

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

**Division of Administrative Law Appeals**

**Claire Abdelahad,**  
Petitioner

v.

Docket No. CR-15-292

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

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**Appearance for Respondent:**

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State Board of Retirement  
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**Administrative Magistrate:**

James P. Rooney

**Summary of Decision**

Petitioner's application for early retirement from her position as a healthcare facility specialist was properly denied because her position was funded by federal monies that are not "federal reimbursements," as that term is defined at M.G.L. c. 29, § 1.

**DECISION**

Claire Abdelahad, a Healthcare Facility Specialist, appeals under M.G. L. c. 32, §16(4) from a decision of the State Board of Retirement turning down her request to participate in an early retirement program because her employer, the Department of Public Health, declined to certify that she was eligible. The Department relied on a provision of the early retirement law

that excluded state employees paid out of federal grants. Ms. Abdelahad acknowledges that she is paid with money received from the federal government, but she contends she is eligible because the money is not a grant, but, instead, a reimbursement of the cost to the state of performing laboratory inspections to determine compliance with federal standards, with the money ultimately coming from fees paid by the laboratories.

I held a hearing on July 29, 2016 that I recorded digitally. I admitted fifteen documents into evidence, eleven from Ms. Abdelahad and four from the Board. I now mark Ms. Abdelahad's appeal as her twelfth exhibit. The parties stipulated to eight facts as set forth in a Second Pre-Hearing Order issued by Magistrate Richard Heidlage. Ms. Abdelahad testified, as did Carol Foltz, the former chief financial officer of the Department of Public Health. I marked Ms. Abdelahad's prehearing memorandum as Pleading A and the Board's memorandum as Pleading B. Both parties filed post-hearing briefs. The record closed on August 17, 2016.

### **Findings of Fact**

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

1. As of the date of the hearing, Claire Abdelahad had been a Healthcare Facility Specialist (also called a surveyor) for the Department of Public Health for twenty-three years. She surveys laboratories under the Department's Clinical Laboratory Program, which monitors compliance and provides certification and licensure under both the Federal Clinical Laboratory Improvement Amendment (CLIA) certification program, 42 CFR part 493) and the State Clinical Laboratory Licensure Regulations (105 CMR 180.000 - The Operation, Approval and Licensing of Clinical Laboratories). (Stipulation.) The Department has two other employees who perform the same

function. Each of them inspects laboratories to determine, as appropriate, compliance with federal or state standards. (Abdelahad testimony.)

2. Section 1864 of the Social Security Act, 42 U.S.C. § 1395aa, provides in subsection (a) that:

The Secretary shall make an agreement with any State which is able and willing to do so under which the services of the State health agency or other appropriate State agency (or the appropriate local agencies) will be utilized by him for the purpose of determining whether . . . a laboratory meets the requirements of paragraphs (16) and (17) of section 1395x(s) of this title . . .

(Stipulation.)

3. Subsection (b) of 42 U.S.C. § 1395aa provides that “[t]he Secretary shall pay any such State, in advance or by way of reimbursement, as may be provided in the agreement with it . . . for the reasonable cost of performing the functions specified in subsection (a)

(Stipulation.)

4. The Clinical Laboratory Improvement Amendments of 1998 (CLIA) is a 100% user fee funded (by approximately 250,000 laboratories nationwide) program administered by Health and Human Services through the Centers for Medicare and Medicaid Services (CMS). Laboratories pay CMS for their biennial survey and also for a certificate valid for two years. CMS provides for surveys of non-accredited Laboratories through 1864 Agreements with the individual states. State agencies submit a yearly budget request to CMS. Their budget is funded by transfer of user funds collected by CMS to the state agency to perform the workload covered by the state budget request and award. (Ex. 7; Stipulation.) No laboratory is inspected until it pays its user fee.

(Abdelahad testimony.)

5. Massachusetts has entered into an 1864 Agreement with the Secretary of Health and

Human Services to provide surveys of Massachusetts non-accredited Laboratories. (Stipulation.)

Ms. Abdelahad obtained this document in response to a Freedom of Information request. Jay Olin, the Director of the Division of FOIA Analysis in the Department of Health and Human Services, described the document provided as “an agreement, not a grant, between the federal government and the State, for laboratories.” Article IX, paragraph C of the agreement provides that the “Secretary [of health and Human Services] will reimburse the State for HFCA’s [Health Care Finance and Administration’s] fair share of the costs attributable” to the expense associated with laboratory inspections. (Abdelahad Ex. 11.)

6. The CLIA survey program is paid for by an approved-cost expenditure reimbursement method. Each year, Massachusetts and the federal CLIA program administrative personnel negotiate and prepare a detailed budget for carrying out the CLIA required activities. *See State Operations Manual* at sec. 6400 *et seq.* Under the program, Massachusetts is entitled to receive advances, and payment of all reasonable cost, for performing the CLIA survey workload. *State Operations Manual* at Sec. 6446.4. CLIA funds cannot be used to pay for any non-CLIA related expenses. *Id.* Under the program, states are required to submit their quarterly expenditure reports to their respective regional offices no later than 45 days following the end of each fiscal quarter. The CLIA program pays states only for approved CLIA-related expenses properly documented in the expenditure reports. *State Operations Manual* at Sec. 6512. (Stipulation.)

7. Funds received by Massachusetts from the United States in connection with the CLIA survey program are deposited into Massachusetts account 4510-0501. This account was described as an account for federal grant spending. The account is used by Massachusetts solely to pay expenses incurred in carrying out the CLIA survey program pursuant to the 1864 Agreement.

(Stipulation; Abdelahad testimony.)

8. Ms. Abdelahad's compensation was funded from account 4510-0501. (Stipulation.) Ms. Abdelahad and one of the other surveyors were paid exclusively from this account. The third surveyor was paid exclusively by direct state appropriations. (Abdelahad testimony; Abdelahad Ex. 9.)

9. On May 11, 2015, Ms. Abdelahad timely applied for early retirement under the 2015 Employee Retirement Incentive Program, St. 2015, ch. 19. (Board Ex. 3.)

10. In order for the application to be complete, Ms. Abdelahad's employer had to certify that she was eligible for early retirement. The Department of Public Health declined to do so. The Department receives around 150 federal grants. After some internal discussion and consultation with the Department of Administration and Finance, the Department of Public Health determined that none of its employees who were paid with funds received from the federal government would be considered eligible for early retirement. (Foltz testimony.) In a letter to Ms. Abdelahad explaining the Department's position, Human Resources representative Kerley Aime stated:

Enclosed please find the Payroll Certificate that you submitted for signature. Unfortunately, we are unable to sign the form certifying that you are eligible for the Early Retirement Incentive Program because you are not eligible pursuant to Section 3 (c) of Chapter 19 of the Acts of 2015. To be clear, certification is not a matter of DPH's discretion, but is constrained by the wording of the statute and interpretation(s) that will be applied as consistently as possible across the executive branch.

(Abdelahad Ex. 2; Board Ex. 2.)

11. Ms. Abdelahad then met with Ms. Aime and learned that the Department thought her position was funded by a federal grant, which would have made her ineligible for early

retirement. Despite this setback, Ms. Abdelahad persisted. She wrote to the State Board of Retirement, explained what had happened to her application so far, and contended that her position was funded not by a federal grant, but ultimately by laboratory-paid user fees. (Board Ex. 2.)

12. The Board refused to process Ms. Abdelahad’s retirement application, informing her that it could not do so because her “employing agency and not the Board maintains information related to the source of your compensation.” (Board Ex. 1.)

13. Ms. Abdelahad timely appealed. (Abdelahad Ex. 12.)

14. On August 5, 2015, the Chief Magistrate of the Division of Administrative Law Appeals, Edward B. McGrath, dismissed Ms. Abdelahad’s appeal because her employer had determined her to be ineligible.

15. On October 20, 2015, the Contributory Retirement Appeals Board remanded the appeal to the Division of Administrative Law Appeals to resolve a factual dispute as to whether Ms. Abdelahad’s position was funded by a federal grant.

### **Discussion**

The 2015 Early Retirement Incentive Program (ERIP) was established by Chapter 19 of the Acts of 2015 to decrease state expenditures by reducing the number of executive department employees. To meet this goal, certain employees were not eligible to participate in ERIP, including “employees whose compensation is funded from a capital appropriation, federal grant or trust as each is defined in section 1 of chapter 29 of the General Laws as of the filing date for

the application.”<sup>1</sup> St. 2015, c. 19, § 3(c)(I).

A “federal grant” is defined at M.G.L. c. 29, § 1 as:

any financial assistance available to a state agency from the United States government, either directly or through an intermediary, including a project, formula, or block grant, a subvention, a subsidy, an augmentation or a state plan but excluding federal reimbursements.

This broad definition, which includes “any financial assistance” Massachusetts receives from the federal government, would appear, absent an exception, to include the money the Department of Public Health receives from the federal government to pay for the cost of certifying laboratories. It makes no difference that the cost is paid initially by the laboratories to the federal government, and the funds are then transferred to Massachusetts, because that money is still be financial assistance the state receives from the federal government. Thus, Ms. Abdelahad, whose position was funded by federal money, would not be eligible for the early Retirement program unless the money was properly characterized as a “federal reimbursement.”<sup>2</sup>

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<sup>1</sup> The ERIP legislation also gave the Secretary of Administration and Finance the authority to designate certain employees who occupied “critical positions” as ineligible to participate. The Secretary designated various positions funded by assessments and users fees, rather than by state tax revenues, as critical positions. The Superior Court affirmed the Secretary’s discretionary decision to do so because “the departure of [employees whose pay did not derive from state tax revenues] would result in no payroll savings and, accordingly, would not help the Commonwealth achieve its goal of budgetary balance.” *National Assoc. of Government Employees v. Lepore*, Civil Action No. 15-01880-E (Suffolk Sup. Ct., Sept. 3, 2015). Although Ms. Abdelahad’s position was funded by what amount to user fees assessed to laboratories, the Secretary did not designate her position as a critical position. Hence, this exception to eligibility for early retirement does not apply.

<sup>2</sup> Why Ms. Abdelahad’s position was funded only with federal money is not clear. She and her two surveyor colleagues each performed both federal and state inspections. The federal government provided financial assistance only for the federal inspections, which appear to have comprised about two-thirds of the overall workload. The state chose to pay Ms. Abdelahad and one of her colleagues out of the federal money it received, and the other colleague only with state funds. In reality, because Ms. Abdelahad performed state inspections, some of her pay should

Under the ordinary meaning of reimbursements, the payments that fund Ms. Abdelahad position appear to be reimbursements. To reimburse is to “make repayment to for expense or loss incurred.” *The Random House Dictionary of the English Language* 1210 (1966). In the laboratory certification program, the federal government repays Massachusetts back for the expense it has incurred inspecting laboratories to determine if they comply with federal standards. The 1864 Agreement between Massachusetts and the Department of Health and Human Services recognizes this, and refers to the payments made to the state as reimbursements. (Finding 5.)

However, the legislature has enacted a statutory definition of federal reimbursements and that definition controls. “Federal reimbursements” is defined at M.G.L. c. 19, § 1 and at 815 C.M.R. § 2.02 as:

financial assistance provided under Titles XVIII or XIX of the Social Security Act or other reimbursements received for state entitlement expenditures and credited to the General Fund, or other federal financial assistance from the United States government for direct payments to individuals, or for other purposes as provided for in section 2ZZZ, section 34 of chapter 90, chapter 92 and section 48 of chapter 151A.

Title XVIII of the Social Security Act, Sections 1801 - 1899B, governs “Health Insurance for the Aged and Disabled,” including Medicare and a prescription drug benefit program. The laboratory inspection program is included in a miscellaneous provision of Title XVIII at Section 1864 (42 U.S.C. § 1395aa). Were I to look only at the first clause of the definition, the financial assistance the federal government provides Massachusetts to pay for the cost of the laboratory

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have come from state funds. This would have made no difference here because so long as a portion of her pay came for a federal grant, she would be ineligible for early retirement. *Nash v. State Bd. of Retirement*, Docket No. CR-15-364, Decision at 5 (Mass. Div. of Admin. Law App., Mar. 25, 2016.)



inspection program under Title XVIII of the Social Security Act would appear to meet the definition of federal reimbursements. This clause, however, does not stand alone. The next clause of the statutory definition – “or other reimbursements received for state entitlement expenditures and credited to the General Fund” – suggests that Titles XVIII (Medicare) and Title XIX (Medicaid) are listed only as major examples of reimbursement for state entitlement expenditures, and hence only those Title XVIII federal payments that involve entitlement expenditures should be considered federal reimbursements. The following clause - “or other federal financial assistance from the United States government for direct payments to individuals” - appears as well to be akin to entitlement expenditures for which the state government is reimbursed for monies it provided to individuals. Because the intent of the legislature in enacting this exception was to treat as federal reimbursements only those payments received from the federal government that reimbursed payments the states made to individual citizens as part of an entitlement or similar program,<sup>3</sup> I conclude that the payments received by the state to reimburse it for the cost of inspecting laboratories, including the cost of paying employees like Ms. Abdelahad to perform the inspections, are not reimbursements the state receives for entitlement expenditures, and therefore are not “federal reimbursements” as defined at M.G.L. c. 29, § 1. They are instead, “federal grants” as also defined in the same statutory section.

I therefore conclude that the money Ms. Abdelahad was paid with came from a “federal grant” that was not a “federal reimbursement” as those two terms were defined by M.G.L. c. 19,

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<sup>3</sup> The statutory sections listed at the end of the federal reimbursements definition do not necessarily fit with this general scheme, as the introductory phrase “for other purposes” suggests. None of these sections apply to Ms. Abdelahad’s situation.

§ 1. Accordingly, because she was paid from federal grant money, she was no eligible for the 2015 early retirement program. I thus affirm the State Board of Retirement's refusal to process her early retirement application.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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James P. Rooney  
First Administrative Magistrate

Dated: April 28, 2017