

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Pamela Feffer,
Petitioner,

No. CR-23-159

Dated: December 1, 2023

v.

**Massachusetts Teachers' Retirement
System,**
Respondent.

Appearance for Petitioner:

Pamela Feffer (pro se)

Appearance for Respondent:

James O'Leary, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner failed to complete a purchase of prior service by the sixty-day deadline stated on the respondent board's invoice. The board then increased the interest rate charged to the petitioner from the "buyback" rate to the "actuarial assumed" rate. The normative source of the sixty-day deadline was the board's own customary practice, not a statute or a formal regulation. The board therefore possessed the discretion to extend the deadline; it erred by failing to evaluate whether an extension was warranted. Further proceedings are nonetheless unnecessary, because it is clear that the board would have reached the same result if it had conducted the requisite discretionary analysis.

DECISION

Petitioner Pamela Feffer seeks to repurchase a period of creditable service that she previously relinquished by withdrawing her accumulated retirement contributions. She appeals from a decision of the Massachusetts Teachers' Retirement System subjecting her purchase to the "actuarial assumed" interest rate under G.L. c. 32, §§ 1, 3(8)(b). The appeal was submitted on the papers. I admit into evidence exhibits marked 1-10 in DALA's case file (1-7 numbered by the board, 8-10 offered by Ms. Feffer without numbering).

Findings of Fact

The following facts are not disputed.

1. Ms. Feffer is a teacher. She became a member of MTRS in 1995, working thereafter for several Massachusetts school systems. In 2015, Ms. Feffer withdrew her accumulated retirement contributions. (Exhibits 2-4.)

2. Ms. Feffer reestablished MTRS membership in August 2021. During May 2022, she filed an application to repurchase credit for her original years of service. Beginning in mid-December 2022, MTRS issued a series of buyback invoices to Ms. Feffer. (Exhibits 2, 5.)

3. At issue here is MTRS's invoice for Ms. Feffer's fourteen years of work with the Somerville school system. That invoice stated a deadline in mid-February 2023. It calculated the interest due from Ms. Feffer using the retirement statute's "buyback" rate, which was then 3.5%. (Exhibits 5, 9.)

4. At the time, Ms. Feffer was contending with family medical issues. She was confused by her multiple invoices. An MTRS staff member had written to her at some point—apparently before MTRS issued its invoices—that she should "take all the time she needs." The mid-February 2023 deadline expired before Ms. Feffer made any payment or entered into an installment plan. (Exhibits 1, 6, 10.)

5. At Ms. Feffer's request, MTRS invoiced her again in March 2023. The new invoice applied the retirement statute's "actuarial assumed" interest rate, then 7%. In an appealable decision, MTRS wrote to Ms. Feffer that the "buyback" rate was no longer available to her. She timely appealed. (Exhibits 1, 7, 8.)

Analysis

A member who has made retirement contributions and accrued retirement credit may withdraw the contributions and relinquish the credit. G.L. c. 32, §§ 10(4), 11(1). If such a

member later returns to service, he or she may repurchase the same amount of credit “upon such terms and conditions as the board may prescribe.” § 3(8)(b).

The cost of the repurchase is the amount that the member previously withdrew from the system, “together with buyback interest.” § 3(8)(b). “Buyback” interest is “one-half of actuarial assumed interest.” § 1. In turn, “actuarial assumed interest” is a PERAC-established figure designed to reflect the “rate of return on investments” that a retirement system would have seen on sums in its possession. *Id.* The opportunity to repurchase credit at the “buyback” rate is thus a considerable benefit to the member at the system’s expense: the member receives full credit, whereas the system collects only half of the investment income that it could have accumulated if the contributions had remained in its custody all along.

The magnitude of § 3(8)(b)’s benefit (to the member) and burden (on the system) grows with the passage of time, i.e., with each additional period for which the member pays only half of the system’s expected earnings. This feature of the statute instigated a “long-standing practice of members waiting to purchase service until near retirement . . . in effect, underfunding their retirement allowances.” *Spinelli v. MTRS*, No. CR-17-188, at *12-13 (DALA Aug. 14, 2020). In response, the Legislature in Acts 2011, c. 176, § 9, inserted the following restriction into § 3(8)(b):

[A] member who . . . 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 . . . re-entry or within 1 year after April 2, 2012, whichever is later, shall pay actuarial assumed interest instead of buyback interest

The Legislature thus determined that the opportunity to repurchase credit at a discount should be available only during a member’s first year back in the system. After the one-year window, a member may still repurchase his or her credit, but only at the rate that compensates the system

for its forgone investment income. *See Perrault v. MTRS*, No. CR-15-32, at *4 (DALA July 21, 2017).

When the 2011 statute came into force, numerous members possessed not-yet-realized rights to repurchase their prior service at the “buyback” rate. The Legislature’s solution was to afford such members a grace period to make their discounted purchases. The grace period ran until April 2, 2013, one year after the new statute’s effective date. *See Acts 2011, c. 176, § 64.*

In MTRS’s case, the grace period triggered a large wave of purchase applications. MTRS found itself unable to process new applications by the April 2, 2013 deadline. MTRS therefore commenced a practice of charging the “buyback” rate to any member who (a) submitted his or her purchase application before the statutory deadline; and (b) complied with MTRS’s purchase invoice by the due date stated on it, i.e., sixty days after the invoice’s issuance. Applicable DALA decisions have uniformly endorsed MTRS’s practice. *See, e.g., Spinelli, supra*, at *11-13; *Perrault, supra*, at *8-10; *Breed v. MTRS*, No. CR-15-660, at *6 (DALA July 31, 2020); *Meaney v. MTRS*, No. CR-14-811, at *9 (DALA Dec. 13, 2019). Those decisions reflect weighty concerns: realistically speaking, most of the members whose purchases the Legislature intended to authorize could not have made their payments without the benefit of system-issued calculations and invoices.

MTRS is no longer facing the onslaught of purchase applications provoked by the 2011 statute. But the same practice that MTRS adopted in that era apparently remains in place. In Ms. Feffer’s case, the date of her reentry into service was August 2021. The unadorned text of § 3(8)(b) would have conditioned Ms. Feffer’s eligibility for the “buyback” rate on her actually remitting payment or accepting an installment plan no later than August 2022. But because Ms. Feffer submitted her application form before that deadline, MTRS agreed to charge her only the

“buyback” rate, as long as she complied with the sixty-day, February 2023 deadline appearing on her invoice.¹

Ms. Feffer’s arguments on appeal focus on the facts surrounding her inadvertent failure to comply with the invoice’s due date. Those facts include Ms. Feffer’s multiplicity of invoices, her family’s medical issues, and the MTRS staff member’s comment that Ms. Feffer need not rush. MTRS’s primary response is as follows: “The statute is clear regarding the terms of such purchases, and MTRS staff do not have the authority to waive these requirements”

MTRS’s position borrows from an extensive body of case law. Arguments focused on fairness and sympathy are presented often by individuals who have missed out on benefits because of technicalities, missteps, or bad advice. The appellate courts and the administrative decisions have held that “equitable” considerations cannot overcome the commands of applicable statutes and regulations. *See, e.g., Clothier v. Teachers’ Ret Bd.*, 78 Mass. App. Ct. 143, 146 (2010); *Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Reed v. Essex Reg’l Ret. Bd.*, No. CR-20-124, at *11 (DALA July 2, 2021); *Walsh v. MTRS*, No. CR-06-269, at *8 (DALA Mar. 19, 2010).

These principles do not control the current case. What the applicable statute says is that Ms. Feffer was required to make her payment within a year of returning to service. The parties and the case law agree that MTRS possessed the power to stretch the statutory deadline by offering the “buyback” rate to individuals who filed timely applications and complied with MTRS’s invoices.² Taking that premise as true, the normative source of the invoices’ specific

¹ Indeed, MTRS did not even issue Ms. Feffer’s invoice until approximately sixteen months after her return to membership.

² Presumably the elasticity of the statutory deadline is not unlimited. It is not necessary to determine here what the limits might be.

sixty-day timeframe is MTRS's informally chosen practice, not any statute or a regulation. *Cf. Rent Control Bd. of Cambridge v. Cambridge Tower Corp.*, 394 Mass. 809, 814 (1985); *Cooper v. State Bd. of Ret.*, No. CR-20-345, 2022 WL 16921451, at *4-6 (DALA Aug. 12, 2022).

There are of course various contexts in which a member's entitlements are governed by a retirement board's own choices rather than by fixed statutes or regulations. *See, e.g., Towler v. Contributory Ret. Appeal Bd.*, 37 Mass. App. Ct. 277, 281 (1994); *Sullivan v. Boston Ret. Bd.*, No. CR-19-623, 2023 WL 4052393, at *6 (DALA June 9, 2023); *Navoy v. Mass. Water Resources Auth. Empls. Ret. Bd.*, No. CR-17-108 (DALA July 26, 2019). The distinction between the two types of situation is significant. Statutes and regulations are overriding sources of authority whose directives leave no room for an agency to consider fairness, sympathy, or unusual circumstances. An agency's informal practices do not dominate the decision-making process in quite the same way. To be sure, it is vitally important for agencies to remain evenhanded. An agency cannot capriciously favor some constituents over others. But the "reasoned consistency" to which the public is entitled does not absolutely bar an agency from making exceptional decisions in exceptional cases. *See, e.g., Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45, 56 (2006); *Rome v. PERAC*, No. CR-13-286, at *8 (CRAB May 20, 2019).

MTRS here incorrectly treated its habitual invoicing practice as impervious to adjustments or exceptions. It refrained from evaluating whether Ms. Feffer's circumstances justified a divergence from MTRS's custom. A decisionmaker commits an error of law by failing to consider whether to undertake a course of action that is available to that decisionmaker as a matter of discretion. The typical remedy for such errors is a remand for further

consideration. See *Commonwealth v. Harris*, 443 Mass. 714, 729 (2005); *Commonwealth v. White*, 436 Mass. 340, 345 (2002).

That remedy is unnecessary here. MTRS has made clear that, setting aside the precise legal analysis, it does not view Ms. Feffer's circumstances as meaningfully unusual. Its brief says: "[T]he evidence does not show anything other than that the invoices themselves were accurate . . . [,] MTRS and its staff [were] . . . sympathetic to the Petitioner[,] . . . and . . . deadline mistakes happen." In view of this analysis, it is reasonably clear that MTRS would have reached the same result if it had undertaken the discretionary exercise that the circumstances warranted. It is also reasonably clear that MTRS would not have abused its discretion in so doing. See generally *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716 (2016). A remand would therefore serve no practical purpose.

Conclusion and Order

For the foregoing reasons, MTRS's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate