

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Ann Marie Irwin,
Petitioner,

Docket No.: CR-24-0615

v.

State Board of Retirement,
Respondent.

Appearances:

For Petitioner: Brian G. Callahan, Esq.

For Respondent: John Durgin, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner became a state employee in 1986. On a preponderance of the record evidence, she was a permanent employee from the start, but began to make retirement contributions only in her seventh month on the job. The petitioner is entitled to retirement credit for her first six months of work in exchange for a purchase price calculated using the “correction of errors” interest rate.

DECISION

Petitioner Anne Marie Irwin seeks retirement credit for a six-month period of work she performed in 1986. Respondent the State Board of Retirement (board) made Ms. Irwin’s entitlement to that credit contingent on her payment of approximately \$3,100. Ms. Irwin appeals from that decision. I held a hearing by Webex on October 15, 2025, at which the witnesses were Ms. Irwin and board employee Pamela Forde. I admitted into evidence exhibits marked A-N.

Findings of Fact

I find the following facts.

1. Ms. Irwin has been a lawyer in public service for forty years. In 1984-1985, she was employed part time as a law clerk. In 1986-1988, she worked in the Attorney General's Office (AGO) as an Assistant Attorney General (AAG). Her career has since featured positions with the Legislature, the city of Medford, and the Office of the State Auditor, where she remains today. She has combined some years of full-time work with others on a part-time schedule. (Exhibit K; Irwin.¹)

2. The focus of this case is Ms. Irwin's work for the AGO. She was hired into a full-time AAG position in March 1986. Early that month, Ms. Irwin filed a form enrolling in the board's retirement system. In a portion of the form about the "nature of [the] employment," markings near the options "permanent" and "temporary" are indistinct. In a portion of the form about the "percentage rate to be deducted for retirement," boxes for various percentages are all unchecked. (Exhibit N; Irwin.)

3. A preponderance of the evidence supports the conclusion that the AGO withheld no retirement contributions from Ms. Irwin's pay during the first six months of her employment. According to the board's database, the board first received such contributions in September 1986. Ms. Forde has worked with the database on numerous occasions without ever discovering an error there. The parties have identified no other pertinent financial records. They have neither claimed nor demonstrated any likelihood that the AGO took contributions from Ms. Irwin only to keep them to itself. And although Ms. Irwin did not recall

¹ The testimony is cited by witness name.

her take-home pay rising after six months of work, she was justifiably uncertain about that detail from a distance of forty years. (Exhibits A, B, E, F, M; Irwin; Forde.)²

4. During the 1980s and 1990s, the Commonwealth classified most of its new hires as “provisional” employees for periods of six months each. The employees so treated included at least some AAGs. But a preponderance of the evidence supports the conclusion that Ms. Irwin was classified from the start as a “permanent” employee, not a “provisional” one. Ms. Irwin testified credibly about her pertinent recollections and communications. She understood her status to be that of a permanent employee from day one. AGO personnel said nothing to her about a provisional or probationary period during the hiring process. Six months later, they said nothing about a provisional or probationary period ending. These are facts about which Ms. Irwin was understandably confident. What little remains of her employment file is not to the contrary. (Exhibits A, N; Irwin.)³

² Recent letters to and from the board support mixed inferences, none of them decisively powerful. A 2016 letter from Medford to the board reports Ms. Irwin’s own belief that she became a retirement-system member in March 1986. A 2020 letter from the board to Ms. Irwin may be read as suggesting the opposite, i.e., that her membership began in September. According to a form completed by the AGO in 2017, Ms. Irwin’s membership began in March; but in 2024, when the board asked the AGO, “Why were no retirement deductions withheld [before September]?”, the AGO wrote: “Unknown.” (Exhibits B, F, M.)

³ The board’s database lists a “start” date for Ms. Irwin in March 1986. Ms. Forde believed that “start” dates are signs of provisional terms; but she did not know what the database would have displayed instead for immediately permanent employees. To the extent that Ms. Forde intended to opine that every single Commonwealth hire in the 1980s and 1990s was at first made provisional, I do not so find. A practice so sweeping could only have flowed from a concerted policy, but the record features no formal or contemporaneous evidence of one. Also, Ms. Forde’s expertise builds on a skewed sample: she works on purchase requests, i.e., circumstances in which a member originally was not credited for his or her service. For reasons that will become more explicit, any cases of members treated as permanent from the start are less likely to cross Ms. Forde’s desk.

5. Over the years, Ms. Irwin made periodic efforts to learn from the board about her entitlements. She realized at some point that the board's records credited her with six months less of service than she thought she had earned. One or more board employees theorized that the discrepancy was related to Ms. Irwin's part-time employment in 1984-1985. But in September 2024, Ms. Irwin learned that the board's files recorded her service with the AGO as starting in September 1986, not March of that year. (Exhibit K; Irwin.)

6. Ms. Irwin presented the board with an application to purchase credit for her work in March-September 1986. The board allowed the request contingent on Ms. Irwin's payment of approximately \$3,100, including approximately \$2,250 in interest, calculated using a "buyback" interest rate of 3.5%. Ms. Irwin timely appealed, contending that her purchase price should be either zero or an interest-free figure. (Exhibits D, G-I; Forde.)

Analysis

The retirement benefits of a Massachusetts public employee depend on the employee's tally of creditable service. *See* G.L. c. 32, § 5(2)(a). The dispute here revolves around Ms. Irwin's entitlement to credit for her work with the AGO in March-September 1986; and in particular, the sum, if any, that she owes the board in return for that credit.

Generally speaking, each public employee is credited with the full periods during which he or she worked for Massachusetts governmental units while maintaining membership in Massachusetts retirement systems. *See id.* § 4(1)(a). Also generally speaking, each employee becomes entitled to retirement-system membership on his or her first day of work. *See Worcester Reg'l Ret. Bd. v. Contributory Ret. Appeal Bd. (Pierce)*, 92 Mass. App. Ct. 497, 500-01 (2017).

Special rules apply to employees who were hired “on a part-time, provisional, temporary, temporary provisional, seasonal or intermittent basis.” G.L. c. 32, § 3(2)(a)(iv). Each board has “full jurisdiction” to determine whether such employees possess “eligibility for membership” in the board’s system. *See id.* § 3(2)(d). When a board grants such eligibility, the pertinent employees, with an exception inapplicable here, become members “upon the completion of six calendar months of service.” § 3(2)(a)(iv).

The retirement statute does not define the concept of “provisional” employment. The term “provisional” in the law typically means “[p]rovided for the time being . . . to be occupied in the end by some more permanent arrangement.” *Black’s Law Dictionary* 1420 (10th ed. 2014). In the contexts of collective bargaining and the civil service, Massachusetts cases have described employees as “provisional” essentially when their positions were assured only temporarily, with the permanence of the appointments to be reassessed. *See Kelleher v. Personnel Adm’r of Dep’t of Pers. Admin.*, 421 Mass. 382, 387 (1995); *Sch. Comm. of Newton v. Lab. Rels. Comm’n*, 388 Mass. 557, 563 (1983). Section § 3(2)’s rules about “provisional” employees likewise suggest a kinship between provisional and “temporary” work. *See also Ricci v. State Bd. of Ret.*, No. CR-00-972, at *8 (Div. Admin. Law App. July 10, 2001).

For the reasons described earlier, a preponderance of the evidence supports Ms. Irwin’s claim that she was hired from the start as a permanent employee, subject to no provisional or probationary period. She was entitled to be treated as a member of the board’s system as of her first day of work. *See* G.L. c. 32, § 4(1)(a); *Pierce*, 92 Mass. App. Ct. at 500-01.

Also for reasons described earlier, a preponderance of the evidence supports the conclusion that no retirement contributions were taken from Ms. Irwin and delivered to the

board during Ms. Irwin’s first six months of work. This is therefore a case in which “a member has contributed an incorrect amount to the retirement system.” G.L. c. 32, § 20(5)(c)(2). The general statutory rule in such cases is that “the member shall be required to contribute an amount sufficient to correct such error.” *Id.*

