

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Gina DiBaro,
Petitioner,

No. CR-23-0279

Dated: August 16, 2024

v.

**State Board of Retirement and Public
Employee Retirement Administration
Commission,**
Respondents.

Appearances:

For Petitioner: James Duffy, Esq.

For State Board of Retirement: Sarah Kim, Esq.

For Public Employee Retirement Administration Commission: Felicia McGinniss, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner worked for a governmental entity in 1992-2001, withdrew her accumulated retirement deductions, returned to state service in 2005-2014, left for the private sector again, and returned to state service again in 2017. At that point, she applied to repurchase credit for her service in 1992-2001. By then she had missed the two alternative one-year deadlines within which a member is entitled to repurchase credit using the discounted “buyback” interest rate. G.L. c. 32, § 3(8)(b). The petitioner’s purchase was therefore governed by the higher “actuarial assumed” interest rate.

DECISION

Petitioner Gina DiBaro appeals from a decision of the State Board of Retirement revising the cost of a credit purchase by Ms. DiBaro under G.L. c. 32, § 3(8)(b). The appeal was submitted on the papers. Both the board and Public Employee Retirement Administration Commission were designated as respondents. I admit into evidence exhibits marked A-M.

Findings of Fact

I find the following facts.

1. From 1992 until 2001, Ms. DiBaro worked for a district attorney's office. She accumulated eight years and six months of creditable service with the state retirement system. When Ms. DiBaro left her public employment in 2001, she withdrew her accumulated retirement deductions. (Exhibit A.)

2. From 2005 to 2014, Ms. DiBaro completed a second stint as a public employee. She worked during that period first for a county sheriff's office and then again for the district attorney. When she returned to the private sector in 2014, Ms. DiBaro left her accumulated retirement deductions in the state system. (Exhibits G, J.)

3. In January 2017, Ms. DiBaro commenced her third period of state service, now with the Department of Children and Families. During that year, Ms. DiBaro applied to repurchase credit for her service in 1992-2001. The board calculated the cost of her purchase using the statutory "buyback" rate (then 3.75%). Ms. DiBaro entered into a five-year installment plan, completing her payments in March 2023. (Exhibits A, B, G, I, K.)

4. Later in March 2023, the board concluded that it should have calculated the cost of Ms. DiBaro's purchase using the statutory "actuarial assumed" rate (then 7.5%). It so notified Ms. DiBaro in a series of letters. The board recalculated the balance due on Ms. DiBaro's purchase as approximately \$35,000; it afforded Ms. DiBaro one month to either pay the balance or accept a new installment plan. In response to an inquiry from Ms. DiBaro, PERAC endorsed the board's analysis. (Exhibits C, D, F, G.)

5. Ms. DiBaro took this timely appeal. During its pendency, the board updated Ms. DiBaro that her deadline to pay her balance or accept a new installment plan had expired. The board stated that it would therefore grant Ms. DiBaro only four years and three months of credit for her purchase. (Exhibits L, M.)

Analysis

A member of a public retirement system who departs from public service may withdraw her retirement contributions and relinquish the corresponding retirement credit. G.L. c. 32, §§ 10(4), 11(1). If the member later returns to service, she may repurchase the same amount of credit. *Id.* § 3(8)(b).

The cost of the repurchase is the sum that the member previously withdrew from the system, plus interest. Depending on the circumstances, two alternative interest rates may apply. The “actuarial assumed” rate is a PERAC-established figure designed to reflect a retirement system’s normal return on invested funds. G.L. c. 32, § 1. The “buyback” rate is a discounted rate equal to half of the actuarial assumed rate. *Id.* The question in this appeal is whether Ms. DiBaro is entitled to the benefit of the buyback rate with respect to her 2018 purchase of her 1992-2001 service.

At one time, the law permitted all credit repurchases to be made at the buyback rate. This arrangement led to a “practice of members waiting to purchase service until near retirement . . . in effect, underfunding their retirement allowances.” *Spinelli v. Massachusetts Teachers’ Ret. Syst.*, No. CR-17-188, at *12-13 (DALA Aug. 14, 2020). To alleviate this problem, a 2011 amendment inserted the following language into G.L. c. 32, § 3(8)(b):

[A] member who is reinstated to, or re-enters the active service of, a governmental unit . . . and who does not, (i) pay . . . make-up payments . . . or (ii) make provision for the repayment in installments . . . within 1 year from the date of reinstatement or re-entry or within 1 year after April 2, 2012, whichever is later, shall pay actuarial assumed interest instead of buyback interest on all make-up payments

In essence, the statute describes two alternative deadlines, entitles each member to “whichever [deadline] is later,” and requires members who do not meet the later deadline to “pay actuarial assumed interest instead of buyback interest.” § 3(8)(b). *See* PERAC Memo No. 23 / 2012

(Mar. 2, 2012); *Perrault v. Massachusetts Teachers' Ret. Syst.*, No. CR-15-32, at *4 (DALA July 21, 2017).

The statute's two deadlines require close attention. One of the deadlines is a readily computable date ("1 year after April 2, 2012"). The other deadline features a pivotal ambiguity. The statutory language reads, "1 year from the date of reinstatement or re-entry." The singular form "date" assumes a single reinstatement. *Cf. Leopoldstadt, Inc. v. Commissioner of Div. of Health Care Fin. & Pol'y*, 436 Mass. 80, 86-87 (2002). This assumption typically presents no reason for uncertainty.

The dilemma here flows from the fact that Ms. DiBaro was reinstated twice, in 2005 and in 2017. The resulting question is which of those dates counts as "the date of reinstatement" with respect to the 2018 purchase application. Stated otherwise, the appeal turns on whether the phrase "the date of reinstatement" in § 3(8)(b) refers to (1) the first reinstatement after the purchasable period or (2) the last reinstatement before the purchase request.¹ The first of these readings would mean that a member can repurchase prior service at a discount only during his or her first subsequent return to service. The second would mean that new opportunities to make a discounted purchase arise upon each successive reinstatement.

As a matter of plain English, the statutory language tolerates both readings. The proper construction is therefore the one that "most appropriately suits [the statute's] intent and purpose." *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015). The statutory intent and purpose easily favor the interpretation that "the date of reinstatement" refers to the member's first reinstatement after the purchasable period. The statute seeks to counteract the heavy burden that belated

¹ If the statutory language contemplates other types of dates of reinstatement, they are not implicated here.

purchases at the buyback rate impose on the retirement systems. *See Spinelli, supra; Perrault, supra; Feffer v. Massachusetts Teachers' Ret. Syst.*, No. CR-23-159, 2023 WL 8526445, at *2 (DALA Dec. 1, 2023). Its essential solution is to subject all discounted purchases to one-year time limits. *See Roy v. State Bd. of Ret.*, No. CR-20-0302 (DALA Mar. 31, 2023); *Grasso v. Massachusetts Teachers' Ret. Syst.*, No. CR-18-0546 (DALA Feb. 3, 2023); *England v. State Bd. of Ret.*, No. CR-14-18 (DALA Dec. 2, 2016). These considerations counsel against a construction that would give some members serial one-year opportunities to make discounted purchases, each one more belated than the last.

It is now instructive to zoom back out to the rest of the pertinent statutory language. In April 2013, Ms. DiBaro became “a member who . . . re-enter[ed] . . . active service . . . and who [did] not [pay or accept an installment plan] within 1 year from the date of . . . re-entry or within 1 year after April 2, 2012, whichever is later.” The consequence that § 3(8)(b) imposes on such a member is that she “shall pay actuarial assumed interest instead of buyback interest on all make-up payments.” The statute does not unambiguously relieve a member of that consequence each time she returns again to active service.

The result of the foregoing analysis is that the board erred in its original determination that Ms. DiBaro's 2018 purchase was governed by the buyback rate. This error caused Ms. DiBaro to pay less for her purchase than the law required. The retirement boards are duty-bound to correct such errors. G.L. c. 32, § 20(5)(c)(2); *Hunter v. Contributory Ret. Appeal Bd.*, 80 Mass. App. Ct. 257, 263 (2011).

Here the board's correction doubled Ms. DiBaro's bill after she had successfully paid off a five-year installment plan. These circumstances generate obvious fairness and sympathy concerns. But administrative agencies lack the authority to make exceptions to statutory rules on

the basis of such concerns. *See Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006).

Conclusion and Order

The board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate