

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Carol Fallon,
Petitioner

v.

Docket Nos.: CR-24-0062; CR-24-0063
Date Issued: Sept. 20, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Carol Fallon, *pro se*

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
1 Winter Street, 8th floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Petitioner is entitled to purchase 11 months, 13 days of prorated contract service because she did not work full-time during the period that she was a contract employee. *See* G.L. c. 32, § 4(1)(s).

DECISION

Petitioner Carol Fallon timely appeals, under G.L. c. 32, § 16(4), the State Board of Retirement's calculation of two periods of contract service under G.L. c. 32, § 4(1)(s). Each period was assigned a separate docket number.

On March 7, 2024, DALA ordered Ms. Fallon to show cause why her appeals should not be dismissed for failure to state a claim upon which relief could be granted. Ms. Fallon responded on March 27, 2024 with a memorandum and 11 proposed exhibits. On May 9, 2024, DALA ordered the parties to file prehearing memoranda and any further proposed exhibits. On August 5, 2024, the Board filed its memorandum and 8 additional exhibits. On August 26, 2024, Ms. Fallon filed her memorandum and 3 additional exhibits. After reviewing the memoranda and exhibits, I have determined that the appeals can be decided on written submissions under 801 CMR 1.01(10)(c). I hereby enter the proposed exhibits into evidence as marked. (Exs. 1-22.)

FINDINGS OF FACT

I make the following findings of fact:

1. Carol Fallon is a Massachusetts State Employees Retirement System (MSERS) member. (Ex. 12.)
2. From May 9, 1983 through June 30, 1984 Ms. Fallon worked for the state as a contract employee. (Ex. 13.)
3. From July 1, 1984 through June 30, 1991, Ms. Fallon worked directly for the state as a full-time employee. This position entitled her to MSERS membership. (Ex. 19.)
4. For budgetary reasons, Ms. Fallon was moved back to a contract position from July 1, 1991 through August 29, 1992, approximately 14 months. (Ex. 4.)
5. When she became a contract employee again, she withdrew her accumulated deductions from MSERS, thus terminating her membership in the system. (Ex. 19.)

6. As of August 31, 1992, Ms. Fallon rejoined the state as a full-time employee. She concurrently re-established her membership in MSERS and eventually bought back her 1984-1991 full-time state service. (Exs. 12, 19.)

7. Ms. Fallon continued to work for the state on and off until she retired effective February 16, 2024. (Ex. 13.)

8. In 2013, Ms. Fallon applied to purchase her two periods of contract service: 1983-1984 and 1991-1992. (Ex. 1.)

9. By letter dated August 28, 2023, the Board confirmed receipt of Ms. Fallon's application to purchase her contract time. The Board has not offered an explanation why it took 10 years to respond to Ms. Fallon's application. (Ex. 3.)

10. The Board requested further documentation from Ms. Fallon, including job descriptions from her various periods of employment; copies of contracts and other documents that list dates of service, hourly rates, job descriptions, and whether the positions were full- or part-time; and payroll records. (Ex. 3.)

11. Ms. Fallon responded with her employment contracts, several paystubs, and a resume. She also requested her personnel records from her employer. (Exs. 4, 5.)

12. By letter dated December 22, 2023, the chief legal counsel of her employing agency informed the Board that the agency was unable to locate the job descriptions and payroll records that Ms. Fallon and the Board requested. (Ex. 6.)

13. For her 1991-1992 contract service, Ms. Fallon worked under two similar contracts that provided hourly rates and an annual maximum. She was paid approximately monthly for only the hours that she worked. In other words, she was not paid a regular salary under the contracts. The first contract contained the following

provision: “In no event shall the Contractor, if an individual, be reimbursed for holidays, sick days or time other than that spent providing services except as otherwise provided herein.” The second contract contained a similar provision: “The Contractor shall not be reimbursed for holidays, sick days or time other than that spent providing services pursuant to this Contract.” (Ex. 4.)

14. By letter dated January 30, 2024, the Board notified Ms. Fallon that she could not purchase her 1983-1984 service because this period of contract service preceded a period of membership service for which she withdrew her retirement contributions. (Ex. 14.)

15. By letter dated February 1, 2024, the Board denied Ms. Fallon’s application to purchase her 1991-1992 service because it concluded that she was an independent contractor and not a contract employee. (Ex. 15.)

16. On February 8, 2024, Ms. Fallon timely appealed both decisions, and the appeals were assigned separate docket numbers. (Ex. 16.)

17. After some further record gathering and investigation, the Board concluded that Ms. Fallon actually was an “03” contract employee for the 1991-1992 period. The Board maintained its position that she could not purchase her 1983-1984 service for the reasons stated in its January 30, 2024 letter. (Exs. 17, 18.)

18. The Board ultimately calculated that Ms. Fallon could purchase 11 months, 13 days of service credit based on her approximately 14 months of contract work from July 1, 1991 through August 27, 1992. (Ex. 18.)

19. In its calculation, the Board treated Ms. Fallon as a part-time employee by dividing the number of hours that she worked during her 14 months of contract service—

1,918.8—by the hypothetical 2,275 full-time work hours ((37.5 hours per week * 52 weeks) + (162.5 hours per month times 2 months)), resulting in approximately 84% part-time. 84% of 14 months is approximately 11 months, 13 days. (Ex. 18.)

CONCLUSION AND ORDER

When a member retires from public service, she may be entitled to a superannuation retirement allowance that is based in part on her years of creditable service. G.L. c. 32, § 5(2)(a). “Creditable service” is defined 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.” G.L. c. 32, § 1.

One form of “other service” that a member may purchase, under certain circumstances, is prior contract service to the Commonwealth. G.L. c. 32, § 4(1)(s) states:

Any member in service of the state employees’ retirement system who, *immediately preceding* the establishment of membership in that system or re-entry into active service in that system, was compensated for service to the commonwealth *as a contract employee for any department, agency, board or commission of the commonwealth may establish* as creditable service up to 4 years of that service if the member has 10 years of creditable service with the state employees’ retirement system, and if the job description of the member in the position which the member holds upon entry into service or re-entry into active service is substantially similar to the job description of the position for which the member was compensated as a contract employee.

(Emphasis added.) “Immediately preceding” has been interpreted by the Board to mean that the contract service occurred within 180 days of the establishment of membership.

941 CMR 2.09(3)(e)(1). 941 CMR 2.09(3)(e)(2) further provides:

A member who refunds his or her retirement contributions terminates membership in the MSERS. If the individual later returns to service for the Commonwealth, he or she is considered a new member for the purposes of M.G.L. c. 32. *Thus, a member of the MSERS may not*

purchase contract service if such contract service preceded a period of membership service for which the member took a refund.

(Emphasis added.)

The Board denied Ms. Fallon’s application to purchase her 1983-1984 contract service because, in 1991, she withdrew her 1984-1991 retirement contributions. Ms. Fallon has withdrawn her appeal of this Board decision.

That leaves her 14 months of service from July 1, 1991 to August 27, 1992. Before Ms. Fallon filed her appeal, the Board denied her request to purchase this service because it concluded that she was an independent contractor and not a contract employee. After she filed her appeal, Ms. Fallon presented additional evidence that convinced the Board that she actually was a contract employee and therefore eligible to purchase the service under § 4(1)(s). However, the parties could not agree on how much service Ms. Fallon was entitled to. Ms. Fallon maintains that she is entitled to the full 14 months that she worked. The Board contends that Ms. Fallon’s contract service must be prorated under § 4(1)(s), which provides that “[e]ligible members who worked part-time as contract employees shall be eligible for creditable service proportionately equal to their part-time service,” because she did not work full-time as a contract employee.

There is some evidence to support each side’s argument, but I conclude that a preponderance of the evidence supports the conclusion that Ms. Fallon did not work full-time for those 14 months. The strongest evidence that she did not work full-time was that she was paid hourly only for the hours that she worked. Consequently, her pay varied significantly from month to month. In other words, she did not receive a regular salary. In fact, the contracts under which she worked prohibited payment for holidays, sick days, vacation days, and any other “time other than that spent providing services.” A full-time

employee, by contrast, would normally receive pay on holidays and be given at least some minimal paid sick time.

On Ms. Fallon’s side of the ledger, her employer did check the “full-time” box on the contract service buyback form. There is also some evidence that her employer sought to minimize the effect of Ms. Fallon’s transition to contract employee by making sure that the hourly rate of the contract would allow her to work a reasonable number of hours to ultimately make the same total annual pay under her contracts as she would have made in salary if she had continued as a full-time state employee. But these efforts are not enough for me to conclude that she worked full-time in the face of stronger evidence that she did not. I therefore conclude that the Board has correctly given Ms. Fallon credit proportional to her part-time service: 11 months, 13 days.

It is easy to understand Ms. Fallon’s frustration. From her perspective, she continued to work either the same jobs or extremely similar jobs over the years while state budget troubles forced her off the full-time employee rolls and into a series of contract positions on two different occasions that have now altered the benefits she would have received if she had remained a full-time employee. In the face of an unambiguous statute, however, DALA does not have the power to deviate from its requirements. *Leto v. State Bd. of Retirement*, CR-19-554, at *3 (DALA Nov. 19, 2021) (citations omitted).

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For the above stated reasons, Ms. Fallon is entitled to purchase service credit for her 1991-1992 contract service at the prorated amount that the Board calculated.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Sept. 20, 2024