

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven E. Orlosky :
 :
 v. : No. 1776 C.D. 2010
 :
 City of Reading, Pa, Thomas :
 M. McMahon, Shelly Fizz, :
 Ryan Hottenstein, City of Reading :
 Firemen's Pension Fund :
 :
 Appeal of: City of Reading, PA, :
 Thomas M. McMahon and Ryan :
 Hottenstein :

Steven E. Orlosky :
 :
 v. : No. 1820 C.D. 2010
 :
 City of Reading, PA, Thomas : Argued: March 8, 2011
 McMahon, Shelly Fizz, :
 Ryan Hottenstein, City of Reading :
 Firemen's Pension Fund :
 :
 Appeal of: Shelly Fizz and the City of :
 Reading Firemen's Pension Fund :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: May 26, 2011

In these consolidated appeals, the City of Reading, Thomas McMahon,¹ and Ryan Hottenstein² (collectively, the City), and Shelly Fizz³ and

¹ Thomas McMahon is the Mayor of the City of Reading.

the City of Reading Firemen's Pension Fund (collectively, the Fund) appeal from the order of the Court of Common Pleas of Berks County (trial court), dated July 28, 2010, which entered summary judgment in favor of Steven E. Orlosky (Orlosky). We reverse.

The relevant facts as stipulated by the parties are as follows. Orlosky was at all times relevant hereto an employee and/or retiree of the City of Reading and performed services on behalf of the City of Reading Fire Department. On January 9, 2006, effective January 1, 2006, the City of Reading adopted Bill No. 91-2005, Deferred Retirement Option Program (D.R.O.P. or DROP), referred to as the "Drop Ordinance".

On January 9, 2006, Orlosky executed documents entitled "Drop Election Program Application, City of Reading Firemen's Pension Plan" and "City of Reading Firemen's Pension Fund Application for Pension Benefits". Paragraph 2 on the Drop Election Program Application provides, "As of my DROP date, the calculation of my pension benefit shall freeze and no service rendered or compensation received after my DROP date, unless paid on a retroactive basis, shall be considered for pension and calculation purposes." Reproduced Record⁴ (R.R.) at 205a.

On January 20, 2006, the City advised Orlosky that he had been accepted into the DROP effective January 1, 2006, with a monthly pension rate of \$3,139.49 and an annual pension rate of \$37,563.88. The Reading Pension Board

² Ryan Hottenstein is the current Managing Director of the City of Reading.

³ Shelly Fizz is the Pension Administrator for the City of Reading.

⁴ The City and the Fund each filed reproduced records. The reproduced record cited throughout this opinion is the one filed by the Fund at Docket No. 1820 C.D. 2010.

Administrator prepared a document entitled “Fire Estimated Pension Calculations”, wherein it provided that Orlosky would receive the aforementioned pension; the document did not include the value of any compensatory time for time worked by Orlosky prior to January 1, 2006, for which he had not been paid as of that date.

Prior to entering the DROP, Orlosky had accrued 384.75 hours of compensatory time for services rendered to the City of Reading. Payment for these hours was at the rate of \$30.32 per hour for a total of \$11,665.62. This money was paid to Orlosky at the time of his retirement on June 30, 2008. No pension contribution deduction was made from this payment.

In 2007, Orlosky requested payment of his compensatory earnings and was advised by the former Managing Director that, according to policy, Orlosky would not be entitled to receive his compensatory funds until he actually retired. This position was reaffirmed by acting Managing Director, Ryan Hottenstein, and Chief William Rehr. Another fireman, Deputy Chief Jeffrey Squibb, was paid for substantially all of his compensatory time without requiring that he wait until actual retirement and such monies were included in his pension calculations.

By letter dated September 21, 2007, Orlosky, through his counsel, requested that his compensatory time be utilized in computing his retirement benefits. On April 30, 2008, Orlosky advised the City that he would be retiring on June 20, 2008. On September 4, 2008, the City advised Orlosky that it was unable to support his request to include compensatory hours as part of his pension; the Mayor reiterated this position by formal response; the Firemen’s Pension Board adopted a resolution accepting and agreeing with the Mayor’s response.

