 25% in 2004-2005 to put her gross salary in line with that being paid to the Superintendent of Oakland County ISD. *However, the so-called salary study which reportedly formed the basis of Petitioner's salary increase does not surmount the application of Respondent's normal salary schedule, which is comprehensive in nature and complies with the provisions of MCL 38.1303a(3)(f).* [Emphasis added.]

The circuit court therefore erred in substituting its own judgment for the judgment of the Retirement Board. See *VanZandt*, 266 Mich App at 584.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan