

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

June 16, 2017

Suffolk, ss.

Docket No. CR-16-243

JONATHAN J. HOGAN, Petitioner

v.

STATE BOARD OF RETIREMENT, Respondent

DECISION

Appearance for Petitioner:

Jonathan J. Hogan, *pro se*
30 Prospect St.
Ware, MA 01082

Appearance for Respondent:

Candace L. Hodge, Esq.
State Board of Retirement
1 Winter St., 8th floor
Boston, MA 02108-4747

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

The petitioner, a retired employee of the Massachusetts Department of Mental Health, cannot purchase his prior work at the Department from June 7, 1988 to June 24, 1989 for retirement credit, pursuant to M.G.L. c. 32, § 4(1)(s), because during that time he was employed, and was paid for his work, by a third-party private contractor providing mental health services to the Department, and therefore he did not render services as a person regularly employed by an agency or political subdivision of the Commonwealth, and was not a contract employee of the Department. He was also not employed by a “vendor functioning as an instrumentality of the Commonwealth,” per 941 C.M.R. § 2.09(3)(c)1, as his employer was not a public entity established by the legislature and placed within state government. The State Board of Retirement’s decision denying the petitioner’s contract service buyback application is therefore affirmed.

Petitioner Jonathan J. Hogan appeals, pursuant to M.G.L. c. 32, § 16(4), from the May 24, 2016 decision of respondent State Board of Retirement (the Board) denying his request to purchase, for retirement credit, his prior work at the Massachusetts Department of Mental Health (DMH) from June 7, 1988 to June 24, 1989, when he was employed and paid by a DMH vendor, Franklin/Hampshire County Community Mental Health Center, Inc. (Exh. B1.) The Board denied Mr. Hogan’s prior contract service “buyback” request pursuant to M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c), a section of the Board’s regulations.

Mr. Hogan filed a timely appeal challenging the Board’s decision with the Contributory Retirement Appeal Board on May 31, 2016. After the appeal was transferred to the Division of Administrative Law Appeals (DALA) for adjudication, DALA issued a notice on June 2, 2016 acknowledging receipt of Mr. Hogan’s appeal. The notice stated (among other things) that a party had the option of waiving an evidentiary hearing and submitting his case upon written materials

pursuant to 801 C.M.R. § 1.01(8)(c).¹ On December 13, 2016, Mr. Hogan elected to waive a hearing and submit his case upon written materials. On December 19, 2016, DALA issued an order setting deadlines by which Mr. Hogan and the Board were to file their respective proposed exhibits and memoranda of law, and any objections to the other party's exhibits. On January 17, 2017, Mr. Hogan filed what he described as a further pleading of his case explaining why he should be allowed to buy back the prior service in question, which I treat as his prehearing memorandum, and five exhibits I have marked as Exhibits H1, H2a-c, and H3.² On February 27, 2017, the Board filed its prehearing memorandum and 18 exhibits I have marked as Exhibits B1, B2, B3, and B3a-o.³ Neither party objected to the other's proposed exhibits, and I have marked all 23 exhibits in evidence. These exhibits are listed in the Appendix to this Decision.

Neither party disputes any of the facts presented here or challenges any of the submitted documents. Therefore, the appeal presents only legal issues that I decide based upon the parties' exhibits and memoranda. Those issues are (1) whether Mr. Hogan was, from June 7, 1988 to June 24, 1989, a "contract employee" of the Massachusetts Department of Mental Health entitled to

¹/ DALA's notice explained that submitting the case upon written materials was appropriate if (1) the facts were not genuinely disputed or were established by undisputed records, (2) the only issue was "a question of law or the proper interpretation of a particular statute," and (3) there was no need for witnesses to appear at a hearing and testify under oath, although it would remain each party's obligation to prove the facts supporting the facts or allegations on which it had the burden of proof.

²/ The prefix "H" denotes Mr. Hogan's exhibits. Exhibits H2a, H2b and H2c are three Department of Mental Health documents regarding Mr. Hogan's employee data and prior service.

³/ The prefix "B" denotes the Board's exhibits. Exhibit B3 is Mr. Hogan's contract service buyback request. There are 15 attachments to the buyback request, which I have marked as Exhibits B3a-B3o.

purchase that service for retirement credit purposes, pursuant to M.G.l. c. 32, § 4(1)(s); and (2) whether he was entitled to purchase that service as the employee of a vendor “functioning as an instrumentality of the Commonwealth,” pursuant to 941 C.M.R. § 2.09(3)(c).

For the reasons stated below, I conclude that Mr. Hogan cannot purchase the period of his prior work at at the Massachusetts Department of Mental Health from June 7, 1988 to June 24, 1989 for retirement credit under either M.G.l. c. 32, § 4(1)(s) or 941 C.M.R. § 2.09(3)(c), and, accordingly, I affirm the Board’s May 24, 2016 decision denying Mr. Hogan’s contract service purchase application.

Undisputed Facts

I find that the following facts are not genuinely or materially disputed:

1. Petitioner Jonathan J. Hogan is a retired former employee of the Massachusetts Department of Mental Health (DMH) who worked for nearly 40 years as a case worker, mental health therapist, case manager and case coordinator.

2. From January 1, 1978 until August 1, 1979, Mr. Hogan worked at the former Belchertown State School,⁴ apparently as a School employee. He again worked at the School from June 22, 1981 until June 2, 1984 as a direct case worker and recreation therapist. During that time, however, he was not an employee of the Belchertown State School; instead, he was employed, and was paid, by a contractor providing mental health services at the School, the Franklin/Hampshire

⁴/ This former state hospital for the mentally disabled was closed at the end of 1992, after the last of its residents had moved to community-based housing pursuant to a 1973 federal court consent decree.

County Community Mental Health Center, Inc. (Franklin/Hampshire), of Northampton, Massachusetts, currently known as Service Net, Inc. (Exh. B3e at 2; Exh. B3g; Exh. B3j.)

Work at DMH During the Period in Question (June 7, 1988—June 24, 1989)

3. Between June 7, 1988 and June 24, 1989, Mr. Hogan was employed as a “service coordinator” by Franklin/Hampshire, which operated an “07” contract program providing mental health services at the Department of Mental Health (DMH) office in Northampton, Massachusetts. (Exhs. B3 at 1, B3c, B3i and B3k.)

4. As this position was advertised prior to Mr. Hogan’s employment, a Franklin/Hampshire service coordinator provided “service coordination, consultation, individual and/or group psychotherapy to chronic mental health clients utilizing [a] treatment team model.” (Exh. B3l.)

5. During this time, Mr. Hogan worked 40 hours per week at DMH in Northampton, Massachusetts as part of a Franklin/Hampshire “Service Coordination/Case Management Team,” with the functional titles of “Case Manager I,” “Respite Coordinator” and “Case Manager II.” The team leader and supervisor of this Team was Michael Murphy, Ph.D, LICSW, a Franklin/Hampshire social worker. Mr. Hogan’s supervisor was Donald Abbott at Franklin/Hampshire’s “area office” in Northampton, Massachusetts. (Exhs. B3b, B3c, B3e and B3k.)

6. Franklin/Hampshire paid Mr. Hogan for his work at DMH between June 7, 1988 and June 24, 1989. (Exhs. B3 at 1, B3c, and B3i.) There is no evidence in the record, and neither party asserts, that he was paid by DMH or by any other agency of the Commonwealth, or by one of the

Commonwealth's political subdivisions.

*Employment at DMH After June 24, 1989, Retirement, and
Contract Service Credit Application*

7. Franklin/Hampshire's "07" contract program at DMH was converted to a state-operated program on or about June 24, 1989, and all of the contract program's staff, including Mr. Hogan and Dr. Murphy (the "Service Coordination/Case Management Team" leader and supervisor) became state employees at DMH. Dr. Murphy became Mr. Hogan's supervisor at DMH and remained so until he retired in July 2013. Upon becoming a DMH employee, Mr. Hogan's position, which had been that of a full-time mental health service coordinator with Franklin/Hampshire, was "Mental Health Case Manager II." He was a "Case Manager II" at DMH when he retired in 2016. (Exhs. B3e, B3g and B3k.)

8. On or about August 22, 1989, DMH determined, with the approval of the Commonwealth's Office of Employee Relations, that Mr. Hogan's "[p]eriod of 03 or 07 service" (meaning service pursuant to a contract with the Commonwealth or one of its agencies or subdivisions) from June 7, 1988 to June 24, 1989:

may be considered as creditable service for purposes of salary placement and vacation status in accordance with the provisions of the agreement between the Commonwealth and Alliance/Local-S.E.I.U. dated June 26, 1983.

(Exhs B3a and B3d.) Neither DMH nor the Office of Employee Relations determined, however, that Mr. Hogan's work between June 7, 1988 and June 24, 1989 was creditable service for retirement purposes pursuant to M.G.L. c. 32.

9. As a full-time DMH employee beginning on or about June 24, 1989, Mr. Hogan was a member in service of the State Employees' Retirement System.⁵ He retired from state service on April 16, 2016, with 28 years and 4 months of creditable service for retirement purposes. (Exhs. B3, B3d; Bd. Mem. at 1, para. 2.)⁶

10. On December 14, 2015, several months before retiring, Mr. Hogan applied to the Board to purchase for retirement credit purposes, pursuant to M.G.L. c. 32, § 4(1)(s), his contract service at DMH between June 7, 1988 and June 24, 1989, using a contract service buyback form prescribed by the Board. (Exh. B3.)

11. Mr. Hogan attempted to obtain documentation of his pay and hours during the time period in question but was unable to do so. Franklin/Hampshire's successor, ServiceNet, Inc., retains fiscal and payroll records for seven years. It no longer has records of Mr. Hogan's wages and hours during the period June 7, 1988—June 24, 1989, which was more than seven years ago. (Exh. B3j.)

12. On or about March 2, 2016, Mr. Hogan submitted an authorization to the United States Internal Revenue Service for the release of his records of account, including his tax returns,

⁵/ The State Employees' Retirement System is one of the Commonwealth's contributory public employee retirement systems governed by M.G.L. c. 32, and is administered by the Board.

