COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Vernessa Harris**,

Petitioner

v. Docket No. CR-16-487

**Boston Retirement System**,

Respondent

**Appearance for Petitioner**:

Patrick N. Long, Esq.

Patrick Long Law Firm

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Dorchester, MA 02122

**Appearance for Respondent**:

Timothy J. Smyth, Esq.

Boston Retirement System

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Boston, MA 02201

**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

Because the petitioner, a contracted employee, was paid through an 03 subsidiary account, and because contracted employees paid through such accounts are not eligible to purchase creditable service, the denial of her application to purchase such service is affirmed.

**DECISION**

 The petitioner, Vernessa Harris, appeals the denial by the Boston Retirement System (BRS) of her application to purchase her past service as a contracted employee with the Commonwealth of Massachusetts.

 The parties initially agreed to waive a hearing and submit the case upon written

submissions. 801 CMR 1.01(10)(c). However, when I began writing a decision, I realized that I needed more information than appeared in the documents. I scheduled a hearing, which I held and recorded on May 24, 2018. At the hearing, I accepted into evidence 10 exhibits, Exhibits A, B, and E for Ms. Harris, and Exhibits 1 through 7 for BRS. At the hearing, I questioned why Ms. Harris had not submitted her employment contracts in a case that turns on her employment status. After the hearing, she submitted various contracts, which I admit as Exhibit F. On my own initiative, I admit her appeal letter as Exhibit G.

 Ms. Harris testified and called no other witness. Jill Sampson, the Director of Employment Services for the Executive Office of Health and Human Services, testified for BRS.

Both parties submitted post-hearing briefs.

**Findings of Fact**

 1. The work of the Commonwealth of Massachusetts is variously performed by employees, contracted employees (also called contract employees), and independent contractors. (Sampson testimony.)

 2. Ms. Harris worked as an information technology professional for the Massachusetts Commission for the Blind (MCB). (Ex. 7.)

 3. Ms. Harris was a contracted employee, paid through Massachusetts’s 03 subsidiary account. (Sampson testimony; Exs. 2, 3.)[[1]](#footnote-1)

 4. As a contracted employee, Ms. Harris had an employee identification number, received Employee Earnings Reports for April 2003 through June 2008, and received W-2s in 2003 through 2007. They listed her “Employer’s ID number,” “Employer’s name, address, and zip code,” “Employee’s social security number,” “Employee’s name, address and zip code,” and “Employer’s state I.D.” (Ex. 7, pp. 18-22.)

 5. On June 6, 2016, Ms. Harris, then a BRS member, applied to purchase creditable service from her work at MCB from April 19, 2003 to March 29, 2008. (Resp. Ex. 7.)

 6. On October 11, 2016, the Boston Retirement System denied her application to purchase creditable service because it contended, “The material you provided indicates that you worked as a contractor for...2003-2008 and were paid as an “03” contractor.”[[2]](#footnote-2) (Ex. 1.)

 7. On October 25, 2016, Ms. Harris timely appealed. (Ex. G.)

 8. On September 14, 2014, the Personnel Officer of Disabilities and Community Services wrote a “To Whom It May Concern” letter, stating that Ms. Harris

was employed by the Commonwealth’s Massachusetts for the Blind as a full-time contracted EDP Systems Analyst from March 31, 2003 through March 1, 2008.

(Ex. 3.)[[3]](#footnote-3)

 9. On June 14, 2017, the Personnel/Payroll Supervisor of Disabilities and Community Services wrote to BRS, stating:

Ms. Harris was paid through the 03 subsidiary for the full-time contracted EDP Systems Analyst position she held with the Massachusetts Commission for the Blind for that time period,

referring to “3/31/03 – 3/1/08.” (Ex. 2.)

 10. Ms. Harris was a contractor paid through the 03 subsidiary account. (Sampson testimony, Ex. 2

**Discussion**

 Contracted employees who are paid through the Commonwealth of Massachusetts’s 03 subsidiary account may not purchase that service for retirement benefits. G.L. c. 32, § 1 (explicitly excluding such contracted employees from the definition of “employee”); *Young v. State Board of Retirement*, CR-10-789 (CRAB 2018).

 Ms. Harris was paid through the 03 subsidiary account. (Sampson testimony, Ex. 2.) Therefore, she may not purchase her service as a contracted employee. Therefore, BRS’s denial of her application to purchase her service was correct.

 Ms. Harris has multiple arguments. She testified that she was *not* paid from the 03 subsidiary account. The bases of her assertion is that she was not an independent contractor, as two of her coworkers were; she was told at MCB (at unspecified times and by unspecified people) that she was not paid from the 03 account; and a person in the financial department once (at a time unspecified and for a reason unspecified) showed her a document or documents showing that she was not paid from the 03 account. It is unclear why, if this were so, she asserted in a July 1, 2015 email, years after she had left MCB, that she “was paid out of the 03...account for the entire time at MCB.” (Ex. 5.)

 Ms. Harris apparently objects that Ms. Sampson, who established that Ms. Harris was paid from an 03 account, did not work in her current position when Ms. Harris was an employee. Ms. Harris argues: “There is apparently no one with a *contemporaneous* memory or *contemporary* documentation of what account Ms. Harris was actually paid through.” (Pet. Br. 1.) This argument has two flaws. Well-established rules of evidence allow keepers of records and their rough equivalents, such as Ms. Sampson, to testify about matters that occurred before their tenures. *See* Massachusetts Rules of Evidence, Rule 803(6)(A), Note (“A business record is admissible even when its preparer has relied on the statements of others because the personal knowledge of the entrant or maker affects only the weight of the record, not its admissibility.”) (citation omitted.) And this is Ms. Harris’s case to make. *Bagley v. Contributory Retirement Appeal Board*, 397 Mass. 255, 258 (1986). If she cannot prove that she was an employee, rather than a contracted employee – and the evidence shows that she was a contracted employee – then she does not prevail.

 Another of Ms. Harris’s argument is that because the *Independent State Auditor’s Report on the Use of Contract Employees by Certain State Agencies* (Ex. E) demonstrates that “no employee, including a ‘contracted employee’, could be paid through the ‘03’ account,” Ms. Harris was impliedly not paid through the 03 account. (Pet. Br.) I have read and reread Ms. Harris’s argument, and, frankly, I do not understand her argument that she could not have been paid through the 03 account. In any event, her argument, which is based on an implication, as she admits, runs straight into unequivocal contrary evidence that Ms. Harris was indeed paid through the 03 account.

 Ms. Harris’s next argument is that even if MCB “mistakenly” paid Ms. Harris through the 03 account, she is still eligible to purchase back her service. She argues that the Legislature intended to create a comprehensive retirement system, not “an arbitrary system where eligibility could be denied based on mistake or gamesmanship by a payroll manager.” (Pet. Br.) At the hearing, Ms. Harris presented no evidence that she was mistakenly paid through the 03 account, a payroll manager engaged in gamesmanship, or MCB did not comply with “relevant law and established procedure.” (Pet. Br.) She does not cite to the record for her argument. She does not cite legal authority for her argument that she should be able to purchase service based “on the account that she *should* have been paid from.” (Pet. Br.)(emphasis in the original.)

 In fact, the law is against Ms. Harris. *Young v. State Board of Retirement*, CR-10-789 (CRAB 2018). As the Contributory Retirement Appeal Board stated:

Because our decision turns on the statutory exclusion of contracted Commonwealth employees from the retirement law’s definition of “employee,” we need not discuss whether Young’s conditions of employment and duties made her the equivalent of a regular employee of the Commonwealth.

*Id.* A contracted employee may have an employer-employee relationship with the Commonwealth – and still be excluded from retirement benefits. *Id.*

**Conclusion and Order**

 BRS correctly denied Ms. Harris’s application to purchase her past service as an 03 contracted employee. Its denial is affirmed.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: July 13, 2018

1. One line of Ms. Harris’s argument seems to be that she was an employee, not an independent contractor. BRS does not contend that she was an independent contractor. Therefore, both parties agree that she was not an independent contractor, and Ms. Harris’s testimony about her work circumstances, demonstrating that she should not be classified as an independent contractor, is irrelevant. [↑](#footnote-ref-1)
2. It is unclear whether by the “material you provided,” BRS meant the attachments to Ms. Harris’s application. (Resp. Ex. C.) [↑](#footnote-ref-2)
3. “EDP” was not explained in the record. It is unclear why this letter was written almost two years before Ms. Harris applied to purchase her past service. [↑](#footnote-ref-3)