

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Nelson Burlingame,
Petitioner

v.

Docket No. CR-22-0130

Date: March 29, 2024

**Worcester Regional
Retirement System,**
Respondent

Appearance for Petitioner:

Nelson Burlingame, *pro se*

Appearance for Respondent:

Madison A. Harris-Parks, Esq.
Murphy, Hesse, Toomey, & Lehane, LLP
50 Braintree Hill Office Park, Suite 410
Braintree, MA 02184

Administrative Magistrate:

Kenneth Forton

SUMMARY OF DECISION

The petitioner's retirement board permitted him to purchase a period of elected service for retirement purposes. In 2022, the Board believed that the purchase was allowed in error. The Board "corrected" its records under G.L. c. 32, § 20(5)(c)(2), and reduced the petitioner's creditable service accordingly. However, the petitioner's original purchase remains supported by precedents that have not yet been overruled. The Board was therefore not presented with any "error" warranting correction.

DECISION

Petitioner Nelson Burlingame timely appeals under G.L. c. 32, § 16(4) the March 25, 2022 decision by the Respondent, Worcester Regional Retirement System (WRRS),

to correct its prior “mistake” allowing Mr. Burlingame to purchase his previous non-membership service as an elected official that he had failed to accrue because he had not become a member within 90 days of his prior elections. *See* G.L. c. 32, § 3(2)(a)(vi). WRRS’s decision reduced Mr. Burlingame’s creditable service by 12 years.

On March 29, 2023, DALA informed the parties that the matter appeared to be capable of resolution on written submissions under 801 CMR 1.01(10)(c) and ordered the parties to file pre-hearing memoranda. Neither party objected. On April 21, 2023, Mr. Burlingame submitted his memorandum and seven proposed exhibits. On August 18, 2023, the Board submitted its memorandum. I have admitted the seven proposed exhibits into evidence as marked. (Exs. 1-7.) As neither party submitted it, I have also marked Mr. Burlingame’s appeal letter Exhibit 8.

FINDINGS OF FACT

Based on the record evidence, I make the following findings of fact:

1. Nelson Burlingame was elected Cemetery Commissioner in the Town of Charlton in 1974. He was re-elected to successive terms until his last term’s expiration in 1985. He did not apply for system membership within 90 days of his assuming office or his re-election. (Exhibit 1.)
2. Beginning June 1, 2001, Mr. Burlingame was employed with the Town of Charlton Board of Health and consequently became member of the Worcester Regional Retirement System. (Exhibit 7.)
3. Soon after he became a retirement system member, Mr. Burlingame requested to purchase his Charlton elected service. On July 23, 2002, the Board approved his request and informed him of the cost to purchase it. (Exhibit 3.)

4. On or about August 12, 2002, Mr. Burlingame bought back his service for \$889.12. (Exhibit 4.)

5. On January 27, 2014, the Board informed Mr. Burlingame that he has 22 years, 7 months of creditable service on account. (Exhibit 5.)

6. In or around 2022, as he approached likely retirement, Mr. Burlingame asked the Board for an updated retirement allowance estimate. (Exhibit 1.)

7. In a letter dated March 25, 2022, the Board notified Mr. Burlingame that it had erroneously allowed him to purchase his twelve years of elected non-membership service and it was required under G.L. c. 32, § 20(5)(c)(2) to correct that mistake, meaning that he would lose 12 years of creditable service. This letter informed Mr. Burlingame of his appeal rights. (Exhibit 1.)

8. On March 30, 2022, Mr. Burlingame filed a timely appeal. (Exhibit 8.)

CONCLUSION AND ORDER

This appeal is governed by the analysis stated in *McGarry v. Bristol County Retirement Board*, CR-20-409 (DALA Jan. 27, 2023) and reiterated in *Casey v. Bristol County Retirement System*, CR-21-351 (DALA Sept. 1, 2023).

A public employee's creditable service is an important input into the computation of his retirement allowance. As a rule, employees receive credit only for periods of work during which they were members of pertinent retirement systems. G.L. c. 32, § 4(1)(a). In specified circumstances, however, employees may "purchase" credit for otherwise noncountable service. Mr. Burlingame was not a retirement system member while he served his 12 years as Charlton Cemetery Commissioner, an elected position. He therefore did not accrue any credit for that service until he purchased it from the retirement system in 2002.

After 2009, employees are unable to purchase credit for pre-membership periods when they served as elected officials. *See Awad v. Hampshire County Retirement Bd.*, CR-08-621, at *6 (CRAB Dec. 19, 2014). This holding results from the statute which allows elected officials to become members of the pertinent retirement system only if they applied “within ninety days after . . . assuming office.” G.L. c. 32, § 3(2)(a)(vi). This rule would be extraneous “[i]f creditable service for work as an elected official could be purchased later.” *Awad*, supra, at *6.

If this purchase occurred after 2009, the analysis would stop there. However, when Mr. Burlingame made his purchase in 2002, the law was different. Prior to 2009, G.L. c. 32, § 4(1)(a) included the language emphasized below:

Any member in service shall . . . be credited with all service rendered by him as an employee in any governmental unit after becoming a member of the system pertaining thereto; *provided, that he shall be credited with a year of creditable service for each calendar year during which he served as an elected official*

A series of DALA and CRAB decisions support the view that this language “allows members who had served as elected officials . . . to receive creditable service for their prior service.” *Sauvageau v. Worcester Reg'l Retirement Bd.*, CR-02-1336 (DALA Dec. 12, 2003). *See Levesque v. Essex County Retirement Bd.*, CR-95-571, at *3 (CRAB Oct. 7, 1996); *Colt v. Essex Retirement Bd.*, CR-95-629, at *2 (CRAB Oct. 7, 1996); *Goode v. Weymouth Retirement Bd.*, CR-99-701, at *2 (CRAB May 1, 2001); *Turner v. Northbridge Retirement Bd.*, CR-00-298 (CRAB Jan. 14, 2002); *Calabrese v. Hampden County Reg'l Retirement Bd.*, CR-08-329, 2010 WL 676236, at *2, 3, 5 (DALA Jan. 8, 2010). CRAB has acknowledged this line of cases in *Awad*, writing:

We note that both *Levesque* and *Goode* contained [a] 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 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 This dictum was applied by DALA in [*Sauvageau*]. We do not reach this issue since it is not presented here

Awad, supra, at *6 n.10. Had CRAB overruled *Sauvageau*, the Board would be on solid ground to argue that it made an actual mistake allowing Mr. Burlingame to purchase the service. However, rather than overruling or endorsing *Sauvageau*, CRAB decided to mention it and leave it be. *Id.* While it called the prior statements in *Levesque* and *Goode* dicta, it did not state that the analysis there was incorrect. *Id.* It acknowledged that the now-defunct portion of § 4(1)(a) was “arguably . . . so specific as to allow” the type of purchase at issue despite the 90-day limitation. *Id.* Because CRAB did not overrule *Sauvageau*, it remains good law.

The final question in this appeal is whether the Board’s original authorization of Mr. Burlingame’s credit purchase was an “error,” and thus subject to correction under G.L. c. 32, § 20(5)(c)(2). In *Casey*, supra, at *6, the DALA magistrate concluded that

[t]he Legislature did not enact § 20(5)(c)(2) in the hopes that, on the eve of retirement, public employees could be deprived of benefits acquired in good faith many years prior. The only types of ‘errors’ that the retirement law could possibly view as a justification for late-breaking, member prejudicing adjustments are clear and certain mistakes, not misgivings or question marks.

Because Mr. Burlingame’s original credit purchase remains supported by *Sauvageau* and a string of other authorities, the Board’s decision allowing Mr. Burlingame to purchase his elected service was not an error.

The board believes that *Awad* foretells the demise of those cases, but that remains a prediction. The possibility that an appellate tribunal may soon adopt a new rule does not mean that “an error exists” or “an error [has been] made.” G.L. c. 32, § 20(5)(c)(2). No “correction” is called for where the foundations supporting a member’s benefits remain in place, even if they are showing cracks.

Casey, supra, at *6. Until an appellate tribunal overrules *Sauvageau* and the other supporting authorities, no “error exists” or “[has been] made.” G.L. c. 32 § 20(5)(c)(2).

For the foregoing reasons, Mr. Burlingame’s case did not present the Board with an error warranting correction under G.L. c. 32, § 20(5)(c)(2). The Board’s decision is therefore VACATED.

SO ORDERED.

Division of Administrative Law Appeals

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Mar. 29, 2024