COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

**Kathleen Callahan**,

 Petitioner

v. Docket No. CR-12-523

 Date Issued: Aug. 25, 2017

**Revere Retirement Board**,

 Respondent

**Appearance for Petitioner:**

Kathleen Callahan

247 Humphrey Street

Marblehead, MA 01945

**Appearance for Respondent:**

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**Administrative Magistrate:**

Kenneth J. Forton, Esq.

**SUMMARY**

The Petitioner, a grant administrator for the Revere Police Department, is entitled to purchase her pre-membership service with the Department from October 1995 to February 9, 2012 because she was regularly employed in the service of Revere, she was paid regular compensation, and her work was controlled by the Revere Police Department. Being paid from grant funds does not disqualify her. The facts of this appeal are substantially similar to those in *Crowley v. Contributory Retirement Appeal Board.*, 73 Mass. App. Ct. 1103, 896 N.E. 2d 59 (2008), where the Appeals Court determined that the plaintiff was entitled to purchase her pre-membership service. The Respondent’s decision denying her eligibility to purchase creditable service is therefore reversed.

**DECISION**

 On September 20, 2012, the Petitioner, Kathleen Callahan, appealed timely under G.L. c. 32, § 16(4) the September 12, 2012 decision of the Respondent, Revere Retirement Board, denying her application to purchase her pre-membership Revere service.

 On November 17, 2014, the Division of Administrative Law Appeals ordered the parties to submit pre-hearing memoranda. On December 20, 2014, the Petitioner submitted her memorandum, marked “A” for identification, with 23 proposed exhibits. On February 19, 2015, the Respondent submitted its memorandum, marked “B” for identification, with two proposed exhibits.

 I held an evidentiary hearing on September 20, 2016 at DALA, One Congress Street, Boston, Massachusetts. The hearing was digitally recorded. At the hearing I admitted twenty-six documents into evidence; I marked an exhibit list as “C” for identification. (Exs. 1-26.) The Petitioner testified on her own behalf. The Respondent called no witnesses.

On November 20, 2016, the Petitioner submitted Proposed Findings of Fact and a post-hearing memorandum that I marked “D” for identification. On November 29, 2016, the Respondent submitted a post-hearing memorandum that I marked “E” for identification. Upon receipt of a reply brief from Petitioner on December 23, 2016, which I marked “F” for identification, the administrative record closed.

Post-hearing, I marked the Board’s September 12, 2012 denial letter as Exhibit 27 and Ms. Callahan’s September 20, 2012 appeal letter as Exhibit 28.

**FINDINGS OF FACT**

Based on the testimony and documents submitted by the parties, I make the following findings of fact:

1. Petitioner, Kathleen Callahan, began work as a grant administrator for the Revere Police Department in October 1995. (Callahan Testimony; Ex. 1.)
2. Her job duties included applying for grants on behalf of the Police Department and administering those funds once they were awarded. She also submitted financial reports to the state and federal agencies that provided the grant funds. (Callahan Testimony; Ex. 21.)
3. At first, her position was paid for through the regular City of Revere budgeting process. As grants were obtained over the years, her position was funded by some of the grants that she successfully obtained for the Department. (Callahan Testimony.)
4. From October 1995 until December 31, 2010, Ms. Callahan submitted invoices to the Chief of Police for her work. Some of the checks she received listed “Salary” under the invoice description. She did not work subject to a contract. On January 1, 2011, she was no longer required to submit invoices and was paid through payroll checks from the City of Revere payroll. (Callahan Testimony; Exs. 2-17, 21.)
5. From October 1995 until February 8, 2012, the grant administrator position was a part-time position. Ms. Callahan first began working approximately 15 hours per week and eventually progressed to 20-plus hours per week and then to her current full-time status. (Callahan Testimony; Ex. 1.)
6. When she worked part-time, Ms. Callahan generally worked Monday through Thursday from 9:00 a.m. to 2:00 p.m. She did not work the same number of hours each week. Generally, she worked between 70 and 90 hours each month and was paid only for the hours that she worked. (Callahan Testimony; Exs. 1, 3-17, 21.)
7. Before Ms. Callahan was added to the regular payroll, in 2011, the Police Chief expected her to report to work each week. She needed the Chief’s permission to take a vacation. She did not accrue vacation or sick time and consequently was not paid when she did not come to work. (Callahan Testimony; Exs. 2-17, 21.)
8. On February 9, 2012, Ms. Callahan began working full-time. The change in her hours was a result of an increase in the number of grants being administered and the additional demands on her time to administer them. She began accruing sick and vacation time. (Callahan Testimony; Ex. 18.)
9. Ms. Callahan consequently became a member of the Revere Retirement System and began making retirement contributions. (Callahan Testimony.)
10. The change to full-time status was not the result of any alteration in Ms. Callahan’s daily work activities or responsibilities; they remained the same as when she worked part-time. (Callahan Testimony.)
11. As a full-time employee, Ms. Callahan has worked regular hours Monday through Thursday 8:00 a.m. to 5:00 p.m. and Friday from 8:00 a.m. to noon. (Callahan Testimony; Ex. 2.)
12. Continuously since 1995, Ms. Callahan has worked under the direct supervision and control of the various Chiefs of Police for the Revere Police Department. (Callahan Testimony; Exs. 21, 22.)
13. Ms. Callahan worked at the old Revere Police Station on Pleasant Street from October 1995 through June 2008 and was provided an office there. (Callahan Testimony, Exs. 21, 23.)
14. In 2008, when the new Revere Police Station was built, Ms. Callahan was given a dedicated office to work in and has worked in that office since that time. (Callahan Testimony, Exs. 21, 23.)
15. Ms. Callahan performs the same work today under the direct supervision and control of the Chief of Police that she has been performing since 1995: writing grants, administering the funds, and filing required reports. (Callahan Testimony; Ex. 22.)
16. In connection with a grant administered by Ms. Callahan, over the course of several years, the salaries of several Revere police officers were paid out of the grant funds. These officers were hired using grant funds and are employees of the City of Revere. (Callahan Testimony.)
17. Ms. Callahan’s position is currently funded by the City of Revere budget and has been since January 1, 2011, when grant funds allocated to pay her were exhausted. (Callahan Testimony; Ex. 24.)
18. At various times, Ms. Callahan made requests to be added to the City of Revere payroll. Those requests were denied. (Callahan Testimony.)
19. Ms. Callahan’s job, job title, and responsibilities are the same in 2016 as they were when she was hired in 1995. The only change has been the method of payment and number of hours worked. (Callahan Testimony; Exs. 21, 22, 25.)
20. In 2012, Ms. Callahan requested that the Revere Retirement Board grant her creditable service for her work from 1995 to February 8, 2012. (Callahan Testimony.)
21. By letter dated September 12, 2012, the Board denied Ms. Callahan’s request to purchase her prior service, referring to her as a “vendor” rather than an employee. (Ex. 27.)
22. By fax dated September 20, 2012, Ms. Callahan timely appealed. (Ex. 28.)

**CONCLUSION AND ORDER**

After consideration of the evidence presented in this case, I conclude that the Petitioner is entitled to purchase her pre-membership service with the City of Revere as a grant administrator because she meets the relevant definition of “employee” in Chapter 32. The Board’s denial of Ms. Callahan’s request to purchase the service is reversed.

Ms. Callahan, an employee of the City of Revere and a member of the Revere Retirement System, seeks credit for her pre-membership service with the City under G.L. c. 32, §§ 4(1)(a) and 4(2)(c). Section 4(1)(a) provides, in pertinent part, “[a]ny 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 . . . .” Section 4(2)(c) provides, in pertinent part:

In the case of any employee of any governmental unit who is a member of the retirement system pertaining thereto, the board may allow credit, upon whatever proportionate basis it shall determine under appropriate rules and regulations which shall be subject to the approval of the actuary, for any previous period of part-time . . . employment or service rendered by him

. . . while he was not eligible for membership . . . .

 There is no dispute that Ms. Callahan became a member in service of the Revere Retirement System on February 9, 2012, when she began working full-time. She remains employed by the Police Department in the same position and is still a member in service.

 Ms. Callahan seeks to purchase her pre-membership service with Revere. The Board has rejected her request because it contends that she was not an employee then but was rather a vendor or independent contractor, and is thus not eligible to purchase that service. “Employee” “as applied to persons whose regular compensation . . . is paid by any political subdivision of the commonwealth, . . . shall mean any person who is regularly employed in the service of any such political subdivision . . . .” G.L. c. 32, § 1. The City of Revere is a political subdivision of the commonwealth, as that term is defined in G.L. c. 32, § 1. During the period of time in question, Ms. Crowley was an employee because she was regularly employed in the service of the City of Revere, she was paid regular compensation for her services by the City, which is a political subdivision of the commonwealth, and her work was controlled by the Revere Police Department.

