COMMONWEALTH OF MASSACHUSETTS

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

Amit Garg,
Petitioner,

v.

State Board of Retirement,
Respondent.

No. CR-22-0584

Dated: September 20, 2024

ORDER OF DISMISSAL

Petitioner Amit Garg appeals from a decision of the State Board of Retirement (board) denying his application to purchase retirement credit for a period of pre-membership "contract" service. The board moves to dismiss for failure to state a claim. *See* 801 C.M.R. § 1.01(7)(g)(3). For the reasons that follow, the motion is meritorious.

At this juncture, Mr. Garg's allegations are taken as true. *See White v. Somerville Ret. Bd.*, No. CR-17-863, at *5 (DALA Nov. 16, 2018). He reports that he is a computer programmer. From 2007 through 2011, he was hired and paid by two private businesses in succession. Each business had contracted to provide the Commonwealth with software-related services. In 2012, Mr. Garg became a permanent Commonwealth employee. In April 2022, he applied to purchase retirement credit for his four years of pre-membership work.

Mr. Garg's purchase request is governed by G.L. c. 32, § 4(1)(s), which discusses purchases of "service to the commonwealth as a contract employee." Such purchases may be made only by active members of the state retirement system with ten or more years of creditable service. *Id.* Once eligible members are notified of their eligibility, they must consummate their § 4(1)(s) purchases within 180 days. *Id.*

A regulation promulgated by the board allows § 4(1)(s) purchases to be made by certain individuals who were hired and paid by state "vendors." 941 C.M.R. § 2.09(3)(c). The

regulation was amended in March 2022. To qualify under today's version, the applicant needs to have worked for "a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth." *Id.* Mr. Garg does not satisfy this standard. He does not claim that the private businesses that hired and paid him were either established by the Commonwealth, or operated by it, or "placed within state government." *Camacho v. State Bd. of Ret.*, No. CR-16-243, at *14 (DALA Dec. 23, 2022).

Before March 2022, § 2.09(3)(c) was more flexible, covering service through a privately operated vendor on two conditions: that the employee worked "under the supervision and control" of state personnel, and that the service was "performed in the standard and ongoing course of an agency's regular business function." Under this older version of § 2.09(3)(c), Mr. Garg's submissions would state a viable claim. He describes his supervisor during the pertinent period as a particular state employee and the focus of his work as a routinely used state computer system.[1]

Liberally construed, Mr. Garg's submissions argue that he is entitled to the benefit of the pre-amendment version of § 2.09(3)(c). This assertion presents two distinct questions.

The first question is whether the March 2022 amendment, construed on its own terms, reaches post-March-2022 applications relating to pre-March-2022 service. On balance, the answer is yes. A purchase application is typically governed by the regulations appearing on the books as of the application's filing date. *See Kalu v. Boston Ret. Bd.*, 90 Mass. App. Ct. 501, 506 n.8 (2016); *Mackay v. Contributory Ret. Appeal Bd.*, 56 Mass. App. Ct. 924, 925 (2002).

[1] The old and new versions of § 2.09(3)(c) both specify that applicants may purchase only "service as a 'contract employee' of the Commonwealth." In other words, the regulation requires applicants to have been employed *both* by a vendor *and* by the state. *Compare Diamantopoulos v. State Bd. of Ret.*, No. CR-15-253 (DALA Jan. 22, 2016), *with Tomeo v. State Bd. of Ret.*, No. CR-22-189, 2024 WL 1155387, at *3 n.2 (DALA Mar. 8, 2024).

Recent decisions have applied that rule to the current context. *See Sullivan v. State Bd. of Ret.*, No. CR-19-100, 2023 WL 6195150, at *6 (DALA Sept. 15, 2023); *Grant v. State Bd. of Ret.*, No. CR-22-542, 2023 WL 9022696, at *3 (DALA Dec. 22, 2023).

The resulting second question is whether Mr. Garg is exempt from the effect of the March 2022 amendment by virtue of G.L. c. 32, § 25(5). That statute states that members of the public retirement systems "are entitled to contractual rights and benefits, and no amendments . . . shall be made that will deprive [them] of their pension rights or benefits." *Id.* *See generally Pereira v. State Bd. of Ret.*, No. CR-16-558, 2023 WL 11806170 (CRAB June 9, 2023).

Section 25(5)'s "contractual" protection of public pension rights reflects the influential approach of California law. *See Opinion of the Justices*, 364 Mass. 847, 862 (1973). "[C]ourts faced with future problems were directed to . . . the . . . guidelines adopted by California." *Dullea v. Massachusetts Bay Transp. Auth.*, 12 Mass. App. Ct. 82, 93-94 (1981). In general terms, the statute views pensions as "delayed compensation for . . . services." *Opinion of the Justices*, 364 Mass. at 858. *See Dullea*, 12 Mass. App. Ct. at 95. The entitlements that are protected against diminution are limited to "the core of [a member's] reasonable expectations," and "reasonable modifications" remain permissible. *Opinion of the Justices*, 364 Mass. at 862-64. *See also State Bd. of Ret. v. Woodward*, 446 Mass. 698, 706-07 (2006).[2]

Massachusetts cases have not yet considered whether an opportunity to purchase credit for non-membership service is within the "core," "contractual" expectations that § 25(5) protects. A recent California decision indicates that the answer is no. At issue in *Cal Fire Local 2881 v.*

[2] "Reasonable modifications" must bear "some material relationship to the theory of a pension system," and must offset new "disadvantage[s] to the employees" with "comparable new advantages . . . to the [same] individual[s]." *Opinion of the Justices*, 364 Mass. at 862. It is not necessary to analyze here whether the amendment to § 2.09(3)(c) meets these demands.

California Public Employees' Retirement System, 435 P.3d 433 (Cal. 2019), was a statute that allowed all public employees with five years of service to purchase five *more* years of credit. The Supreme Court of California declined to view that purchase opportunity as a part of the pension system's scheme of delayed compensation, explaining:

> [T]he opportunity to purchase [extra] credit . . . was made available at the option of each individual employee. If not taken advantage of, the opportunity expired upon an employee's retirement or termination of employment. . . . Once the five-year qualification period was served, further public employment did not increase the amount of [extra] credit that an employee could purchase . . . .
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> [I]t is not unusual for public employees to be offered the opportunity to purchase different types of . . . benefits . . . . We have never suggested that this type of [offer] is entitled to protection . . . .
>
> The opportunity to purchase [extra] credit was *conditioned on* public employment, but it was not offered *in exchange for* public service.

Id. at 448-50.

Section 4(1)(s) is not identical to the statute analyzed in *Cal Fire*. But the core of that decision's reasoning applies here. Section 4(1)(s) gives state employees neither money nor free credit; it only empowers them to make a purchase. Some employees will never accumulate enough membership service to become eligible for § 4(1)(s) purchases. Some will acquire eligibility but then lose it through retirement, termination, resignation, or the expiration of the 180-day deadline. The expense accompanying the purchase suggests that only some eligible members will be interested. Perhaps most importantly, credit acquired through § 4(1)(s) is not principally derived from work within the public retirement scheme; it is the product of *earlier* work, coupled with a purchase price.

These factors together mean that the opportunity to purchase credit under § 4(1)(s) is not the kind of right to delayed compensation that § 25(5) protects. It follows that Mr. Garg's

purchase application remains governed by the up-to-date version of 941 C.M.R. § 2.09(3)(c). Under that version, the board was correct to deny his application.

Mr. Garg makes one additional claim: he says that, at various points in time, certain state employees have assured him that he will be able to purchase credit for his pre-membership contract service. But the board is required to disregard erroneous prior statements and to enforce the law correctly. *See Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010); *Moynihan v. Contributory Ret. Appeal Bd.*, 104 Mass. App. Ct. 1108, slip op. at 7-8 (2024) (unpublished memorandum opinion). To the extent that the resulting consequences are harsh or unfair, administrative agencies are not permitted to intercede on that basis. *See Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006); *Roussin v. Boston Ret. Syst.*, No. CR-23-28, 2024 WL 2956657, at *2 (CRAB June 3, 2024).

In view of the foregoing, Mr. Garg's pleadings do not state a claim upon which relief can be granted. It is therefore ORDERED that the motion to dismiss is ALLOWED and the appeal is DISMISSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate