

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

DANIEL BROWN
Petitioner

v.

MASSACHUSETTS PORT AUTHORITY
EMPLOYEES' RETIREMENT SYSTEM,

and

MIDDLESEX COUNTY RETIREMENT
SYSTEM
Respondents.

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:
: Docket No. CR-20-0426

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: Date: July 7, 2023

Appearance for Petitioner:

Gary Nolan, Esq.
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Appearance for Respondents:

Richard Heidlage, Esq.
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Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner, a member of the Massachusetts Port Authority Employees' Retirement System, is entitled to purchase his prior service as a reserve police officer in another system. *See* G.L. c. 32, § 3(5); *Shailor v. Bristol Cty. Ret. Bd.*, CR-20-0343, 2023 WL 2535786 (DALA Mar. 10, 2023).

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Daniel Brown, appeals a decision by the Respondent, the Massachusetts Port Authority Employees' Retirement System ("MPAERS"), denying his request to purchase creditable service for his prior work as a reserve police officer in North Reading. MPAERS moved to add the Middlesex County Retirement System ("MCRS") as an additional party, which I allowed.

The MPAERS and the Petitioner each submitted pre-hearing memoranda with proposed facts and exhibits. In response to a scheduling order, the parties submitted additional pleadings. I then held a status conference on June 12, 2023. I gave each party a chance to request an evidentiary hearing, if they believed it necessary; both parties agreed the matter could be decided without a hearing because there were no facts in dispute. At that point the administrative record closed.

MPAERS submitted five exhibits, which I admit into evidence. The Petitioner submitted one exhibit, a sworn affidavit, which I also admit into evidence.

FINDINGS OF FACT

Based on the exhibits and stipulations, I find the following facts:

1. The Petitioner has been an active member of the MPAERS since 2020. (Stipulated facts.)
2. Before that, he worked with the North Reading police department from 1989 through 1998. (Ex. 1; Petitioner affidavit.)
3. According to North Reading, he served as a "part-time, reserve officer." The Petitioner likewise characterizes himself as a reserve police officer. (Ex. 1; Petitioner affidavit.)
4. In that capacity, the Petitioner was not a member of a retirement system and did not make retirement contributions. (Exhibit 2.)

5. At North Reading, the Petitioner was appointed for 1-year periods and was reappointed each consecutive year. (Petitioner affidavit.)
6. He was part of a group of officers who would be called in to cover patrol and unfilled overtime shifts due to absences. He substituted for full-time officers who would normally work those shifts. (Petitioner affidavit.)
7. He could be called into work on short notice. He had no set schedule. (Petitioner affidavit.)
8. In 2020, the Petitioner applied to purchase this prior service. North Reading confirmed the Petitioner's employment and service hours. However, MCRS—the system that includes North Reading employees—did not accept liability because the Petitioner “was not eligible for membership in the retirement system, did not remit contributions, and was not wrongfully excluded from membership during this period.” (Exs. 1-3.)
9. The MPAERS, in turn, denied his request, which the Petitioner timely appealed. (Ex. 4.)

DECISION

This case is governed largely by my prior decision in *Shailor v. Bristol Cty. Ret. Bd.*, CR-20-0343, 2023 WL 2535786 (DALA Mar. 10, 2023).¹ As noted in *Shailor*, a petitioner is entitled to purchase his prior service from a different retirement system if he qualifies under G.L. c. 32, § 3(5). Section 3(5) governs credit for prior service from a different system, including “any member of any system who rendered service in any governmental unit other than that by which he is presently employed, in a temporary, provisional, or substitute position and who was excluded from membership by the rules of any board[.]” I find the Petitioner here qualifies under § 3(5) for the same reason as the Petitioner in *Shailor*:

¹ I acknowledge that *Shailor* is presently under appeal with CRAB.

