

Docket No.: CR-08-621

Parties: ANNE AWAD, Petitioner-Appellant v. HAMPSHIRE COUNTY RETIREMENT BOARD, Respondent-Appellee.

Date: December 19, 2014

Appearances:

Magistrate:

Decision Type: CRAB

DECISION

Petitioner Anne Awad appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), affirming the decision of the respondent Hampshire County Retirement Board (HCRB) denying Awad's application for late entry into membership as an elected official. The DALA magistrate heard the matter on November 28, 2012 and admitted twenty-two exhibits. The magistrate's decision is dated December 20, 2013. Awad filed a timely appeal to us.

We affirm the DALA decision and adopt its Findings of Fact 1-10. [1] After considering the parties' submissions and the magistrate's opinion, we reaffirm

[1] While not contained in a Finding of Fact, the petitioner notes that the DALA decision incorrectly describes witness Mary G. Barones as testifying for the petitioner, when in fact she testified for the HCRB. See DATA decision at 2. Despite the absence of a transcript, we accept this correction as it is unchallenged and has no effect on the outcome of our decision.

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our prior decisions in *Goode v. Weymouth Retirement Bd.*, CR-99-701 (CRAB May 1, 2001) and *Levesque v. Essex County Retirement Bd.*, CR-95-571 (CRAB Oct. 7, 1996), holding that the ninety-day time limit for elected officials to join a retirement system following their election, provided under G.L. c. 32, § 3(2)(a)(iv), is mandatory. The late entry and buy-back provisions under §§ 3(3) and 3(5) cannot override the more specific provisions of § 3(2)(a)(iv), and neither late entry nor, in most cases, subsequent purchase of creditable service is available to elected officials who miss the ninety-day "window" for retirement system membership.

Background. Awad was employed by the Commonwealth's Department of Social Services and the Department of Public Health from 1969 to 2001 and was a member of the Massachusetts State Employees' Retirement System (MSERS). [2] She left her state position in 2001 and retired from the MSERS in approximately 2008.

In 2000 Awad was elected to the Town of Amherst Select Board. She took no compensation during 2000 on the advice of the State Ethics Commission. After her resignation from the Department of Public Health in 2001, Awad began receiving compensation of \$300 per year for her work as a Select Board member. She was reelected in 2003 and 2006 and apparently served on the Select Board until 2009. [3]

[2] Finding of Fact 1; Exhibit 10.

[3] Findings 2, 3, 6, 10.

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When she was receiving a salary of \$200 or more from the Town of Amherst, Awad was eligible to join the Hampshire County Retirement System (HCRS) during the first ninety days of each term pursuant to G.L. c. 32, § 3(2)(a)(vi). [4] That section provides:

(2) Eligibility for Membership. -- (a) Membership in a system . . . shall comprise the following persons:--

(vi) Any person hereafter elected by popular vote to a state, county or municipal office or position who files with the board on a prescribed form a written application for membership within ninety days after the date of assuming office; provided, that a member becoming an elected official shall retain his membership and an elected official who is a member shall remain a member upon his reelection or upon his election or appointment to any other position which would otherwise entitle him to membership

Id. (emphasis added).

Awad, however, was not aware of this provision and was not informed of it by the town. The Town of Amherst did enroll her in an OBRA defined contribution retirement plan, and, when she asked about the notation on her paycheck for "decont," she was told (correctly) that this was a retirement contribution. Awad did not understand that she was contributing to an OBRA account rather than to the HCRS. [5]

[4] See *Rotondi v. Contributory Retirement Appeal Bd.*, [463 Mass. 644](#), 644, 649-651 (2012) (\$200 salary threshold contained in G.L. c. 32, § 3(2)(d) applies to elected officials). For service on or after July 1, 2009, the \$200 threshold was effectively raised to \$5,000 by the enactment of G.L. c. 32, § 4(1)(o) (added by St. 2009, c. 21, §, 5), requiring annual earnings in that amount in order to earn creditable service.

[5] Findings 4-6, Ex. 9.

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In 2008, while still employed by the Town of Amherst, Awad applied to the HCRB for late entry into membership. She sought to utilize G.L. c. 32, § 3(3), which provides in pertinent part:

. . . and any employee who, having had the right to become a member of any retirement system established under the provisions of this chapter, or under corresponding provisions of earlier laws or any special law, failed to become or elected not to become a member, may apply for and be admitted to membership [6]

At the time of her application, the retirement law permitted elected officials to earn an entire year of creditable service for each calendar year in which they served, regardless of the number of hours worked. [7] The HCRB denied her application because she had not sought membership within ninety days of assuming office, as required by G.L. c. 32, § 3(2)(a)(vi) (quoted above).

The DALA magistrate affirmed, but stated that, had the Contributory Retirement Appeal Board (CRAB) not issued the decision in *Goode* (and, by implication, *Levesque*), he would have ruled differently. In effect, the magistrate, as well as Awad, urge us to overrule our decisions and hold that

Awad was entitled to late entry into membership. We decline to do so.

Discussion. In *Goode v. Weymouth Retirement Bd.*, CR-99-701 (CRAB May 1, 2001), we stated:

[6] The section also requires buyback payments in the amount of the contributions that would have been withheld, plus buyback interest. *Id.*

[7] G.L. c. 32, § 4(1)(a) (as amended through St. 2008, c. 302, § 8). This provision was repealed as part of the 2009 pension reform legislation, St. 2009, c. 21, § 4 (applicable to those who retired after July 1, 2009).

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[General Laws] c. 32, § 3(2)(a)(vi) provides the mechanism for elected officials to become members of a retirement system and provides the time period during which they must exercise this option. This provision cannot be rendered meaningless by operation of G.L. c. 32, § 3(3).

Id. We continue to agree with this reasoning. Section 3(2)(a)(vi) does not merely include elected officials as persons generally eligible for membership in a retirement system, it conditions their membership upon application within a specific time limit. While this requirement was likely intended to restrict membership by elected officials at a time when they received particularly favorable treatment (and at the time of Awad's application, she would have qualified for that favorable treatment), the Legislature did not repeal or amend it at the time of its pension reform legislation in 2009 or later. It would be entirely illogical for the Legislature to have enacted a ninety-day application limit and, at the same time, nullify that limit by allowing a late application. Both sections 3(2)(a)(vi) and 3(3), in slightly different form, were enacted with the original version of the current retirement law, effective in 1946. [8] We cannot conclude that the ninety-day limit was intended to be optional or subject to a late application – if it were, there would have been no reason to include it at all. [9]

[8] See St. 1945, c. 658, § 1 (effective Jan. 1, 1946).

[9] See *School Comm. of Brockton v. Teachers' Retirement Bd.*, [393 Mass. 256](#), 262 (1984) (no part of statute is to be treated as superfluous) (citation omitted); *Sperounes v. Farese*, [449 Mass. 800](#), 807 (2007) (statutes are construed harmoniously, but also so as to avoid illogical results).

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The same reasoning applies to purchase of creditable service for prior work as an elected official under G.L. c. 32, § 3(5). The applicable portion of that subsection allows purchase of creditable service, with buyback interest, by:

. . . any member who had a right to become a member of an existing system in any other governmental unit and who did not exercise such right, and who, when he left the service of such other governmental unit, had such right

Id. (in pertinent part). If creditable service for work as an elected official could be purchased later, it would also render the ninety-day limit

for membership by elected officials meaningless as to those who later become members of a retirement system. Moreover, the particular wording of § 3(5), requiring the employee to have had the right to membership "when he left the service of such other governmental unit," also suggests that the Legislature did not contemplate use of this section to allow purchase of service as an elected official, since in most cases the ninety days – and with it the right to membership – will have expired by the time an elected official leaves office. [10]

[10] We note that both *Levesque* and *Goode* contained dictum to the effect that G.L. c. 32, § 4(1)(a), as it existed prior to its 2009 amendments, allowed purchase by members of a retirement system of their prior service as elected officials, where that service occurred in a governmental entity within the same retirement system. The former version of § 4(1)(a) contained a proviso that arguably was so specific as to allow such credit despite the ninety-day limitation: "provided, that he shall be credited with a year of creditable service for each calendar year during which he served as an elected official." *Id.* (in pertinent part; as appearing prior to St. 2009, c. 21, § 4). This dictum was applied by DALA in *Sauvageau v. Worcester Regional Retirement Bd.*, CR-02-1336 (DALA Dec. 12, 2003, no CRAB decision). We do not reach this issue since it is not presented here and since the current version of § 4(1)(a) omits this language, instead providing for credit for service rendered only "after becoming a member."

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We understand that cities and towns may not have informed newly-elected officials of their option to join the applicable retirement system in time for them to do so within the ninety-day window and that, as a result, the opportunity to utilize this benefit has been unevenly utilized. Ironically, where elected employees such as *Awad* focus more on their duties than on their benefits, they may be less likely to learn of their retirement benefit. Nevertheless, we must apply the retirement law as it is written, and it contains no requirement that municipal employers notify newly-elected officials of their eligibility to join a retirement system – although it is of course good practice to do so. We reaffirm our holding to this effect in *Levesque v. Essex County Retirement Bd.*, CR-95-571 (CRAB Oct. 7, 1996). [11]

Nor can compliance with the ninety-day statutory deadline be avoided for equitable reasons or because of incorrect information supplied by an employer or a retirement board. Although there are quite a few decisions by DALA that appear to support such an equitable remedy for erroneous advice, [12] they are not

[11] Fewer elected officials will need such notification since the enactment in 2009 of the \$5,000 minimum salary for earning creditable service, which makes it less likely that an elected municipal board member will be able to join a retirement system.

[12] E.g., *Clark v. Barnstable County Retirement Bd.*, CR-96-135 (DALA Apr. 16, 1998) (late entry into membership); *Roberge v. Worcester Regional Retirement Bd.*, CR-04-670 (DALA Jan. 26, 2006) (purchase of prior service) (*Roberge*, however, may fall into the same category as *Sauvageau*, *supra*). Also inconsistent with our holdings in *Levesque* and *Goode* is *Ralston v. Teachers' Retirement Bd.*, CR-99-742 (DALA Nov. 6, 2000) (purchase of creditable service) and dictum in *Schadt v. Barnstable County Retirement Bd.*, CR-01-742 (CRAB Jan. 31, 2003; DALA

Sept. 16, 2002) (dictum re late entry into membership) and Farrington v. Barnstable County Retirement Bd., CR-02-1402 (CRAB Nov. 12,

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consistent with caselaw from the appellate or Superior Courts, as DALA has recently pointed out. [13]

We thus reaffirm our decisions in Levesque and Goode, not only because we prefer to be consistent in our rulings, [14] but also because we agree with their reasoning and holdings.

The decision of the DALA magistrate is affirmed. Awad is not entitled to establish membership in the Hampshire County Retirement Board.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

/s/Catherine E. Sullivan, Assistant Attorney General, Chair, Attorney General's Appointee

/s/Russell W. Gilfus, Governor's Appointee

/s/Joseph I. Martin, Public Employee Retirement Administration, Commission Appointee

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2003; DALA June 5, 2003) (same). Awad describes several similar cases, unpublished in administrative databases, that also appear inconsistent with Levesque and Goode.

[13] See Donnelly v. Mass. Teachers' Retirement System, CR-09-176 (DALA Sept. 7, 2012) (Heidlage, C.M.) and cases cited; Clothier v. Teachers' Retirement Bd., [78 Mass. App. Ct. 143](#), 146 (2010) (reliance on advice contrary to statute is not reasonable; estoppel not applied against government).

[14] See, e.g., Stonehill College v. Mass. Comm frt Against Discrimination, [441 Mass. 549](#), 562 (2004) ("stare decisis provides continuity and predictability in the law, but the principle is not absolute"); MCI WorldCom Communications, Inc. v. Department of Telecommunications & Energy, [442 Mass. 103](#), 115-16 (2004) (agencies should apply "reasoned consistency" in their decisions, but may reconsider a holding as long as the reasoning behind the change is explained).

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