COMMONWEALTH OF MASSACHUSETTS

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

**Joe Cook**,

 Petitioner

v. Docket No. CR-13-262

 Date Issued: November 2, 2018 **Northampton Retirement Board**,

 Respondent

**Appearance for Petitioner:**

*Pro se*

157 Lincoln Avenue

Amherst, MA 01002

**Appearance for Respondent:**

James H. Quirk, Jr., Esq.

P.O. Box 268

Yarmouthport, MA 02675

**Administrative Magistrate:**

**Judithann Burke, Esq.**

**SUMMARY OF DECISION ON REMAND**

The Northampton Retirement Board had originally denied Petitioner’s request to purchase creditable service for the period from November 17, 1987 through June 26, 1989, prior to his establishing membership in the Northampton Retirement System, because he was an independent contractor, and not an employee, of Northampton during that time. After a hearing pursuant to CRAB’s April 2018 Remand Order, it was established the Petitioner was an employee of the City of Northampton during that period, and, he is entitled to purchase his non-membership service.

**ORIGINAL DECISION**

 The Petitioner, Joe Cook, appealed timely under G.L. c. 32, § 16(4) the April 24, 2013 decision of the Respondent, the Northampton Retirement Board (the Board), which denied his request to purchase creditable service for the period from November 17, 1987 to June 26, 1989, prior to his establishing membership in the Northampton Retirement system. (Exhibit 1.) The Petitioner filed a timely appeal on May 3, 2013. (Exhibit 2.)

I initially scheduled a hearing for March 30, 2015. However on March 11, 2015, the parties requested a continuance of the hearing to sometime after August 3, 2015. I granted this request and issued a Pre-Hearing Order on July 17, 2015, ordering the parties to submit Pre-Hearing Memoranda. I received the Petitioner’s Pre-Hearing Memorandum, with five proposed exhibits, on August 21, 2015. (Attachment A.) I received the Respondent’s Pre-Hearing Memorandum, with five proposed exhibits, on September 14, 2015. (Attachment B.)

The following is the initial Decision that I rendered on October 16, 2015:

After carefully reviewing the evidence presented by the parties, I have determined that there are no disputed issues of material fact and that the Petitioner has failed to state a claim for which relief may be granted. I therefore decide this matter pursuant to 801 CMR 1.01(7)(g)(3).

 I have marked the following documents as exhibits:

 Ex. 1 Letter from David Shipka, Retirement Administrator for the Northampton Retirement Board, to Mr. Cook, dated April 24, 2013, denying Mr. Cook’s request to purchase creditable service from November 17, 1987 to June 26, 1989;

 Ex. 2 Mr. Cook’s letter of appeal, dated May 3, 2013;

 Ex. 3 Draft of the proposed professional services contract between Mr. Cook and the City of Northampton, dated November 12, 1987;

 Ex. 4 Miscellaneous Transactions form showing credit towards vacation time accrual for Mr. Cook’s professional services contract time;

 Ex. 5 Memorandum from Kathleen G. Fallon, Asst. City Solicitor of Northampton, to Northampton Mayor David B. Musante, Jr., dated June 15, 1990, describing a proposal to restructure the positions and job descriptions within the Northampton Law Department;

 Ex. 6 Notification of Payroll Change, dated June 28, 1989, showing Mr. Cook’s initial appointment as a City employee to the position of Contract Administrator;

 Ex. 7 The United States Internal Revenue Service’s “Independent Contractor Test”;

 Ex. 8 Northampton Board of Retirement “New Enrollment Blank,” dated July 27, 1989 and completed by Mr. Cook;

 Ex. 9 Mr. Cook’s personnel record from the City of Northampton; and

 Ex. 10 Decision in *Kim v. Northampton Retirement Board*, CR-95-954 (DALA 1996).

**FINDINGS OF FACT**

Based on the evidence presented by the parties, I make the following findings of fact:

1. Mr. Cook and the City of Northampton (the City) executed a Professional Service Contract on November 17, 1987. (Exhibits 1, 3, and 9.)
2. Mr. Cook was hired as an independent contractor to perform the job of Contract Administrator for the City. (Exhibit 3.)
3. Under the terms of the professional services contract, Mr. Cook was required to submit bills bi-weekly, and was compensated in equal bi-weekly payments in accordance with the City’s usual bills payable procedure. (Exhibit 3.)
4. When Mr. Cook signed the professional services contract he knew that there was a difference between an employee and an independent contractor. (Attachment A.)
5. Under the terms of the professional services contract, Mr. Cook worked under the direct supervision of the Law Department of the City. (*Id.*)
6. Under the terms of the professional services contract, Mr. Cook was not a member of the Northampton Retirement System, and no state or federal taxes were withheld by the City from the payments he received under the contract. (*Id*.)
7. Under the terms of the professional services contract, Mr. Cook was entitled to paid vacation and holidays, and he accrued paid sick time. (*Id*.)
8. Subsequent to entering into the professional services contract, Mr. Cook received a license to practice law in Massachusetts. (Exhibits 5 and 9; Attachment A.)
9. On June 28, 1989, Mr. Cook was added to the City’s payroll as an employee in the position of Contract Administrator. (Exhibits 6 and 9.)
10. Mr. Cook filed for membership in the Northampton Retirement System on July 27, 1989, with a service start date of July 1, 1989. (Exhibit 8.)
11. In the course of completing this application, Mr. Cook answered “No” to the question “Have you ever been previously employed by this governmental unit?” (*Id*.)
12. Mr. Cook first started having retirement contributions deducted from his compensation in 1989. (Exhibit 9.)
13. Subsequent to being hired as an employee in 1989, Mr. Cook was credited with the period he worked under the professional services contract for purposes of vacation accrual. (Exhibits 4 and 9.)
14. On March 22, 2013, Mr. Cook applied to purchase creditable service for the period of November 17, 1987 to June 26, 1989. (Exhibit 1.)
15. On April 24, 2013, the Board denied his request on the ground that he was an independent contractor, and not an employee, of the City during this period. (*Id.*)
16. On May 3, 2013, Mr. Cook appealed the Board’s decision to the Division of Administrative Law Appeals. (Exhibit 2.)

**CONCLUSION AND ORDER**

After careful consideration of the evidence presented in this case, the Board’s denial of Mr. Cook’s request to purchase creditable service for the period of November 17, 1987 to June 26, 1989 is affirmed. Mr. Cook is not eligible to purchase this service because he was an independent contractor during this time, and not an employee of Northampton as required by G.L. c. 32. *See* G.L. c. 32, § 1.

When a member retires from public service, he is entitled to a superannuation retirement allowance that is based in part on the amount of his creditable service, which G.L. c. 32, § 1 defines 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.” (Emphasis added).

One form of “other service” that can qualify as creditable service is previous service rendered as an employee in the governmental unit by which a member is presently employed but before he became a member of the retirement system. G.L. c. 32, § 3(5). However, in order to purchase credit under § 3(5), Mr. Cook must establish that he was an employee of Northampton. *See Trivers v. Contributory Retirement Appeal Bd.*, 2009 WL 102847, \*1 n.2 (Mass. App. Ct. 2009)(“ in order to purchase creditable service under the public pension system, the plaintiff must have worked as an ‘employee’ as defined in G.L. c. 32, § 1.”). Section 1 defines “employee,” in pertinent part, as follows:

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, including members of the police and fire departments, teachers, and employees of any free public library or any public museum maintained in any city or town. . . and also including officials and public officers so paid whether employed, appointed or elected by popular vote for stated terms or otherwise.

 It is well settled that service performed as an independent contractor cannot be purchased as creditable service. *Hebert v. Springfield Retirement Board*, CR-05-491 (DALA 2006); *Locke v. Hampden County Retirement Board*, CR-06-1136 (DALA 2010), *aff’d* CR-06-1136 (CRAB 2010).

 An analysis of the totality of the circumstances surrounding Mr. Cook’s relationship with the City between November 17, 1987 and June 26, 1989 leads to the conclusion was not an employee as defined in G.L. c. 32, § 1 during this time. Mr. Cook signed and was a party to a professional services contract that clearly stated that he “shall be deemed an independent contractor and shall not be considered an employee of the City of Northampton.” (Exhibit 3.) Mr. Cook himself has admitted that he was aware of the distinction between an employee and an independent contractor when he signed the contract. (Attachment A) (“When the Petitioner signed the professional services contract the Petitioner understood that there was a difference between an employee and an independent contractor.”) Furthermore, when Mr. Cook completed his New Entrant Enrollment Blank on July 27, 1989 for membership in the Northampton Retirement System, he answered “No” to the question “Have you ever been previously employed by this governmental unit?” (Exhibit 8.) These factors are evidence of a conscious and willing decision by Mr. Cook to accept employment as an independent contractor.

The contract specifically provided that Mr. Cook would not be a part of the Northampton Retirement System, and that the City would not withhold any state or federal taxes from payments made to him under the contract. (*Id.*) Accordingly, Mr. Cook was responsible for making his own state and federal tax payments, as well as payments to social security. It is well settled that one cannot be an employee under G.L. c. 32, § 1, eligible for retirement benefits, and yet still contribute to Social Security. *See, e.g., Allen v. Teachers’ Retirement Bd.*, CR-02-881 (DALA 2003) (“She cannot receive both social security benefits as well as contributory retirement system benefits for the same work. If she is a consultant able to have social security deductions as self-employed, then she cannot be a regular employee of a governmental unit of the Commonwealth.”).

Finally, the fact that Mr. Cook was hired to be the Contracts Administrator, and subsequently an Assistant City Solicitor upon passing the bar – both positions which require significant expertise in analyzing contract terms – supports the conclusion that he should be held to the terms of the professional services contract that he signed in 1987.

 While it is true that previous decisions have held members to be employees rather than independent contractors when one or two of the above factors are present, there have been no such decisions when all of the above factors have been present. *See Suzuki v. Arlington Contributory Retirement Appeal Bd.*, CR-08-119 (CRAB 2010) (holding that school tutor who signed contract stating she was an “independent contractor” and who contributed to Social Security was nonetheless an “employee” under Chapter 32); *Crowley v. Boston Retirement Bd.*, CR-03-258 (DALA 2005), *aff’d*, *Crowley v. Contributory Retirement Appeal Bd.*, 2008 Mass. App. Unpub. LEXIS 405 (Mass. App. Ct. 2008) (holding that city attorney who contributed to Social Security was an “employee” under Chapter 32, and not an independent contractor).

 Here, Mr. Cook signed a contract stating that he was an independent contractor and would receive no retirement benefits, and he contributed to Social Security. Furthermore, he was engaged in a profession (attorney) and a position (Contracts Administrator/Asst. City Solicitor) that required skill in evaluating contracts. Based on these factors, it would be unreasonable to allow Mr. Cook to avoid the consequences of the agreement into which he entered in 1987. Mr. Cook has failed to establish that he was an employee, and not an independent contractor, of Northampton during the period in question. He is therefore ineligible to purchase the desired creditable service.

In conclusion, the Board properly determined that Mr. Cook is ineligible to purchase creditable service under G.L. c. 32, § 3(5) for service rendered from November 17, 1987 to June 26, 1989, because he was an independent contractor during this period. The Board’s decision is therefore affirmed.

 CRAB Remand Order

 On April 2, 2018, the Contributory Retirement Appeal Board vacated the October 2015 DALA Decision and remanded this case for an evidentiary hearing and further findings of fact in order to explore the Petitioner’s duties as an independent contractor, and, the degree of control exercised over his work by the City of Northampton. CRAB noted that helpful facts might include how the Petitioner’s work was assigned and whether he was required to complete it in a particular sequence; to what extent he received training from the city; whether he underwent performance evaluations, whether he needed approval for time off, whether he hired and supervised other staff or participated in hiring decisions, whether there was uncertainty as to continued funding for his position, and whether his position or the extent of his supervision changed once he became a regular full-time employee. CRAB also noted that the previous record was unclear as to whether the Petitioner’s hiring in 1989 occurred because of his bar admission (with which it was essentially contemporaneous), or whether the position was moved in house in anticipation of enactment of the Uniform Procurement Law, which would require a Chief Procurement Officer. (Attachment E.)

 I held the remand hearing on June 7, 2018 in the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. I incorporated the original exhibits and Decision into this case. The Petitioner testified in his own behalf. The Petitioner also presented the testimony of his former secretary, and the secretary of the former Assistant City Solicitor Kathleen Fallon, Susan Stone. The Board presented no witnesses. The hearing was digitally recorded. The parties filed prehearing and post-hearing memoranda of law. (Respondent-Attachments A and C-Petitioner-Attachments B, with additional Exhibit 11, and D.) The last of the submissions was received on July 5, 2018, thereby closing the record.

**ADDITIONAL FINDINGS OF FACT**

1. For the period from November 17, 1987 to June 26, 1989, the Assistant City Solicitor, Kathleen Fallon, in the City of Northampton monitored the Petitioner’s use of sick and vacation time and personal leave. The Petitioner’s schedule was adjusted with the permission of Assistant City Solicitor Fallon per the personnel policies of the city regarding extra hours that may be required outside of the normal working day. (Petitioner and Stone Testimony.)
2. For the period from November 17, 1987 through June 26, 1989, the Petitioner was provided with an office in the City of Northampton Law Department. Further, he was provided with all tools and supplies to carry out his work. (*Id.*)
3. Also during the time period at issue, the Petitioner was afforded reimbursement for all expenses that he incurred during his work for the City of Northampton. (*Id.*)
4. The Petitioner did not participate in hiring decisions. (*Id.)*
5. During the same period, the Petitioner received training from Assistant City Solicitor Fallon, both in the form of review of drafted documents, and, attendance at hearings and depositions to ensure proper legal practice. Further, the Petitioner received supervision from Assistant City Solicitor Fallon during weekly meetings. Progress on existing tasks was reviewed and new assignments were delegated by Fallon. There was no formal performance evaluation review system in place during said period. (*Id.*)
6. The Petitioner did not work for any other person or entity other than the City of Northampton during the time period in question. (*Id.*)
7. After the Petitioner became a member of the Northampton Retirement System, all of his day to day activities within the Law Department remained the same. The level of supervision remained the same. (*Id.*)

 **CONCLUSION ON REMAND**

 The primary concern of the Contributory Retirement Appeal Board, as set forth in the April 2, 2018 Remand Order, is the level of control the City of Northampton exercised over the Petitioner while he performed his duties between November 17, 1987 and June 26, 1989. The evidence produced at the June 2018 remand hearing reflects that the Assistant City Solicitor, Kathleen Fallon, exercised supervisory and monitoring functions in relation to the Petitioner during that period. Ergo, he has met his burden of proving that he was, in actuality, an employee of the City of Northampton and he is entitled to purchase his prior service. *Cf. Crowley v. Contributory Retirement Appeal Board*, 73 Mass. App. Ct. 1103 (October 31, 2008.)

 The Petitioner was accountable for all of his time, both on vacation or other leave and sick time. He met with Fallon during weekly meetings at which time she provided feedback on his work product and delegated new assignments. Fallon also attended hearings and depositions and critiqued the Petitioner’s performance and provided more feedback. It must be noted that there was no formal performance evaluation system in the City of Northampton from November 1987 through June 1989. *See Casey v. Department of Health and Human Services,* 807 F. 3d 395, 404-405 (1rst Cir. 2015.)

 The Petitioner did not participate in hiring decisions. There is minimal evidence as to whether he became a member of the retirement system in 1989 because of his bar admission, however, the evidence does reflect that his duties remained the same after he became a member in late June 1989. *Contra Salmon v. Teachers’ Retirement System,* CR-07-484 (Division of Administrative Law Appeals October 16, 2009; no Contributory Retirement Decision). There is no evidence as to whether the funding of his position was uncertain at any point.

 Based on the foregoing, *i.e.,* the credibly established level of supervision exerted over the Petitioner’s work in the City of Northampton from November 1987 through June 1989, the decision of the Northampton Retirement Board denying his request to purchase his prior service from that period is reversed. He was indeed an employee of the city. This case is remanded to the NRB for purposes of allowing the Petitioner to purchase his prior service.

 So Ordered.

 BY:

 Division of Administrative Law Appeals,

 Judithann Burke

 Administrative Magistrate

DATED: November 2, 2018