Substitute employment is when an employee fills in for another. A substitute has the same responsibilities as the person for whom they are filling in; they have no set hours or schedule and may never work if no one requires substitution. *See, e.g., Nester v. School Comm. of Fall River*, 318 Mass. 538, 541-542 (1945) (substitute teacher provided “intermittent and irregular service.”); *Demeris v. Town of Foxborough*, 99 Mass. App. Ct. 603 (2021) (reserve police officer is generally someone who “never had a set schedule. Instead, the department would call him as needed, and he then had the option of either accepting or rejecting the particular assignment”). As a reserve police officer, the Petitioner was a substitute employee. Therefore, under our precedents, while the Petitioner is not eligible to purchase his prior service with the Town or Rowley under § 4(2)(c), he is entitled to purchase it under § 3(5).

Shailor, supra.

That should be the end of this case: the Petitioner was a reserve police officer in a different system just like the Petitioner in *Shailor*. He should be entitled to purchase credit for that service. However, MPAERS advances several counterarguments.

First, it argues the Petitioner was not a temporary, provisional, or substitute employee because his position “was permanent part-time on an ad-hoc, as-needed basis.” But those terms sometimes overlap—a substitute is used on an ad-hoc, as-needed basis.² Ultimately, what matters is whether the kind of work the Petitioner performed falls under § 3(5), regardless of his title. Here, it does, because the Petitioner provided “substitute” employment.

² MPAERS also argues the Petitioner was not a reserve officer but instead a “constable,” based on a North Reading Board of Selectmen policy entitled “police constables.” The Petitioner cites this current policy in his affidavit as an example of his duties. It is available at < https://www.northreadingma.gov/board-selectmen/pages/board-policies#anchor_3_3 > (last visited on June 19, 2023). It is not clear whether this policy was in place when the Petitioner worked in North Reading.

Regardless, if one reads beyond the policy’s title, it is about “a pool of competent trained reserves.” And in any event, North Reading and the Petitioner both refer to his service as a “reserve officer.”

MPAERS next explains that § 3(5) applies only to members who “rendered service.” G.L. c. 32, § 1 defines service as “service as an employee in any governmental unit for which regular compensation is paid”; it defines “employee” as a person who is “regularly employed in the service of any such political subdivision.” *Ibid.* Therefore, MPAERS argues, the Petitioner did not provide “service” because he was not an “employee” since he was not “regularly employed.” Drafting off its first argument, MPAERS says the Petitioner’s employment was instead “sporadic, ad hoc, and irregular.”

MPAERS quotes § 3(5) out of context. It indeed applies to members who “rendered service” but, more specifically, to members who rendered service “in a temporary, provisional, or substitute position.” The Petitioner was a “substitute” for full-time police officers. It would not make sense for the statute to allow someone to purchase their service as a substitute employee, but then disqualify them because they performed substitute employment, which is, by definition, sporadic, ad hoc, and irregular. *See Peoples v. Reading Ret. Bd.*, CR-97-653 (DALA May 28, 1998) (reserve police officer eligible to purchase prior service under § 3(5) because it was a “temporary, provisional or substitute” position); *Soojian v. Worcester Ret. Bd.*, CR-95-876 (DALA Nov. 5, 1996) (same); *see also Forzese v. Milton Ret. Bd.*, CR-18-0424 (DALA May 21, 2021) (“seasonal employment qualifies as a ‘temporary position’ under G.L. c. 32, § 3(5) because he worked as needed at irregular, non-continuous intervals.”); *cf. Young v. CRAB*, 486 Mass. 1 (2020) (contract employee who completed ten consecutive one-year terms was employee because service was “regular and permanent.”).

Finally, MPAERS argues that § 3(5) allows only the same credit “as would have been allowed if such service had been rendered by him in the governmental unit by which he is presently employed.” It points out that Massport does not have any “on call” police as commonly

maintained by municipalities. Therefore, the Petitioner could not have rendered this service—service as a reserve police officer—at Massport and so no credit is available. That is a misreading of § 3(5). This clause's reference to service does not refer to the actual job someone held, *i.e.* reserve police officer, but rather the kind of service provided, *i.e.* substitute; it is not about whether there are reserve officers at Massport but whether Massport allows its own members to purchase prior service for temporary, substitute, or provisional service. *See Dow v. State Bd. of Ret.*, CR-09-98 (DALA Aug 3, 2012).

That is why, for example, a Turnpike Authority employee could purchase his prior service as a high school football announcer in Needham; I am sure the Turnpike Authority does not employ football announcers. *Jacques v. Mass. Turnpike Auth.*, CR-01-1094 (DALA Nov. 7, 2002), *aff'd* (CRAB July 30, 2003). Or, why an employee of the Comptroller's office could purchase her prior service as a substitute teacher at the North Middlesex Regional School District; the Comptroller's office does not employ school teachers. *Dow, supra*. Massport appears to allow purchases for these types of service when they took place at Massport;³ if it does, then under § 3(5), it must allow purchases for these types of service when they occurred in a different system.

The Petitioner is eligible to purchase his prior service as a reserve police officer in North Reading. MPAERS's decision denying the Petitioner's application is **reversed**.

³ Current and past Massport regulations allow credit for “less than full time employment” and for claims “pursuant to § 4(2)(c) for temporary or part-time service prior to the time that the member became a member of the system.” *See* Massport Retirement Board Supplemental Regulations, < <https://www.mass.gov/service-details/massport-retirement-board-supplemental-regulations> > (last visited June 19, 2023). Depending on when someone provided service, and which regulation applies, the amount of credit could vary. Upon remand, MPAERS will have to determine which regulations apply to the Petitioner's service.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate

APPENDIX

North Reading Board of Selectmen policy

3.3 - Police Constable Appointments

Purpose:

Police constables are appointed so that the Police Chief of the full time North Reading Police Department will have a pool of competent trained reserves to augment the regular police force. The Police Chief or his designee may assign police constables to:

- Details not covered by members of the regular police force;
- Regularly scheduled shifts that are open and unable to be staffed by a member of the regular police force;
- Call-ups in emergency situations;
- Any other reason deemed necessary by the Police Chief or his designee.

The powers of the police constables, while they are on duty, will be the same as those powers & duties exercised by members of the regular police force, as described in Massachusetts General Laws, Chapter 41, section 98.

The Police Chief may impose limitations on the use of the aforementioned powers & duties as he determines it necessary to do so.

Requirements for initial appointment:

- A. Education: High School diploma or equivalent.
- B. Physical: Physical exam by M.D. (paid by applicant)
- C. References: Three (3) not related to applicant. (To be checked by N.R.P.D.)
- D. Residency: North Reading resident for at least one year prior to application.
- E. Written Recommendation: Police Chief and Director of Public Safety will submit a written recommendation to the Select Board for each new applicant.
- F. Training:
 1. Legal: Courses prescribed by the Massachusetts Criminal Justice Training Council as required by Massachusetts General Laws, Chapter 41, section 96B, i.e. basic training and in service training.
 2. Firearms Proficiency: A passing grade, as determined by the Massachusetts Criminal Justice Training Council on the handgun courses recommended by the Massachusetts Criminal Justice Training Council, administered annually by the N.R.P.D.
 3. First Responder: Shall possess a valid first responder card certifying their ability to render medical assistance as first responders, as prescribed in Massachusetts General Laws, Chapter 111, section 201.
 4. Cardiopulmonary Resuscitation: Shall possess a valid CPR card certifying their ability to render medical assistance as first responders, as prescribed in Massachusetts General Laws, Chapter 111, section 201.

5. Expenses and time: Police constables shall be responsible for the expense incurred to qualify for the training requirements and shall be responsible for recertification as required in: Firearms Proficiency, First Responder and CPR.
- G. Equipment: (To be owned and maintained by applicant)
 1. Handgun permit: For protection of life & property
 2. Weapon: To be approved by the Police Chief.
 3. Uniform: As determined by the Police Chief
- H. Experience: Desirable

Requirements for re-appointment:

- A. Training.
 1. Legal: On-going, administered by N.R.P.D. as prescribed by Massachusetts General Laws and the Massachusetts Criminal Justice Training council.
 2. Firearms Proficiency: Annual qualification administered by N.R.P.D. as prescribed by the Massachusetts Criminal Justice Training Council.
 3. Medical Aid: Active first responder training and CPR card
 4. Verification: Proof of attendance at required training to be submitted to the Select Board for re-appointment.
- B. Physical: As for initial appointment - every three (3) years.
- C. Residency: As for initial appointment.
- D. Service: After two (2) years of service, applicants for reappointment shall have served in the previous year at least 80 hours, performing functions other than traffic control, or shall possess special qualifications or hold special position where re-appointment is deemed necessary.
- E. Written Recommendation: From the Police Chief and Director of Public Safety and based upon performance evaluations, forms #1 and #2.
- F. Age Requirement: No individual who has reached his/her 65th birthday shall be reappointed.

Adopted 1. reading: October 27, 1986

Adopted 2. reading: November 3, 1986

Amended & Reaffirmed: January 7, 2002

Amended 1. reading: November 18, 2002

2. reading: December 2, 2002

Massport Retirement Board Supplemental Regulations

Creditable Service:

April 26, 2019: For all employees whose service with the Authority commenced on or before the day prior to the effective date of this supplementary regulation, the supplementary regulation then in effect shall continue to apply. For all employees whose service with the Authority commenced on or after the effective date of this regulation, the following supplementary regulation shall apply:

1(a). Regularly employed full time employees shall receive one year of creditable service for each year of full time employment as defined for the position.

1(b). Except as set forth below, for all purposes in G.L. c. 32, creditable service for any member in service regularly employed on a part-time basis shall be calculated on a pro-rated basis as it relates to a full-time position, equal to the period of service multiplied by a fraction, no greater than 1, the numerator of which is the actual number of hours of service performed in each week divided by the number of hours in a normal work week for the member's position. The pro-rated service shall be based on the actual hours worked as it relates to the full time hours of the position.

October 1, 2002: In the event that a member claims creditable service pursuant to § 4(2)(c) for temporary or part-time service prior to the time that the member became a member of the system, the member shall submit such documentation as she or he has to verify said service. Service shall be granted equal to the period of service multiplied by a fraction, no greater than 1, the numerator of which is the actual number of hours of service performed in each week divided by the number of hours in a normal work week for the member's position. In the event that the member and/or the board are able to document the fact of such service and the status (full- or part-time) under which the member was employed but there are no records of the member's actual service performed, creditable service shall be given according to the member's status of record unless there is competent evidence that establishes that the actual service was different. For members first employed by the Authority after May 1, 1999, no such creditable service shall be allowed, unless within one year after becoming a member, the member has, pursuant to subsection 4(2)(a) of Chapter 32, filed a detailed statement of the service which he or she is claiming credit.

...

April 26, 1993: Regularly employed employees with periods of full time and less than full time employment, shall be granted one full year of creditable service for each year of full time employment and a prorated amount of creditable service for the periods of less than full time employment determined in the same manner as for transferred service referred to above. The prorated service shall be based on the actual hours worked as it relates to the full time hours of the position.

Regularly employed employees who work less than full time throughout their entire employment with Massport, do not have prior full time creditable service with another c. 32 retirement system, and retire from Massport, shall receive one year of creditable service for each year of such part time service. If any such employee should transfer to another retirement system, governed by c. 32 pursuant to which service with Massport would be considered creditable service, the amount of creditable service to which the employee shall be entitled should be that part of a year determined by multiplying one year by a fraction in which the numerator is the total hours worked and the denominator is the total of the full time hours of the position.

Regularly employed full time employees shall receive one year of creditable service for each year of full time employment as defined for the position.