

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

NEAL GOUCK, ¹	:	Docket No. CR-19-0311
<i>Petitioner</i>	:	
	:	Date: March 3, 2023
v.	:	
	:	
STATE BOARD OF RETIREMENT	:	
SYSTEM,	:	
<i>Respondent</i>	:	

Appearance for Petitioner:

Neal Gouck, *pro se*
Dartmouth, MA 02747

Appearance for Respondent:

Brendan McGough, Esq.
Boston, MA 02108

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Petitioner is eligible to purchase veteran’s creditable service pursuant to G.L. c. 32, § 4(1)(h). The law allows a veteran to purchase this service, at the latest, if they apply for it within 180 days of being notified by the Board, *after becoming vested in the retirement system*. The Board sent a notice of eligibility before the Petitioner had vested and thus before he was eligible to purchase the credit.

DECISION

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Neal Gouck, timely appealed a June 5, 2019 decision of the Respondent, the State Board of Retirement (Board), denying his request to

¹ This case was consolidated with various other cases raising the same issue. This is one of two cases still active. I am issuing a separate decision in the remaining case, *Freeman v. State Bd. of Ret.*, CR-20-0198.

purchase veteran's creditable service pursuant to G.L. c. 32, § 4(1)(h). DALA issued a scheduling order indicating that the matter could be decided without a hearing and instructing the parties to file memoranda and evidence in support of their positions. The Petitioner filed a letter on February 3, 2021 which I now enter into evidence (P1). The Board filed a memorandum with five exhibits (1A-1E); I also enter the Board's exhibits into evidence.

FINDINGS OF FACT

Based on the exhibits, I find the following facts.

1. The Petitioner is a veteran who served approximately 10 years in the military. (Exhibit 1A.)
2. He began working in state service in 2011. (P1.)
3. The Board submitted an affidavit from its Executive Director explaining the process by which the Board regularly sent out letters telling veterans that they are eligible to purchase creditable service for their prior military service. (Exhibit 1E.)
4. The Executive Director explained that the Board would send the letters after a veteran had obtained approximately six years of creditable service. (Exhibit 1E.)
5. In October 2016, the Board sent the Petitioner a letter advising him about his right to purchase his prior service under G.L. c. 32, § 4(1)(h). The letter stated he had 180 days in which to complete his purchase. (Exhibit 1E.)
6. While the Board has no copy of the letter, it submitted an affidavit from its Executive Director explaining the process by which the Board regularly sent out these letters. (Exhibit 1E.)
7. The Petitioner agrees he received that letter. (Exhibit P1.)

8. In May, 2019, the Petitioner submitted an application to purchase his military service. (Exhibit 1A.)
9. The Petitioner attempted to purchase his prior military service three years after receiving the Board's 2016 letter. He explains he relied on the portion of the letter indicating that he should make his purchase "after becoming vested in the retirement system." (Exhibit P1.)
10. Therefore, he waited until he had worked almost 10 years to submit his application. (Exhibit P1.)
11. On June 5, 2019, the Board denied his request. (Exhibit 1B.)
12. The Board explained that a letter of eligibility was sent in 2016. However, because the 180-day eligibility period had passed, the Board denied his application:

Unfortunately, eligible MSERS members in service must apply for this purchase no later than 180 days after receiving notification from the State Board of Retirement of their eligibility to make the purchase, after becoming vested in the retirement system. Chapter 71, Acts of 1996 and Chapter 468, section 2, Acts of 2002.

(Exhibit 1B.)

13. The language in the 2019 letter corroborates the Petitioner's claim that the 2016 letter also included language about vesting.
14. The Petitioner filed a timely appeal on June 24, 2019. (Exhibit 1C.)

CONCLUSION AND ORDER

A summary decision may be granted when "there is no genuine issue of fact relating to all or part of a claim." 801 Code Mass. Regs. § 1.01(7)(h). "In such a circumstance, a hearing serves no useful purpose." *Jordan v. State Bd. of Ret.*, CR-21-0201, 2022 WL 16921458 (DALA Feb. 18, 2022). This is such a case.

Before 2002, a veteran was not eligible to purchase his prior military service until he had completed “ten or more years of membership service.” *See* Mass. Stat. 1996, c. 71, § 2; *see MacDonald v. Barnstable County Ret. Bd.*, CR-09-0326 (DALA Nov. 29, 2013). This was codified at G.L. c. 32, § 4(1)(h). The Legislature also enacted a deadline for purchasing this service:

Members in service of a retirement system eligible for said creditable service under this act shall make application for said creditable service within one hundred and eighty days of being notified by the retirement board of their eligibility after becoming vested in the retirement system . . .²

Mass. Stat. 1996, c. 71, § 3; *MacDonald, supra*. Then, in 2002, the Legislature amended the statute to eliminate the requirement that the veteran complete “ten or more years of membership service.” *See* Mass. Stat. 2002, c. 468, § 1; G.L. c. 32 § 4(1)(h). Simultaneously, the Legislature amended the deadline:

Members in service of a retirement system eligible for said creditable service under this act shall make application for said creditable service not earlier than the date of becoming eligible and not later than 180 days after being notified by the retirement board of their eligibility after becoming vested in the retirement system . . .

Mass. Stat. 2002, c. 468, § 2; *MacDonald, supra*. Therefore, after 2002, a veteran no longer needs 10 years of membership service to qualify. However, when the veteran may apply is a little more convoluted.

Mass. Stat. 2002, c. 468, § 2 leaves no ambiguity as to the latest a veteran may apply. The Act requires the member to vest and then the Board to give notice. That notice, in turn, triggers the 180-day deadline in which to apply. Unless and until the Board gives the member notice

² The Act added that currently eligible members must apply “within one hundred and eighty days of the acceptance of this act by the local legislative body.” Mass. Stat. 1996, c. 71, § 3. This clause is not at issue in this case.

“after [the member has become] vested in the retirement system,” the clock does not start ticking. However, there are two ways to interpret the language about the earliest a veteran can apply—though either way does not help the Board’s position in this case.

The first interpretation is that the veteran can apply, regardless of whether the Board gives them notice, as soon as they are eligible for the credit. Since the Legislature eliminated the “ten or more years of service” language, that could mean as soon as the applicant has the mandatory military experience. For some, that may be the first day they become a member of a system.

The second way to interpret the language is that the term “after becoming vested in the retirement system” in Mass. Stat. 2002, c. 468, § 2 modifies both the “earliest date” clause and the “board notice” clause. In this scenario, a veteran must first vest. Then, they can apply even if the Board has not notified them of their eligibility.

There is logic to the Legislature’s 2002 amendments. The retirement statute does not actually define “vested.” See *Macedo v. New Bedford Ret. Bd., et al.*, CR-17-570 (DALA July 31, 2020). However, it is generally understood that a member is vested in the retirement system after completing ten or more years of creditable service. *Id.*, quoting G.L. c. 32, § 5(1)(m). Creditable service, in turn, consists of “membership service” and any prior or other service “for which credit is allowable.” G.L. c. 32, § 1. Membership service is simply the amount of actual time (service) someone has worked in a system. *Id.* As often happens, a member could complete 10 years of creditable service without having worked for 10 years; rather, they have a combination of years worked (membership service) plus prior or other credit which totals 10 years.

Under the original version of G.L. c 32, § 4(1)(h), some veterans may have had 10 years of creditable service, but less than 10 years of membership service, and thus needed to wait to purchase their prior service. Now, a veteran can apply sooner than the original statute allowed. The amendments to the law reflect the Legislature's efforts to expand, not contract, when a veteran could apply for this credit.

After the 2002 amendments, PERAC recognized that the Legislature eliminated the 10-year membership service requirement. However, for some reason, PERAC ignored the language requiring the veteran to become vested before the Board may give formal notice. Instead, it issued a policy memorandum advising Boards as follows:

[Mass. Stat. 2002, c. 468, § 1] removes the requirement of Chapter 71 of the Acts of 1996 (G.L. c. 32, § 4(1)(h)) that a member in service have ten years of creditable service in order to purchase military service credit. As of April 1, 2003, any member in service who qualifies as a "veteran" can purchase up to four years of creditable service for his or her military service. All other provisions of Chapter 71, including the definition of "veteran," remain the same.

Retirement Boards must assure that all eligible new members and all eligible members with less than ten years of creditable service are notified of this option and given 180 days to determine whether or not to purchase this creditable service.

PERAC Memorandum #11/2003.

This memo incorrectly stated the Legislature removed the requirement that the member have "ten years of *creditable* service" when it actually removed the requirement that the member have "ten years of *membership* service." More importantly, the memo did not explain (or cite) Mass. Stat. 2002, c. 468, § 2, which in turn retained the language about "becoming vested."

Many Boards did not question PERAC's guidance. They began sending letters to veterans whether they were vested or not. As the Executive Director of the State Board of Retirement explains, "the Board sent Veteran's letters to members upon the attainment of six

years of creditable service as a regular practice.” See Exhibit 1E. They did so because “PERAC issued Memorandum #11, 2003 which addressed a change to G.L. c. 32 § 4(1)(h) and advised retirement boards notify all member with less than ten years of service that they have 180 days from notification to purchase qualifying service.” *Ibid*.

Since then, DALA has decided five cases interpreting this provision. In each case, DALA has also followed PERAC’s guidance. That is, DALA ruled that a veteran must apply for this credit within 180 days of receiving notice, regardless of whether he was vested in the system or not. See *Roberts v. Worcester Ret. Sys.*, CR-18-0434, 2022 WL 16921466 (DALA May 20, 2022); *Gamache v. State Bd. of Ret.*, CR-19-0116 (DALA Mar. 11, 2022); *Bard v. State Bd. of Ret.*, CR-19-0114 (DALA Mar. 11, 2022); *Drury v. Franklin Regional Ret. Bd.*, CR-09-0543 (DALA Dec 20, 2013); *MacDonald, supra*.³

I disagree with PERAC’s and DALA’s prior interpretation of Mass. Stat. 2002, c. 468, § 2. As I read it, the Legislature did not, change the latest date a veteran could apply, just the earliest. Accordingly, a Board cannot shrink the time in which a veteran can apply by sending notice *before* they vest in a retirement system.

