

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Robert Ekstrom,
Petitioner

v.

Docket No. CR-25-0366

Dated: October 2, 2026

New Bedford Retirement Board,
Respondent

Appearance for Petitioner:

James H. Quirk, Jr., Esq.

Appearance for Respondent:

Michael Sacco, Esq.

Administrative Magistrate:

James P. Rooney

SUMMARY

City Auditor who left his position but continued to perform the same work on a regular basis as a consultant for the City in a City office with City equipment was an employee for retirement purposes and thus is eligible to purchase creditable service for the time he served as a consultant.

DECISION

Robert Ekstrom appeals the May 23, 2025 decision of the New Bedford Retirement Board, declining to allow him to purchase service with the City of New Bedford from 2021 to 2023 because he was a consultant/independent contractor during that period. I held a hearing on April 1, 2026 and June 24, 2026 via Webex. I marked the joint prehearing memorandum, which included agreed facts, as Pleading A and admitted eleven exhibits into evidence that had

been filed with the joint memorandum. Mr. Ekstrom, the former New Bedford City Auditor, testified, as did Michael Gagne, who was the City's Chief Financial Officer during the relevant period, and Eric Jaikes, the New Bedford City Solicitor. I granted the New Bedford Retirement Board's request to sequester the witnesses. The record closed when the parties filed closing briefs on July 31, 2026.

Findings of Fact

Based on the testimony, agreed facts, and exhibits presented at the hearing and reasonable inferences from them, I make the following findings of fact:

1. Robert Ekstrom served as the New Bedford City Auditor from September 12, 2014 until June 30, 2021. During his time as Auditor, Mr. Ekstrom was supervised by New Bedford's Chief Financial Officer. (Agreed facts 1-3.)
2. On February 1, 2021, Mr. Ekstrom tendered his resignation to be effective on June 30, 2021. He did so with the idea that he would help out with his son's business. One month later, the Chief Financial Officer resigned, effective May 15, 2021. These dual resignations put the City in a bind. The mayor's chief of staff spoke to Mr. Ekstrom about this. He agreed to stay on while the City attempted to fill these two positions. Because he needed time to work on changing careers, Mr. Ekstrom agreed to an hourly professional services contract with Wednesdays as his day off. (Agreed facts 2 and 4; Ekstrom testimony.)
3. On May 15, 2021, Mr. Ekstrom was appointed Acting Chief Financial Officer to serve until the City appointed someone as Interim Chief Financial Officer, which it did on June 1, 2021 when it hired Michael Gagne. Mr. Gagne was the Chief Financial Officer from June 2021 to

October 2023. He was a part-time employee working 25 hours per week. (Agreed facts 5 and 6; Ekstrom and Gagne testimony.)

4. After Mr. Gagne was hired, Mr. Ekstrom agreed to remain with the City and perform the City Auditor function until the City hired a new City Auditor. (Agreed fact 7.)

5. Mr. Ekstrom and the City entered into a standard Agreement for Professional Services dated June 28, 2021 that was for the period between July 1, 2021 and June 30, 2022. The Agreement called for Mr. Ekstrom to be paid \$3,000 for his work in July 2021 and thereafter to be paid \$85 per hour up to \$47,200. His pay was to be reported for tax purposes in a 1099 form not a W-2 form. The low rate for July 2011 was because Mr. Ekstrom was taking vacation that month but agreed to be on call if needed.¹ (Agreed facts 8, 15, and 17; Ex. 3; Ekstrom testimony.)

6. The Agreement referred to Mr. Ekstrom as a consultant, which it defined as “an independent contractor, solely responsible for methods and means used in performing the services under this Agreement, and . . . not an employee, agent, or partner of the City.” Mr. Ekstrom knew he would not be a City employee or part of the retirement system. (Agreed facts 9 and 10; Ex. 3; Ekstrom testimony.) The City also agreed to provide Mr. Ekstrom a dedicated space to work, which was a private office on the second floor of City Hall, a desktop and a laptop computer, the continued use of his existing work cellphone, and a City email address. Mr. Ekstrom worked 9-5 at City Hall except on Wednesdays. (Agreed fact 12; Ex. 3; Ekstrom testimony.)

1. The contract stated that Mr. Ekstrom would have to provide his own car insurance. Mr. Ekstrom described this as part of standard boilerplate in professional services agreements. He did not need a car for his work. (Ex. 3; Ekstrom testimony.)

7. The Agreement called for Mr. Ekstrom to perform thirteen specified services to the City Auditor's Department including responding to an annual audit, working on tax and budget matters, overseeing the final phase of a centralized Accounts Payable Office, consulting on COVID-19 related expenditures, and providing advice and guidance on the functions performed by the City Auditor's Office. (Agreed fact 14; Ex. 3.) The duties it described were the same as the duties Mr. Ekstrom had previously performed when he was employed as the City Auditor. (Ekstrom testimony.) The reason these specific duties were listed was because existing staff did not have the experience or training to perform these tasks. (Jaikes testimony.) Mr. Ekstrom supervised eight employees (although this was not mentioned in the contract), authorized payment of invoices, approved purchase orders, and hired new City auditors. (Ekstrom testimony.) Mr. Gagne described Mr. Ekstrom as the de facto City Auditor. (Gagne testimony.)
8. Throughout Mr. Gagne's time as Chief Financial Officer, he was Mr. Ekstrom's supervisor. He directed Mr. Ekstrom to take on certain tasks, some of which were not listed in the professional services agreement. While acknowledging that these assignments were meant to take advantage of Mr. Ekstrom's expertise and judgment, on some matters Mr. Gagne directed Mr. Ekstrom on how he wanted them done. (Gagne testimony.)
9. On January 1, 2022, the parties modified their agreement through June 28, 2021. Extra work was described in the modification, including providing "testimony before the Joint Labor-Management Committee in the City's arbitration with the New Bedford Police Union" and assisting in the "preparation of the fiscal year 2023 [budget] as need by the Chief Financial Officer." Mr. Ekstrom was to be paid \$95 per hour up to \$155,000 for fiscal year 2022. (Agreed facts 18-20; Ex. 4.)

10. On July 1, 2022, Mr. Ekstrom entered into a second annual contract with the City. It again referred to him as a consultant. The agreement added detailed tasks to assist the Chief Financial Officer, including attending the mayor's weekly staff meetings, coordinating and attending weekly Finance Team meetings, and assisting in "compiling a 2023-2027 Capital Improvement Plan." He was to be paid \$95 per hour for auditor functions and \$115 per hour for assisting the Chief Financial Officer. His total compensation was not to exceed \$130,000. Again, his income was reported in a 1099 form. Mr. Ekstrom was given duties related to the Chief Financial Officer position because Mr. Gagne took a part-time position in the private sector and reduced his time spent in the office to 16 to 18 hours per week. And as with the first contract, the additional duties listed that were ordinarily ones assigned to the Chief Financial Officer were assigned to him because existing staff lacked the ability to perform them. (Agreed facts 21-24; Ex. 5; Ekstrom, Gagne, and Jaikes testimony.)

11. Throughout his work under a professional services contract, Mr. Ekstrom submitted weekly invoices to the City listing the days he worked, the projects he worked on, and the hours spent on each project. The invoice was headed "Robert W. Ekstrom Financial Consulting." Mr. Ekstrom never incorporated this entity as a business.² The only outside work he performed was to prepare his son's taxes; he did not charge for this service. (Exs. 2 and 6; Ekstrom testimony.)

12. The City hired a new auditor in July 2022. Mr. Ekstrom trained her for the next six months. (Ekstrom testimony.)

2. The contract allowed the City to view the audited financial statements of Mr. Ekstrom's consulting business. (Ex. 3.) Mr. Ekstrom testified that his consulting business had no books and records. (Ekstrom testimony.)

13. On January 31, 2023, Mr. Ekstrom left to work for Middleborough. The New Bedford mayor spoke to him in June 2023 to tell him the City had been unable to find acceptable Chief Financial Officer candidates. On July 4, 2023, Mr. Ekstrom resigned his position in Middleborough. (Ekstrom testimony.)

14. On October 15, 2023, Mr. Ekstrom became the Chief Financial Officer for New Bedford and again became a member of the New Bedford Retirement System. (Agreed fact 26.)

15. In January 2025, Mr. Ekstrom asked the New Bedford Retirement System to allow him to purchase the 19 months he served as a consultant.³ (Agreed fact 27; Ex. 7.)

16. On April 7, 2025, Board counsel sent the New Bedford mayor a letter seeking his thoughts on whether Mr. Ekstrom was a City employee or an independent contractor. The letter noted that the professional services contract:

(1) required that Mr. Ekstrom carry his own personal automobile insurance, (2) required all documents the Consultant prepares and receives become the property of the City, (3) required all communications be confidential, which extends to Mr. Ekstrom's employees, officers, agents, attorneys, subcontractors or other representatives, (4) identifies Mr. Ekstrom as consultant, "solely responsible for the methods and means used in performing the services" under the *Agreement*, (5) required to maintain records pertaining to the *Agreement's* requirements and maintain such records for six (6) years, permitting access to the City for review and copying, (6) required Mr. Ekstrom to maintain internal accounting controls and permit the City to review his audited financial statements and (7) the invoices he submitted to the City were on his Robert W. Ekstrom Financial Consulting letterhead and were billed to the City at an hourly rate based on the time spent on the services provided and (8) reported his compensation on a 1099 rather than a W-2 Form.

(Ex. 11.)

3. Generally, a member seeking to purchase creditable service must identify a provision in the retirement statute that allows such a purchase. Mr. Ekstrom's request did not specify on what provision he relied when making this request. I asked the parties following the hearing to brief what provision of the retirement law potentially applied. They filed briefs by September 23, 2026, thereby closing the record.

17. In response to this inquiry, Eric Jaikes, the New Bedford City Solicitor, acknowledged that Mr. Ekstrom had worked for the City during the period he sought to purchase but declined to take a position as to whether he was an employee or an independent contractor. He stated that when the City was negotiating for his services, it was Mr. Ekstrom who:

suggested a consulting agreement, with Mr. Ekstrom providing services on a part-time basis. Additionally, the Scope of Services contained in both Agreements for Professional Services were agreed upon by Mr. Ekstrom and the City. Mr. Ekstrom's hourly rate reflected in the Agreements was higher than that for a comparable Unit C employee due in part to the fact that Mr. Ekstrom would not be receiving benefits from the City such as health insurance, vacation, sick, or personal leave, etc.

(Agreed fact 28; Ex. 8.) As to whether Mr. Ekstrom was an employee or an independent contractor, Mr. Jaikes responded that:

It is the Administration's opinion that whether Mr. Ekstrom should be classified as an "employee" in accord with the Retirement statute, thereby allowing him to purchase creditable service for that 19 month period, requires an application of facts to Massachusetts statutes and case law, responsibility for which we believe rests with the New Bedford Retirement Board and not the City of New Bedford.

Id.

18. On May 23, 2025, the New Bedford Retirement Board denied Mr. Ekstrom's service purchase requests. He filed a timely appeal. (Agreed facts 29 and 30; Exs. 9 and 10.)

Discussion

The public employee retirement statute provides that “[a]ny member in service shall, subject to the provisions and limitations of sections one to twenty-eight inclusive, be credited with all service rendered by him as an employee in any governmental unit after becoming a member of the system.” M.G.L. c. 32, § 4(1)(a). Mr. Ekstrom is now a member of the New Bedford Retirement System and was a system member before he entered into the professional services contract with New Bedford, a time period for which he is seeking to purchase creditable service. The parties agree that whether he can make this purchase turns on whether he was an employee of the City during this period. That Mr. Ekstrom signed contracts that described him as an independent contractor does not necessarily stand in his way because the Contributory Retirement Appeal Board has previously determined that a signed contract that called a worker an independent contractor and the workers’ understanding at the time that he was an independent contractor is not dispositive of whether the worker was an employee. *Cook v. Northampton Retirement Bd.*, CR-13-262, Decision at 10 (Cont. Ret. App. Bd., April 2, 2018).

The retirement statute does not give a definition of employee that clearly distinguishes an employee from an independent contractor. In pertinent part, it provides that a public employee is a “person whose regular compensation . . . , is paid by any political subdivision of the commonwealth . . . [and] shall mean any person who is regularly employed in the service of any such political subdivision.” M.G.L. c. 32, § 1. Regular compensation in turn means “compensation received exclusively as wages by an employee for services performed in the

course of employment for his employer.” *Id.* Wages are “the base salary or other base compensation of an employee paid to that employee for employment by an employer.”

These definitions are mostly circular but not completely unhelpful. The City of New Bedford is a political subdivision of the state. And there can be little dispute that Mr. Ekstrom worked regularly for New Bedford during the relevant period because he worked 9 to 5 four days per week at City Hall. *See Pollard v. Berkshire County Ret. Sys.*, CR-08-803, Decision at 4 (Div. Admin. Law App., June 7, 2013) (continuous part-time service qualifies as regular employment).

But before attempting to resolve whether Mr. Ekstrom should be considered a municipal employee for the period of time he seeks to purchase, I address a prerequisite to his purchase application, namely that applications to purchase creditable service must rely on a statutory provision authorizing such purchase. The retirement statute allows *state employees* to purchase certain contract service; it does not mention municipal employees. M.G.L. c. 32, § 4(1)(s). Thus, municipal employees, like Mr. Ekstrom, must rely on some other provision of the statute if they wish to purchase contract service. The Division of Administrative Law Appeals (DALA) has previously approved contract service purchases by municipal employees under a variety of other provisions within the retirement statute. *See Callahan v. Revere Ret. Bd.*, CR-12-523 (Div. Admin. Law App., Aug. 25, 2017) (purchase of prior part-time service under M.G.L. c. 32, § 4(2)(c)); *Levy v. Cambridge Ret. Bd.*, CR-11-636 (Div. Admin. Law App., Mar. 30, 2012) (purchase of service rendered in a different retirement system under M.G.L. c. 32, § 3(5)).

Mr. Ekstrom argues that his purchase is allowable under M.G.L. c. 32, §§ 3(3) or 4(1). Section 4(1)(a), as previously noted, states that a public employee who is a member in service

and performs work for a public employer is entitled to creditable service. This provision does not mention service purchases, but it was cited by an Appeals Court panel as supporting the purchase by a Boston city employee of four months of contract service prior to being admitted as a member of the Boston Retirement System. *Crowley v. Contributory Ret. App. Bd.*, 73 Mass. App. Ct. 1103 (2008) (MAC Rule 23.0 decision).

Section 3(3) provides an employee who had a right to become a retirement system member but failed to do so may have an opportunity to later become a member. Mr. Ekstrom has not cited any decisions addressing whether Section 3(3) may be used by a municipal employee to purchase contract service. Nonetheless, that section is similar to a provision of Section 3(5) that allows an employee to purchase service when wrongly excluded from membership in a retirement system. DALA has granted an application by a member who sought to purchase service for a municipality under Section 3(5) when he first worked for the municipality as a contractor. *Cook v. Northampton Ret. Bd.*, CR-13—262 (Div. Admin. Law App., Nov. 2, 2018.)⁴

None of these decisions discuss in detail why municipal applicants may rely on the cited provisions as bases for purchasing contract service. The theory supporting such purchase must ultimately be that the workers should all along have been treated as employees and retirement deductions been taken from their pay. Thus, what Mr. Ekstrom must prove is that he should have been considered an employee during the 19 months he worked for New Bedford as a contractor.

4. DALA's decision does not make a finding of fact as to the particular provision under which Mr. Cook applied to purchase his prior contract service, but I take it to be Section 3(5) because this is the only pertinent provision mentioned in the decision. See DALA decision at 4.

Mr. Ekstrom tries several approaches. He argues that DALA should look to the Wage and Hour statute that sets forth specific standards for determining whether a person is an employee or an independent contractor. The Wage and Hour statute presumes that a person working for an employer is an employee unless the following three things can be shown:

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. c. 149, § 148B(a). Were this statute applicable in the retirement law context, Mr. Ekstrom could easily be determined to have been an employee when he worked under a professional services contract. Looking at just the last two criteria, he was functioning as the City Auditor, which was a City position that he had just left, and hence his work was not outside the usual course of business of the City. Mr. Ekstrom did not have an independent business that served multiple communities providing municipal auditor services, did not develop one while working under the professional services contract, and indeed worked on auditing exclusively for New Bedford at City Hall.

But CRAB has decided that M.G.L. c. 149, § 148B(a) does not apply to retirement matters. It observed that Section 148B's definition of employee was stricter than the common-law approach and that:

The Legislature . . . did not make these stricter definitions of "employee" applicable to the retirement law. . . . Thus, we, DALA, and the courts have continued to apply

traditional common-law principles in considering whether a contracted municipal worker is an employee or an independent contractor.

Cook v. Northampton Retirement Bd., CR-13-262, Decision at 7 (Cont. Ret. App. Bd., Apr. 2, 2018).⁵ CRAB described the common-law approach as focusing on the degree of control the employer exercised over the worker. It stated:

We have held that whether a worker is deemed an employee or an independent contractor under the retirement law must be determined by the “nature of the relationship,” and that the “most prominent, if not the controlling criterion” is the degree to which the employer controls the contractor’s work. The “control test” arises from the common law, which originally utilized the test to determine whether an employer should be held liable for the tortious deeds of a contractor. The reasoning behind the distinction was that, if the employer exercised control over the contractor’s performance of his work duties, the employer was also in a position to protect the safety of others and minimize his risk. Thus, the degree of control exercised by the employer over his contractor was linked both to his ability to prevent harm and to the degree of fault fairly attributable to the employer.

Id. at 6.⁶

5. This is consistent with a Supreme Judicial Court decision of the same year holding that Section 148B’s definition of employee did not apply in workers’ compensation matters, in part because the legislature specifically limited the applicability of the Section 148B definition to the two statutes governing wage and hour issues. *Camargo’s Case*, 479 Mass. 492, 498 (2018).

6. The Appeals Court spelled out the control test in more detail as follows:

“The essence of the distinction [between independent contractors and employees] under common law has always been the right to control the details of the performance, . . . and the freedom from supervision ‘not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work.’ ” *Athol Daily News v. Board of Review of the Div. of Employment & Training*, 439 Mass. 171, 177 (2003), quoting from *Maniscalco v. Director of the Div. of Emp. Sec.*, 327 Mass. 211, 212 (1951). See Restatement (Second) of Agency § 2 (1958) (“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent”). An independent contractor is therefore “only responsible for the accomplishment of an agreed result in an agreed manner.” *Brigham’s Case*, 348 Mass. 140, 141-142 (1964). He nevertheless maintains complete

In practice, this has meant that who supervises a worker, where they work, and under what conditions are part of the evaluation. For example, when an attorney named Danna Crowley was hired by the City of Boston's treasury office trust department, she was not at first treated as a City employee. She submitted invoices for the 35 hours per week she worked, and she received work from the City's corporation counsel and the secretary of the treasury department, both of whom supervised her work. After four months, on August 4, 1988, she became a Boston Retirement System member. Her hours, work, location and supervision did not change. An Appeals Court panel determined that she was an employee, holding that:

As the DALA magistrate explicitly found, [corporation counsel and the secretary-treasurer] had "exclusive control of [Crowley's] work assignments and were responsible for evaluating her job performance." CRAB adopted this finding. Crowley was hired by [corporation counsel] and reported to [corporation counsel and the secretary-treasurer], and Crowley worked in a designated location at Boston City Hall, using supplies provided by the city. She was required to sign in and out each day. Crowley's job duties did not change after August 4, 1988, and [corporation counsel and the secretary-treasurer] continued to supervise her work. These facts demonstrate sufficient control to show that Crowley should be considered an employee and not an independent contractor.

Crowley, Decision at 5-6 (2008). It did not matter to the Court that Ms. Crowley had to submit invoices to be paid during her first four months or whether the invoices were for the same amount of time each week because the evidence showed that she was regularly employed by the City or that the invoices described her as a vendor. Decision at 3, 7.

Similarly, Kathleen Callahan worked for many years as the grant administrator for the Revere Police Department. For the first 15 years, she worked part-time, had to submit invoices

control over the task for which he contracted.

Cable Mills, LLC v. Cokley Pierpan Dolan and Collins Ins. Agency, Inc., 82 Mass. App. Ct. 415, 421-22 (2012).

to get paid during many of those years, and for some of the time the funds to pay her came from grants. Magistrate Kenneth Forton determined that she was an employee during this period because she was regularly employed by the City of Revere in service for the benefit of the Police Department and she was supervised by the police chief. It did not matter that for a time she was paid out of grant funds she had raised, nor did it matter that she did not receive sick or vacation time. *Callahan v. Revere Ret. Bd.*, CR-12-523 (Div. of Admin. Law App., Aug. 25, 2017.)

Most tellingly, Joseph Cook, a law school graduate worked under a written professional services contract with the City of Northampton that deemed him to be an independent contractor until he passed the bar exam and became a municipal employee. CRAB, fully aware that Mr. Cook had worked under a written professional services contract, remanded the matter to DALA to determine whether Mr. Cook worked truly independently or under the control of the City's law department. *Cook*, decision at 2, 10-11 (Contributory Ret. App. Bd., Apr. 2, 2018.) As noted earlier, on remand, DALA determined that the City law department maintained sufficient control over Mr. Cook's work that he was in fact an employee. DALA decision at 9-11.

The facts concerning Mr. Ekstrom's work as a consultant also show that he was actually an employee, not an independent contractor. When he started as a consultant, the work he performed was the same work he performed when he was the City Auditor. He continued to work in City Hall, with a City-provided office, desktop computer, and laptop, and he communicated with a City-provided cell phone and on the City's email. When he later took over some of the work of the City's Chief Financial Officer, this again was work ordinarily performed by a City employee, and he performed it at City Hall with the equipment provided to

him by the City. His auditing work was subject to supervision by the Chief Financial Officer and the tasks he performed that were Chief Financial Officer tasks were subject to supervision by the mayor.

That Mr. Ekstrom submitted invoices in order to receive payment for the work he performed does not detract from this conclusion, just as it did not in *Crowley*. Many of the other conditions set forth in his professional services contract had little impact on the nature of his relationship with the City. The documents he created became property of the City, which is hardly surprising for a municipal worker who works at City Hall. The requirement that he keep records of his work for the City for six years does not appear to have required any extra effort in practice since he worked at City Hall and presumably kept his records there since his nascent consulting business had no records. The clause requiring that he was to keep his communications with other City workers confidential assumed that Robert W. Ekstrom Financial Consulting had numerous employees when in fact it had only Mr. Ekstrom. The clause discussing his firm's internal auditing controls and audited financial records again assumes the existence of an actual consulting firm that did not exist. Unsurprisingly, given the agreement, his compensation was reported on a 1099, not a W-2, but this did not change the nature of his actual working relationship with the City.

How much Mr. Ekstrom was supervised by the City when working under contract must be evaluated in the light of the supervision provided when he was employed by the City as the auditor. As a contractor, he was supervised by the part-time Chief Financial Officer, Mr. Gagne, who regarded him as the de facto City Auditor and appears to have supervised him accordingly. While undoubtedly relying on Mr. Ekstrom's expertise, Mr. Gagne gave him assignments

beyond what the contract called for and at times directed him how to perform certain tasks. When in the second year of the contract, Mr. Ekstrom took on some of the roles of the Chief Financial Officer, he was required to attend the mayor's weekly staff meetings, which I take to be a means by which the mayor supervised high ranking City employees. As the City supervised Mr. Ekstrom in a manner that looks like the way it supervised him when he was employed as the Auditor, this shows a sufficient level of control to establish that he was an employee.

When Mr. Ekstrom entered into the first professional services agreement with the City, he may have wanted space to branch out and perform other work for other people, but in practice that did not happen. In the 19 months he worked for the City as a consultant, he worked only for the City at City Hall performing work that was normally the work of a City employee. Because his position seems to have been treated no differently than when he was the City Auditor, I conclude that Mr. Ekstrom was an employee for retirement purposes, and that he may therefore purchase the 19 months he worked under a contract.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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