SJC-13229

JOSEPH O'LEARY vs. CONTRIBUTORY RETIREMENT APPEAL BOARD & others.[1]

Suffolk. April 6, 2022. – August 11, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Retirement. Police, Retirement, Vacation, Compensation. Municipal Corporations, Police, Vacations. Public Employment, Retirement, Vacation pay. Statute, Construction. Public Employee Retirement Administration Commission. Retroactivity of Judicial Holding. Words, "Regular compensation."

Civil actions commenced in the Superior Court Department on August 22 and 24, 2018.

After consolidation, the case wase heard by Jackie A. Cowin, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Kenneth J. Hill for Public Employee Retirement Administration Commission.
John M. Becker for the plaintiff.

[1] Retirement board of Lexington and Public Employee Retirement Administration Commission.

Kimberly Parr, Assistant Attorney General, for Contributory Retirement Appeal Board.

Michael Sacco for retirement board of Lexington.

Thomas F. Gibson, Gerald A. McDonough, Timothy J. Smyth, & Natacha Thomas, for Boston retirement system & others, amici curiae, submitted a brief.

Matthew L. Feeney, Rachel L. Millette, & Katherine A. Hesse, for Norfolk County retirement system & others, amici curiae, submitted a brief.

BUDD, C.J. Joseph O'Leary, an employee of the town of Lexington, elected to forgo ten vacation days each year for seven years in exchange for payment until he retired. The issue presented is whether these payments in lieu of unused, accrued vacation time are to be included as "regular compensation" for the purpose of calculating O'Leary's pension. The retirement board of Lexington (board), a magistrate in the Division of Administrative Law Appeals (DALA), the Contributory Retirement Appeal Board (CRAB), and a Superior Court judge all concluded that the payments in lieu of vacation time did not constitute regular compensation. We agree and therefore affirm.[2]

Background. Pursuant to G. L. c. 32, public employees who participate in the Commonwealth's retirement system (members) and meet certain age and years of service criteria receive a government pension (superannuation retirement allowance) at retirement. G. L. c. 32, § 5 (2). The amount received by each

[2] We acknowledge the amicus briefs submitted by the Norfolk County, Leominster, and Somerville retirement systems; and by the Boston, Brookline, and Fitchburg retirement systems.

member is a percentage of the highest average consecutive three-year period of his or her "regular compensation" while an employee. G. L. c. 32, § 5 (2) (a). Over one hundred local retirement boards throughout the Commonwealth, such as the board in this case, are responsible for calculating and administering public retirement benefits to their respective members. G. L. c. 32, §§ 2, 20. The Public Employee Retirement Administration Commission (PERAC) is the State agency responsible for regulating and overseeing the work of local retirement boards.[3] G. L. c. 7, §§ 49, 50.

On July 11, 2012, PERAC issued memorandum no. 39/2012, an advisory memorandum to local retirement boards -- guidance which is hereby invalidated, for the reasons discussed infra -- stating that payments for unused vacation time may be considered as regular compensation (and therefore counted for the purpose of calculating a member's retirement benefit) if they meet two threshold requirements: (1) the payments must be part of the member's base salary or "other base compensation," but payments that are of limited duration or lack predictability do not count

[3] Although PERAC is responsible for the "efficient administration of the public employee retirement system," G. L. c. 7, § 50, its decisions and guidance are subject to review by CRAB, a three-member board empowered to consider appeals filed on behalf of an aggrieved member subject to a decision issued by either a retirement board or PERAC. G. L. c. 32, § 16 (4). Decisions issued by CRAB are "final and binding" on the member, the retirement board, and PERAC. Id.

as other base compensation; and (2) the payments must be for services performed. The memorandum further states that if the payments satisfy both of these threshold requirements, the board then must make findings regarding ten additional criteria to determine whether the payments are considered regular compensation.[4]

O'Leary's employment with the Lexington police department was covered by a collective bargaining agreement that included a "[v]acation [e]lection" provision. That provision allowed participants with at least twenty years of service to convert up to ten unused vacation days into compensation each year. Eligible participants could make the election each December, and the compensation, if selected, would be paid biweekly in the ensuing fiscal year. The provision stated:

> "Annually, Captains and Lieutenants with at least [twenty] years of service as a police officer with the Lexington Police Department will have the option each December to choose to convert up to ten (10) unused vacation days to compensation (i.e., the Vacation Election), with such compensation paid on a bi-weekly basis in the ensuing fiscal year. The bi-weekly vacation election payment shall begin on July 1, 2008 (FY09) and shall be subject to all normal tax withholdings. The value of the vacation election payment will be based on the Officer's daily rate as of the fiscal year in which it is paid. The daily rate is defined as the base wage, educational incentive and duty differential.

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[4] Because, as discussed infra, we conclude that the payments in lieu of vacation time cannot meet the threshold requirements set forth in the PERAC memorandum, we need not address the additional ten criteria.

> ". . .
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> "Vacation Election payment shall not be considered regular income for the purposes of retirement, educational incentive payments, overtime calculation, holiday pay or duty differential pay."

O'Leary chose to convert ten unused vacation days into compensation beginning in 2008, when he first became eligible. He made the same election each year until his retirement in January 2015.

Shortly before his retirement, O'Leary asked the board whether the payments he had received in lieu of taking vacation time would be considered as regular compensation for purposes of calculating his retirement allowance. When he learned that the board did not consider these payments to be regular compensation, he appealed to CRAB, which assigned the matter to DALA. DALA affirmed the board's decision. O'Leary then appealed to CRAB, which affirmed the decision by DALA. See G. L. c. 32, § 16 (4), second par.[5] O'Leary filed a complaint in the Superior Court seeking reversal of CRAB's order. See G. L. c. 30A, § 14. PERAC, which had been joined at the request of the board as a necessary party in the proceedings before DALA,

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[5] General Laws c. 32, § 16 (4), second par., instructs that CRAB automatically must assign any appeal in the first instance to a magistrate in DALA for a hearing. The magistrate makes factual findings and issues a binding decision on the board, PERAC, and the individual member. This final decision may be appealed to CRAB for further review, or CRAB may on its own initiative review the final decision by DALA. Id.

also filed a complaint seeking a reversal of CRAB's order. The two complaints were consolidated, and all parties subsequently filed cross motions for judgment on the pleadings. A Superior Court judge affirmed CRAB's decision that the payments in lieu of vacation time were not regular compensation. O'Leary and PERAC appealed, and we transferred the case to this court on our own motion.

Discussion. 1. Analysis. As the facts are undisputed, the issue involves a pure question of law (specifically, one of statutory interpretation). We therefore review the Superior Court judge's decision on a de novo basis.[6] See Kraft Power Corp. v. Merrill, 464 Mass. 145, 147 (2013). The central question is whether payments made in lieu of vacation time may be included as "regular compensation" under G. L. c. 32, § 1, when calculating a participant's retirement allowance provided for in G. L. c. 32, § 5. We conclude the answer is no.

"Regular compensation" is defined in G. L. c. 32, § 1, as "compensation received exclusively as wages[, i.e., the base

[6] Although we normally give weight to agency expertise, here PERAC and CRAB have different views on the matter. See Public Employee Retirement Admin. Comm'n v. Contributory Retirement Appeal Bd., 478 Mass. 832, 834 (2018) (Vernava), quoting Pelonzi v. Retirement Bd. of Beverly, 451 Mass. 475, 478 n.8 (2008). In any case, as the question is one of statutory interpretation, ultimately it is for the court to decide. See Vernava, supra.

salary or other base compensation of an employee,[7]] by an employee for services performed in the course of employment for his employer." We previously have held that the "'straightforward and unambiguous' language of § 1 indicates that 'regular compensation' is 'ordinary, recurrent, or repeated payments not inflated by any "extraordinary ad hoc" amounts such as bonuses or overtime pay.'" Public Employee Retirement Admin. Comm'n v. Contributory Retirement Appeal Bd., 478 Mass. 832, 835 (2018) (Vernava), quoting Pelonzi v. Retirement Bd. of Beverly, 451 Mass. 475, 479 (2008).

Thus, we conclude that "regular compensation" does not encompass payments, such as those at issue here, that an employee chooses to receive annually or at some other interval, even if the employee consistently elects to receive such payments. Such payments are not by their nature "recurrent" or "repeated," but rather repeat only upon specific election by the

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[7] General Laws c. 32, § 1, defines "[w]ages" in relevant part as "the base salary or other base compensation of an employee." The provision goes on to delineate what the term does not mean:

> "'wages' shall not include, without limitation, overtime, commissions, bonuses other than cost-of-living bonuses, amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term, . . . [one]-time lump sum payments in lieu of or for unused vacation or sick leave."

G. L. c. 32, § 1.

employee during the election period. See Vernava, 478 Mass. at 835. The employer cannot predict year to year whether an eligible employee will opt to receive these buyback[8] payments, or how many hours of compensation an employee will elect to buy back.

In addition to being elective rather than naturally recurring, periodic elective payments received in lieu of vacation time are "amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term," which is explicitly excluded from the definition of "[w]ages" in G. L. c. 32, § 1. In O'Leary's collective bargaining agreement, for example, the election period is annual, meaning the payment will last only one year. Cf. Vernava, 478 Mass. at 836 (vacation time not considered "of indefinite duration" because it is "limited in amount").

For all of these reasons, payment in lieu of vacation time that requires an employee to select payment annually or at some other interval is not "regular compensation."[9] The 2012 PERAC

[8] We use the term "buyback" to refer to payments, such as those at issue here, "related to the selling back of vacation time by an employee as a result of that employee not using that vacation time," as referenced in PERAC's memorandum no. 39/2012.

[9] Because we conclude that the statutory language is unambiguous, we do not address the parties' legislative history arguments. Additionally, it is not dispositive that the collective bargaining agreement at issue stated that payment in

memorandum is invalid to the extent it directs otherwise because no elective, periodic vacation buyback scheme, such as the one at issue here, could pass the first threshold requirement and be considered part of an employee's "base compensation."[10]

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lieu of vacation time would not be considered regular compensation. General Laws c. 32 is not one of the statutory provisions that a collective bargaining agreement with public employees may overrule. See G. L. c. 150E, § 7 (d). See also National Ass'n of Gov't Employees v. Commonwealth, 419 Mass. 448, 452, cert. denied, 515 U.S. 1161 (1995) ("[S]tatutes not specifically enumerated in § 7 [d] will prevail over contrary terms in collective bargaining agreements").

[10] O'Leary and PERAC argue that because the definition of "[w]ages" in G. L. c. 32, § 1, specifically excludes only one type of vacation pay, i.e., "[one]-time lump sum payments in lieu of or for unused vacation . . . leave," see note 7, supra, payments not distributed as a one-time lump sum are necessarily included in the definition of wages. We disagree. We consistently have emphasized that "the maxim of negative implication -- that the express inclusion of one thing implies the exclusion of another -- 'requires great caution in its application'" (citation omitted). Halebian v. Berv, 457 Mass. 620, 628 (2010). See, e.g., Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 546 (2022); Reuter v. Methuen, 489 Mass. 465, 474 (2022); Commonwealth v. Garvey, 477 Mass. 59, 65 (2017). Caution is especially warranted here because the payments in lieu of vacation time at issue are expressly excluded as "amounts derived from salary enhancements or salary augmentation plans which will recur for a limited or definite term." G. L. c. 32, § 1. Moreover, the list of excluded types of wages in § 1 is provided "without limitation," further belying the notion that the absence of some explicit words here necessarily excludes the logical result derived from the statute's plain language. See Federal Nat'l Mtge. Ass'n v. Nunez, 460 Mass. 511, 519 (2011) ("we understand the phrase 'without limitation' to mean the broadest reasonable definition of acts").

For the same reason, we are not persuaded by O'Leary's argument that the exclusion from "[w]ages" of "all payments

2. Retroactivity. O'Leary argues that if we conclude, as we do, that periodic elective payments in lieu of using vacation time are not "regular compensation," we should apply our decision prospectively only because of the adverse effect it may have on those participants whose retirement sums were calculated in reliance on the 2012 PERAC memorandum. We are not convinced.

"In general, when we construe a statute, we do not engage in an analysis whether that interpretation is given retroactive or prospective effect; the interpretation we give the statute usually reflects the court's view of its meaning since the statute's enactment." Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 587 (2012). We did have occasion to consider prospective application in Eaton, where our interpretation of the term "mortgagee" was different from the meaning that commonly and widely had been ascribed to it up until the case was decided. Id. at 587-588. Because we concluded that retroactive application of our interpretation of the term likely would have resulted in significant uncertainty in determining the validity of many land titles, we limited our holding to

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other than payment received by an individual . . . for services rendered," G. L. c. 32, § 1; 840 Code Mass. Regs. § 15.03(3)(f) (2010), creates the negative implication that payments that are received by an individual for services rendered always will be classified as wages.

prospective application only. Id. at 588-589. However, we have no such problem here.

In this case, none of the relevant considerations provide reason to depart from the presumption of retroactive application. As explained supra, our interpretation is not novel, but rather is based on the plain language of the statute. Indeed, the board, DALA, and CRAB correctly interpreted the relevant statute consistent with our holding today.[11]

Moreover, O'Leary has failed to provide support for his contention that retirees whose pension amounts were calculated pursuant to the 2012 PERAC memorandum may be required to repay any amounts improperly paid out and may be subject to a recalculation and reduction of future retirement payments, creating a "truly imminent" risk of hardship. See Worcester Regional Retirement Bd. v. Public Employee Retirement Admin. Comm'n, 489 Mass. 94, 105 (2022). This is especially true because G. L. c. 32, § 20 (5) (c) (3), provides that, upon

[11] For the same reason, O'Leary's argument that retroactive application of our decision violates G. L. c. 32, § 25 (5), also fails. General Laws c. 32, § 25 (5), states that the pension law "shall be deemed to establish and to have established membership in the retirement system as a contractual relationship . . . , and no amendments or alterations shall be made that will deprive any such member . . . of their pension rights or benefits provided for thereunder, if such member or members have paid the stipulated contributions." There are no "amendments or alterations" at issue here; as discussed supra, we merely have interpreted statutory language, not changed it.

request, retirement boards may "waive repayment or recovery of such amounts" from members who inadvertently have been paid more than that to which they were entitled.[12] See Worcester Regional Retirement Bd., supra ("Th[e] absence of specific evidence establishing the likely occurrence of extraordinary hardship weighs in favor of the presumption of retroactive application").

Conclusion. Payment in lieu of unused vacation time requiring periodic election by an employee, whether annually or at some other interval, does not qualify as "regular compensation." Accordingly, the judgment is affirmed.

So ordered.

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[12] General Laws c. 32, § 20 (5) (c) (3), states:

"At the request of a member or beneficiary who has been determined to have been paid amounts in excess of those to which he is entitled or at the request of a member who has been determined to owe funds to the retirement system, the board may waive repayment or recovery of such amounts provided that:

"(i) the error in any benefit payment or amount contributed to the system persisted for a period in excess of one year;

"(ii) the error was not the result of erroneous information provided by the member or beneficiary; and

"(iii) the member or beneficiary did not have knowledge of the error or did not have reason to believe that the benefit amount or contribution rate was in error."