In this case, the competing interpretations make a difference. Under PERAC’s and DALA’s prior interpretation, the Petitioner would be unable to purchase his service—because he did not apply within 180 days of being notified. However, under my interpretation, he would be eligible, because the Board’s letter did not comply with the statute—it was not sent after the

³ In *Gamache*, the petitioner was still allowed to purchase his prior service because he submitted his application within the 180-day window; he simply had not completed the purchase within that time, which DALA held was not a statutory requirement. In *Drury*, the petitioner would have been time-barred anyway, because he had already vested, *i.e.* he had over 10 years of membership service, when he received his eligibility letter.

Petitioner became vested in the system. The Board's letter did not therefore trigger the 180-day deadline. The Petitioner's 2019 application was either timely⁴ or, if premature, he can apply again once vested (which he now is). And if the Board reissued a letter today, the Petitioner would have 180 days to apply. Only if he missed that deadline would he be precluded from purchasing this credit.

In varying from prior DALA precedent, I note that administrative decisions "have at least some precedential value." *Cain v. Milton Ret. Bd.*, CR-12-573 (DALA Feb. 19, 2016).

[P]recedential value serves many purposes. It protects parties' reasonably "settled expectations." Relying on precedent, rather than case-by-case adjudication, improves predictability and consistency. It saves resources because an Administrative Magistrate need not "reinvent the wheel every time [he or she] reaches a decision." And recognizing precedential value and striving for consistency discourages "arbitrary discretion," especially when arbitrariness can be used to target disfavored parties. Deciding cases case-by-case can lead to abuses of power.

Ibid. I have felt bound by DALA precedent before. *See Perry v. Plymouth Cty. Ret. Ass'n*, CR-20-0132, 2022 WL 18398911, (DALA Dec. 10, 2022); *Murphy v. Plymouth Cty. Ret. Ass'n*, CR-20-0133, 2022 WL 18398911, (DALA Dec. 10, 2022); *Mystic Valley Ret. Bd. v. PERAC, et al.*, CR-20-0243, 2022 WL 18398910 (DALA Nov 10, 2022), even when I had some reservations. *See Connor v. Plymouth Cty. Ret. Ass'n*, CR-20-0142, 2022 WL 18398943, (DALA Dec. 10, 2022) ("Were I writing on a clean slate, the result may very well be different.").

"Respecting *stare decisis* means sticking to some wrong decisions." *Com. v. Rossetti*, 489 Mass. 589, 610 (2022), quoting *Kimble v. Marvel Entertainment LLC*, 576 U.S. 446, 455 (2015). "The principle of *stare decisis* however, is not absolute, and an agency may reconsider a holding

⁴ If the "earliest date" clause does not require vesting, a veteran can apply whenever they are eligible. The Petitioner's 2019 application would comply with this interpretation.

as long as the reasons behind the change are explained and are considered to outweigh the values underlying *stare decisis*.” *Rome v. PERAC, et al.*, CR-13-286 and CR-16-192 (CRAB May 20, 2019); *see Rossetti*, at 609.

I find a few reasons to depart from DALA’s prior cases. First, “[i]t is a well settled rule of statutory interpretation that, when a statute after having been construed by the courts is re-enacted without material change, the Legislature are presumed to have adopted the judicial construction put upon it. The doctrine of *stare decisis* is supported by legislative approval.” *See Com. v. Rivera*, 445 Mass. 119, 128 (2005), *quoting Nichols v. Vaughan*, 217 Mass. 548, 551 (1914). However, because the statute has not been amended since these decisions issued, there is no presumption of “legislative approval” in this case. Second, the prior decisions did not address the “vested” language in Mass. Stat. 2002, c. 468, § 2. “Continuing to adhere to decisions in which we did not faithfully interpret a statute consistently with legislative intent does not promote ‘the actual [or] perceived integrity of the judicial process.’” *Rossetti*, at 610.⁵

Lastly, and most importantly, there is no detrimental reliance or any harm that will befall either party. At most, veterans who were erroneously excluded will now have the option to purchase this service. The veterans will still have to affirmatively apply, and then pay, for the service. But the Board will not suffer any financial consequences. Instead, veterans will get the benefits intended for them.

Accordingly, because the Board issued an eligibility letter before the Petitioner had vested in a retirement system, the 180-day deadline was not triggered. What that means now is still up for interpretation. As noted, there is some ambiguity as to whether a veteran can apply

⁵ To the extent there are competing interpretations, I would look to the federal “canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

without Board notice prior to, or only after, vesting. If prior to vesting, the Petitioner's 2019 application is valid. If only after vesting, the Petitioner may have to refile his application unless the Board is willing to act on his premature application. Whatever the right interpretation, it should be made, in the first instance, by the agency. *See Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344 (1964).

Therefore, the Board's decision denying the Petitioner the ability to purchase his prior service is **vacated**. The matter is remanded to the Board so it can decide how to proceed, consistent with this order.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate