

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Kevin Fox,**  
Petitioner,

No. CR-23-0238

Dated: February 16, 2024

v.

**Franklin Regional Retirement System,**  
Respondent.

**Appearance for Petitioner:**

Kevin Fox (pro se)

**Appearance for Respondent:**

Michael Sacco, Esq.

**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The petitioner applied for retirement-system membership more than ninety days after taking office as an elected official. At first, the retirement board erroneously allowed the membership application. The board acted properly by later correcting its error.

**DECISION**

Petitioner Kevin Fox appeals from a decision of the Franklin Regional Retirement System declining to grant him retirement credit for a period of service as an elected official. The appeal was submitted on the papers. I admit into evidence exhibits marked A-P.

**Findings of Fact**

I find the following facts.

1. Mr. Fox became an elected selectman of the town of Buckland in July 1998. In June 1999, he filed an application for membership in the board's retirement system. A board representative annotated the application as "approved." (Exhibits A, D, G.)

2. Buckland subsequently withheld retirement deductions from Mr. Fox's pay. His annual compensation came to approximately \$2,000, disbursed through between one and four paychecks per year. (Exhibits C, G, I.)

3. Mr. Fox first won reelection in July 2001. He was reelected repeatedly thereafter, serving as a selectman uninterruptedly until June 2018. Starting in 2012, Mr. Fox also worked simultaneously in the part-time, appointed position of town coordinator. (Exhibits J, M.)

4. During 2022, Mr. Fox contacted the board to discuss his potential entitlement to a retirement allowance. The board became concerned that it had erred by allowing Mr. Fox into membership in June 1999.<sup>1</sup> After prudently taking advice from PERAC, the board amended its records to indicate that Mr. Fox's membership had commenced upon his second term in office, i.e., in July 2001. (Exhibits K-M.)

5. In early 2023, Mr. Fox asked the board in writing to grant him credit for his service from 1998 through 2001. The board declined, and Mr. Fox timely appealed. (Exhibits F, N-P.)

### **Analysis**

The retirement benefits of a Massachusetts public employee depend in part on the duration of the employee's creditable service. G.L. c. 32, § 5(2). As a rule, employees receive credit only for periods of work during which they were retirement-system members. § 4(1)(a).

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<sup>1</sup> The board insists that Mr. Fox was not formally "voted" into membership. That position is supported by a preponderance of the evidence, which is equivocal on this point. (Exhibits A, B, D, H.) But the statutory demand for a "vote of the board" applies specifically to positions "for which the annual compensation is fixed in an amount of two hundred dollars or less." G.L. c. 32, § 3(2)(d). *See Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644 (2012). No such requirement applied here. *Cf. Bliss v. Bristol Cty. Ret. Bd.*, No. CR-20-138, at \*2 (DALA Mar. 25, 2022).

Exacting requirements govern the retirement-system membership of elected officials. To establish membership, an elected official must file a written application with the pertinent board “within ninety days after . . . assuming office.” § 3(2)(a)(vi). The ninety-day deadline cannot be sidestepped through the more general rules governing belated entry into membership. *Awad v. Hampshire Cty. Ret. Bd.*, No. CR-08-621 (CRAB Dec. 19, 2014); *Levesque v. Essex Cty. Ret. Bd.*, No. CR-95-571 (CRAB Oct. 7, 1996).

Mr. Fox filed his application for membership almost a year after taking office. Because the ninety-day deadline had expired, the application was unmeritorious. The board records and actions that treated Mr. Fox’s membership as effective in June 1999 were erroneous. The board acted properly by correcting the error upon discovering it. G.L. c. 32, § 20(5)(c)(2).

An elected official receives a new ninety-day window upon each reelection to office. *Calabrese v. Hampden Cty. Reg'l Ret. Bd.*, No. CR-08-329, 2010 WL 676236, at \*4 (DALA Jan. 8, 2010). Having annulled Mr. Fox’s original membership date, it was reasonable for the board to construe his history as if his membership application remained outstanding at the time of his reelection, and as if the board approved the application at that time. The result is that Mr. Fox’s membership is now effective as of the start date of his second term in office (July 2001).<sup>2</sup>

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<sup>2</sup> The analysis stated in *McGarry v. Bristol Cty. Ret. Bd.*, No. CR-20-409, 2023 WL 3614628 (DALA Jan. 27, 2023), is inapplicable here. The board in *McGarry* originally granted a member’s pre-2009 request to be credited with pre-membership elected service. In view of the unsettled state of the law with respect to such requests (specifically when posed before 2009), the board’s original decision was not an “error” within the meaning of § 20(5)(c)(2). By contrast, here the board had no occasion until 2023 to consider whether Mr. Fox should be credited with pre-membership service; everyone assumed incorrectly that his membership dated back to his June 1999 application. The records and actions predicated on that assumption amounted to the type of “clear and certain mistake[]” that the boards are supposed to correct. *See Casey v. Bristol Cty. Ret. Syst.*, No. CR-21-351, 2023 WL 5774615 (DALA Sept. 1, 2023).

Mr. Fox might have ended up with more advantageous entitlements if he had not filed a late membership application, and if the board had not misprocessed the application. But cases in which a member's benefits suffer as a result of procedural missteps are unhappily commonplace. Administrative agencies generally are powerless to remedy such problems. *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, 446, 450-51 (2006). That powerlessness persists even when the disappointed member states (as Mr. Fox does) that the pertinent board has acted more benevolently toward other individuals in comparable circumstances. *Racow v. Winthrop Ret. Bd.*, No. CR-20-492, 2022 WL 20401628, at \*2 (DALA Mar. 25, 2022).

**Conclusion and Order**

In view of the foregoing, the board's decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate