COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Peter Forbes**,

Petitioner

v. Docket No. CR-13-146

**State Board of Retirement**,

Respondent

**Appearance for Petitioner**:

Peter Forbes

*Pro se*

**Appearance for Respondent**:

Candace L. Hodge, Esq.

State Board of Retirement

One Winter Street, 8th Floor

Boston, MA 02018

**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

Petitioner sought pro-rated credit for service in Group 2. State Board of Retirement’s denial is affirmed for two reasons. Petitioner did not prove that he spent more than half of his time engaged in the care, custody, or supervision of youth in the care of the Department of Youth Services. Statutory language for Group 2 refers to “defective delinquents” and “wayward children,” but those categories of people no longer exist legally.

**DECISION**

The petitioner, Peter Forbes, appeals the denial by the State Board of Retirement (SBR) of his application to classify in Group 2 his service as a case work manager.

I held a hearing on November 15, 2016, which I recorded digitally. Mr. Forbes testified and was the only witness. I accepted into evidence 11 exhibits for Mr. Forbes, and four for SBR. Both parties waived post-hearing briefs and instead, presented their closing arguments orally.

**Findings of Fact**

1. The Department of Youth Services (DYS) is “the juvenile justice agency for the Commonwealth of Massachusetts.” www.mass.gov/eohhs/gov/departments/dys/.

2. DYS case workers spend almost all their time working directly with youth in DYS’s care. (Testimony.)

3. At one point, DYS case workers had the title of parole officer. (Testimony.)

4. Before Mr. Forbes became a case work manager on September 16, 1987, he was a case worker. (Testimony.)

5. From September 16, 1987 to May 30, 1992, Mr. Forbes was a case work manager. A case work manager supervises case workers. (Testimony, *e.g.*, Pet. ex. 4 (Form 30).)

6. In addition to his supervisory duties, Mr. Forbes maintained a caseload. That is, he still performed the functions of a case worker. (Testimony.)

7. Mr. Forbes maintained a caseload because he filled in for case workers if they left the job, were on vacation, were on leave, including maternity leave, or had conflicting appointments. (Testimony; Pet ex. 9, p. 7.)

8. The Form 30 for case work manager does not mention maintaining a caseload. (Resp. ex. 4.)

9. Mr. Forbes’s performance evaluation, dated July 1, 1988, referred to his caseload. (Pet. ex. 4.) So did his performance evaluation from June 1989, and a 1992 nomination for a Department of Youth Services award. (Pet. exs. 5, 8.) *See also* Petitioner’s Exhibits 2, 3, 9, 10, 11 (all referring to Mr. Forbes’s direct work with youth under DYS’s care).

10. Approximately half of Mr. Forbes’s duties were administrative; approximately half of his duties entailed working directly with youth under DYS’s care. (Testimony.)

11. When Mr. Forbes worked directly with youth under DYS’s care, he drove them to and from residential programs, where they were interviewed for admission; physically removed them from residential programs, sometimes in mechanical restraints (handcuffs and leg irons); drove them to and from medical appointments, sometimes in mechanical restraints; decided whether to remove the restraints during medical appointments; visited them and their families in their home; drove them to and from court, sometimes from home and back, sometimes from a detention facility and back; and sat down with them, after they had been apprehended under a warrant, and explained why. (Testimony.)

12. In court, Mr. Forbes sat with or behind youth under DYS’s care; tried to make sure that everything was in order, including that the probation officers knew that the youth were there; and sometimes talked about the youth with the judges, defense lawyers, and prosecutors. (Testimony.)

13. Mr. Forbes’s average work week was 50 hours when he was a case work manager. (Testimony.)

14. On January 7, 2013, Mr. Forbes applied to classify in Group 2 his service as a case work manager from September 16, 1987 to May 30, 1992. (Resp. ex. 3.)

15. On March 1, 2013, SBR denied Mr. Forbes’s application. (Resp. ex. 1.)

16. On March 13, 2013, Mr. Forbes appealed. (Pet. ex. 1.)

**Discussion**

For retirement purposes, Commonwealth employees fall into four groups. Group 1 is the general group. G.L. c. 32, § 3(2)(g). Group 2 is the group for various employees, including those

whose regular and major duties require them to have the care, custody, instruction or other supervision of…defective delinquents or wayward children….

Citing this provision, Mr. Forbes seeks to reclassify his service as a case work manager from Group 1 to Group 2, which is more advantageous for the purpose of calculating retirement benefits.

An employee’s group generally depends on his or her duties when he or she retires.

*Maddocks v. Contributory Retirement Appeal Board*, 369 Mass. 488, 494 (1976). In some circumstances, an employee who has served in more than one group may receive retirement benefits pro-rated among groups. G.L. c. 32, § 5(2)(a). That is what Mr. Forbes seeks to do.

In its prehearing memorandum, SBR brought to my attention that Massachusetts has eliminated the terms “defective children” and “wayward children.” At the start of the hearing, my first question to SBR was whether youth in DYS’s care were “defective delinquents or wayward children” under G.L. c. 32, § 3(2)(g). SBR answered yes.

The statutory provision for “defective delinquents,” G.L. c. 123, § 113, *see In re Arthur Chinouinard*, 358 Mass. 780 (1971)(interpreting statute), was repealed in 1970. St. 1970, c. 888, § 4.

The definition of “wayward child” was repealed in 1973. St. 1973, c. 1073, § 6. The term “wayward child” was eliminated from G.L. c. 120, § 21 in 1996. St. 1996, c. 23.

The language in Chapter 32 was not amended to reflect the elimination of these terms. As far as I know, no statute, specific court decision, or general principle of statutory construction provides that references to “defective delinquents” and “wayward children” now mean youth under DYS’s care.

In fact, the elimination of the terms “defective delinquents” and “wayward children” means that it is no longer possible for state employees to engage in “the care, custody, instruction or other supervision of…defective delinquents or wayward children,” to have “regular and major duties” involving defective delinquents or wayward children, and to be classified in Group 2 or receive pro-rated benefits for Group 2 service on that basis. So opined the Contributory Retirement Appeal Board in *Denise DellaGuistina v. State Board of Retirement*, CR-11-699 (CRAB 2015). CRAB noted that “it may safely be assumed that there are no longer any children in Massachusetts who have been adjudicated a ‘wayward child’” and

it may safely be assumed that no persons are currently committed as “defective delinquents.” These categories cannot add any support to DellaGuistina’s claim that a majority of her clients fell within a population covered

by Group 2. *Id.* at 4, 5.

The parties agree that DYS employees “whose regular and major duties require them to have the care, custody, instruction or other supervision” of youth in DYS’s care are eligible for Group 2. However, the agreement of the parties cannot override the absence of statutory authority for their position. In addition, I am bound by CRAB’s decision.

My understanding is that DYS employees whose regular and major duties require them to have the care, custody, instruction or other supervision of youth in DYS’s care are placed in Group 2. If my understanding is correct, then an anomaly exists. DYS employees who retire in Group 2 or seek pro-rated Group 2 benefits, and receive Group 2 status without an appeal, receive the advantage of Group 2 classification. Mr. Forbes and other DYS employees who are denied Group 2 status and who may appeal in the future do not receive the advantage. However, I don’t have the authority to resolve the anomaly, for the two reasons stated in the previous paragraph.

Mr. Forbes does not prevail for another reason. The “regular and major duties” requirement in G.L. c. 32, § 3(2)(g) has come to mean that an employee must spend more than half of his or her time engaged in those duties. The Division of Administrative Law Appeals has so decided multiple times. *E.g.*, *Jo Ann Neusner v. State Board of Retirement*, CR-12-56 \*8 (DALA 2015). The Contributory Retirement Appeal Board agrees. *E.g.*, *Kathleen Bailey v. State Board of Retirement*, CR-07-724 \*6 (CRAB 2012); *Theresa Currie v. State Board of Retirement*, CR-10-461 \*4 (CRAB no date).

I am not sure that this 51% rule is correct. The words “major” and “majority” are related but they are not the same. To interpret “major duties” to mean “majority of duties” may misread the statute.

Furthermore, if an employee is engaged in duties more than half of the time, the duties are necessarily regular. If “major duties” doesmean “majority of duties,” then “regular... duties” is superfluous. However, “no word in a statute should be considered superfluous.” *International Organization of Masters, Mates & Pilots, Atlantic and Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984). If no statutory word is considered superfluous, then “regular” must mean something and “major duties” cannot mean “majority of duties.”

Perhaps the 51% rule should be revisited, but for now, I am bound by CRAB’s embrace of it.

Mr. Forbes testified that he spent “about half” of his time engaged in the care, custody, or supervision of youth who were, in turn, in DYS’s care. Twenty-four years after he ended his service as a case work manager, he cannot be more specific. He may have spent 55% of his time directly caring for youth, but he may have spent 45% of his time. Mr. Forbes has the burden of proof. *Deborah Herst Hill v. State Board of Retirement*, CR-07-605 (DALA 2009)(“The Petitioner has the burden of proof on each element necessary to establish entitlement to a benefit under Chapter 32”). *See generally* *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 255 (1996); *Blanchette v. Contributory Retirement Appeal Board*, 20 Mass. App. Ct. 479, 483 (1985). However, Mr. Forbes has not proved that he spent more than half of his time engaged in the care, custody, or supervision of youth in DYS’s care.

**Conclusion and Order**

SBR’s denial of Mr. Forbes’s application for pro-rated credit for service in Group 2 is affirmed. Mr. Forbes relied on statutory language for Group 2 that refers to “defective delinquents” and “wayward children,” but there are no longer any such people under Massachusetts law to care for. And Mr. Forbes did not prove that he spent more than half of his time engaged in the care, custody, or supervision of youth in DYS’s care.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Kenneth Bresler

Administrative Magistrate

Dated: December 23, 2016