

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Amy Gerrish,
Petitioner,

No. CR-22-0188

Dated: July 26, 2024

v.

State Board of Retirement,
Respondent.

Appearances:

For Petitioner: James H. Quirk, Jr., Esq.

For Respondent: Yande Lombe, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The respondent retirement board was correct to prorate the amount of creditable service earned by the petitioner during a period of part-time work.

DECISION

Petitioner Amy Gerrish appeals from a decision of the State Board of Retirement calculating her creditable service as just under ten years. The appeal was submitted on the papers under standard rule 10(c).^{1,2} I admit into evidence exhibits marked 1-6.

¹ In accordance with G.L. c. 30A, § 9, the “standard rules” in this context are the provisions of 801 C.M.R. § 1.01.

² The board’s original papers did not truly explain the board’s position or support it with intelligible exhibits. In response to an order to show cause, the board made a corrected and augmented submission. A decision in Ms. Gerrish’s favor by default is not warranted. *See Monahan v. Washburn*, 400 Mass. 126, 129 (1987). Nonetheless, the board is cautioned that a party’s belated compliance with an order does not typically amount to “good cause” for that party’s original noncompliance. *See* standard rule 7(g)(2). *Cf. Young v. Gordon*, 330 F.3d 76, 82-83 (1st Cir. 2003).

Findings of Fact

I find the following facts.

1. Ms. Gerrish worked for the Department of Children and Families for two consecutive periods: full-time in 1992-2000 (approximately seven years, seven months) and part-time in 2000-2004 (approximately four years, four months). In October 2004, the board wrote a letter to Ms. Gerrish stating: “You are vested with the state with 10 years of service.” Soon thereafter, Ms. Gerrish left her state position. (Exhibits 1, 2.)

2. Ms. Gerrish communicated with the board again about her entitlements during 2022. In April of that year, the board issued a decision recalculating Ms. Gerrish’s creditable service total as “9 years, 9 months, and 28 days.” The board apologized for its contrary earlier letter and stated that Ms. Gerrish was entitled to a return of her accumulated deductions. Ms. Gerrish timely appealed. (Exhibits 2-4.)³

Analysis

To retire for superannuation, a Massachusetts public employee must “complete[] ten or more years of creditable service.” G.L. c. 32, § 5(1)(m). *Kaplan v. Contributory Ret. Appeal Bd.*, 51 Mass. App. Ct. 201, 205 (2001). It is easy to understand why Ms. Gerrish would have relied on the board’s original letter informing her that she had reached the ten-year threshold. This appeal presents a badly unfair situation.

Unfairness alone is not a permissible basis for relief in an administrative tribunal. *See Bristol County Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 451-52 (2006).

³ If the board had stood by its original calculation, Ms. Gerrish would have been eligible to retire now for superannuation. The board’s current decision is therefore unlike the unappealable letter at issue in *Bretschneider v. PERAC*, No. CR-09-701 (DALA Nov. 13, 2009).

More specifically, the courts have held that a retirement board's erroneous earlier statements cannot relieve it from enforcing the law correctly today. A panel of the Appeals Court recently explained: "The courts cannot estop the conduct of a governmental officer or agency, as they might a private actor, because the public interest in the lawful work of the governmental actor overrides the unfairness or injury to the private complainant." *Moynihan v. Contributory Ret. Appeal Bd.*, 104 Mass. App. Ct. 1108, slip op. at 7-8 (2024) (unpublished memorandum opinion). See *Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010); *Hunter v. Contributory Ret. Appeal Bd.*, 80 Mass. App. Ct. 257, 263 (2011).

The decisive question is therefore whether the board's current computation of Ms. Gerrish's service is correct. For her period of full-time service, Ms. Gerrish is undisputedly entitled to seven years, seven months of full-time credit. The question is whether she is also entitled to full-time credit for her four years, four months of part-time service.

The general rule with respect to part-time work is that the retirement boards may "fix and determine" the amount of their members' credit "under appropriate rules and regulations." G.L. c. 32, § 4(2)(b). See *Gomes v. Plymouth Ret. Syst.*, No. CR-14-127, at *6 (CRAB Nov. 18, 2016). When a retirement board fails to establish such rules and regulations, its part-time members are entitled to full-time credit. G.L. c. 32, § 4(1)(a); *Madden v. Contributory Ret. Appeal Bd.*, 431 Mass. 697, 699-700 (2000); *Murphy v. Falmouth Ret. Bd.*, No. CR-20-0453, 2023 WL 5528749, at *6-7 (DALA Aug. 18, 2023).

Ms. Gerrish's essential argument is that the board "did not have a part-time service policy so part-time employees [were entitled to] full-time creditable service." The premise of the argument is incorrect. In 1993, the board promulgated a regulation stating that part-time employees "shall receive credit for their part-time service based on the number of hours worked

in proportion to the regular hours of work of full-time employees.” 941 C.M.R. § 2.03(2)(c).

See Times v. State Bd. of Ret., No. CR-21-290, 2024 WL 756095, at *2 (DALA Feb. 16, 2024).

By the time the regulation came into effect, Ms. Gerrish was already an employee; but the regulation nonetheless controls her entitlements as to periods postdating its enactment. *See Madden*, 431 Mass. at 702-04. Ms. Gerrish did not transition into part-time work until 2000-2004. The board was therefore correct to prorate her credit for her part-time work.

Conclusion and Order

The board’s decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate