COMMONWEALTH OF MASSACHUSETTS

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

**Susan Delorme,**

Petitioner

v. Docket No. CR-13-540

 Date Issued: February 24, 2017

**Shrewsbury Retirement Board**

**& Massachusetts Teachers’ Retirement System,**

Respondents

**Appearance for Petitioner:**

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**Appearance for Shrewsbury Retirement Board:**

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**Administrative Magistrate:**

 **Judithann Burke, Esq.**

**SUMMARY OF DECISION**

Pursuant to G.L. c. 32, § 1, 259 CMR 3.02 (2) & (3), and 807 CMR 4.02(1), the Petitioner was never entitled to membership in the Massachusetts Teachers’ Retirement System. She was properly enrolled in the Shrewsbury Retirement System from 2005 through the day of her injury and final day of work on March 17, 2011. The Teachers’ Retirement System properly declined to enroll her as a member between the summer of 2013, and the summer of 2015, and the Shrewsbury Retirement Board improperly revoked her membership in its system October 2013.

**DECISION**

 Pursuant to G.L. c. 32 § 16(4), the Petitioner, Susan Delorme, appealed from the October 23, 2013 decision of the Respondent, Shrewsbury Retirement Board (SRB) terminating her membership in the Shrewsbury Retirement System and tabling her application for Section 7 accidental disability retirement benefits. (Exhibit 1.) The Petitioner filed a timely appeal on November 4, 2013. (Exhibit 2.)

 On April 8, 2015, the Petitioner filed a Motion to Join a Necessary Party, the Massachusetts Teachers’ Retirement System. This motion was initially denied on April 10, 2015. On January 7, 2016, the Petitioner filed a second Motion to Join the Massachusetts Teachers’ Retirement System. This motion was allowed on January 15, 2016.

I held a hearing on May 19, 2016 at the offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. I admitted twenty-four (24) documents into evidence. After the close of the hearing on May 19, 2016, I marked two additional exhibits: Exhibit 25- SBR New Member Enrollment Form dated September 12, 2005 and Exhibit 26-Job Description of a Certified Occupational Therapist Assistant (COTA). The Petitioner was the only witness to provide hearing testimony. All parties submitted pre-hearing and post hearing memoranda of law. (SRB-Attachments A and D; MTRS-Attachments B and E; and Petitioner-Attachments C and F.) The last of the post-hearing submissions was received on July 18, 2016, thereby closing the case record.

**FINDINGS OF FACT**

 Based upon the testimony and documents submitted in this case, I hereby render the following findings of fact:

1. The Petitioner, Susan Delorme, born in 1951, was issued a license/certification from the Board of Allied Health Professionals (BAHP) for the position of Occupational Therapist Assistant. (Petitioner Testimony.)
2. The Petitioner began employment as a Certified Occupational Therapist Assistant (COTA) in the Shrewsbury Public Schools on September 12, 2005. She was enrolled in the Shrewsbury Retirement System (SRS) at that time. Throughout her employment in the Shrewsbury Public Schools, the Petitioner was a contributing member of the SRS. (Exhibit 25.)
3. At all times during her employment as a COTA in the Shrewsbury Public Schools, the Petitioner worked under the supervision of a licensed Occupational Therapist (OT). While she delivered occupational therapy services, the OT, and not the Petitioner, created the student evaluations and the Individual Education Plan (IEP) goals. The Petitioner’s sole role was to consult with the OT on a regular basis and to perform the treatments.[[1]](#footnote-1) (Petitioner Testimony and Exhibit 26.)
4. There is a different level of schooling and training required for OTs than there is for COTA’s. (Petitioner Testimony.)
5. At the time of the Petitioner’s enrollment in the SRS, the following regulation of the MTRS, that had been promulgated in 1987, was in effect:

807 CMR 4.02 (1) No individual shall be eligible for membership within the retirement system unless the retirement Board finds:

1. The individual is covered by a contractual agreement for employment with one or more school committees or boards of trustees or by any combination of such committees and boards;
2. The contractual agreement requires not less than half-time service;
3. The individual holds a certificate granted by the board of education, has been granted a waiver pending certification by the board of education, or has been approved as an apprentice teacher in accordance with the provisions of St. 1985, c. 188, 21; and
4. The individual has a contractual agreement which requires that the individual be certified by the board of education as a condition of employment.
5. In 1997, as a matter of administrative policy, the MTRS began accepting licensed OTs who worked in Massachusetts public schools for membership in the Teachers’ Retirement System. OTs were licensed and certified by the Board of Allied Health Professions and not the Department of Education. (Exhibit 6.)
6. The Petitioner alleges that she injured her head, neck and back when she slipped on ice in the parking lot of the school where she was working on March 17, 2011. She collected Workers’ Compensation benefits and filed an application for accidental disability retirement benefits on the basis of this claim in August 2012. (Exhibits 3, 13 and 14.)
7. Between the years 2013 and 2015, the MTRS erroneously accepted a few COTAs as members in the Teachers’ Retirement System. There was a mistaken understanding that these individuals were licensed in the same manner as OTs. Three of these individuals were originally enrolled in the Shrewsbury Retirement System. This resulted in some confusion among members of the SRB. As of March 2016, this error had been cured and the MTRS no longer enrolls COTAs. (Exhibit 12.)
8. In a letter dated May 1, 2013, counsel for the SRB requested that the MTRS accept the Petitioner as a member in that system and process her application for accidental disability retirement benefits. The MTRS declined this request. (Exhibits 4, 6 8, 10 and 20.)
9. In a letter dated October 25, 2013, the SRB notified the Petitioner’s attorney that it had voted to rescind the Petitioner’s membership and therefore would not take any formal action on her application for accidental disability retirement benefits. (Exhibit 1.)
10. The Petitioner filed a timely appeal on November 4, 2013. (Exhibit 2.)
11. In a letter to SRB counsel dated July 10, 2015, MTRS counsel noted that it was his understanding that a small number of COTAs had been mistakenly enrolled in the MTRS as the result of misrepresentations that they are licensed exactly like Occupational Therapists. Counsel noted that there would be no revision of the MTRS decision that the Petitioner was ineligible for membership in the Teachers’ Retirement System. (Exhibit 8.)

 **CONCLUSION**

 The Petitioner was never eligible for membership in the Massachusetts Teachers Retirement System (MTRS). Prior to 1987, the MTRS used a member’s job title alone to determine whether the individual met the statutory definition of “Teacher” in accordance with G.L. c. 32, § 1.[[2]](#footnote-2) After this narrow interpretation led to subjective eligibility determinations, MTRS enacted 807 CMR 4.02 in 1987 and set forth the eligibility criteria previously set forth herein in Finding of Fact #5 in order to include coordinators, school principals, department heads, school psychologists, school psychiatrists, school adjustment counselors, and assistant superintendents, notwithstanding the specific position titles.

 In 1997, the MTRS began accepting licensed OTs who worked in Massachusetts public schools, even though these members were not licensed by the Department of Education. This shift was sanctioned by the higher courts in Massachusetts as a permissible exercise of the MTRS’s authority to implement the terms of Chapter 32. *See Bruen v. Contributory Retirement Appeal Board,* Suffolk Superior Court, C.A. No. 2004-4307 (Connors, J. December 9, 2005) at p. 5 citing G.L. c. 32, § 20(5) and *Flanagan v. Contributory Retirement Appeal Board*, 51 Mass. App. Ct. 862, 868 (2001).

 “The fact that the Petitioner’s responsibilities as a COTA brought her into the classroom setting do not mandate that she was a teacher for purposes of retirement system membership. Instead, the statutory scheme authorized by the legislature to govern pensions under Chapter 32 authorizes the MTRS to implement its terms, consistent with the language of the statute.” *Bruen, supra* at p. 5, citing *Flanagan, supra* at p. 868. The Petitioner in this case was never formally employed as, and never functioned as an OT. OTs held a different licensure per the Board of Allied Health Professions regulations. They also completed a higher level of schooling. The Petitioner’s work as a COTA was always performed under the supervision of an OT. The OT was the person who created the IEPs and the individual student’s goals. Ergo, the Petitioner’s role was more akin to that of a teacher’s aide, assistant or tutor than that of a classroom teacher or any other position included in Chapter 32, § 1 or 807 CMR 4.02.

 It is a precedent in retirement case law that “assistant “ service, i.e. teaching assistant, research assistant, tutor, instructor, or other positions that involve some teaching but are not full-fledged “teachers” are not “teachers” within the definition of that term in G.L. c. 32, § 1. *See Pichney v. MTRS,* CR-12-46 (DALA 11/20/15) (No CRAB Decision) (Instructional Aide position did not qualify as service as an MTRS member for purposes of RetirementPlus); *Tosti v. MTRS*, CR-95-807 (DALA 9/13/96; CRAB 2/5/97) out of state service purchase case, research assistant not a teacher); *Bergin v. MTRS*, CR-94-1194 (DALA 4/12/96) (No CRAB Decision) (tutor in the Waltham public schools not a teacher); *Bevelander v. MTRS*, CR-95-749 (DALA 9/13/96; CRAB 2/5/97) out of state, part-time teaching assistant and full time instructor not “teacher”); and, *Lachance v. MTRS*, CR-00-1037 (DALA 8/10/01; CRAB 3/21/02) (out of state research assistant not a teacher.)

 In each of the cases cited, the employee performed services consistent with the conventional notion of a teaching assistant or research assistant and assisted the classroom teacher or professor with the coursework. Although the MTRs enrolls OTs as members in the system, there is no basis for expanding that enrollment to COTAs, much as there has been no basis for enrolling teaching assistants or tutors.

 The MTRS is also correct in its contention that it is not bound by the erroneous enrollment of a few other Shrewsbury OTAs. 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. *See Moynahan v. Essex Retirement Board*, Essex Superior Court, Civil Action No. 94-859-B (Sikora, J. October 1998) and *Doris v. Police Commissioner of Boston*, 374 Mass. 443, 449-50 (1978). G.L. c. 32, § 20(5) requires that when errors are detected by the retirement system, benefits shall, if “practicable,” be adjusted to correct the mistake. The MTRS has embarked on the more practicable and common sense solution to correct the enrollment error of OTAs prospectively. Thus, the MTRS is not estopped from declining to enroll the Petitioner as a member of the system.

 The resolution of this appeal is rendered without any analysis of the policy of proportional retirement system liability manifested in G.L. c. 32, § 3(8)(c). The SRB has effectively argued that the decision in *Haverhill Retirement System v. CRAB,* 82 Mass. 129 (2012) is not controlling as it does not pertain to accidental disability retirement cases. However, the Petitioner was at all pertinent times properly enrolled in the SRS and made contributions thereto for several years.

 In conclusion, the SRB erroneously rescinded the Petitioner’s membership in said retirement system and wrongfully opted to take no action on her application for

accidental disability retirement benefits. This matter is remanded to the SRB to correct these digressions and render its vote on her Section 7 application.

 So ordered.

Division of Administrative Law Appeals,

BY:

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 Judithann Burke, Esq.,

 Administrative Magistrate

DATED: February 24, 2017

1. 259 CMR 3.02 provides as follows:

**(2)** **Supervision of Occupational Therapy Assistants and Occupational Therapy Aides.** Adequate supervision of occupational therapy assistants and occupational therapy aides requires, at a minimum, that a supervising occupational therapist perform the following:

provide initial evaluation;

interpret available information concerning the individual under care;

develop plan of care, including long and short-term goals;

identify and document precautions, special problems, contraindications, anticipated progress, and plans for re-evaluation;

select and delegate appropriate tasks in the plan of care;

designate or establish channels of written and oral communication;

assess competence of supportive personnel to perform tasks;

direct and supervise supportive personnel in delegated tasks; and

re-evaluate, adjust plan of care when necessary, perform final evaluation and establish follow-up plan.

**(3) Supervision by Occupational Therapists.**

(a) Occupational Therapists must exercise their professional judgement when determining the number of supportive personnel they can safely and effectively supervise to ensure that quality care is provided at all times.

 (b) Licensed occupational therapy personnel must provide adequate staff to patient ratio at all times to ensure the provision of safe, quality care.

 (c) An occupational therapist must provide supervision to the following persons

 rendering occupational therapy services:

 1. occupational therapy assistants, and

 2. temporary license holders. [↑](#footnote-ref-1)
2. G.L. c. 32, § 1 defines “teacher” as “any person who is employed by one or more school committees or boards of trustees or by any combination of such committees and boards on a basis of not less than half-time service as a teacher, school psychologist, school psychiatrist, school adjustment counsellor or school social worker…, director of occupational guidance and placement…principal, supervisor or superintendent in any public school as defined in this section or as a supervisor or teacher of adult civic education, but excluding any person serving as an exchange teacher in any such school unless he is a member of the teachers’ retirement system at the time of entry into such service. [↑](#footnote-ref-2)