

COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala**

David Gingerella,
Petitioner

v.

Docket No. CR-21-0625

State Board of Retirement,
Respondent

Appearance for Petitioner:

Michael D. Chittick, Esq.
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Appearance for Respondent:

Jennifer Hunt, Esq.
State Board of Retirement
One Winter Street
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Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Petitioner was not entitled to buy back previous service at lower buyback interest rate and must pay higher actuarial interest rate because he did not begin or complete his buyback within one year of returning to government service. Petitioner did not prove that State Board of Retirement erred.

DECISION

The petitioner, David Gingerella, appeals the imposition by the State Board of Retirement (SBR) of the higher actuarial interest rate to his buyback of previous creditable service, rather

than the lower buyback interest rate.

I held a hearing on February 27, 2024 by Webex, which I recorded. Mr. Gingerella testified, and called no other witness. I admitted 18 exhibits at the hearing. Both parties submitted post-hearing briefs, which the Division of Administrative Law Appeals received in April 2024.

Findings of Fact¹

1. Mr. Gingerella was the Vice President for Administration and Finance at Northern Essex Community College from 2011 through 2016. (Testimony; Exs. 6, 12)

2. During that time, he was a member of the Massachusetts State Employees Retirement System (MSERS). (Testimony)

¹ In Mr. Gingerella's appeal on November 29, 2021, he alleged many facts. In his prehearing memorandum, he alleged many more facts and attached many documents. Mr. Gingerella did not have a lawyer when he appealed or submitted his prehearing memorandum. At the hearing, Mr. Gingerella had a lawyer who (1) did not elicit from Mr. Gingerella during his testimony many of the alleged facts in the appeal and prehearing memorandum; and (2) saw to it that only one of the documents that Mr. Gingerella attached to his prehearing memorandum was introduced as an exhibit. In his post-hearing brief, Mr. Gingerella, through his lawyer, did not rely on the alleged facts in the appeal and the prehearing memorandum or specific documents attached to the prehearing memorandum. (Mr. Gingerella's lawyer did refer to the "evidence submitted with Mr. Gingerella's pre-hearing memorandum." (Pet. Br. 4) He also referred to "the undisputed evidence submitted...in his pre-hearing memorandum." (Pet. Br. 7) However the references are not more specific than that – and the documents attached to the prehearing memorandum are not evidence; they are unadmitted documents, except for Exhibit 18.)

In this decision, I do not consider the alleged facts in Mr. Gingerella's appeal or prehearing memorandum or the documents attached to the prehearing memorandum, other than Exhibit 18. I do not consider them for a few related reasons: I defer to Mr. Gingerella's lawyer on which facts I should consider; he may have investigated the facts while preparing for the hearing and verified some alleged facts and not others. The alleged facts in the appeal and prehearing memorandum do not appear to be complete, coherent, or consistent with Mr. Gingerella's testimony. Finally, there is only so much parsing I can do, especially of unsworn statements and unintroduced documents that do not speak for themselves, to figure out the facts of Mr. Gingerella's case, which is, after all, his case to make. *Bagley v. Contributory Retirement Appeal Board*, 397 Mass. 255, 258 (1986).

3. Mr. Gingerella left Northern Essex Community College to become Vice President for Administration and Finance at Rhode Island College. (Testimony)

4. When Mr. Gingerella left Northern Essex Community College, he withdrew all his retirement contributions from MSERS and deposited it with Merrill Lynch. (Testimony; Ex. 4)

5. On February 24, 2019, Mr. Gingerella started working at the University of Massachusetts - Dartmouth. (Testimony; Ex. 6)

6. Mr. Gingerella became a member of MSERS again. (Testimony)

7. On April 17, 2019, Mr. Gingerella asked to buy back his creditable service at Northern Essex Community College. (Testimony; Ex. 6)

8. If Mr. Gingerella wanted to pay the buyback interest rate and avoid paying the higher actuarial interest rate on a buyback of previous government service, he had a year after he resumed working as a state employee to complete his buyback or agree to an installment plan. G.L. c. 32, §3(8)(b). (Exs. 1, 17) That is, he had until February 24, 2020.

9. On February 6, 2020, SBR sent Mr. Gingerella a letter informing him that it had all the necessary information to begin his purchase of creditable service.²

10. The February 6, 2020 letter informed Mr. Gingerella that he could purchase his creditable service for a lump sum of \$85,236.76 by March 12, 2020.³ The letter also contained a schedule for a payment plan ranging from six months to five years. (Ex. 7)

11. The February 6, 2020 letter gave Mr. Gingerella four options and asked him to pick one:

² The evidence did not explain why it took SBR almost nine months to send this letter, such as the possibility that it did not have the necessary information.

³ This date was past the one-year deadline of February 24, 2020. The evidence does not explain why SBR apparently gave Mr. Gingerella longer than one year to buy back his service with a lump sum at the buyback interest rate.

- ___ Lump sum to be paid by 03/12/2020.
- ___ Installment Payment Plan – check the payment plan schedule and return this form to the State Board of Retirement by 03/12/2020.⁴
- ___ Transfer of assets from the SMART Plan.⁵ If you choose this option, you must contact your local SMART Plan representative to obtain the required paperwork....
- ___ Transfer of assets from an IRC section 403(b) plan.⁶

(Ex. 7)

12. For a lump sum payment, the letter informed Mr. Gingerella to make a check or money order payable to SBR and to mail it to SBR. (Ex. 7)

13. The February 6, 2020 letter did not inform Mr. Gingerella that he had one year since resuming state government employment to get the buyback interest rate; that is, he had until February 24, 2020. (Ex. 7)⁷

14. Mr. Gingerella did not know that the buyback interest rate was available for only the first year of his renewed employment with the Commonwealth of Massachusetts. (Testimony)

15. Sometime after receiving the February 6, 2020 letter, Mr. Gingerella contacted Merrill Lynch about withdrawing money and using it to buy back his previous service. (Testimony)

⁴ This apparently referred to the payment plan schedule on page 1, with the durations for the payment plans of 6 months, and 1, 2, 3, 4, and 5 years. (Ex. 7)

⁵ This retirement savings plan is also called the Massachusetts Deferred Compensation 457 SMART Plan. <https://www.mass.gov/smart-plan-for-public-employees>. “SMART” stands for “Save Money and Retire Tomorrow.” <https://retirementpartner.com/wrFundOverview.do?accu=MassachusettsWR&groupID=98966-01&db=ppn>.

⁶ This refers to a provision of the Internal Revenue Code regarding a tax-deferred savings plan. <https://www.macomptroller.org/commonwealth-403b-tax-deferred-savings-plan-glossary-of-terms/>.

⁷ I do not intend to imply that SBR should have, with this letter or any other communication, informed Mr. Gingerella of the one-year deadline. Mr. Gingerella has not posited that SBR should have so informed him.

16. The testimony and exhibits do not reveal what if anything Merrill Lynch did in response to Mr. Gingerella's contact and the nature, number, or dates of any later contacts by Mr. Gingerella.

17. Mr. Gingerella did not complete his buyback by February 24, 2020.

18. On March 10, 2020, the governor of Massachusetts declared the COVID-19 pandemic a public health emergency. <https://wayback.archive-it.org/1101/20230103094903/https://www.mass.gov/news/declaration-of-a-state-of-emergency-to-respond-to-covid-19>. State government started operating remotely that month. *See id.*

19. Mr. Gingerella did not complete his buyback before March 2020, when COVID-19 became a pandemic and public health emergency.

20. On August 26, 2020, Mr. Gingerella emailed SBR, asking that the dollar amount of his buyback be updated. (Ex. 8)

21. The testimony and exhibits do not reveal what Mr. Gingerella did between February 6 and August 26, 2020, besides contacting Merrill Lynch, to advance the buyback of his previous service.

22. On September 8, 2020, SBR sent Mr. Gingerella a letter informing him that he could buy back his creditable service for a lump sum of \$86,644.35 by October 13, 2020. The dollar amount was higher than in February 2020, reflecting interest on the unpaid buyback. The letter also contained a schedule for a payment plan ranging from six months to five years. (Ex. 9)

23. The September 8, 2020 letter gave Mr. Gingerella the same four options for his buyback (Ex. 9) as did the February 6, 2020 letter. (Ex. 7)

24. With the September 8, 2020 letter, SBR offered Mr. Gingerella the buyback interest rate, even though it had expired on February 24, 2020. The letter did not explicitly note that it

offered the buyback interest rate. (Ex. 9) (The testimony and exhibits do not reveal why SBR offered Mr. Gingerella the expired buyback interest rate.)

25. Mr. Gingerella asked Merrill Lynch for a withdrawal from his Individual Retirement Account (IRA) in the amount of \$86,644.35. (Testimony; Ex. 18)

26. On October 28, 2020, Merrill Lynch issued a check made out to Mr. Gingerella for \$86,644.35. (Ex. 18)⁸ Merrill Lynch mailed it to SBR. (Testimony)

27. The check (Ex. 18) did not appear to comply with SBR's instruction to Mr. Gingerella that it make a check or money order payable to SBR. (Ex. 9)

28. SBR did not accept the check.⁹ Instead, it mailed the check back to Merrill Lynch, which, at Mr. Gingerella's request, mailed it to him. (Testimony)¹⁰

29. Sometime after October 28, 2020, Mr. Gingerella called SBR and spoke to someone who told him that he could not walk into SBR with a check because of the pandemic. (Testimony)

30. Mr. Gingerella testified that he did not do anything further about his buyback for

⁸ It was already long past the one-year deadline, which ended on February 24, 2020. The expiration of the deadline went unremarked on at the hearing and in the post-hearing briefs.

⁹ The testimony and exhibits do not reveal the precise reason or reasons, although it may have been or related to the previous fact. SBR argues the reason in its brief (Resp. Br. 3-4) but, again, the reason is not in evidence.

¹⁰ No exhibits explicate or support this development, which is the heart of Mr. Gingerella's post-hearing brief. For example, one would expect that SBR sent a cover letter to Merrill Lynch with the check, explaining why it was sending the check back. However, any such cover letter or other communication between SBR and Merrill Lynch is not in evidence. Mr. Gingerella testified that a document attached to his prehearing memorandum supports this development. However, the document he referred to is not an exhibit and his lawyer did not move to admit it. The document does not speak for itself, is inexplicable, and ultimately demonstrates nothing: It is an envelope from SBR *with no addressee*, with a postmark of *December 2, 1998*, and unexplained handwritten notes consisting of "Friday" and a calculation subtracting one number from another.

approximately one year for two reasons.

A. Because of the pandemic, government operations were going remote.¹¹

(Testimony)

B. In February 2021, the chancellor at UMass - Dartmouth, who had hired Mr. Gingerella as a vice chancellor, told him that he, the chancellor, was leaving. Mr. Gingerella served at the discretion of the chancellor; a new chancellor might not want to keep Mr. Gingerella as vice chancellor; he might have to leave; and he did not want to buy back his service, leave MSERS again, and withdraw the money that he had redeposited. (Testimony; Ex. 12)

31. In September 2021, UMass - Dartmouth hired a permanent chancellor, who asked Mr. Gingerella to remain as vice chancellor. (Testimony)

32. On October 5, 2021, Mr. Gingerella emailed SBR, asking that the dollar amount of his creditable service purchase be updated. He wrote, "Covid caused some issues that resulted in me not being able to make the transactions last year." (Ex. 10) (parentheses omitted).

33. On October 15, 2021, SBR sent Mr. Gingerella a letter informing him that he could purchase his creditable service for a lump sum of \$110,920.78 by November 19, 2021. The letter also contained a schedule for a payment plan ranging from six months to five years. (Ex. 11)

34. Upon receiving that letter, Mr. Gingerella learned that his buyback amount was significantly higher than it had been in previous letters. (Testimony)

35. The October 15, 2021 letter gave Mr. Gingerella the same four options for his buyback (Ex. 11) as did the February 6, 2020 letter. (Ex. 7)

¹¹ This testimony did not quite make sense. Government operation began remotely in March 2020.

36. On October 28, 2021, Mr. Gingerella sent SBR a letter asking for “an exception to the buyback calculation and...allow me to buy back my time using the original calculation.” (Ex. 12) (emphasis omitted).

37. On November 22, 2021, SBR wrote a letter to Mr. Gingerella, denying his “request to complete a service purchase at a reduced interest rate.” (Ex. 1) It wrote:

As you know, you were a member of the Massachusetts State Employees’ Retirement System (“MSERS”) from on or around May 18, 2011 to March 25, 2016 as a result of your employment at Northern Essex Community College. When you separated from service, you accepted a refund of your accumulated total deductions, thereby terminating your membership in MSERS.

In or around February 2019, you returned to service in the Commonwealth, and re-established membership in the MSERS as a result of your employment at the University of Massachusetts / Dartmouth. General Laws c. 32, §(3)(8)(b) requires that a member must either complete a service purchase or commence making payments toward that service purchase within one year of reinstatement in order for the service purchase to be assessed interest at half of the actuarial rate. After that date, a member is required to pay interest at the full actuarial interest rate.

You inquired about purchasing your previously refunded time as creditable service and you were billed in February 2020 and then again in September 2020 at the reduced interest rate of half of the MSERS actuarial interest rate. You have not completed the service purchase to date.

In October 2021, you inquired again about purchasing this time as creditable service, and the Board billed you at the full actuarial interest rate as required by G.L. c. 32, §3(8)(b). By letter dated October 28, 2021, you asked that the Board allow you to complete the service purchase at half of the actuarial rate.

The Board is not able to grant your request. The Board has no discretion to waive the statutory requirement that you pay actuarial interest on this service purchase. [Citations omitted.]

The Board has no authority to grant your request on an equitable basis, as that would provide you with a benefit that is not authorized by law. [Citation omitted.]

(Ex. 1)

38. On November 29, 2021, Mr. Gingerella timely appealed. (Ex. 2)

Discussion

A member of a retirement system who has left a retirement system, withdrawn the member's contributions to the system, and then returned to a retirement system may buy back previous service. The member may do so at a lower buyback interest rate by buying back service or arranging to do so within one year of returning to a retirement system. After a year, any buyback is at a higher actuarial rate. G.L. c. 32, §3(8)(b). (Ex. 17 (PERAC memorandum); Ex. 1)

During the hearing, Mr. Gingerella's theory of the case seemed to be that the pandemic was to blame for his not buying back his creditable service at the buyback interest rate. (That was also the theory of his appeal and prehearing memorandum.) See SBR's post-hearing brief, anticipating and countering this pandemic-based theory. During the hearing, Mr. Gingerella glossed over a precise chronology of events and blamed the pandemic for things that did not have to do with the pandemic. Ultimately, those things do not matter, because Mr. Gingerella's theory of the case in his post-hearing brief changed: He argued that SBR erred and is required to fix its error. That is the argument that I rule on.

In his post-hearing brief, Mr. Gingerella's argument began as follows:

The evidence submitted with Mr. Gingerella's pre-hearing memorandum and at hearing establishes that Mr. Gingerella timely and dutifully submitted payment to purchase his prior service time for the original lump sum amount of \$86,644.35. Although the Board indisputably received the payment, due to its own administrative error, the Board did not accept it. As a direct result of the Board's non-acceptance of Mr. Gingerella's timely payment, the window for Mr. Gingerella to purchase his prior service time at the lower buyback interest rate expired.

(Pet. Br. 4)

The first sentence appears to be carefully crafted. It avoids arguing that Mr. Gingerella tried to buy back his creditable service within one year of resuming state employment. Nonetheless, the sentence is inaccurate. The word "timely" is inaccurate. On September 8, 2020,

SBR informed Mr. Gingerella that he could buy back his creditable service for a lump sum of \$86,644.35 by October 13, 2020. (Ex. 9) On October 28, 2020, two weeks after the deadline, Merrill Lynch issued a check made out to Mr. Gingerella for \$86,644.35. (Ex. 18) The record does not reveal when Merrill Lynch sent the check to SBR, but October 28, 2020 was already untimely.

It is unclear what Mr. Gingerella means by “dutifully.” That he followed SBR’s instructions? If that is what Mr. Gingerella means, then “dutifully” is inaccurate because he did not buy back his creditable service by October 13, 2020, as SBR instructed. Nor did Mr. Gingerella make a check or money order payable to SBR, as SBR had instructed. (Exs. 9, 18) And “dutifully” is conclusory. What exactly did SBR advise Mr. Gingerella, through phone calls, emails, and other communications, on how to exercise the four options in its letters to him? What exactly was Mr. Gingerella required to do? What exactly did Mr. Gingerella do? Those things are not in the record.

The phrase “the original lump sum amount of \$86,644.35” is inaccurate. The original lump sum was \$85,236.76. (Ex. 7)

The second sentence argues that “the Board indisputably received the payment.” (Pet. Br. 4) This is not in the record, but SBR does not contest this assertion. See Resp. Br. 3, referring to Mr. Gingerella’s second attempt to buy back his creditable service. (If the record documents a first attempt, the record is too obscure to reveal it.)

Mr. Gingerella’s argument fails with the words “due to its [SBR’s] own administrative error.” (Pet. Br. 4) What error was that? On the next page, Mr. Gingerella refers to “the Board’s administrative error in not accepting the check.” (Pet. Br. 5) However, he does not specify *how* SBR erred by not accepting the check that was not made out as he was instructed.

The only apparent errors by SBR in the record *benefited* Mr. Gingerella. On February 6, 2020, SBR allowed Mr. Gingerella to buy back his creditable service at the buyback interest rate by March 12, 2020 (Ex. 7), a possible error because that interest rate expired on February 24, 2020. SBR was still offering the expired buyback interest rate on September 8, 2020 (Ex. 9), which SBR concedes it should not have done. (Resp. Br. 3)

The third sentence argues:

As a direct result of the Board's non-acceptance of Mr. Gingerella's timely payment, the window for Mr. Gingerella to purchase his prior service time at the lower buyback interest rate expired.

(Pet. Br. 4) This is inaccurate. As stated above, Mr. Gingerella's payment was not timely. The buyback interest rate expired, not through any act of SBR, but through the operation of law, the passage of time, and Mr. Gingerella's decisions. (SBR argues that the buyback interest rate expired because Mr. Gingerella failed to follow the buyback procedure (Resp. Br. 3), but any such failure is not in the record.) As one example of Mr. Gingerella's decisions, on February 6, 2020, SBR gave Mr. Gingerella an option of buying back his creditable service at the buyback interest rate in an installment plan of six months. (Ex. 7) Had Mr. Gingerella accepted, he would have fully bought back his creditable service before the events of September and October 2020.

Mr. Gingerella argues that "the Board was clearly culpable in perpetuating a correctible administrative mistake" (Pet. Br. 6), but he did not prove by any evidence, let alone a preponderance of the evidence, that SBR had erred. *Bagley*. Therefore, G.L. c. 32, §20(5)(c)(2), which requires retirement boards to correct errors, does not govern this case.

Conclusion and Order

The State Board of Retirement's imposition of the actuarial interest rate on the petitioner's buyback of creditable service, rather than the buyback interest rate, is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: June 7, 2024