COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

 One Congress Street, 11th Floor

 Boston, MA 02114

 (617) 626-7200

**KATHLEEN COSTELLO-GORDON**, Fax: (617) 626-7220

 Petitioner **www.mass.gov/dala**

 Docket No: CR-15-331

 *v.* July 12, 2017

**STATE BOARD OF RETIREMENT**,

 Respondent

**Appearance for Petitioner:**

Albert Gordon, Esq.

1350 Main Street, Suite 1003

Springfield, MA 01103

**Appearance for Respondent:**

 Candace L. Hodge, Esq.

 State Board of Retirement

 One Winter Street, 8th Floor

 Boston, MA 02108-4747

**Administrative Magistrate:**

Angela McConney Scheepers, Esq.

**SUMMARY OF DECISION**

The State Board of Retirement’s determination that the Petitioner is ineligible to participate in the Employee Retirement Incentive Program (ERIP) is affirmed. St. 2015, c. 19, § 3. The Petitioner worked for the Department of Children and Families as a social worker for more than ten years, a position classified as Group 2 pursuant to G. L. c. 32, § 3(2)(g). St. 2012, c. 139, §62.

**DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Kathleen Costello-Gordon, appealed from the June 18, 2015 decision of the Respondent, State Board of Retirement (Board), to classify her in Group 2 rather than Group 1, thereby making her ineligible for participation in the Employee Retirement Incentive Program (ERIP). Ms. Costello-Gordon appealed on July 1, 2015.

I held a hearing on June 6, 2017 at the Division of Administrative Law Appeals (DALA), One Congress Street, Boston, MA. I admitted eleven exhibits (Exhibits 1-11) into evidence. I marked the Petitioner’s Pre-hearing Memorandum “A” for identification, and marked the Respondent’s Pre-hearing Memorandum “B” for identification. Ms. Costello-Gordon testified on her own behalf. The hearing was digitally recorded.

 I left the record open in order for the parties to submit additional evidence. On July 5, 2017, the Petitioner submitted a supplemental memorandum, whereupon the administrative record closed.

**FINDINGS OF FACT**

From the Petitioner’s testimony and the exhibits submitted into evidence, I make the following findings of fact:

1. Kathleen Costello-Gordon was employed as a social worker by the Department of Children and Families (DCF) from February 4, 1996 until her retirement in January 2016. Ms. Costello-Gordon retired with the title of Social Worker D, working as a screening supervisor. (Exhibit 3; Testimony.)
2. As a screening supervisor, Ms. Costello-Gordon assigned cases to five social service staff. After the social service staff performed intake about the abuse and neglect of children, Ms. Costello-Gordon reviewed the reports, made risk assessments and determined how the social service staff would proceed. (Exhibit 5; Testimony.)
3. The Form 30 job description for Social Worker D at the time of Ms. Costello-Gordon’s ERIP application provided the following “General Statement of Duties and Responsibilities”:

[Incumbent] makes case assignments to social service staff; supervises substitute cases; homefinding and adoption services provided by social workers; supervises and evaluates the level and quality of intake, assessment, service planning and case management services; coordinates case reviews; approves major casework decisions; reviews departmental reports; provides orientation for new employees; identifies training needs of employees; establishes and maintains effective relationships with courts, collateral agencies and providers; performs related duties as required.

(Exhibit 7.)

1. The Form 30 included the following “Detailed Statement of Duties and Responsibilities”:
* Provides individual and group information, consultation, training and case review staff of own and/or other agencies.
* Ensures that subordinates are meeting the quantitative and qualitative goals set for them.
* Conducts evaluations of subordinates and the quality and effectiveness of their client service plans.
* May approve transfer or discharge of clients.
* Conducts assessment and intake studies and develops preliminary service plans for applicants for services.
* Reviews assessment and intake studies and develops preliminary service plans for applicants for services.
* Provides supervision of case management activities.
* Diagnoses clients’ needs and develops, implements and evaluates service plans for clients as part of consultation with employees of lower grade and for own clients.
* Makes case assignments to assigned direct social service staff.
* Participates with area management staff in area planning, budgeting, resource development and evaluation.

 (Exhibit 7.)

1. The Form 30 provided that “1 or more social workers – average of 5” reported to the position of Social Worker D. (Exhibit 7.)
2. Ms. Costello-Gordon’s supervisors used the performance criteria listed in the  FY 2013 Employee Performance Review Form (EPRF) to evaluate her performance of her primary job duties. (Exhibit 6.)
3. The EPRF also listed four duties:
4. “Provide weekly scheduled clinical supervision in accordance with DSS Policy #86-011 to ensure that workers carry out their responsibilities in an effective and timely manner.”
5. Complete “administrative casework related activities as required to ensure that quality services are being provided.”
6. Complete “non-casework related administrative activities as required.”
7. “Provide supportive leadership by encouraging and supporting ongoing staff development and training to enhance workers’ knowledge, skills and expertise.”

(Exhibit 6.)

1. The supervisor awarded Ms. Costello-Gordon ratings of “Excels” for both her six-month progress reviews and her annual reviews. (Exhibit 6.)
2. In 2015, Ms. Costello-Gordon filed a classification request with the Board. (Exhibit 3.)
3. On May 20, 2015, the Board responded. The Board recommended that Ms. Costello-Gordon provide any information that would be helpful in her request. The Board also enclosed a Group Classification Questionnaire. (Exhibit 3.)
4. The Board received Ms. Costello-Gordon’s completed questionnaire on June 4, 2015. (Exhibit 4.)
5. On June 18, 2015, the Board notified Ms. Costello-Gordon of its decision to classify the Social Worker D position in Group 2, thus making her ineligible for participation in ERIP. (Exhibit 1.)
6. On July 1, 2015, Ms. Costello-Gordon timely appealed the Board’s decision to DALA. (Exhibits 1 and 2.)
7. On October 8, 2015, the Board sent Ms. Costello-Gordon an estimate of her retirement benefits based upon superannuation retirement from Group 1.[[1]](#footnote-1) (Exhibit 11.)
8. On October 21, 2015, Ms. Costello-Gordon filed her superannuation retirement application. She retired in January 2016. (Exhibit 10; Testimony.)

**CONCLUSION AND ORDER**

The Board’s denial of Ms. Costello-Gordon’s application for ERIP is affirmed.

To be eligible for ERIP, an employee must be employed by an executive department, be a member of the State Employee Retirement System, and be classified in Group 1 pursuant to G.L. c. 32, § 3(2)(g). St. 2015, c. 19, § 3(b).

G.L. c. 32, § 3(2)(g) classifies members into groups for retirement purposes. Group 1, the classification sought by Ms. Costello-Gordon, includes “officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified.” G.L. c. 32, § 3(2)(g). Chapter 32, §3(2)(g) was amended in July 2012 to add the following language to the Group 2 classification, “employees of the department of children and families holding the title of social worker A/B, C or D or successive titles who have been employed in such titles for 10 years or more.” St. 2012, c. 139, §62. St. 2012, c. 139, §62 was approved on July 8, 2012 and by § 229 made effective as of July 1, 2012. The statutory change reflects the notion that the General Court had begun to view all Social Worker positions as those involving the direct care, custody, instruction, or other supervision over the DCF children in their caseloads.” *Dellaguistina v.* *Contributory Retirement Appeal Bd*., CR-11-699 (DALA 2014).

Ms. Costello-Gordon’s retirement date is significant because until the amendment took effect in 2012, classification for DCF social workers was “properly based on the sole consideration of [the applicant’s] duties at the time of retirement.” *Maddocks v. Contributory Retirement Appeal Bd*., [369 Mass. 488](http://sll.gvpi.net/document.php?id=sjcapp:369_mass_488), 494 (1975).

The amendment was not retroactive in its reach. *Anderson v. Mass. Teachers’ Retirement System,* CR-97-1543 (DALA), *aff’d* (CRAB 1999). DALA found that those social workers retiring before the amendment took effect were properly classified in Group 1, unless they could show under the statutory provision before the effective date of the amendment that their

… regular and major duties require them to have the care, custody, instruction or other supervision of parolees or persons who are mentally ill or mentally defective or defective delinquents or wayward children …

 M.G.L. c. 32, § 2(g).

Regular and major duties must comprise at least fifty-one per cent (51%) of one’s duties. *See McCalla v. State Bd. of Retirement,* CR-07-1040 (DALA 2011).

 In *Harding v. State Bd. of Retirement*, the Chief Magistrate found, “While in 2012, the Petitioner’s position, Clinical Social Worker A/B, was added to the list of positions in Group 2, that change, effective July 1, 2012, does not apply to his case; because he retired on October 1, 2010.” *Harding v. State Bd. of Retirement*, CR-10-788 (DALA 2016). In *Whitman v. State Bd. of Retirement*, the magistrate found that the petitioner was ineligible for the Group 2 provision adding Social Workers A/B, C and D with ten years of experience because she retired prior to the amendment’s effective date. *Whitman v. State Bd. of Retirement*, CR-12-169 (DALA 2012). In *Bombaci v. State Bd. of Retirement,* the magistrate found that the DCF social worker was not entitled to Group 2 classification under the 2012 amendment of G. L. c. 32, §3(2)(g) because she retired before the amendment went into effect. *Bombaci v. State Bd. of Retirement,* CR-11-324 (DALA 2016).

 “Thus it would appear that the statute reflected a change in the legislature’s judgment as to who should be [classified] as a Group 2 employee, and was not simply a clarification of the existing statute.” *Bombaci, supra*.

Ms. Costello-Gordon testified that she had always been in Group 1. She testified that she performed supervisory duties in her position as a Social Worker D, and that her regular and major duties did not involve care, custody or control of mentally ill children in DCF care. This assertion is borne out by her job description and her supervisor’s reviews.

According to the Form 30 “General Statement of Duties and Responsibilities,” the incumbent of the position had the responsibility of assigning cases to social service staff, supervising substitute cases and supervising home finding and adoption services provided by social workers. The incumbent also supervised and evaluated the level and quality of intake, assessment, service planning and case management services, coordinated case reviews, approved major casework decisions and reviewed departmental reports. The incumbent also provided orientation for new employees and identified the training needs of employees.

According to the Form 30, five separate staff positions reported to the Social Worker D position. Ms. Costello-Gordon’s FY 2013 EPRF shows that her supervisor evaluated her abilities to implement DCF policies, supervise the staff, new employees and interns. Based on her duties at the time of retirement, it is possible that Ms. Costello-Gordon may indeed have been classified as Group 1 before the effective date of the amendment.

Ms. Costello-Gordon also argues that the Board informed her that she was in Group 1 when it mailed her an “estimate of retirement benefits based upon superannuation retirement from Group 1.” The October 8, 2015 document specifically states on its face that it is an estimate, and proclaims in capital letters in the last paragraph, “Your actual benefit will be determined at retirement after all records have been verified. The receipt of this estimate does not guarantee that you are eligible to retire.” This is not a document upon which Ms. Costello-Gordon can rely.

Chapter 19 of the Acts of 2015, ERIP allows certain eligible Group 1 employees to receive enhanced retirement benefits. Under the provisions of the amendment, if Ms. Costello-Gordon had worked as a DCF social worker for fewer than ten years and performed the same regular and major duties, she may have been eligible for Group 1 status. Because she worked as a DCF social worker for more than ten years, she was properly classified in Group 2.

If Ms. Costello-Gordon were classified in Group 1 and found eligible to participate in ERIP, she would have received five years of creditable service added to her total service, thus increasing her retirement allowance. Ms. Costello-Gordon is in effect seeking equitable relief since M.G. L. c. 32 makes no provision for placing her in any group but Group 2. Neither the Board nor DALA has the authority to employ an equitable remedy in contradiction to the contributory retirement law. *See Early v. State Bd. of Retirement*, 420 Mass. 836 (1995); *Petrillo v. Public Employee Retirement Admin*., CR-92-731 (DALA), *aff’d* (CRAB 1993).

The decision of the Board classifying Ms. Costello-Gordon in Group 2, deeming her

ineligible for ERIP, is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Angela McConney Scheepers

Administrative Magistrate

DATED: July 12, 2017

1. The estimate stated in the last paragraph in capital letters, “Your actual benefit will be determined at retirement after all records have been verified. The receipt of this estimate does not guarantee that you are eligible to retire.” (Exhibit 11.) [↑](#footnote-ref-1)