

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Francis Fitzgerald,
Petitioner

v.

Docket No. CR-20-0225

Dated: May 19, 2023

Massachusetts Teachers' Retirement System,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

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Administrative Magistrate:

Timothy M. Pomarole, Esq.
Administrative Magistrate

SUMMARY OF DECISION

In an earlier appeal, the petitioner successfully appealed the denial of his request to purchase prior creditable service. The present appeal concerns which rate of interest applies to that purchase – the buyback interest rate under G.L. c. 32, § 4(1)(p) or the correction of errors interest rate under G.L. c. 32, § 20(5)(c)(2). The Massachusetts Teachers' Retirement System correctly determined that the buyback interest rate applies to the petitioner's purchase of his prior creditable service.

DECISION

In an earlier case, Francis Fitzgerald successfully appealed the denial of his application to purchase creditable service under G.L. c. 32, § 4(1)(p). In this case, Fitzgerald appeals the

Massachusetts Teachers' Retirement System's ("MTRS") decision that the buyback interest rate under G.L. c. 32, § 4(1)(p), rather than the correction of errors interest rate under G.L. c. 32, § 20(5)(c)(2), must be applied to his purchase. For the reasons set forth below, I affirm the MTRS's decision.

Findings of Fact

This appeal was submitted on the papers. 801 CMR 1.01(10)(c). I admit into evidence Petitioner's Exhibits 1-10 and Respondent's Exhibits 1-5. I also admit into evidence Attachments A, B, and C to the Petitioner's memorandum of law.¹

Based on the evidence presented by the parties and the uncontradicted statements of fact contained in the parties' prehearing briefs, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. Mr. Fitzgerald, who is retired and receiving a retirement allowance, is an inactive member of the MTRS. (Petitioner's Statement of Facts, ¶ 1).
2. On November 26, 2012, while still an active member in service of the MTRS, Mr. Fitzgerald applied to purchase nonpublic school teaching service with the New England Home for Little Wanderers ("the Home") under G.L. c. 32, § (4)(1)(p). (Petitioner's Statement of Facts, ¶ 2).
3. Mr. Fitzgerald had worked for the Home from July 1981 to June 1984, and again from February 1986 until June 1990. (Petitioner's Exhibit 1).

¹ These attachments are a PERAC memorandum dated November 20, 2013, a chart of Social Security cost-of-living adjustments, and a PERAC memorandum dated March 5, 2018.

4. On October 22, 2015, the MTRS notified Mr. Fitzgerald that his application to purchase his service with the Home was denied. (Petitioner's Exhibit 6).
5. Mr. Fitzgerald appealed the MTRS's decision to DALA. On September 20, 2019, DALA reversed the MTRS's decision and ruled that Mr. Fitzgerald was entitled to purchase all of his prior service with the Home. Francis Fitzgerald v. MTRS, CR-15-607 (DALA September 20, 2019).
6. On February 21, 2020, after the MTRS filed objections to the DALA decision, the Contributory Retirement Appeal Board ("CRAB") issued a decision reversing DALA's determination that Mr. Fitzgerald could purchase the period of service between July 1, 1981 through June 30, 1984, but affirming its decision that Mr. Fitzgerald could purchase his service between February 15, 1986 and June 30, 1990. Francis Fitzgerald v. MTRS, CR-15-607 (CRAB Feb. 21, 2020).
7. On April 24, 2020, the MTRS informed Mr. Fitzgerald of the cost of purchasing a sufficient amount of his service with the Home in order to reach 30 years of creditable service and retire at the end of the 2019-2020 school year. (Petitioner's Exhibit 7).
8. The MTRS informed Mr. Fitzgerald that the entire purchase of his service with the Home, from the dates of service up to the time of the purchase, including the five-year period between the initial denial to purchase and the issuance of the CRAB decision in 2020, would be subject to a buyback interest rate of 3.625%. (Petitioner's Exhibit 7).
9. Mr. Fitzgerald informed MTRS that he believed a correction of errors interest rate should be the applicable interest rate and requested that the correction of errors interest rate be applied. (Petitioner's Exhibit 9).

10. On May 14, 2020, MTRS informed Mr. Fitzgerald that it was denying this request.

(Petitioner's Exhibit 9).

11. On May 15, 2020, Mr. Fitzgerald filed an appeal of MTRS's decision concerning interest to DALA. (Petitioner's Exhibit 10).

Analysis

A. Buyback Interest Rate v. Correction of Errors Rate

1. Buyback interest rate

The purchase of creditable service based on work at a non-public school is governed by G.L. c. 32, § 4(1)(p), which provides that to purchase a period of prior creditable service, the member must pay 5% of the compensation he or she received during the period of service plus "buyback interest." Buyback interest, in turn, is defined as one-half the "actuarial assumed interest rate," which in turn is defined as the "interest that would have been so credited using a rate equal to a system's actuarial assumed rate of return on investments, as determined from time to time by the [Public Employee Retirement Administration Commission ("PERAC")]." G.L. c. 32, § 1. There does not appear to be any dispute in this case that the actuarial assumed interest rate applicable here is 7.25% and that the resulting buyback interest rate is 3.625%.

The "payment of buyback interest reflects the legislature's evident intent to have the cost of membership be the same for those who contributed all along and those who bought back time." McDonough v. Quincy Retirement Board, CR-13-357, 2016 WL 8466253, at *5 (DALA Nov. 9, 2016). After all, an "employee who buys back prior service is paying retirement deductions that would have been taken from her paycheck earlier, had she been eligible at the time. Interest represents the time value of money and puts the person paying late in the same

position as the person who all along was having retirement deductions taken from her paycheck.”

Id.

2. Correction of errors interest rate

Chapter 32 contains the following provision concerning the correction of errors by retirement boards:

(2) When an error exists in the records maintained by the system or an error is made in computing a benefit and, as a result, a member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct or had the error not been made, the records or error shall be corrected and as far as practicable, and future payments shall be adjusted so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid. If it is determined that a member has contributed an incorrect amount to the retirement system, the member shall be required to contribute an amount sufficient to correct such error or the board shall pay an amount to the member to correct such error, as the case may be.

G.L. c. 32, § 20(5)(c)(2).²

The MTRS has established a correction of errors interest rate that is equal to the CPI-W index, as determined by the Commissioner of Social Security. See 807 CMR 22.02. For the period of 2015 to 2020, the annual interest rates range between 0% and 2.8%. (Petitioner’s Attachment B).

² Notwithstanding the fact that § 20(5)(c)(2) references only errors “in the records” maintained by retirement systems and errors made in “computing a benefit,” the Supreme Judicial Court has concluded that this section applies to errors of law as well. Herrick v. Essex Regional Retirement Board, 465 Mass. 801, 808-09 (2013).

B. The Interest Rate Applicable to Mr. Fitzgerald's Purchase

Mr. Fitzgerald contends that because he had been erroneously precluded from purchasing his prior service, under § 20(5)(c)(2) he is entitled to avail himself of the lower interest rate applicable to the correction of errors by retirement boards.

Section 20(5)(c)(2) contains two parts, each of which addresses a different situation, and neither of which are applicable here.

The first sentence of § 20(5)(c)(2) applies to errors made with respect to retirement benefits received by members. If the member receives benefits that are greater than or less than those to which he or she is entitled, "future payments shall be adjusted so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid." This sentence is inapplicable to this appeal because the purpose of this appeal is not to adjust retirement benefits. That was already done with the appeal in docket number CR-15-607. Of course, the benefits that Petitioner has received since retirement must be adjusted under the first sentence and that adjustment includes interest calculated with the adjustment of errors rate. But that has no direct relation to the interest that Mr. Fitzgerald owes on his creditable service purchase.

The second sentence pertains to errors made with respect to the amount contributed by a member. If a member has contributed an incorrect amount, "the member shall be required to contribute an amount sufficient to correct such error or the board shall pay an amount to the member to correct such error, as the case may be." § 20(5)(c)(2). Here, Mr. Fitzgerald is making a purchase, not adjusting contributions. The second sentence is therefore inapplicable. In sum, Mr. Fitzgerald's purchase does not fall within the scope of § 20(5)(c)(2).

Mr. Fitzgerald argues that his situation is akin to an erroneous exclusion from membership and that the correction of errors interest rate therefore applies. The argument is unavailing. The Contributory Retirement Appeal Board (CRAB) has held that if a member has been erroneously excluded from membership and must therefore purchase his prior service, the applicable interest rate is the correction of errors rate described in the first sentence of § 20(5)(c)(2). Wright v. State Bd. of Ret., CR-16-68, at 2 (CRAB Oct. 18, 2022). As CRAB observed, “Chapter 32 does not directly address members who were erroneously excluded from membership and sets no particular rate of interest for purchase of creditable service in such circumstances.” Id. at 5. In the DALA proceedings under review, PERAC had taken the position that “since these members have been excluded by error, it is more logical for the ‘correction of errors’ interest rate to attach to payments of those erroneously excluded.” Id. at 7 n. 15 (citing PERAC Memorandum #14 of 2018 (“Interest Payments in Certain Situations”)). The DALA magistrate, on the other hand, had reasoned that where members are erroneously excluded from membership, the circumstances are most analogous to members buying back creditable service, thus warranting the application of the buyback interest rate. Id. at 6. CRAB concluded that given “the silence of G.L. c. 32 on the matter of interest for wrongfully-excluded members and PERAC’s role in filling in statutory gaps, it logically flows that absent any authority to the contrary, PERAC’s guidance is reasonable and due deference.” Id. Accordingly, erroneously excluded members are subject to the correction of errors interest rate when purchasing their service.

CRAB’s adoption of a correction of errors interest rate for erroneously excluded members is premised on a gap in the statute, which PERAC filled. There is no such gap here: the purchase of creditable service based on work at a non-public school is governed, directly and

entirely, by the buyback provisions of G.L. c. 32, § 4(1)(p). Grafting the interest rate from § 20(5)(c)(2) onto § 4(1)(p) would not fill a gap in the statutory scheme, it would amend it.

Mr. Fitzgerald also appears to argue, in essence, that because the MTRS erred by denying his application to purchase his prior creditable service in 2015 (resulting in a multi-year, and ultimately partially successful, appeal process), he should not be penalized for this error by paying the higher buyback interest rate rather than the lower correction of errors interest rate. I disagree. It first bears mention that, although Mr. Fitzgerald ultimately prevailed, it is not clear that MTRS “made” any error when it first denied his application to purchase his prior creditable service. MTRS suggests that, based on the information it had at the time, its denial was sound and that, in any case, the twenty-plus year gap between the prior service and Mr. Fitzgerald’s application limited MTRS’s ability to investigate that application.³ Mr. Fitzgerald’s success on appeal, MTRS argues, was based on testimony and documents not available to it when it denied Mr. Fitzgerald’s application.

In any case, if Mr. Fitzgerald experienced unfair consequences from the 2015 denial and ensuing administrative process, that would be unfortunate, but this division lacks the equitable powers that would be required to remedy any such unfairness. See Bristol County Ret. Bd. v. CRAB, 65 Mass. App. Ct. 443, 451-52 (2006) (DALA lacks the power to provide equitable remedies).

³ The 2015 denial, and much of the ensuing administrative proceedings, concerned whether Mr. Fitzgerald was entitled to receive a separate retirement allowance based on his prior service at the Home. (Petitioner’s Exhibit 6; Francis Fitzgerald v. MTRS, CR-15-607 (DALA September 20, 2019); Francis Fitzgerald v. MTRS, CR-15-607 (CRAB Feb. 21, 2020)). It appears that relevant documents were obtained only after the 2015 denial; in fact, one relevant pension plan was evidently never located.

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Accordingly, the decision of the MTRS is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Timothy M. Pomarole

Timothy M. Pomarole
Administrative Magistrate