COMMONWEALTH OF MASSACHUSETTS

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

**Rosetta Filkins**,

 Petitioner

v. Docket No. CR-11-715

 Date Issued: June 10, 2016

**State Board of Retirement**,

 Respondent

**Appearance for Petitioner:**

Rosetta Filkins, *Pro se*

15A Crapo Street

New Bedford, MA 02740

**Appearance for Respondent:**

 Melinda Troy, Esq.

 State Board of Retirement

 One Winter Street, 8th Floor

 Boston, MA 02108

**Magistrate:**

Edward McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF DECISION**

The Respondent’s decision to deny the Petitioner’s request to purchase time as creditable service is affirmed, because the Petitioner did not met her burden of establishing that she was an employee of a governmental unit so as to be entitled to credible service pursuant to G.L. c. 32, §3(5). In addition, the Respondent did not issue an appealable decision with regard to the Petitioner’s application to purchase her service at Job Training and Employment Corp. and, with respect to the Petitioner’s employment with the Manpower Area Planning Council, the Petitioner did not provide the Respondent with sufficient documentation verifying her dates of employment and salary information.

**DECISION**

 Pursuant to G.L. c. 32 § 16(4), the Petitioner, Rosetta Filkins, appeals the State Board of Retirement’s November 8, 2011 decision denying her request to purchase credible service for the period from July 27, 1975 to August 19, 2009. During this period, she worked for various employers funded by several iterations of a federal law that provided funding aimed at training low income populations for work in the public sector. On November 21, 2011, Filkins filed a timely appeal of the Respondent’s decision in accordance with the provisions of G.L. c. 32 § 16(4). (Ex. 2)

 On May 12, 2015, I issued a pre-hearing order requiring the parties to submit any proposed exhibits and to file pre-hearing memoranda. Both parties complied with this order. The Petitioner’s Pre-hearing Memorandum was marked “A” and the Respondent’s “B”.

 A hearing on the merits of the appeal was held September 15, 2015 at the offices of the Division of Administrative Law Appeals, One Congress Street, 11th Floor, Boston, Massachusetts. I accepted 37 exhibits into evidence. (Ex. Pa-Pv and R1-R15) Filkins testified on her own behalf. She was the only witness. I recorded the hearing on digital media. The Parties submitted closing briefs. The Petitioner’s Closing Brief was marked “C” and the Respondent’s “D.” On November 3, 2015, I closed the record.

**FINDINGS OF FACT**

Based on the documents entered into evidence and the testimony of the Petitioner, I make the following findings of fact:

1. Rosetta A. Filkins is currently employed by the Executive Office of Labor and Workforce Development and has been so employed since August 20, 2009. (Ex. R3) She became a member of the State Employees’ Retirement System (“SERS”) at that time. (Filkins Testimony)
2. Prior to becoming a Commonwealth employee in 2009, Filkins worked for various employers funded by The Comprehensive Employment and Training Act (“CETA”), The Job Training Partnership Act of 1982 (“JTPA”) and The Workforce Investment Act of 1998. (“WIA”) (Ex. R3) Filkins worked for the Manpower Area Planning Council, which was funded by CETA, from July 27, 1975 to September 30, 1982. (Ex. R3, Testimony) Filkins then worked for Job Training Employment Corp., a non-profit, which was funded by JTPA, from October 1, 1983 to June 30, 1993. (Ex. R3, Testimony) Filkins next worked for New Directions, which was funded by JTPA from July 1, 1993 to August 31, 1998 and was funded by WIA from September 1, 1998 to June 30, 2007. (Ex. R3) Filkins next worked for Greater New Bedford Workforce Investment Board, Inc., which was funded by WIA, from July 1, 2007 to August 20, 2009. (Ex. R3)
3. From October 1, 1983 until May 21, 1993, Filkins worked for Job Training and Employment Corp. as a payroll clerk/bookkeeper. (Ex. R9)
4. While employed with the Manpower Area Planning Council, Filkins worked as a payroll clerk and a bookkeeper. (Ex. R9)
5. From May 21, 1993 until June 1993, Filkins worked for the City of New Bedford while “working on the startup of New Directions to replace JTEC.” (Ex. R9)
6. Filkins held numerous positions during her tenure at New Directions including Assistant Manager of Financial Services (May 1993-November 1993), the Manager of Financial Services (November 1993-July 1996), Assistant Accounts Manager (July 1996-September 1998), and Fiscal Accounts Manager (September 1998-June 2003) (Ex. R9)
7. The New Directions offices where Filkins worked were located in buildings owned by the City of New Bedford and these buildings housed “other city departments.” (Ex. R9)
8. Filkins was paid under the City of New Bedford’s Tax Identification Number and the treasurer of the City of New Bedford signed her paychecks. (Ex. Pk, Filkins Testimony) Filkins also received health and life insurance through the City of New Bedford. (Ex. Pk)
9. The City of New Bedford’s CFO was a signatory on the New Directions payroll account until New Directions became an independent 501(c)(3) in October 2006. (Ex. R9)
10. “New Directions was part of the City of New Bedford’s A-133 Audit.” (Ex. R2)[[1]](#footnote-1)
11. The New Bedford Contributory Retirement System will not accept liability for Filkins for the time she was not making contributions to their system, including the period from January 1, 1994 to August 19, 2009. (Ex. Pi) None of the New Directions employees were permitted to become members of the City of New Bedford Retirement System. (Filkins Testimony)
12. Filkins submitted a buy back request form on November 25, 2009 to the Respondent State Board of Retirement requesting that she be allowed to buy back her service for her employment with Manpower Area Planning Council, Job Training Employment Corp, New Directions, and Greater New Bedford Workforce Investment Board, Inc. (Ex. R3)
13. On October 15, 2010, the Respondent wrote to the Petitioner and asked for more information. (Ex. R7)
14. On October 22, 2010, the Petitioner wrote a letter to the Respondent explaining the history of her employers and promising to provide written documentation as soon as possible. (Ex. R8)
15. On February 17, 2011, in response to the Respondent’s October 15, 2010 request for additional information, the Board received records from Filkins detailing her employment history. (Ex. R9)
16. A November 19, 2009 letter from the Greater New Bedford Workforce Investment Board’s CFO, Steven Grant, states that Filkins’ salary information for the years 1977 through 1979 and 1987 is unavailable. (Ex. Pb) The letter states that although only $2,564 and $2,882 were listed as wages in 1975 and 1976 respectively, Filkins worked 35 hours a week. (Ex. Pb)
17. The discrepancies in Filkins’ wages concern years in which she transitioned into a new position, which would have affected her salary records at the previous position. (Testimony)
18. Greater New Bedford Workforce Investment Board was “the fiscal agent for workforce development funds for the City of New Bedford.” (Ex. R.9 Letter dated December 16, 2010 from Carlene LeBlanc)
19. In a letter dated November 8, 2011, the Respondent denied Filkins’ request to purchase as credible service the period from July 27, 1975 to August 19, 2009, when she worked for various agencies funded by CETA, JTPA, and WIA, respectively. (Ex. Pa) However, the Board concluded that she was eligible to purchase time for her employment at the Job Training Employment Corp. from October 1, 1983 to May 21, 1993, pending the Respondent’s receipt of records confirming her annual salary during this period. (Ex. Pa)
20. The Respondent denied the Petitioner’s request to purchase her service at Manpower Area Planning Council from July 27, 1975 to September 30, 1982, because she failed to provide the Respondent with sufficient documentation concerning the council or Filkins employment there. The Respondent also denied Filkins’ request to purchase time for her employment with New Directions, because it said New Directions is not a “governmental unit” as defined in G.L. c. 32, §1, and, she was not erroneously excluded from membership in the New Bedford Contributory Retirement System. (Ex. Pa, Ex. R1)
21. Filkins timely appealed to DALA by letter dated November 21, 2011and received by DALA on November 22, 2011. (Ex. R2)

**CONCLUSION AND ORDER**

 The Petitioner is not entitled to prevail in this appeal. Chapter 32 § 3(5) provides for the purchase of creditable service under certain circumstances. It allows a retirement system’s member

who had rendered service as an employee of any governmental unit other than that by which he is presently employed, for any previous period during which the first governmental unit had no contributory retirement system or during which he had inchoate rights to a non-contributory pension or in a position which was not subject to an existing retirement system, or which was specifically excluded therefrom…

to purchase service. G.L. c. 32 § 3(5). The same section mandates that, “such member shall furnish the board with such information as it shall require to determine the amount to be paid and the credit to be allowed under this subdivision.” (*Id.*)

1. **Manpower Area Planning Council July 27, 1975 to September 30, 1983**

The Respondent does not dispute that employees of the Manpower Area

Planning Council, which was funded by CETA, may be entitled to purchase credible service for their employment. Rather, the Respondent argues that the Petitioner’s request must be denied, because she failed to provide sufficient documentation detailing the dates of her service through CETA and her salary amount.

 As a current member of SERS, Filkins may be entitled to purchase credible service for past service rendered in the CETA program. *See Gomes v. CRAB*, CA-94-5927-B (Middlesex Sup. Ct. 10/11/1995) ("[A]lthough the CETA program is a federal program, it was applied for and administered by Commonwealth...[s]ince there is no doubt that the Commonwealth is a governmental unit, it follows that someone working for the state administered CETA program is someone who is providing services for the Commonwealth.") Filkins, however, still has the burden of “furnish[ing] the Board with such information as it shall require to determine the amount to be paid and the credit to be allowed under this subdivision.” Chapter 32 §3 (5). G.L. c. 32 §20(5)(c)(1) further provides in pertinent part that:

Whenever any such board shall find it impossible or impracticable to consult an original record to determine the date of birth, length of service, amount of regular compensation or other pertinent fact with regard to any member, it **may**, subject to the approval of the actuary, use estimates thereof on any basis which **in its judgment** is fair and just...

(Emphasis added). While this statute allows the Respondent to use estimates of dates of service and regular compensation subject to the actuary’s approval, it does not require the Respondent to do so. The statute says it “may” use estimates “which inits judgment are fair and just.” *See Bristol Cnty. Ret. Brd. v. CRAB,* 65 Mass. App. Ct. 443, 451- 452 (2006) (use of “may” in G. L. c. 32, s. 20(5)(c)(3) means authority granted board is permissive not mandatory). Therefore, the Board’s decision to require the documentation is affirmed. Moreover, even if I decided that I had the authority to review the Respondent’s decision concerning the documentation, the Petitioner failed to satisfy her burden that the Board’s decision was an abuse of its discretion. Exhibit Pb and the Petitioner’s testimony support the Respondent’s decision, because there is confusion over the amount of the Petitioner’s salary.[[2]](#footnote-2)

1. **Job Training Employment Corp. October 1, 1983 to June 30, 1993**

The Respondent did not deny the Petitioner’s request to purchase the service she rendered from October 1, 1983 until June 30, 1993 at the non-profit Job Training Employment Corp. In fact, the Respondent wrote in its letter dated November 8, 2011, “Please just provide to the board documentation confirming your annual salary during this period so that the Board staff can calculate your purchase and begin to process your request.” I find that the Respondent did not issue an appealable decision concerning that aspect of the Petitioner’s claim and, therefore, I do not decide it. *See Decie v. Essex Reg. Ret. Brd.*, CR-09-862 \* 4 (CRAB 2013) (clarity concerning what constitutes appealable decision especially important); *citing* *Barnstable Cty Ret. Bd. v. PERAC,* CR-07-163 (2012).

1. **New Directions July 1, 1993 to June 30, 2007**

The Respondent’s decision to deny Petitioner’s request to buy back her pre-

membership service at New Directions is affirmed, because the Petitioner failed to meet her burden of proof that New Directions was a governmental unit. Pursuant to G.L. c. 32 § 4(1)(a), “[a]ny member in service shall, subject to the provisions and limitations of section 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 pertaining thereto.” The burden of proving each element of a benefit claim is on the applicant by a preponderance of the evidence. *Lisbon v. Contributory Ret. App. Brd.*, 41 Mass. App. Ct. 246, 255 670 N.E.2d 392, 399 (1996). Thus, in order to be entitled to buy back her service, Filkins had to prove that she was an “employee” of a “governmental unit,” as those terms are defined in G.L. c. 32 §1 while she was employed with New Directions. Governmental unit is defined as “the commonwealth or any political subdivision thereof…” G.L. c.32 §1.

New Directions was a separate legal entity and its employees were not employees of the City of New Bedford. Filkins presented evidence that her checks were paid under the City of New Bedford Tax ID number, her paychecks said “City of New Bedford”, and her office was in a building owned by the City of New Bedford. However, the evidence was insufficient to show that Filkins was an employee of the City of New Bedford. Rather, the evidence established only that the City of New Bedford may have been the “fiscal agent” for New Directions. A fiscal agent is generally defined as “[a] bank or other financial institution that collects and disburses money and serves as a depositary of private and public funds on another’s behalf.” Garner B.A. Black’s Law Dictionary, p. 69 (8th ed. 2004). In this relationship, the agent, the City of New Bedford, and the principal, New Directions, were two separate legal entities. *Wrobleski v. State Board Of Retirement*, CR-09-338 \* 9-10 (DALA Dec. 5/6/10; no CRAB Dec.)

While Filkins submitted evidence that the City of New Bedford performed other services for New Directions, such as auditing its financial statements (Ex. Pl); she did not meet her burden of proof and establish that these services were performed because New Directions was a unit of the government rather than a separate entity which provided services on a contractual basis. While New Directions stated, in 2005, that it was a “component unit of the City of New Bedford,” as the magistrate wrote in *Wrobleski*, section 3 (5) of Chapter 32 “does not apply to pre-membership service in every political subdivision of the commonwealth, but only to pre-membership services in those political subdivisions that later establish a Chapter 32 retirement system” and New Directions has not done so. *Wrobleski* supra \* 6. In addition, a letter dated December 14, 2010 from Albert J. Roy of JTEC stated that “Filkins was hired…for the Office of Job Partnerships…as part of the New Bedford Consortium which operated **in part** under the Chief elected official in New Bedford.” (Ex R9 emphasis added)

 *Carter v. Mass. Teachers’ Retirement System*, CR-07-1155 (DALA 4/27/2012), held that Ms. Carter’s prior employment with non-profits was found not to be employment with a governmental unit or political subdivision, because “the independence of an organization from the Commonwealth, or independence from a recognized political subdivision of the Commonwealth, is well-established as an indicator that the organization is not a governmental unit.” See *Popeo v. State Ret.t Brd.*, CR-95-645 (DALA 6/6/1996) (board of directors was independent from the City of Worcester); *Castellano v. Springfield Ret. Brd.*, CR-04-1118 (DALA 6/2/2006) (no governmental unit when the organization was a non-profit corporation and employees contributed to Social Security); *Mol v. Teachers' Ret. Brd.*, CR-01-719 (DALA 10/5/2001) (insufficient statutory authority to establish a link between an organization and a recognized governmental unit). In this same vein, work for a non-profit corporation that makes independent hiring decisions, even when it provides services to a governmental unit, is not work for a governmental unit that would entitle an employee to creditable service. In *Fawcett v. Mass. Teachers’ Retirement System*, CR-07-225 (DALA 12/10/2010), Fawcett’s work directly benefitted the City of Lowell, although he worked for the Neighborhood Youth Corps, a non-profit, receiving federal grant money used to pay him. Fawcett was hired by the non-profit to help carry-out its mission. “The City of Lowell was simply the beneficiary of the work” of the non-profit. *Id.*

 There must be a link between the service and the governmental unit. For example, in the case of *Sennott v. Mass. Teachers’ Retirement System*, CR-03-688 (DALA, 2003). Ms. Sennott was paid by Montachusett Employment and Training, Inc. to provide services to the City of Gardner … a federally-funded agency established to provide employment and training services to the residents of the City of Gardner, as a Service Delivery Area designated to receive employment and training funds from the Commonwealth of Massachusetts." Montachusett was found to be a "component unit of the City of Gardner, for which a separate general purpose financial statement was issued as the primary report to the management of the City of Gardner." While at some point Montachusett became a non-profit corporation, but continued to be funded through CETA federal funds. The City of Gardner continued to permit the entity "to operate out of an unused building it owned in the city" without paying rent. Only because the entity was found to be a component unit of the City of Gardner was it found to satisfy the M.G.L. c. 32, s. 1 definition of political subdivision. As in *Sennott, supra*, in *Roy v. Springfield Retirement System*, CR-06-590 (DALA, 2008), Roy was able to purchase creditable service for his employment with a non-profit. This was allowed because the non-profit had intertwined operations with a public school and was considered an unclassified department of the City of Springfield.

In *Rocha v. Mass. Teachers’ Retirement System*, CR-08-751 (DALA 6/20/2014), work for a non-profit was not found to be eligible for creditable service despite the non-profit’s close connections with the city. The work was funded by federal JTPA funds, the predecessor program to CETA, but the non-profit was found to be an independent entity with “no evidence that the city had financial oversight over … [it], such as to make it a political subdivision of the city.” Relying on *Carter, supra*, the decision explained; “The independence of an organization … from a recognized political subdivision … is well-established as an indicator that the organization is not a government unit.” This was despite the city designation of the non-profit as its anti-poverty agency and with the city manager serving on its board of directors. Determinative factors included the following:

[T]here is no evidence that … [the city manager] controlled its operations, made staff hiring decisions, and approved appointments of the other board members. There was no oversight by the city, and no accountability from the … [non-profit] to the city … [It’s] use of a city building, rent free, does not alone overcome the lack of evidence that the city had financial oversight over the organization.

After considering all of the evidence and the factors outlined above, I am

not persuaded that New Directions is a governmental unit.

**Greater New Bedford Workforce Investment Board, Inc. from July 1, 2007 to August 20, 2009**

 Similarly, I am not persuaded that Greater New Bedford Workforce Investment Board is a governmental unit. In a letter dated December 16, 2010, Carlene LeBlanc, Accounting Manager/ HR Coordinator for Greater New Bedford Workforce Investment Board described the agency as “the fiscal agent for workforce development funds for the City of New Bedford (Ex. R.9). The Petitioner did not meet her burden and establish that the Greater New Bedford Workforce Investment Board was a governmental unit. Therefore, the Respondent’s decision concerning the Petitioner’s request to purchase that service is affirmed.

The Petitioner claims she was “denied equal rights under Amendment 14 Equal Protection Clause.” She alleges that “other employees who worked with the Petitioner at New Directions were allowed to buy back time they earned working for New Directions.” To the extent that these arguments implicate the due process and equal protection clauses of the federal Constitution and the Massachusetts Declaration of Rights, neither DALA nor CRAB have jurisdiction to decide constitutional questions. *See Maher v. Justices of the Quincy Div. of the Dist. Ct. Dept*., [67 Mass. App. Ct. 612](http://sll.gvpi.net/document.php?id=sjcapp:67_mass_app_ct_612), 619 (2006); *Barker v. State Board of Retirement*, CR-15-72 \* 5 (DALA 6/26/2015) (DALA no authority to decide constitutional question). To the extent the Petitioner argues that the Respondent allowed other employees to buy back their time and, therefore, she should be allowed to buy back the time at issue, I make no findings concerning any other employees. Even if the Petitioner’s assertions were true, the argument would not be persuasive. *See LeClerc v. Teachers Retirement System*, CR 14-436 \* 4-5 (CRAB 12/2/2015) (error in one case, if there was error, does not require repeating error).

Wherefore, I conclude that the Petitioner has not established by a preponderance of the evidence that she is entitled to buy back the service at issue. Therefore, the Respondent’s decisions are affirmed and the Petitioner’s appeal is dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath, Esq.

Chief Administrative Magistrate

DATED: June 10, 2016

1. Circular A-133 from OMB states that entities that receive federal funds are subject to audit requirements that are commonly referred to as single audits andrefers to audits of states, local governments and non-profit organizations. [↑](#footnote-ref-1)
2. If Filkins obtains the documentation that the Respondent requires before she retires, she may make the request again. [↑](#footnote-ref-2)