COMMONWEALTH OF MASSACHUSETTS

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

**John Clement**,

Petitioner

v. Docket Nos. CR-14-184

 CR-13-294

**Essex Regional Retirement System**, Date: October 20, 2017

Respondent

**Appearance for Petitioner**:

 Timothy F. Fallon, Esq.

 Mann Law Firm, P.C.

 1071 Worcester Road, Suite 42

 Framingham, MA 01701

**Appearance for Respondent**:

 Christopher J. Collins, Esq.

 Law Offices of Michael Sacco, P.C.

 P.O. Box 479, Suite 210

 Southampton, MA 01073-0479

**Administrative Magistrate**:

 Edward B. McGrath, Esq.

 Chief Administrative Magistrate

**SUMMARY OF DECISION**

 The Essex Regional Retirement System properly denied the Petitioner’s request to purchase additional service, because he failed to prove by a preponderance of the evidence that he worked a permanent 20-hour per week schedule during the period at issue and it correctly awarded the Petitioner’s retirement allowance under option B, because the Petitioner did not elect an option.

**DECISION**

On May 14, 2013, the Essex Regional Retirement System (“ERRS”) wrote the Petitioner, John Clement, informing him of its understanding of his retirement benefits and informed him what amount of money it required of him to purchase the creditable service to which, it said, he might be entitled. The Petitioner’s appeal of that decision was timely filed and docketed at DALA with docket number CR-13-294. On April 11, 2014, the Petitioner timely appealed, under M.G.L. c. 32, § 16(4), from the Respondent’s March 31, 2014, award of a retirement benefit under option B. The second appeal was docketed at DALA as CR-14-184. On July 19, 2016, I allowed the Respondent’s unopposed motion to consolidate the matters. At the heart of these matters is whether the Petitioner is entitled to purchase an additional 5 years, 4 months of service.

The Petitioner filed a pre-hearing memorandum that I marked “A” for identification. The Respondent also filed a Pre-hearing memorandum and I marked it “B.” I held a hearing on July 20, 2016, which was digitally recorded. The Petitioner testified at the hearing. In addition, the Petitioner called Patricia Rogers, the Town of Groveland’s Assistant Treasurer Collector, as a witness. The Respondent called Charles Kostro as a witness. Mr. Kostro is the Executive Director of ERRS. The Petitioner attached a certified transcript of the recording to his post-hearing brief and marked it “Exhibit 1.” In this decision, I refer to the transcript as “Tr.” followed by the page number.

 At the hearing, I marked Petitioner’s exhibits 1-5 and Respondent’s exhibits 1-10. By agreement of the parties, Respondent’s exhibit 11 was marked as an exhibit on August 10, 2016. The parties filed post-hearing briefs. The Respondent’s was marked “C” and the Petitioner’s “D”. When I received the Petitioner’s post-hearing brief, on October 24, 2016, I closed the administrative record.

**Findings of Fact**

Based on the evidence presented by the parties, and reasonable inferences drawn from it, I make the following findings of fact:

1. The Petitioner was a member of State Employees Retirement System from 1967 to 1983. (Res. Ex. 3)
2. In 1976, the Petitioner moved to the Town of Groveland and joined the fire department as a call firefighter. (Pet. Test. Tr. 19)
3. Since 1985, the Petitioner has worked as an environmental consultant at New England Environmental Technologies. (Pet. Test. Tr. 19)
4. The Petitioner was appointed fire chief for the Town of Groveland on February 1, 1993. (Res. Ex. 3, Stip.)
5. From 1993 to 2013, the Petitioner received health care benefits from the Town of Groveland. (Stip.)
6. In 2007, the fire department instituted a “timesheet, time payroll” and the Petitioner has copies of the time sheets. (Pet. Test. Tr. 25)
7. On February 9, 2009, Cynthia Sweeney, an employee of the Respondent, wrote that she had talked to the Petitioner. She wrote that he had quite a few years of service with the commonwealth and stated:

Since he was vested, he left his money on account with the state. Since that is the case and once a member always a member, [Petitioner] should have been paying into Essex since he started working for Groveland. As a result he needs to be signed up immediately. Also he is interested in buying back his prior time, so we need records for all these years, or at least since he has been chief to start with.

(Pet. Ex. 4)

1. On February 11, 2009, the Petitioner submitted a New Member Enrollment form for the Respondent. (Res. Ex. 3)
2. He had not applied for membership in ERRS before. (Pet. Test. Tr. 57)
3. On February 11, 2009, Lilli Gilligan the Respondent’s Chief Operating Officer, sent an email stating, among other things, that:

Once the paper work is entered we will need to go back to the date he began working in Groveland in order to determine what is owed to the Retirement Board for all of the years he should have been contributing…We will need a breakdown of hours worked while he was a call fireman from 1976 to 1991. Please also provide the exact date John was appointed the Fire Chief.

(Pet. Ex. 4)

1. The Petitioner was enrolled in ERRS and his state service was transferred to the ERRS, resulting in a total of 18 years and 4 months of creditable service. (Resp. Ex. 1)
2. On February 25, 2009, an attorney representing the Petitioner, Lisa Nahil, Esq., wrote the Groveland finance director stating “you have stopped the submission of the cancellation of John Clement’s health insurance benefits until the matter can be resolved by the Groveland Board of Selectmen, the Board of Fire Engineers and [the Petitioner]. (Pet. Ex. 1)
3. On May 23 and June 20, 2011, the Groveland Selectmen discussed the Petitioner’s employment as fire chief. (Pet. Ex 2 pp. 5-6, 10-11)
4. In April 2012, the Respondent adopted a policy that required a member work a permanent 20-hour-per-week schedule in order to be eligible for membership. (Kostro Test. Tr. 96)
5. The Petitioner served as fire chief until May 30, 2013 when he faced mandatory retirement at age 65 after the Town of Groveland adopted the so called “strong chief” law, M.G.L. c. 48 § 3. (Stip.)
6. Pursuant to G. L. c. 32 § 4(2)(b), the Petitioner was credited with an additional 5 years of service for his service as a call firefighter. (Resp. Ex. 1)
7. The Town of Groveland did not accept chapter 171 section 1 of the Acts of 1995, which when approved allows call fire fighters to receive creditable service pursuant to G.L. c. 32 4(2)(b). (Resp. Ex. 4)
8. The Town of Groveland Personnel Procedures Manual stated that there were four authorized positions established by the town. They were: Full-Time Permanent Position with Benefits, Part-time Permanent Position with Benefits, Part -Time Position without benefits and Temporary Position with Benefits. (Pet. Ex. 3, pp. 2-3)
9. The Personnel Procedures Manual provided that: “All employees must belong to the Essex Regional Retirement System or the defined Contribution Plan….membership in the system [ERRS] is mandatory for all employees who are regularly employed at least 20 hours a week.” (Pet. Ex. 3, p. 16)
10. The Personnel Procedures Manual provided that “All employees who work at least twenty (20) hours each week continually throughout the year or who are officially retired from the town are eligible for medical insurance.” (Pet. Ex. 3, p. 17)
11. According to the Town of Groveland Assistant Treasurer/Collector, The Town of Groveland considered the Petitioner a “full time employee who works part-time.” (Pet. Ex. 5)
12. From 1985 until 2009, the Petitioner contributed to an OBRA account. (Pet. Ex. 5)
13. In 2009, the Petitioner began contributing to ERRS. (Pet. Ex. 5)
14. On March 27, 2013, Patricia Rogers, Groveland’s Assistant Treasurer/Collector wrote that “From 1993 thru 2008 [Petitioner] worked 15 hours a week.” (Resp. Ex. 5)
15. Rogers does not have records as to the number of hours the Petitioner worked, because her department did not keep track of his hours. (Rogers Test. Tr. 90-91)
16. On May 14, 2013, the Respondent wrote a letter to the Petitioner outlining its understanding of his service. The Respondent notified the Petitioner that it would cost $9,448.50 to purchase the additional service at issue and stated: “Please be aware that once you are retired you may not remit payment to ERRS in order to purchase prior service.” (Res. Ex. 1)
17. The Petitioner did not pay the buyback funds demanded by the Respondent. (Tr. 63, 66)
18. The Petitioner appealed the Respondent’s actions to DALA on May 29, 2014. (Res. Ex. 2)
19. The Petitioner did not file a retirement application or elect a retirement option. (Resp. Ex. 8)
20. On March 31, 2014, the Respondent voted to award the Petitioner a retirement benefit under Option B effective as of May 31, 2013, the date of his mandatory retirement. The Respondent estimated the monthly benefit would be $1,456.89. (Resp. Ex. 9)
21. The Petitioner filed a timely appeal of that decision on April 11, 2014. (Resp. Ex 10)

**Discussion**

 When a member of a public retirement system retires from public service, he is entitled to a superannuation retirement allowance that is based on several factors including years of creditable service. G.L. c. 32, § 1 defines creditable service as "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive.” Under certain circumstances, the retirement law allows members to purchase creditable service. Chapter 32, § 3(3) is one such provision. It provides, in part:

(3) Late Entry into Membership….[A]ny employee who, having or having had the right to become a member, 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; *provided, that during his present period of service he had previously been eligible for membership;* 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, … No such member shall be entitled to full credit for service rendered prior to the date of his becoming a member, unless before the date any retirement allowance becomes effective for him he shall have paid into the annuity savings fund of the system in one sum, or in instalments, upon such terms and conditions as the board may prescribe, make-up payments of an amount equal to that which would have been withheld as regular deductions from his regular compensation had he joined the system at his earliest opportunity, together with buyback interest. Upon the completion of such make-up payments such member shall be entitled to all creditable service to which he would have been entitled had he joined the system when first eligible to become a member….

(Emphasis added). The central issue presented in this matter is whether the Petitioner was eligible for membership in ERRS while he worked as fire chief prior to becoming a member of the ERRS.[[1]](#footnote-1)

The Supreme Judicial Court has said that, pursuant to Massachusetts retirement law: “The board possesses full jurisdiction to determine when non-full-time employees become eligible for membership in the [Essex] retirement system.” *Retirement Board of Stoneham v. Contributory Retirement Appeal Board*, 476 Mass. 130, 137 (2016); citing G.L. c. 32, § 3(2)(d). While the criteria for membership of part-time employees may be reflected in a regulation or written policy of the Board, it need not be. *William Bailey v. Lowell Retirement System*, CR-11-440 at 5 (DALA 7/10/2015). According to the credible testimony of Mr. Kostro, in April 2012, the Respondent adopted a policy requiring that, in order to become a member of the ERRS, the Petitioner had to work a permanent 20 hour a week schedule. (Finding 14). There was no evidence of any earlier policy that addressed non-fulltime employees’ eligibility in ERRS.

The Petitioner had the burden of proving by a preponderance of the evidence that he is entitled to purchase creditable service under § 3(3) and, therefore, he had to prove that he worked a permanent 20-hour a week schedule. *See Baker v. Massachusetts Teachers' Retirement Sys.*, CR-08-51 at 8 (DALA July 20, 2012) (claimant has burden of proving entitlement to c. 32 benefits); *citing Narducci v. Contributory Retirement Appeal Bd*., [68 Mass. App. Ct. 127](http://sll.gvpi.net/document.php?id=sjcapp:68_mass_app_ct_127), 136 (2007); *Lisbon v. Contributory Retirement Appeal Bd.*, [41 Mass. App. Ct. 246](http://sll.gvpi.net/document.php?id=sjcapp:41_mass_app_ct_246), 255 (1996)). He failed to meet his burden. “It may be that the Town of [Groveland] maintained inadequate records for the purposes of this inquiry, but that does not relieve [the Petitioner] of his burden to provide proof of when he worked.” *Baxter v. Essex Reg. Retirement Bd*., CR-07-182 at 7 (DALA July 20, 2010).

The Petitioner’s uncorroborated testimony is not sufficiently reliable to prove that he worked a permanent 20-hour a week schedule. In an administrative adjudicatory hearing, "evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2). The Petitioner testified that he has copies of time sheets that he said show that he worked 40 hours a week as fire chief in 2007 and after, but he failed to produce them at the hearing, and, therefore, I did not give any weight to his testimony concerning the contents of the records.

The Petitioner’s argument that, because he received health insurance during the period in question from the Town of Groveland, he must have been working at least 20-hours a week does not persuade me. Chapter 32B of the General Laws and the Town of Groveland’s Policy and Procedures manual do not prohibit the Town of Groveland from providing medical insurance to employees who work less than 20 hours a week. *See Shea v. Board of Selectmen Ware*, 4 Mass. App. Ct. 333, 335-336 (1993). I find the Petitioner’s argument on this point no more persuasive than I would find an argument that said: The Policies and Procedures Manual mandates membership in ERRS for employees who work 20 hours a week. Since the Petitioner was not a member of ERRS, he must not have worked 20 hours a week.

The Petitioner posits that statements made by Board staff contained in emails (Pet. Ex. 4) establish that Board staff believed, on February 9 and 11, 2009, that the Petitioner should have been a member of ERRS prior to 2009. This argument fails to persuade me for three reasons. First, I found these emails were evidence that the staff were investigating the Petitioner’s status. They did not have documentation of his hours and were trying to gather it. In addition, I note that the policy concerning part-time membership was not adopted until 2012 and so the staff could not have been interpreting that policy in 2009. Moreover, “errors by agency staff in excess of the proper exercise of agency authority do not bind that agency to a course of action not authorized by law.” *Susan Delorme v. Shrewsbury Ret. Bd.,* *et al*, CR-13-540 at 8 (DALA February 24, 2017) *citing Moynahan v. Essex Ret. Bd.*, Essex Superior Court, Civil Action No. 94-859-B (Sikora, J. October 1998) and *Doris v. Police Comm’r of Boston*, [374 Mass. 443](http://sll.gvpi.net/document.php?id=sjcapp:374_mass_443), 449-50 (1978).

 Nor did I find the Petitioner’s argument concerning the impact of statements made during the Town of Groveland Board of Selectman’s meetings convincing. Even, if the statement of one selectman that “the job is 20 hours a week” or some other statement contained in the minutes was probative on the issue of the Petitioner’s job duties, the statements were made in 2011 and, therefore, they have no probative value for the period prior to 2009. Reading all of the selectmen meeting minutes in evidence, I was not persuaded that any of the selectmen thought the fire chief position was, in fact, a permanent 20-hour a week schedule. Rather, it appeared to me based upon my reading of the minutes, that, given the tough fiscal times that the selectmen were confronting, they were determining if they could justify providing the Petitioner with health benefits when it was unclear how many hours a week he was working in 2011.

Finally, the Petitioner’s argument that the Respondent should grant him the creditable service, because “because the Town of Groveland did not comply with state law and its own personnel policy…” (Petitioner’s brief p. 1) is not persuasive, because it ignores the fact that ERRS is independent of the Town of Groveland. As the Massachusetts Appeals Court wrote: “On this question the cases have spoken: a retirement board established under G.L. c. 32 is independent of the city or town whose employees it serves.” *Everett Retirement Bd. v. Board of Asses. of Everett*, 19 Mass. App. Ct. 305, 308 (1985).

The Respondent’s decision to award the Petitioner’s retirement benefit under option B was also correct. G.L. c. 32, § 12(1) provides that:

If no election of an option is made or if none is in effect as provided for in this section, the retirement allowance of such member shall be paid in accordance with the terms of option (b) of subdivision (2) of this section.

In this case, the Petitioner did not elect any option and, therefore, the statute mandates that the Petitioner’s retirement allowance be paid in accordance with option B.

**CONCLUSION AND ORDER**

 For the reasons outlined above, the Respondent’s decisions denying him the opportunity to purchase the service at issue and awarding his retirement allowance under option B are **AFFIRMED** and the Petitioner’s appeals are **DISMISSED**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Edward B. McGrath, Esq.

Chief Administrative Magistrate

Dated: October 20, 2017

1. The Respondent contends that since the Petitioner did not pay for the service before he retired, he cannot buy it. As I decide that the Petitioner was not entitled to the service, I do not address that argument. [↑](#footnote-ref-1)