⁶/ The record does not make clear the basis for this amount of creditable service, which exceeds by several months the duration of Mr. Hogan's employment at DMH as a state employee beginning June 24, 1989. The additional creditable service may relate to his prior employment at Belchertown State School from January 3, 1978 to August 1, 1979 when he was apparently not paid by Franklin/Hampden County Community Mental Health Center. (See Exh. B3e at 2.) Clearly, however, it does not include his work at DMH during the time period in question (June 7, 1988—June 24, 1989), which immediately preceded his state employment (and membership in the State Employees' Retirement System), because the Board denied Mr. Hogan's request to purchase that period of time for retirement credit.

for the period December 31, 1988 through December 31, 1989. (Exh. B3n.) However, the record does not make clear whether the IRS sent him any materials in response to the authorization, because Mr. Hogan did not file copies of any of tax records for the period of time in question.

13. On May 24, 2016, the Board denied Mr. Hogan's prior contract service purchase request pursuant to M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c), on the ground that he was not a contract employee of DMH between June 7, 1988 and June 24, 1989, and was, instead, "paid through a vendor" (Franklin/ Hampshire). (Exh. B1.)

14. On May 31, 2016, Mr. Hogan appealed the Board's decision to the Contributory Retirement Appeal Board.

Discussion

1. Retirement Credit for Previous Contract Employee Service Under M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c), Generally

A member of a public employee retirement system who retires is entitled to a superannuation requirement allowance that is based, in part, upon his years of creditable service. M.G.L. c. 32, § 5(2)(a). Chapter 32 defines "creditable service" 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.*" M.G.L. c. 32, § 1 (emphasis added.). One of those sections, M.G.L. c. 32, § 4(1)(s), provides in pertinent part that:

Any member in service of the state employees' retirement system who, immediately preceding the establishment of membership in that system or re-entry into active service 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 or re-entry into active service is substantially similar to the job description of the position for which the member was compensated as a contract employee.

Two of the prerequisites for this type of creditable service are met here.

First, the period of contract service Mr. Hogan seeks to purchase for retirement credit—June 7, 1988 through June 24, 1989—immediately preceded his conversion to state employment at DMH and the establishment of his membership in the State Employees' Retirement System. (*See Findings 7 and 9.*)

Second, there is sufficient reliable evidence that when he entered state service as a DMH employee on June 24, 1989, Mr. Hogan's job duties as a DMH Mental Health Case Manager II were unchanged (and therefore substantially similar) from what they had been when he worked at DMH as a full-time service coordinator employed by Franklin/Hampshire. Although the record does not include a job description for a DMH "Mental Health Case Worker II," it shows that Franklin/Hampshire's "07" contract program at DMH was converted to a state-operated program on or about June 24, 1989, and the members of the Franklin/Hampshire service coordination/case management team at DMH, including Mr. Hogan and his supervisor, Dr. Murphy, continued to perform their work at DMH as state employees. (*See Finding 7.*) There is no evidence, or assertion, that the work Mr. Hogan had performed at DMH when he was employed by Franklin/Hampshire as a full-time service coordinator changed upon his conversion to a DMH-employed Mental Health Case Worker II, or that, overall, the work (or mission) of the former Franklin/Hampshire service

coordination/case management team at DMH changed in any material respect when the team members became DMH employees.

There was an additional statutory prerequisite for the contract service purchase Mr. Hogan requested. He needed to show, per M.G.L. c. 32, § 4(1)(s), that he “was compensated for service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth” when he worked at DMH between June 7, 1988 through June 24, 1989 in order to purchase that period for retirement purposes under the statute. It was his burden to show, consequently, that he was a “contract *employee*” of DMH during that time, rather than an independent contractor or the employee of an independent contractor (in this case, Franklin/Hampshire). See *Seshadri v. State Bd. of Retirement*, Docket No. CR-15-62, Decision (Mass. Div. of Admin. Law App., Feb. 5, 2016)(Department of Workforce Development employee could not purchase prior work at the agency as contract service under M.G.L. c. 32, § 4(1)(s), because he was, during that time, a full-time salaried employee of a private contractor providing services to the agency and was not a contract employee of the Commonwealth); *Diamantopoulos v. State Bd. of Retirement*, Docket No. CR-15-253, Decision (Mass. Div. of Admin. Law App., Jan. 22, 2016) (for more than six years immediately preceding her employment as Area Program Manager by the Massachusetts Department of Social Services (DSS) and Department of Children and Families, petitioner performed essentially the same work as an employee of DARE Family Service, a contracted vendor that administered foster care and adoption case management at DSS, but could not purchase her service at DARE for retirement purposes because she was employed and paid by DARE, and provided service to that third-party vendor, and was not a contract employee of the

Commonwealth).

The Board’s regulations reiterate that for prior contract service to be eligible for retirement-related purchase, it “must have been service as a ‘contract employee’ of the Commonwealth.” 941 C.M.R. § 2.09(3)(c), first sentence. Per a revision added June 21, 2013 and still in effect, the regulation also states that, with an exception it recites, retirement system members “who were employees of a vendor or contractor, who were selected and contracted to provide services to the Commonwealth, are specifically excluded from purchasing contract service as creditable service.”

Id., second sentence. The exception is as follows:

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.

Id. (emphasis added.)

As I discuss below, the “instrumentality of the Commonwealth” exception is problematic to the extent that it expands the prior contract service that may be purchased under M.G.L. c. 32, §

4(1)(s) based upon whether the vendor functioned *as if it were* a Commonwealth or Commonwealth agency “instrumentality,” if that is how the regulation should be read. If not, and the exception applies only when the vendor *is* such an instrumentality (meaning a public entity created by statute and placed within state government), then what Mr. Hogan needed to show was not whether Franklin/Hampshire performed the same type of work DMH, or DMH employees, could have performed themselves during the time period in question, but whether Franklin/Hampshire was indeed an “instrumentality” of the Commonwealth or DMH.

2. *Eligibility of Mr. Hogan’s Work at DMH between June 7, 1988 and June 24, 1989 for Purchase and Retirement Credit under M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c)*

a. *“Contract Employee” Basis for Prior Service Buyback*

The first issue to be decided is whether Mr. Hogan was a contract employee of the Massachusetts Department of Mental Health while he worked there between June 7, 1988 through June 24, 1989, making his service during that time eligible for purchase and retirement credit under M.G.L. c. 32, § 4(1)(s).

There is no evidence in the record that Mr. Hogan was “compensated for service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth” while he worked at DMH between June 7, 1988 through June 24, 1989.

The best evidence on this point (although not the only type of reliable evidence) would be paystubs or payroll records showing who paid Mr. Hogan for his work during this time, and federal

tax returns, including W2 forms, showing whether deductions were taken from Mr. Hogan's pay between June 7, 1988 through June 24, 1989 for contributions to a public employee retirement system during that time (which would be consistent with employment by DMH) or not (which would be consistent with private contractor status), or whether Social Security contributions were deducted from his pay, which would be consistent with his employment by a private contractor.

Mr. Hogan does not have paystubs or copies of payroll records for his work at DMH during the time period in question, which was nearly 30 years ago, and attempted to obtain them from ServiceNet, Inc., Franklin/Hampshire's successor, without success. ServiceNet, Inc. no longer has records of Mr. Hogan's wages and hours during the period June 7, 1988—June 24, 1989. (*See* Finding 11.)

Mr. Hogan, who apparently has no copies of his 1988 and 1989 federal tax returns, submitted to the Internal Revenue Service an authorization for the release of his 1988 and 1989 federal tax returns, but appears to have received no copies of those tax filings from the IRS. (*See* Finding 12.) For these reasons, I do not presume that the tax returns (specifically, copies of his W2 forms for wages he received during those two years) would have shown contributions to Social Security that were inconsistent with any assertion that Mr. Hogan was compensated by "any department, agency, board or commission of the commonwealth" between June 7, 1988 and June 24, 1989, per the requirement of M.G.L. c. 32, § 4(1)(s). *See Cook v. Northampton Retirement Bd.*, Docket No. CR-13-262, Decision at 7 (Mass. Div. of Admin. Law App., Oct. 16, 2015) ("It is well settled that one cannot be an employee under G.L. c. 32, § 1, eligible for retirement benefits, and yet still contribute to Social Security," *citing Allen v. Teachers' Retirement Bd.*, Docket No. CR-02-881,

Decision (Mass. Div. of Admin. Law App., Dec. 5, 2003).) I also cannot presume reasonably that his 1988 and 1989 tax returns would have shown that contributions for a public employment retirement system were taken from his pay, or that no deductions were taken for Social Security contributions.

It is unnecessary to confirm whether Social Security contributions were deducted from Mr. Hogan's paychecks during the time in question, however. The evidence suffices to show that the statutory prerequisite of compensation by "any department, agency, board or commission of the commonwealth" between June 7, 1988 and June 24, 1989 is not met. In her letter supporting Mr. Hogan's contract service buyback application, ServiceNet, Inc.'s chief financial officer confirmed that Mr. Hogan was an employee of its predecessor, Franklin/Hampshire, even though the firm no longer has records showing specific payroll-related information. (*See* Exh. B3j.) Dr. Murphy, the leader of the Franklin/Hampshire "team" at DMH, and Mr. Hogan's supervisor, during the time period in question, confirmed that he and Mr. Hogan (and the other team members) worked for Franklin/Hampshire until they became DMH employees on June 24, 1989. (*See* Exh. B3k.) There is no evidence in the record that DMH or the Commonwealth paid Mr. Hogan between June 7, 1988 and June 24, 1989. In addition, Mr. Hogan does not claim that any entity other than Franklin/Hampshire paid him for his work at DMH between June 7, 1988 and June 24, 1989. Even if this did not qualify as an admission through silence, it would show that Mr. Hogan's payment by Franklin/Hampshire exclusively during this time period is not genuinely disputed.

I conclude, consequently, that during the time period in question, Mr. Hogan was not a contract employee of DMH but, instead, the employee of a private vendor (Franklin/Hampshire) that

performed mental health-related services for the state agency.

b. Employee of Vendor Functioning as “Instrumentality of the Commonwealth or a Commonwealth agency”

Mr. Hogan argues that he is eligible to purchase his service at DMH while he was an employee of Franklin/Hampshire because he was “employed in a vendor position that was functioning as an instrumentality of the Commonwealth.” (Hogan prehearing mem. at 1.)

Mr. Hogan does not base this argument specifically on 941 C.M.R. § 2.09(3)(c). There is, however, no other apparent authority in Massachusetts retirement law for this proposition; indeed, there is none in M.G.L. c. 32, § 4(1)(s), one of the provisions of Chapter 32 that the Board regulations interpret and implement. The statute provides retirement credit for prior “service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth,” but not for prior service as an employee of a contractor or vendor who “functioned as an instrumentality of the Commonwealth or a Commonwealth agency.” In addition, the Board cited 941 C.M.R. § 2.09(3)(c) in rejecting Mr. Hogan’s prior service buyback application, although it did not explain why it rejected the application under the regulation.

A similar “instrumentality of the Commonwealth” argument was asserted, and rejected, in two recent DALA decisions. *See Seshadri v. State Bd. of Retirement*, Docket No. CR-15-62, Decision at 6 (Mass. Div. of Admin. Law App., Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, Docket No. CR-15-253, Decision at 8 (Mass. Div. of Admin. Law App., Jan. 22, 2016). In each of those appeals, the petitioner worked for, and was paid by, a private contract vendor

providing services to that agency prior to becoming an agency employee. Prior to becoming state employees, Ms. Diamantopoulos was employed by DARE Family Service, a contract vendor that administered foster care and adoption case management at the Department of Social Services (*Diamantopoulis*; Decision at 3-4), and Mr. Seshadri was employed by Salem Associates (a subcontractor for Deloitte Consulting, a contract vendor of the Department of Workforce Development) who worked primarily as an Oracle Database Administrator and DEC/Alpha Tru64 Unix specialist on “building a new workforce development system and unemployment insurance e-applications, and developing a workforce training system.” *Seshadri*; Decision at 3. The State Board of Retirement denied their respective applications to purchase retirement credit for their prior service as contract vendor employees under both M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c).

Mr. Seshadri and Ms. Diamantopoulos each argued that their respective prior service actually qualified as creditable service under the regulation’s “instrumentality of the Commonwealth” exception. DALA Magistrate Kenneth J. Forton determined that the exception was inconsistent with M.G.L. c. 32, § 4(1)(s) and was therefore invalid. That was because:

Section 4(1)(s) requires the member (in service of the state employees’ retirement system) to have rendered service to the Commonwealth as a contract employee. The regulation, in contrast, entitles employees of vendors and third-party contractors to creditable service.

Seshadri v. State Bd. of Retirement, Docket No. CR-15-62, Decision at 6 (Mass. Div. of Admin. Law App., Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, Docket No. CR-15-253, Decision at 8 (Mass. Div. of Admin. Law App., Jan. 22, 2016).

Applying the provisions of M.G.L. c. 32, § 4(1)(s) as the sole controlling authority in both appeals, Magistrate Forton held that the Board properly denied Ms. Diamantopoulos's request to purchase contract service for retirement credit because she was not an employee when she worked for DARE and was, instead, "an employee of a third-party vendor and provided service to the vendor, and was compensated by the vendor." *Diamantopoulos*; Decision at 8-9. In *Seshadri*, Magistrate Forton held that the Board properly denied the petitioner's request to purchase contract service for the Department of Workforce Development because Salem Associates, Mr. Seshadri's employer, was not a "department, board or commission of the commonwealth," as M.G.L. c. 32, § 4(1)(s) required. However, Magistrate Forton also held that even if 941 C.M.R. § 2.09(3)(c) was not invalid as inconsistent with the statute, Mr. Seshadri had "provided no evidence to suggest that his service with Salem Associates satisfied either of the two exceptions provided" by the regulation at 941 C.M.R. § 2.09(3)(c)1 and 2. *Seshadri*; Decision at 6-7.

In contrast with *Diamantopoulos*, *Seshadri* suggests that 941 C.M.R. § 2.09(3)(c) may not conflict with M.G.L. c. 32, § 4(1)(s), depending upon how it is applied. Here, the Board does not read the regulation as extending the statute's application to contract service beyond "service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth," despite its addition of "vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency" to the statutory phrase "any department, agency, board or commission of the commonwealth."⁷ The Board argues that Mr.

⁷/ The Board concedes that Chapter 32 authorized it "to create rules and regulations concerning the purchase of contract service," *citing* M.G.L. c. 32, § 20(5)(b), but not "to extend or modify the

Hogan did not furnish “sufficient information to calculate a service purchase,” whether as to “the specific dates he worked, the specific number of hours he worked, or the sources of payments” to him while he worked as a Franklin/Hampshire employee at DMH (Board prehearing mem. at 4), suggesting that it denied Mr. Hogan’s prior contract service purchase application for this reason under both M.G.L. c. 32, § 4(1)(s) and 941 C.M.R. § 2.09(3)(c). If that was actually the only ground for the Board’s action, it would find scant support in the record, because the evidence shows that Mr. Hogan worked 40 hours per week during the time period in question (June 7, 1988 and June 24, 1989) and was paid solely by Franklin/Hampshire. (*See Findings 5 and 6.*)

In fact, the Board emphasizes Mr. Hogan’s employment and payment during the time period in question as the critical ground for denying his prior contract service purchase application—while Mr. Hogan worked at DMH between June 7, 1988 and June 24, 1989 he was (as I have already concluded) the employee of a third party vendor (Franklin/Hampshire), provided service to that vendor, and was compensated by the vendor, as a result of which he was not entitled to purchase his work at DMH during the time in question as creditable service for retirement purposes. (Board prehearing mem. at 5.) It also rejects Mr. Hogan’s “instrumentality” argument, asserting in effect that his application was properly denied on the merits under 941 C.M.R. § 2.09(3)(c) for failure to satisfy the regulation’s “functioning as an instrumentality of the Commonwealth” provision, and not simply for failing to furnish sufficient information on that point. The Board’s argument is somewhat

application of a statute to events or circumstances not accounted for in the statutory framework,” *citing Gaw v. Contributory Retirement App. Bd.*, 4 Mass. App. Ct. 250, 257, 345 N.E.2d 908 (1976). (Board prehearing mem. at 3.)

ambiguous; although it asserts that *Mr. Hogan* was not functioning as an instrumentality of the Commonwealth (*id.* at 4), it stops short of asserting that *his employer*, Franklin/Hampshire, was, or was not, functioning as an instrumentality of the Commonwealth or DPH.

The Board does not suggest how that point should be resolved. Its resolution depends upon how 941 C.M.R. § 2.09(3)(c) is read, particularly the “exception” it purports to create for “contract service . . . provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency.”

If the regulation was intended to broaden the scope of previous contract service qualifying for purchase and retirement credit under M.G.L. c. 32, § 4(1)(s), that would amount to amending the statute, something only the legislature may do. In that circumstance Mr. Hogan’s argument that his previous work at DMH while he was employed by Franklin/Hampshire should qualify as creditable service for retirement purposes because that vendor “functioned as an instrumentality of the Commonwealth” could not be decided by the Board or by DALA, and his sole avenue of recourse would be a legislative one. *See Kemp v. Boston Retirement Bd.*, Docket No. CR-14-561, Decision at 51 (Mass. Div. of Admin. Law App., Oct. 14, 2016).

If 941 C.M.R. § 2.09(3)(c)1 was intended to explain what M.G.L. c. 32, § 4(1)(s) meant by “any department, agency, board or commission of the commonwealth,” that would make sense only if the statutory phrase were disputed here, which it is not, or if this statutory phrase was ambiguous, which it also is not, or, more specifically, if there was any question here whether Franklin/Hampshire was a “department, agency, board or commission” of the Commonwealth. Neither party asserts,

however, that it was.⁸

A third alternative is that a vendor “functioning as an instrumentality of the Commonwealth” is a phrase of art referring to another type of public entity, rather than to a private vendor, and, as a result, 941 C.M.R. § 2.09(3)(c) may be read as clarifying that service by an employee of this type of public entity may be purchased for retirement credit pursuant to M.G.L. c. 32, § 4(1)(s). This reading harmonizes the regulation with M.G.L. c. 32, § 4(1)(s), consistent with the approach to the construction of retirement regulations that the Supreme Judicial Court commended in *Massachusetts*

⁸/ M.G.L. c. 32, § 1 does not define “department,” “agency,” “board” or “commission” of the commonwealth. The general modifier of all of these words is “commonwealth,” which has the same meaning as state government. M.G.L. c. 7C, § 1 defines “‘state agency’ or ‘state department’” as:

a legal entity of state government established by the general court as an agency, board, bureau, department, office or division of the commonwealth with a specific mission that may report to cabinet-level units of government known as executive offices or secretariats or may be independent divisions or departments; provided however, that for the purposes of sections 32 to 40, inclusive, state agency shall not include counties.

M.G.L. c. 29, § 1 defines “‘state agency’ or ‘state department’ similarly, as:

a legal entity of state government established by the General Court as an agency, board, bureau, department, office or division of the commonwealth with a specific mission, which may either report to cabinet-level units of government, known as executive offices or secretariats, or be independent divisions or departments.

“Board” and “commission” are not defined generally, but specific boards and commission with specific names and missions are; for example, M.G.L. c. 40A, § 1A provides that “‘[s]pecial permit granting authority’ shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by zoning ordinance or by-law for the issuance of special permits.” Again, the general modifier of these terms is “commonwealth,” meaning that they must be a legal entity of the commonwealth or of state government. In this case, there is no evidence or assertion that Franklin/Hampshire was a legal entity of the commonwealth or of state government.

Teachers' Retirement System v. Contributory Retirement Appeal Bd., 466 Mass. 292, 994 N.E.2d 355 (2013).⁹ I follow this approach here in construing the “vendor . . . functioning as an instrumentality of the Commonwealth” provision of 941 C.M.R. § 2.09(3)(c).

The Board’s regulations do not define “instrumentality of the Commonwealth,” either at 941 C.M.R. § 2.09(3)(c) or anywhere else. M,G.L. c. 32, § 1, the statute’s definitions section, also does not define this phrase. However, the phrase is used elsewhere in the General Laws to mean, or refer to, a public body created by statute and placed within an existing agency or department of the Commonwealth.

Several examples suffice.

M.G.L. c. 40J, § 3 creates “a body, politic and corporate, to be known as the Massachusetts Technology Park Corporation,” and provides that this body “is hereby constituted a public instrumentality of the commonwealth and the exercise by the corporation of the powers conferred in this chapter shall be deemed and held to be an essential governmental function.” The statute also provides, as to this body, that it is “placed in the department of economic development but shall not be subject to the supervision or control of said department or of any board, bureau, department or other agency of the commonwealth except as specifically provided in this chapter.”

St. 1963, c. 703, Section 2 established the Massachusetts State College Building Authority

⁹/*Massachusetts Teachers* recited two prerequisites to this approach that I presume are met here, absent any argument to the contrary: the retirement board had authority to promulgate regulations interpreting the applicable retirement statute, and the regulations were subject to approval by the Public Employee Retirement Administration Commission (PERAC). The other prerequisite, which is met here, is that construing the regulations in this manner reflects a reasonable interpretation of the statute.

as a “body politic and corporate” placed within the Commonwealth’s Department of Education, but not “subject to the supervision or regulation of the department of education or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in” St. 1963, c. 703, § 2, the Authority’s enabling act. St. 1963, c. 703, § 2 provided, in pertinent part, that “[t]he Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function.”

Elsewhere in the General Laws, “public agency” and “instrumentality of the commonwealth” are used interchangeably. *See, e.g.*, M.G. L. c. 79A, which provides (at section 3) that “[a]ny public agency . . . shall provide relocation assistance and payments under this act upon undertaking a project which results in displacement of occupants by the acquisition of real property” and defines “public agency” (at section 1) as “any department, agency, board, commission, authority, or other instrumentality of the commonwealth or of a political subdivision of the commonwealth; or of two or more subdivisions thereof.”

To the extent that 941 C.M.R. § 2.09(3)(c) contemplates that a third party contractor or vendor “functioning as an instrumentality of the Commonwealth” refers to a public entity created by the legislature and placed by the legislature within state government, it does not diverge from M.G.L. c. 4(1)(s) or from the interchangeability of “instrumentality of the Commonwealth” and “public agency,” as those phrases are used in the General Laws. With the regulation read in this manner, the Board held correctly that Mr. Hogan was not employed by a “vendor functioning as an instrumentality of the Commonwealth” between June 7, 1988 through June 24, 1989. There is no

evidence, or claim, that Franklin/Hampshire, Mr. Hogan's employer during that time, was established by the legislature and placed within state government by a provision of the Session Laws or General Laws. For these reasons, it is of no consequence that during this time period, Franklin/Hampshire or its employees, including Mr. Hogan, performed work that DMH might have performed, and that they performed later when DMH took over the services that Franklin/Hampshire had provided and the members of its team of employees working at DMH became DMH employees, or that in the opinion of a DMH personnel officer, Mr. Hogan performed work "in a vendor position that was functioning as an instrumentality of the Commonwealth." (*See* Exh. 1.)

I conclude, therefore, that Franklin/Hampshire was not an instrumentality of the Commonwealth between June 7, 1988 through June 24, 1989.¹⁰

¹⁰/ The Secretary of the Commonwealth's online public corporate records show that Franklin/Hampshire Community Mental Health Center, Inc. was organized as a Massachusetts nonprofit corporation on November 21, 1975 and was merged into ServiceNet, Inc., another Massachusetts nonprofit corporation, on January 1, 1995. *See*: <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=042595883>

The Secretary of the Commonwealth's record for Franklin/Hampshire shows that 1995 merger was with both ServiceNet, Inc. and Valley Programs, Inc., another Massachusetts nonprofit corporation, but the Secretary's record for Valley Programs, Inc. show that it merged with ServiceNet, Inc. on July 1, 1994. *See* <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=042747645> . That minor discrepancy aside, the Secretary's public corporate records show that Franklin/Hampshire was a private nonprofit corporation during the period of time in question here, June 7, 1988 through June 24, 1989, when it employed Mr. Hogan and he worked at DMH as a Franklin/Hampshire employee.

In concluding that Franklin/Hampshire is not an "instrumentality of the Commonwealth," as that phrase is employed throughout the General Laws and the Session Laws, I rely not upon the Secretary of the Commonwealth's online corporate record database, but upon the absence of any legislation creating Franklin/Hampshire as an "instrumentality of the Commonwealth" or as a "body politic and corporate" placed within state government. The Secretary's information confirms my conclusion.

Disposition

During the time period in question, June 7, 1988 - June 24, 1989, Mr. Hogan was not a contract employee of the Massachusetts Department of Mental Health. He was, instead, the employee of a private vendor (Franklin/Hampshire County Community Mental Health Center, Inc.) that performed mental health-related services for DMH, and was paid for his work at DMH during that time by Franklin/Hampshire exclusively. Franklin/Hampshire was not an “instrumentality of the Commonwealth” or a “body politic and corporate” created by legislation and placed within state government. Accordingly, Mr. Hogan was not entitled to purchase his work at DMH between June 7, 1988 and June 24, 1989 for retirement credit pursuant to M.G.L. c. 32, § 4(1)(s) or 941 C.M.R. § 2.09(3)(c).

I affirm, therefore, the Board’s decision denying Mr. Hogan’s request to purchase his prior work at the Massachusetts Department of Mental Health from June 7, 1988 to June 24, 1989 for retirement credit.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: June 16 , 2017

APPENDIX TO DECISION

LIST OF 23 EXHIBITS FILED BY THE PARTIES (All in Evidence)

5 Exhibits filed by petitioner Jonathan J. Hogan

Exh. H1. Letter, Tammy Petrowicz, Personnel Officer I, Massachusetts Department of Mental Health, Western MA Area, "to whom it may concern," re: Docket No. CR-16-243, dated Jan. 17, 2017.