Ms. Irwin’s missing contributions were supposed to be collected from her in 1986. Forty years later, the nominal sum originally owing from Ms. Irwin is no longer “an amount sufficient to correct [the] error” within the meaning of § 20(5)(c)(2). *See Herrick v. Essex Reg’l Ret. Bd.*, 465 Mass. 801, 802, 809 (2013). The amount to be charged to Ms. Irwin now must be computed using the low interest rate known as the “correction of errors” rate. *See Wright v. State Bd. of Ret.*, No. CR-16-68 (Contributory Ret. App. Bd. Oct. 18, 2022); *Lyons v. Middlesex Cty. Ret. Bd.*, No. CR-21-401, 2024 WL 4432415, at *4 & n.2 (Div. Admin. Law App. Sept. 27, 2024); *LaPalme v. Worcester Ret. Bd.*, No. CR-19-461, 2023 WL 6806269, at *5 (Div. Admin. Law App. Oct. 6, 2023); *Skinner v. Massachusetts Teachers’ Ret. Syst.*, No. CR-22-0084, 2023 WL 4052398, at *3-4 (Div. Admin. Law App. June 9, 2023). Because the board derived its invoice from the typically higher “buyback” rate, a recalculation is necessary.⁴

Ms. Irwin focuses on a different legal consequence of her circumstances: with money now owing from her in exchange for her first six months of service, the board has the authority

⁴ Ms. Irwin’s papers did not emphasize the applicability of the “correction of errors” rate, given her aspiration to pay no interest at all. But the law on this point has been settled since *Wright, supra*, to which the board was a party. If the analysis in the main text overlooks a significant factor that the board would have flagged in response to more complete briefing by Ms. Irwin, the board may move for reconsideration. *See* 801 C.M.R. § 1.01(10)(f).

to waive its right to repayment. See G.L. c. 32, § 20(5)(c)(3); *LaPalme*, 2023 WL 6806269, at *4.⁵

That authority is discretionary. “[T]he . . . board is entitled to deny, as well as to grant, relief.”

Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd. (Polycarpo), 65 Mass. App. Ct. 443, 451

(2006). “[T]he Legislature expected that the final decision would be made at [the board]

level.” *Id.* If a board’s decision to insist on repayment is reviewable at all, the “review [is]

limited to the question whether the . . . board abused its discretion.” *Id.*

Ms. Irwin has identified no reason to believe that hers is the exceptional case in which any decision other than a waiver of repayment would be an abuse of discretion. In particular, the sum of \$2,250 now being charged to her is much more manageable than the amounts at stake in cases such as *Polycarpo*, 65 Mass. App. Ct. at 448.

That said, when a member seeks a waiver of repayment, the board must at least consider the request. See *LaPalme*, 2023 WL 6806269, at *4. There are mixed indications as to whether the board has already done so here.⁶ Regardless, the matter needs to return to the board for a recalculation of Ms. Irwin’s invoice. At that time, the board will be able to consider Ms. Irwin’s request for a waiver, if it has not already done so.⁷

⁵ The authority arises where: “(i) the error in any benefit payment or amount contributed to the system persisted for a period in excess of one year; (ii) the error was not the result of erroneous information provided by the member or beneficiary; and (iii) the member or beneficiary did not have knowledge of the error or did not have reason to believe that the benefit amount or contribution rate was in error.” § 20(5)(c)(3).

⁶ The board’s attorney expressed an understanding that board personnel consider whether any repayments should be waived whenever they process purchase applications. But Ms. Forde did not appear to be familiar with the concept of waivers of repayment; and the board maintained in a prehearing memorandum that the waiver provision “would not apply” in this case because the board “has not made an error.”

⁷ By comparison to the members in *Pierce* and *LaPalme*, Ms. Irwin has expressed a more tentative interest in her missing period of credit: her papers and testimony suggest that she

Conclusion and Order

For the foregoing reasons, the board’s decision is AFFIRMED in part and REVERSED in part. Ms. Irwin is entitled to credit for her work in March-September 1986 in exchange for a purchase price calculated using the “correction of errors” interest rate. If the board has not yet considered Ms. Irwin’s request for a full or partial waiver of repayment, then it must consider that request on remand.

SO ORDERED.

Dated: October 31, 2025

/s/ Yakov Malkiel
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Administrative Magistrate
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might conceivably wish to relinquish that credit if the purchase price is too high. In comparable circumstances, the magistrate in *Lyons* indicated that the member would only need to “purchase the service if he wants credit for it.” 2024 WL 4432415, at *4. *See also Pierce*, 92 Mass. App. Ct. at 500-01. The board here has not suggested any intention of requiring Ms. Irwin to acquire the pertinent period of credit involuntarily.