

**Docket No.: CR-08-621**

**Parties: Anne Awad, Petitioner, V. Hampshire County Retirement Board, Respondent.**

**Date: December 20, 2013**

**Appearances: Appearance for Petitioner:**

**Ronda G. Parish, Esq.**

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**Appearance for Respondent:**

**James H. Quirk**

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**Magistrate: Administrative Magistrate: James P. Rooney, Esq**

**Decision Type: CRAB**

#### Summary of Decision

Elected official is not entitled to establish membership in a retirement system under the late entry provision of M. L. G. L. c. 32, s. 3(3) because she is precluded by precedent established by the Contributory Retirement Appeal Board in *Goode v. Weymouth Retirement Board*.

#### DECISION

Petitioner Anne Awad appealed timely under M.G.L. c. 32, § 16(4) the August 21, 2008 decision of Respondent Hampshire County Retirement Board denying her late-entry membership in the Hampshire County Retirement System. I held a hearing on November 28, 2012 at the Division of Administrative Law Appeals and recorded the hearing digitally. I admitted twenty-two exhibits into evidence. Both parties submitted post-hearing briefs; the record closed on January 29, 2013.

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Ms. Awad testified on her own behalf and also presented testimony by Mary G. Baronas, an Administrator of the Hampshire County Retirement Board. The Hampshire County Retirement Board called no witnesses.

#### FINDINGS OF FACT

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

1. Ms. Awad was an employee of the Commonwealth of Massachusetts from 1979 to 2001. During this time, she was a member of the State Retirement System. (Awad Testimony).
2. Ms. Awad was elected to the Town of Amherst Board as a Selectman in 2000. The annual compensation for Selectmen was \$300.00.
3. After her election, Ms. Awad consulted the State Ethics Commission for guidance as to how to proceed as both a Selectman and a state employee. During her first year as a Selectman, when she was employed by both the Commonwealth and the Town of Amherst, Ms. Awad waived her pay from the Town of Amherst, as the Ethics Commission advised her to do. (Awad Testimony).
4. At the time Ms. Awad was sworn in as Selectman, she was not notified of her right to membership in the Hampshire County Retirement System.

(Awad Testimony).

5. When she received her first compensation check, approximately one year after taking office, she contacted the Amherst Human Resources Director and Town Financing Director regarding a deduction listed as "Decont." She was told that this was a retirement contribution, but she was not told that this contribution was unrelated to the Hampshire County Retirement System. (Awad Testimony; Exhibit 6).

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6. Ms. Awad was re-elected to consecutive three-year terms as a Selectman in 2003 and 2006. Again, she was not notified of her right to membership in the Hampshire County Retirement System. (Awad Testimony).

7. In May of 2007, Ms. Awad contacted the State Board of Retirement for an update on her retirement benefits. The Board informed her that her service as a Selectman for Town of Amherst had not been, and would not be, applied as creditable service because she was not a member of the Hampshire County Retirement System. (Awad and Baronas Testimony).

8. In a March 5, 2008 letter, Ms. Awad requested information from the Hampshire County Retirement Board regarding their retirement policies. (Exhibit 4).

9. Mary G. Baronas, the Hampshire County Retirement System Administrator, responded to Ms. Awad's inquiry on March 18, 2008 and informed her that elected officials have the option of becoming members of the Hampshire County Retirement System within ninety days of their election. (Exhibit 7).

10. On May 30, 2008, while still employed by the Town of Amherst as a member of the Select Board, Ms. Awad submitted an application for membership in the Hampshire County Retirement System together with an offer to buy back her years of service from 2001 on. (Exhibits 10-11; Awad Testimony). Her application was denied by the Hampshire County Retirement Board after a hearing at its August 21, 2008 board meeting because Ms. Awad had not applied within ninety days of assuming her elected office. (Ex. 16; Awad Testimony).

#### DISCUSSION

Ms. Awad's request for late membership in the Hampshire County Retirement System must be denied in light of an earlier decision by the Contributory Retirement Appeal board that appears to preclude elected officials from establishing membership under the late entry provision of M.G.L. c. 32, § 3(3).

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Ms. Awad was entitled to establish membership in the Hampshire County retirement system after her election to the Town of Amherst Select Board, in accordance with M. G. L. c. 32, § 3(2)(a)(vi), which extends eligibility for membership to any person who is elected to a state, county or municipal office who files "a written application for membership within ninety days after the date of assuming office." Following each of the three times Ms. Awad was elected, she had a ninety-day window to enroll in the Hampshire County Retirement System. It is undisputed that Ms. Awad failed to become a member of the Hampshire County Retirement System within ninety days of assuming her elected office on any of these occasions.

Having failed to become a member, her remaining option was to seek late entry into membership, which is governed by M. G. L. c. 32, § 3(3). The provision states in pertinent part:

any employee who, having had the right to become a member of any retirement system established under the provisions of this chapter. . .

failed to become or elected not to become a member, may apply for and be admitted to membership if under the maximum age for his group on the date of his application. No employee shall otherwise be admitted to membership except by vote of the retirement board of the system for which application is made, and then only if that board finds that his failure to become or his election not to become a member was caused by circumstances other than those generally applicable to employees.

To be eligible for late membership, a person must first be an employee. Under M. G. L. c. 32, § 1, the term employee, when applied to persons whose regular compensation is paid by any political subdivision of the commonwealth, means:

[A]ny person who is regularly employed in the service of any such political subdivision... including officials and public officers so paid whether employed, appointed or elected by popular vote for stated terms or otherwise.

A "political subdivision" of the commonwealth means "any county, hospital district, city, town, district or housing authority." M. G. L. c. 32, § 1. Thus, an elected local official, like Ms. Awad, would appear to be eligible for late membership in the retirement system, just like any other employee, if she met the late membership requirements. I assume the legislature was aware that M.G.L. c. 32, § 3(2)(a)(vi) generally requires elected officials to establish membership within ninety days of taking office and that if it viewed late

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entry by an elected official to be inconsistent with this time limit, it would have excluded elected officials from eligibility for late membership.

Unlike the membership automatically available to elected officials who chose to become members within ninety days of assuming office, no one applying for late membership automatically becomes a member. A person applying for late membership must still be an employee at the time application is made. *Farrington v. Barnstable*, Docket No. CR-02-1402 (Mass. Div. of Admin. Law App., June 5, 2003; CRAB dec., Nov. 12, 2003) (application of elected official who sought membership after he left office was properly denied because he was no longer an employee). Eligibility for late membership does not turn on why an employee initially failed to become a member – whether the employee simply failed, for whatever reason, to become a member or deliberately elected against membership. See M.G.L. c. 32, § 3(3). It does, however, require a vote of the pertinent retirement board, which may allow late membership if the failure to become a member when eligible, or election not to become a member, "was caused by circumstances other than those generally applicable to employees." *Id.*

Late membership by elected officials has at times been allowed in the past. Many of these cases involve misinformation given an official about eligibility for membership. For example, an elected Water Commissioner who served for twenty-one years and who relied on erroneous advice of his employer that he was not eligible for membership, was allowed late membership when he applied on his last day of service. *Clark v. Barnstable County Retirement Board*, Docket No. CR-96-135 (Mass. Div. of Admin. Law App., Apr. 16, 1998; no CRAB decision). Similarly, a city councilman who served without membership for twenty-two years and who was erroneously informed by a retirement board official that he was not eligible to become a member was allowed retroactive membership. *Brown v. Pittsfield Retirement Board*, Docket

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No. CR-1500 (Mass. Div. of Admin. Law App., June 29, 1979; CRAB dec. Aug. 16, 1979.) [1] Even elected officials who turned down membership have been allowed late entry. Thus, a state representative was allowed retroactive membership under section 3(3) in the county retirement system for her prior service as a Selectman, even though she had turned down the opportunity for membership at the time based on the advice of the town treasurer that membership was not worth it for low-salaried, elected town officials. *Walrath v. Middlesex County Retirement Board*, Docket No. CR-9071 (Mass. Div. of Admin. Law App., July 14, 1986; CRAB dec., Oct. 20, 1986).

More recently, the Contributory Retirement Appeal Board issued a decision in *Goode v. Weymouth Retirement Board* that disfavors late entry by elected officials. James Goode served as an elected member of the Weymouth Board of Assessors from 1971 to 1977, and then from 1977 to 1980 he served as an elected Selectman in the Town of Weymouth. He was never advised of his right to become a member of the Weymouth Retirement System, and did not become a member. In 1999, Mr. Goode became an employee of the Norfolk County Sheriff's Department and a member of the Norfolk County Retirement System. He sought to purchase creditable service for his service as an elected official in Weymouth, which the Weymouth Retirement Board denied because he had never been a member of that retirement system. On appeal, DALA Magistrate Sarah Luick, relying on *Brown*, *Clark*, and *Walrath*, ruled that Mr. Goode was entitled to late entry to membership under section 3(3). *Goode v. Weymouth Retirement Board and Norfolk Retirement System*, Docket No. CR-99-701 (Mass. Div. of Admin. Law App., Oct. 6, 2000). The Contributory Retirement Appeal Board reversed, holding that the retirement statute does not require retirement boards to "notify newly elected officials of their right to membership" and that

The Magistrate's reliance on G.L. c. 32, s. 3(3) is misplaced. G.L. c. 32, s. 3(2)(a)(vi) provides the mechanism for elected officials to become members of a retirement system

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[1] Mr. Brown was allowed late membership although he had ceased to be a government official. This was because the misinformation about his eligibility came directly from the retirement board while he still was in office. *Farrington*, decision at 3 and 4.

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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).

*Goode*, decision at 2 and 3 (CRAB dec., May 1, 2001.)

Were I to consider this matter on a clean slate, I would conclude that Ms. Awad, who applied for late membership while she was still in office, had met the minimum requirement for consideration for late membership. I would also conclude that the Hampshire County Retirement Board could not summarily reject her application because she did not apply during the first ninety days of any of her terms of office. I would therefore remand the matter to the Board to consider whether her "failure to become . . . a member was caused by circumstances other than those generally applicable to employees." See M.G.L. c. 32, § 3(3).

Ms. Awad has asserted two claims that might apply under this standard. She claims she was not told she was eligible to become a member of the Hampshire County Retirement System and she was not told that the retirement deduction taken from her pay was unrelated to membership in the Hampshire County Retirement System. I would direct the Board to examine this claim, not for whether the Board or local officials had any obligation under the retirement statute to inform Ms. Awad about her eligibility for membership,

but rather whether the facts she asserts establish that her situation was other than that "generally applicable to employees."

Ms. Awad also testified that she was not paid during her first year in office. This would have made her ineligible for membership during this time because she was not an employee for purposes of the retirement statute as she was not receiving "regular compensation" during that year. See M.G.L. c. 32, § 1 (definition of employee). Thus, she was not eligible to become a member during the first ninety days she served in office. I would direct the board to examine this circumstance as well to determine whether it was other than that "generally applicable to employees."

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However, the Contributory Retirement Appeal Board's Goode decision is controlling. Its rationale would appear to preclude any official who failed to establish membership during the ninety day eligibility window from using section 3(3) to establish late membership. I am compelled, therefore, to deny Ms. Awad's application for late membership.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS  
/s/ James P. Rooney  
First Administrative Magistrate  
December 20, 2013

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