Exh. H2a-c. Documents from the Massachusetts Department of Mental Health regarding Jonathan Hogan:

Exh. H2a. Certification that period of service from June 7, 1988 to June 24, 1989 may be considered as creditable service for purposes of salary placement and vacation status in accordance with the provisions of the agreement between the Commonwealth and Alliance/Local-S.E.I.U. dated June 26, 1983, signed on behalf of Massachusetts Department of Mental Health, and Massachusetts Office of Employee Relations.

Exh. H2b. Department of Mental Health request for verification of 03 or 07 service re Jonathan Hogan from 06-22-81 to 06-2-84, and from 06-7-88 to 06-24-89; information provided by Donald H. Abbott, Franklin/Hampshire Case Management, Director of Adult Day Services, dated June 25, 1989.

Exh. H2c. Information provided by Jonathan Hogan to Department of Mental Health re 03 or 07 contract service, dated June 22, 1989.

Exh. H3. Department of Mental Health Employee Data Verification for Jonathan Hogan, dated Apr. 11, 2003.

18 Exhibits filed by the State Board of Retirement

Exh. B1. State Board of Retirement decision, dated May 24, 2016, denying Jonathan Hogan's request to purchase contract service for the period June 7, 1988 - June 24, 1989.

Exh. B2. Appeal of Jonathan Hogan to Contributory Retirement Appeal Board, dated May 30, 2016, re State Board of Retirement's decision denying his request to purchase prior contract service for the period June 7, 1988 to June 24, 1989.

Exh. B3. Contract Service Buyback Request of Jonathan J. Hogan, submitted to State Board of Retirement, dated Dec. 14, 2015, with 15 attachments marked separately as Exhs. B3a - B3o).

Exh. B3a. Certification that period of service from June 7, 1988 to June 24, 1989 may be considered as creditable service for purposes of salary placement and vacation status in accordance with the provisions of the agreement between the Commonwealth and Alliance/Local-S.E.I.U. dated June 26, 1983, signed on behalf of Massachusetts Department of Mental Health, and Massachusetts Office of Employee Relations.

Exh. B3b. Information provided by Jonathan Hogan to Department of Mental Health re 03 or 07 contract service, dated June 22, 1989.

Exh. B3c. Contract Service Buyback Request of Jonathan James Hogan, submitted to State Board of Retirement: Section A, completed by Jonathan Hogan, dated Dec. 14, 2015; and Section B, completed by ServiceNet, Inc., dated Dec. 23, 2015.

Exh. B3d. Certification that period of service from June 7, 1988 to June 24, 1989 may be considered as creditable service for purposes of salary placement and vacation status in accordance with the provisions of the agreement between the Commonwealth and Alliance/Local-S.E.I.U. dated June 26, 1983, signed on behalf of Massachusetts Department of Mental Health, and Massachusetts Office of Employee Relations.

Exh. B3e. Department of Mental Health request for verification of 03 or 07 service re Jonathan Hogan from 06-22-81 to 06-2-84, and from 06-7-88 to 06-24-89; information provided by Donald H. Abbott, Franklin/Hampshire Case Management, Director of Adult Day Services, dated June 25, 1989; and Information provided by Jonathan Hogan to Department of Mental Health re 03 or 07 contract service, dated June 22, 1989.

Exh. B3f. Handwritten cover note from Jonathan Hogan (no date or named recipient) re re-sending member portion of buyback form along with section B of form completed by former employer.

Exh. B3g. State Board of Retirement Enrollment Form for Jonathan James Hogan, with nomination of beneficiary, dated June 21, 1989.

Exh. B3h. Letter, Jon Hogan to state Retirement Board, re enclosing additional documents in support of his request for prior service buyback.

Exh. B3i. Contract Service Buyback Request of Jonathan James Hogan, submitted to State Board of Retirement: Section B, completed by ServiceNet, Inc., dated Dec. 23, 2015.

Exh. B3j. Letter, Genevieve G. Schreiber, Chief Financial Officer, ServiceNet “to whom it may concern,” re Jonathan Jhogan’s contract service buyback form, dated Mar. 31, 2016.

Exh. B3k. Letter, Michael Murphy, Ph.D., LICSW, “to whom it may concern” (re Franklin/Hampshire Community Mental Health Center 07 contract program Service Coordination/Case Management Team at Massachusetts Department of Mental Health, July 1, 1985 - June 24, 1989, and conversion of team members to DMH employees on June 24, 1989), dated Apr. 1, 2016.

Exh. B3l. 1986 newspaper advertisement for position of service coordinator at Franklin/Hampshire Community Mental Health Center.

Exh. B3m. Franklin/Hampshire Community Mental Health Center position description for Mental Health therapist III/Service Coordinator, Oct. 1987.

Exh. B3n. IRS Form 4506-T, request by Jonathan J. Hogan for transcript of tax return, dated Mar. 2, 2016.

Exh. B3o. Letter, Jon Hogan to State Retirement Board re appeal of “Buyback Unit”’s April 6, 2016 denial letter.