 The facts of this case closely parallel the facts in *Crowley v. Contributory Retirement App. Bd.*, 73 Mass. App. Ct. 1103, Memorandum and Order under Rule 1:28 (2008), where the Appeals Court determined that Ms. Crowley was entitled to purchase her pre-membership service because she was an “employee” during that period. *See also* G.L. c. 32, § 1. Ms. Crowley began working as a principal administrative assistant/staff attorney for the City of Boston treasury department’s trust office division. *Id.* at 1. She was supervised by the city’s corporation counsel and the executive secretary of the trust department, who gave her work assignments and evaluated her job performance. *Id.* Ms. Crowley worked in Boston City Hall 35 hours per week and submitted invoices to the trust department for her services. *Id.* Approximately four months after she started in the trust department, she began receiving regular weekly paychecks issued by the city and was no longer required to submit invoices. *Id.* She consequently became a member of the Boston Retirement System. *Id.* She continued to work 35 hours per week while neither her duties nor her responsibilities changed. *Id.* During the disputed four months Ms. Crowley’s checks were not issued from a regular payroll account, but rather from a different city trust account. The invoices that came with the checks described her as a “Vendor or Claimant.” No deductions for retirement, social security, or taxes were taken from the checks, and she did not accrue sick leave or vacation time.

 In all relevant respects, Ms. Callahan’s employment terms and conditions were the same as Ms. Crowley’s. Ms. Callahan worked directly for the Revere Police Department, where she was supervised by the various police chiefs during her tenure. She was paid after submitting monthly invoices to the police chief. She worked part-time at first and was not paid through regular city payroll. She was paid from grant funds that she had raised for the Department. No deductions for retirement, social security, or taxes were taken from the checks, and she did not accrue sick or vacation time. She was paid strictly for the hours that she worked. Then, on January 1, 2011, she was transferred to the regular city payroll and was no longer required to submit invoices. A little more than a year later, in February 2012, she started working full-time and became a member of the retirement system.

 In *Crowley*, the Boston Retirement System relied on the source of funds used to pay Ms. Crowley, as well as the method of payment, to support its argument that Ms. Crowley was a contractor to the trust and was not paid by the City. The Revere Board makes a parallel argument: that being paid from grant funds pursuant to monthly invoices proves that Ms. Callahan was not paid by the City and was therefore not an employee. The record clearly supports the conclusion that Ms. Callahan was paid from Revere grant funds. As the *Crowley* court held, the source of funds used to pay the employee is not what makes an “employee.” As an example, several Revere police officers during the same period were paid from grant funds, as well. Surely, the retirement system would not argue that Revere police officers paid from grant proceeds are not employees. That same logic must apply to Ms. Callahan. *See Leonard v. Salem Retirement Bd.*, CR-87-1201 (DALA 1989) (source of funds used to pay person not determinative of employment status); *Palladino v. Boston Retirement Bd.*, CR-01-296 (DALA 2002) (same).

 The Board makes another argument similar to the Boston Board in *Crowley*: that the police department did not have the right to control Ms. Callahan’s work and that she was consequently not an employee. This conclusion is wholly unsupported by the record. The three police chiefs that Ms. Callahan worked for assigned and supervised her work. They also evaluated her performance. She worked in an office in the police department, using supplies provided by the City. When a new police building was built, a new office was reserved for her. These job duties and conditions have been consistent from her part-time years through her full-time years. These facts demonstrate sufficient control to show that Ms. Callahan was an employee and not an independent contractor or consultant. *See* *Crowley*, 73 Mass. App. Ct. at 1105 (supervisors had exclusive control of Crowley’s work, she was hired by the supervisor, she worked in a designated location in City Hall, and was required to sign in and out each day).

Finally, the Board argues that Ms. Callahan was not “regularly employed” and therefore did not meet the statutory definition of an employee. The retirement system points to the fluctuation in the amount of hours that Ms. Callahan worked and her part-time schedule until 2012. However, under § 4(2)(c), Ms. Callahan is entitled to prorated credit for part-time service if she was an employee of any governmental unit and a member of its retirement system and the system had a supplementary regulation in effect when Ms. Callahan applied for the service. Revere’s regulation was promulgated on July 11, 1990; it provides that “[c]reditable service for part time workers shall be prorated as it bears against full time service.”[[1]](#footnote-1) Ms. Callahan was “regularly employed,” even though she worked part-time, did not work the same number of hours each week, and occasionally took a week or two off of work for an unpaid vacation. “The term ‘regularly employed’ according to its usual meaning refers to continuous employment as distinguished from sporadic, intermittent, or temporary employment.” *Retirement Bd. of Concord v. Colleran*, 34 Mass. App. Ct. 486, 488-489 (1993); *Crowley*, Memorandum at \*4 (citing *Colleran*).

For the foregoing reasons, the Petitioner has proven that she is an employee of the City and thus entitled to purchase her creditable service. The Board’s decision denying her request is therefore reversed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kenneth J. Forton, Esq.

Administrative Magistrate

Dated: Aug. 25, 2017

1. This regulation was subsequently repealed in 2013, but the now-effective regulation similarly provides for the prorating of part time service. [↑](#footnote-ref-1)