On September 8, 2009, Orlosky filed a complaint with the trial court seeking to have the City and the Fund recalculate his pension benefit to include all compensatory time earned prior to entering the DROP. No trial was held in the

matter. The parties filed a joint stipulation of facts. The parties also submitted motions for summary judgment and briefs in support thereof. Based upon the uncontroverted facts, the trial court entered summary judgment in favor of Orlosky and against the City and the Fund and ordered the City and the Fund to include Orlosky's pension benefits after all appropriate deductions are taken from the compensatory time payments.

From this order, the City and the Fund both filed separate appeals, which were consolidated by order of this Court dated November 4, 2010.⁵ The following issues have been raised for our review:

1. Whether the trial court erred in granting Orlosky's motion for summary judgment.
2. Whether the City properly interpreted the "Drop Ordinance" to not include unpaid compensatory time in Orlosky's pension benefit calculation.
3. Whether the trial court erred in denying the Fund's motion for summary judgment.

In essence, the City and the Fund contend that the trial court erred by granting Orlosky's motion for summary judgment and denying the Fund's motion for summary judgment where the "Drop Ordinance" was properly interpreted to not include unpaid compensatory time in Orlosky's pension benefit calculation. We agree.

⁵ Our scope of review of an order granting or denying summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion. Salerno v. LaBarr, 632 A.2d 1002 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 655, 644 A.2d 740 (1994). Summary judgment is only appropriate when, after examining the record in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party clearly establishes that he is entitled to judgment as a matter of law. Id.

The City of Reading is a city of the Third Class of the Commonwealth of Pennsylvania and is subject to The Third Class City Code⁶ (Code). The Code requires cities of third class to establish, by ordinance, a firemen's pension fund. Section 4320 of the Code, 53 P.S. §39320. The Code directs that the “basis of the pension of a member shall be determined by the monthly salary of the member at the date of vesting under section 4320.1 or retirement, or the highest average annual salary which he received during any five years of service preceding retirement, whichever is the higher... .” Section 4322 of the Code, 53 P.S. §39322. The Code defines the term "salary" as “the fixed amount of compensation paid at regular, periodic intervals by the city to the member and from which pension contributions have been deducted.” Section 4328 of the Code,⁷ 53 P.S. §39328.

Pursuant to this authority, the City enacted the Firemen’s Pension Fund.⁸ The Firemen’s Pension Fund mirrors the provisions of the Code, but is more generous with regard to the definition of salary. Section 1-641 of the Firemen’s Pension Fund provides that the “basis of the pension of a member shall be determined by the monthly salary (includes base salary, overtime, holiday and longevity) of the member at the date of vesting... .”

On January 9, 2006, the City amended its Firemen’s Pension Fund by adding the Drop Ordinance. The Drop Ordinance provides:

For all Retirement Fund purposes, continuous service of a member participating in the D.R.O.P. shall remain as it

⁶ Act of June 23, 1931, P.L. 932, as amended, 53 P.S. §§ 35101-39701.

⁷ Added by the Act of June 16, 1993, P.L. 97.

⁸ The City’s Firemen’s Pension Fund is located in Chapter 1, Part 6.B of the Administrative Code of the City of Reading, Sections 1-621 – 1-649.

existed on the effective date of commencement of participating in the D.R.O.P. Service thereafter shall not be recognized or used for the calculation or determination of any benefits payable by the Reading Firemen's Pension Fund. ***The average monthly pay of the member for pension calculation purposes shall remain as it existed on the effective date of commencement of participating in the D.R.O.P. Earnings or increases in earnings thereafter shall not be recognized or used for the calculation or determination of any benefits payable by the Pension Fund.*** The pension benefit payable to the members ***shall increase only*** as a result of Cost of Living Adjustments in effect on the effective date of the member's participation in the D.R.O.P., or by applicable cost of living adjustments granted thereafter.

Section 1-644(4) of the Drop Ordinance, R.R. at 201a-202a (emphasis added). The Drop Ordinance expressly excludes any service credit and/or compensation received *after* a member's entry into the DROP from the calculation of that member's pension benefit. Id. Any "earnings" or "increases in earnings" after entering the DROP shall not be recognized for calculation purposes. Id. The member's entry into the DROP is the critical moment in time which dictates the calculation of that member's pension benefit. See id.; Shippensburg Police Ass'n v. Borough of Shippensburg, 968 A.2d 246, 248 (Pa. Cmwlth. 2009) (recognizing that a retiree's receipt of unused vacation pay after retirement fell outside the time period specified in the police pension plan for calculating average compensation upon which the pension benefit was based); Kosey v. City of Washington Police Pension Board, 459 A.2d 432 (Pa. Cmwlth. 1983).

By reading the DROP Ordinance in conjunction with the Firemen's Pension Fund and the Code, it is clear that only compensation time that is paid within the calculation period and thereby part of the member's salary, is to be

included in the pension calculation. Time that is accrued but unpaid is not included in the calculation. According to the Drop Ordinance, the only reason for a *post hoc* pension benefit modification shall be for a cost of living adjustment. Section 1-644(4) of the Drop Ordinance, R.R. at 202a.

Here, Orlosky entered into the DROP on January 1, 2006. The Fund properly relied upon this date in calculating Orlosky's pension benefit as reflected in the January 1, 2006 Estimated Pension Calculation, which used the "last 12 months preceding retirement date" to determine Orlosky's average monthly pay. Orlosky did not receive any monies related to his compensatory time until after his retirement, which was two years later; employee pension contributions were not deducted from this payment. While there is no dispute that Orlosky's compensatory time was accrued prior to June 30, 2008⁹ and was owed to Orlosky at the time he entered DROP, the fact remains that Orlosky did not receive payment for those earnings until he retired. Contrary to Orlosky's assertions, the payment was not made on a "retroactive" basis. Rather, Orlosky could have chosen to utilize this accrued time as time off in lieu of payment. Until such time as the payment was made, Orlosky's compensation time did not constitute "earnings" for purposes of pension calculation under the DROP Ordinance. Moreover, Orlosky did not request payment of these earnings prior to his enrollment in DROP.¹⁰

⁹ There is nothing in the record to indicate exactly when Orlosky earned 384.75 hours; indeed, some or all of that time may have accrued over the course of many years.

¹⁰ In this regard, Chief Deputy Squibb was not similarly situated to Orlosky since Squibb
(Continued....)

The DROP Ordinance clearly provides that the pension calculation is based upon average monthly pay as it existed on the date of the DROP election and that earnings received thereafter are not recognized. The value of Orlosky's compensatory time was properly excluded from the calculation of his pension payments because he had not been compensated for such time as of the date he elected to enter the DROP. We, therefore, conclude that the trial court erred in determining that the City's interpretation of the DROP Ordinance was erroneous. Consequently, the trial court erred by granting Orlosky's motion for summary judgment and denying the motions for summary judgment filed by the City and the Fund.

Accordingly, we reverse the order of the trial court.

JAMES R. KELLEY, Senior Judge

requested and received payments for his compensatory time *prior* to the date upon which he entered the DROP. Squibb also had employee pension contributions deducted from his payment since he was not yet participating in the DROP. While the Court realizes that Orlosky was advised he could not receive payment for his compensatory time until he retired, the fact remains he did not request this money until after he entered the DROP.

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ORDER

AND NOW, this 26th day of May, 2011, the order of the Court of Common Pleas of Berks County (trial court), at No. 09-11285, dated July 28, 2010, which entered summary judgment in favor of Steven E. Orlosky, is hereby REVERSED; the case is remanded to the trial court for the entry of summary judgment in favor of Appellants.

Jurisdiction relinquished.

JAMES R. KELLEY, Senior Judge