COMMONWEALTH OF MASSACHUSETTS

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

Mark Grant,
Petitioner

v.

Docket No.: CR-22-0542
Date Issued: Dec. 22, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

Kavita M. Goyal, Esq.
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Appearance for Respondent:

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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Petitioner is not entitled to purchase contract service for his employment with PeopleServe, Inc. while working at the Executive Office of Health and Human Services because he was not a "contract employee" under G.L. c. 32, § 4(1)(s), but instead worked for a third-party for-profit private contractor that was not an instrumentality of the Commonwealth. *See* 941 CMR 2.09(3)(c) (2022). Accordingly, the State Board is granted summary decision.

DECISION

Petitioner Mark Grant timely appeals, under G.L. c. 32, § 16(4), the decision of the State Board of Retirement to deny his application to purchase certain contract service from May 17, 2009 to September 29, 2012 because he was paid by a third-party contractor.

On May 15, 2023, DALA ordered the parties to file pre-hearing memoranda and proposed exhibits. On October 13, 2023, in addition to its memorandum and 6 proposed exhibits, the Board moved DALA for summary decision. The Petitioner opposed the motion on October 16, 2023, attaching 9 proposed exhibits. I hereby admit the proposed exhibits into evidence as marked. (Exs. P1-P9, R1-R6.)

FINDINGS OF FACT

The following facts are not in dispute:

1. Mark Grant was born in 1960. (Ex. R1.)

2. Mr. Grant responded to a Craigslist job posting advertising a position at the Massachusetts Department of Public Health (DPH). DPH employees interviewed Mr. Grant for the position. (Ex. R1.)

3. On May 17, 2009, Mr. Grant began working in an IT support role at DPH. He was managed by state employees. He remained in this role until September 29, 2012. During this period, he was paid by PeopleServe, Inc., a for-profit corporation that, in part, provides workers to fill IT positions. Mr. Grant's W-2 statements for this period list "PeopleServe, Inc." as his employer. (Exs. R2, R3.)

4. Mr. Grant's position was funded from an 03 or 07 account because there were no state positions or state funds available to pay him as a Commonwealth employee. (Ex. P5.)

5. While he worked for PeopleServe, Mr. Grant made Social Security contributions and received health insurance through PeopleServe. (Ex. R3.)

6. On or about September 30, 2012, Mr. Grant became a full-time state employee performing the same work for the Executive Office of Health and Human Services (EOHHS) as he did as an employee of PeopleServe.[1] He is still employed full-time by EOHHS. (Ex. R1.)

7. When Mr. Grant started working for EOHHS in 2012, he applied for what was termed "creditable service" for purposes of vacation credit and placement on the collective bargaining agreement's salary schedule. EOHHS determined that he would be granted salary/step placement and vacation benefits pegged to the first day of his contract service: May 17, 2009. However, his "Department Service Date" and "State Service Date" were pegged to his first day as a full-time employee for EOHHS: September 30, 2012. (Exs. P4, P5, R1.)

8. After working for EOHHS for ten years, on or around October 3, 2022, Mr. Grant submitted a Contract Service Buyback Form to the Board seeking to purchase his contract service working for PeopleServe under G.L. c. 32, § 4(1)(s). (Exs. P7, R1.)

9. Mr. Grant attached to his application a letter from the former president of PeopleServe, Linda Moraski Chasen, who insisted that Mr. Grant had always been a

[1] At some point while he was employed by PeopleServe, EOHHS absorbed the DPH.

Commonwealth employee, that all of his work was controlled by the Commonwealth, and that PeopleServe was merely a "payment vessel" for Mr. Grant. (Exs. P3, R1.)

10. On November 8, 2022, the Board denied Mr. Grant's application. (Exs. P8, R4.)

11. On November 15, 2022, Mr. Grant timely appealed the Board's denial. (Exs. P9, R5.)

12. In support of the appeal, Mr. Grant's supervisor also submitted a letter asserting that Mr. Grant was "only paid by PeopleServe and was hired and received all of his work duties from Commonwealth employees." (Exs. P2, R5.)

CONCLUSION AND ORDER

Summary decision is appropriate when "there is no genuine issue of fact . . . and [the moving party] is entitled to prevail as a matter of law." 801 CMR 1.01(7)(h). An issue of fact is "genuine" if the non-moving party possesses a "reasonable expectation" of prevailing on it. *Goudreau v. Nikas*, 98 Mass. App. Ct. 266, 269-70 (2020). An agency adjudicating a motion for summary decision must analyze the record evidence in a light favorable to the non-moving party. *Caitlin v. Bd. of Reg. of Architects*, 414 Mass. 1 (1992).

When a member retires from public service, he may be entitled to a superannuation retirement allowance that is based in part on his years of creditable service. G.L. c. 32, § 5(2)(a). "Creditable service" is defined as "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive." G.L. c. 32, § 1. One form of

"other service" that a member may purchase, under certain circumstances, is prior "contract service" with the Commonwealth. G.L. c. 32, § 4(1)(s) states:

> Any member in service of the state employees' retirement system who, immediately preceding the establishment of membership in that system . . ., was compensated for service to the commonwealth *as a contract employee for any department, agency, board or commission of the commonwealth* may establish as creditable service up to 4 years of that service if the member has 10 years of creditable service with the state employees' retirement system, and if the job description of the member in the position which the member holds upon entry into service . . . is substantially similar to the job description of the position for which the member was compensated as a contract employee.

(Emphasis added.)

As a general matter, G.L. c. 32, § 4(1)(s) provides a limited opportunity for members to purchase prior contract service when the service was rendered to a department, agency, board, or commission of the Commonwealth. A series of DALA and CRAB decisions establish that it does not allow for the purchase of service based on work for a third-party vendor, even if that work was performed for the Commonwealth. *See, e.g., Hogan v. State Bd. of Retirement*, CR-16-243 (CRAB June 1, 2021); *Seshadri v. State Bd. of Retirement*, CR-15-62 (DALA Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, CR-15-253 (DALA Jan. 22, 2016).

In 2011 (amended in 2013), a few years after § 4(1)(s) was enacted, the State Board attempted to clarify what constitutes "contract service" by issuing a regulation. *See* Acts 2006, c. 161, § 1. The Board amended the regulation effective March 18, 2022. Mr. Grant submitted his application to purchase contract service in October 2022. The revised regulation therefore applies in this case. *See Kalu v. Boston Retirement Bd.*, 90 Mass. App. Ct. 501, 505 n.8 (2016) (generally, "[t]he applicable regulations are those in effect at the time of [a Petitioner's] application and the [Board's] decision.")

941 CMR 2.09(3)(c)[2] now provides:

> Service through a Vendor or Contractor. The contract service being purchased must have been service as a "contract employee" of the Commonwealth. Except only as otherwise set forth in 941 CMR 2.09(3)(c) members who were employees of a vendor or contractor, which was selected and contracted to provide services to the Commonwealth, are specifically excluded from purchasing contract service as creditable service. The Board may consider as eligible contract service such service provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency. The Board may consider as eligible contract service such service, as verified by the Board, provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency.

Although the regulation begins with a general prohibition on the purchase of service credit based on work for a vendor or contractor that was selected to provide

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[2] From 2013 until March 17, 2022, 941 CMR 2.09(3)(c) read:

> Service Through a Vendor or Contractor. The contract service being purchased must have been service as a "contract employee" of the Commonwealth. Except only as otherwise set forth in this sub-section members who were employees of a vendor or contractor, which was selected and contracted to provide services to the Commonwealth, are specifically excluded from purchasing contract service as creditable service.
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> The Board may consider as eligible contract service such service provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency. The Board may consider as eligible contract service: (1) such service, as verified by the Board, provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency; or (2) such service, as verified by the Board, provided through a vendor by an individual (a) who was under the supervision and control of a Commonwealth agency or its employees and, (b) which service was performed in the standard and ongoing course of an agency's regular business function, but not including, any such service provided as part of any specific or defined projects of that agency for which a vendor was selected.

services to the state, it does provide an exception under which the Board may consider such work as "contract service." If the member's former employer was established and operated by the state or if it functioned as an instrumentality of the state or one of its agencies, the member may purchase his service.

PeopleServe was not established and operated by the state. It is a for-profit corporation. Evidently the Commonwealth contracted with PeopleServe to pay one of its employees to provide IT support services to DPH. Mr. Grant's employer was PeopleServe, as shown on his W-2 statements. He also received health insurance through PeopleServe.

The only remaining possibility for Mr. Grant is if PeopleServe was an "instrumentality of the Commonwealth," a term not defined in § 4(1)(s) or the Board's regulation. CRAB however has concluded that the phrase "functioning as an instrumentality of the Commonwealth" refers to a public body "created by statute and placed within an existing agency or department of the Commonwealth" and does not mean a private vendor. *Hogan*, supra, at *6. In the present matter, PeopleServe was not created by the Legislature and placed within state government by a provision of the Session Laws or General Laws. In fact, this business was no more than a garden variety for-profit business, registered with the Secretary of State as just that. PeopleServe was not an instrumentality of the Commonwealth.

Mr. Grant argues that the Commonwealth was his employer, and he is therefore entitled to purchase service credit for his PeopleServe employment as a regular full-time employee. He bases his conclusion on the independent contractor law, which distinguishes between employees and independent contractors. *See* G.L. c. 149, § 148B.

This law sheds no light on the problem at hand. The Board does not argue that Mr. Grant was an independent contractor; it just maintains that he was an employee of PeopleServe and not the Commonwealth and therefore cannot purchase his service.

Mr. Grant ignores the Chapter 32 definition of "employee," perhaps because it is beyond reasonable dispute that the money used to pay for Mr. Grant was from an "03 account" and "any person whose compensation for service rendered to the commonwealth is derived from the subsidiary account 03 of the appropriation of any department" is not an employee for purposes of the retirement law. G.L. c. 32, § 1. *See also Young v. State Bd. of Retirement*, CR-10-789 (CRAB April 2, 2018) for a thorough discussion of 03 account appropriations.

The two letters that Mr. Grant submitted from PeopleServe's former president and his DPH and EOHHS supervisor do not determine whether or not he was an employee. The description of PeopleServe as a "payment vessel" does not reveal much, especially when tax statements show that PeopleServe was actually Mr. Grant's employer. The letter from his supervisor appears to have been submitted to support an argument that the Commonwealth "controlled" Mr. Grant as an employee. Even if these assertions are accepted as true, PeopleServe still contracted with the Commonwealth to provide Mr. Grant as IT support, the Commonwealth paid PeopleServe for that service, and then PeopleServe paid Mr. Grant.

In his appeal letter, Mr. Grant points out that a co-worker also employed by PeopleServe, Thomas McCollem, was able to purchase his contract service under § 4(1)(s). Apparently, Mr. McCollem appealed the denial of his 2018 application to purchase contract service to DALA, CR-18-0594. He filed a pre-hearing memorandum,

DALA granted a joint motion to stay the appeal, and then Mr. McCollem withdrew his appeal after he came to an unspecified agreement with the Board. This does not mean that Mr. Grant is entitled to be treated the same. First, there was no adjudication of his co-worker's case, so it is not clear if the Board's revised decision was legally correct. Moreover, Mr. McCollem's application was subject to the prior version of Board's regulation, which arguably had broader exceptions to the ban on service credit for employment with Commonwealth vendors. *See* note 2, supra.

Finally, Mr. Grant argues that as a matter of public policy, he should be allowed service credit under the prior version of the regulation, which he still describes as remaining "inconsistent with the needs of petitioners" like Mr. Grant who were forced under the statute to wait 10 years to apply for contract service credit. Putting to one side the coherence of this argument, neither the Board nor this tribunal can grant such requests. "Equitable considerations and the doctrine of estoppel do not alter the entitlements that an administrative agency must distribute under an unambiguous statute. The amount of the benefits is governed entirely by G.L. c. 32, and as such may not be enlarged by a [government employee's] error." *Leto v. State Bd. of Retirement*, CR-19-554, at *3 (DALA Nov. 19, 2021) (citations omitted).

For the above stated reasons, Mr. Grant is not entitled to purchase service credit for his work for PeopleServe. The Board's motion for summary decision is allowed and its decision is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Dec. 22, 2023