COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

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**Steven Jochim,** Docket No. CR-15-328

 Petitioner

v.

**State Board of Retirement,**

Respondent

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**Appearance for Petitioner:**

*Pro se*

16 Weldons Road

Buzzard’s Bay, MA 02532

**Appearance for Respondent**

Melinda E. Troy, Esq.

State Board of Retirement

One Winter Street, 8th Floor

Boston, MA 02108

**Administrative Magistrate:**

Bonney Cashin

**SUMMARY OF DECISION**

There is no actual controversy between the parties because Mr. Jochim withdrew his application to participate in the Employee Retirement Incentive Program (ERIP). In addition, the deadline to apply for the ERIP has expired. Mr. Jochim’s appeal is moot, and is, therefore, dismissed.

**DECISION**

**INTRODUCTION**

Steven Jochim timely appealed the June 18, 2015 decision of the State Board of Retirement (the Board). The Board determined that, while Mr. Joachim was eligible to participate in the Employee Retirement Incentive Program (ERIP) because of his employment with the Department of Mental Health, his salary from his employment with the University of Massachusetts Boston (UMass Boston) could not be considered when calculating his retirement benefit because it is not a qualifying agency.

On September 3, 2015, in response to an order, Mr. Jochim filed a Pre-Hearing memorandum listing the legal issues he is asserting; I have marked this “A” for identification. On October 6, 2015, Respondent Board filed its response to Petitioner’s Pre-Hearing memorandum; I have marked this “B” for identification. There is no genuine issue of material fact; and so this case is decided without a hearing pursuant to 801 CMR 1.01(7)(h).

From the documents filed by the parties, I have entered the following exhibits into evidence:

Ex. 1 Mr. Jochim’s ERIP application dated June 9, 2015;

Ex. 2 Letter from the Board dated June 18, 2015 notifying Mr. Jochim that his participation in the ERIP would be based on his service with the Department of Mental Health;

Ex. 3 Mr. Jochim’s appeal letter to the Division of Administrative Law Appeals with attachments, dated June 26, 2015; and

Ex. 4 Mr. Jochim’s letter to the Board notifying it that he was withdrawing his ERIP application dated June 23, 2015.

**FINDINGS OF FACT**

Based on the evidence in the record, the following facts are not in dispute:

1. Mr. Jochim was born in 1956. (Ex. 1).
2. Mr. Jochim has worked as Site Director for the Department of Mental Health since July 15, 1984 and as a Senior Lecturer for the University of Massachusetts Boston since September 1999. (Ex. 1).
3. Mr. Jochim began making contributions to the State Employee Retirement System for the UMass Boston position on January 27, 2008. (Ex. 3).
4. On September 10, 2012, Mr. Jochim received an e-mail from Michael Southerland, Benefits Counselor for the Board, stating that Mr. Jochim’s creditable service for his full-time position with the Department of Mental Health was 28 years and 2 months as of September 14, 2012. His half-time service at UMass would not count toward his creditable service. The message also stated that “the benefit of working at UMass will be the ability to combine the two salaries.” (Ex. 3).
5. On June 9, 2015, Mr. Jochim applied for the ERIP. (Ex. 2).
6. On June 18, 2015, the Board issued its decision stating that Mr. Joachim’s eligibility to participate in the ERIP would be limited to his service with the Department of Mental Health. (Ex. 2).
7. The Board relied on guidance dated May 14, 2015 and issued by the Department of Higher Education which opined that employees of state universities and community colleges are not eligible to participate in the ERIP. (Ex. 2).
8. On June 23, 2015, Mr. Jochim withdrew his ERIP application. (Ex. 4).
9. On June 26, 2015, Mr. Jochim timely appealed the Board’s decision. (Ex. 3).

**DISCUSSION**

The ERIP was created via special legislation for a particular purpose: to decrease state spending by decreasing the number of executive department employees. Acts 2015, c. 19. It required these employees to apply by June 12, 2015 in order to participate. Acts 2015, c. 19, §4.

Mr. Jochim’s application was timely. He, however, withdrew his application on June 23, 2015 and appealed on June 26, 2015. Because he withdrew his application and the deadline for participation in the ERIP has passed, Mr. Jochim’s appeal is moot and is dismissed.

When a case is moot, it generally means that the plaintiff no longer has a stake in the outcome of his claim. A case must stem from a controversy that is not theoretical or lacking in adversarial quality. *Lockhart v. Attorney General, et. al.*, 390 Mass. 780, 782-785 (1984). A case can become moot if the circumstances that allow the plaintiff to seek judicial relief change because of, but not limited to, settlement, a new statute, or the death of a party. *Id*.

Mootness is a settled doctrine in Massachusetts courts and administrative tribunals, including DALA and the Contributory Retirement Appeal Board. *City of Holyoke v. Holyoke Ret. Bd.*, CR-07-949, Decision on Respondent’s Motion to Dismiss and Order of Dismissal (Div. Admin. Law App. July 31, 2008) (citations omitted).

When a plaintiff no longer has a stake in the claim’s outcome, a court may nonetheless decide the case is not moot if the same issues are likely to arise again yet are capable of evading review. *Wolf v. Commissioner of Public Welfare*, 367 Mass. 293, 298-300 (1975) (passage of time during appeal cannot moot a case if other pertinent circumstances surrounding the claim remain the same). However, if the factual circumstances surrounding the claim are likely to change so that the same issues are unlikely to arise again, the court may use its discretion and dismiss the case. *Lockhart,* 390 Mass. 784-785.

This case stems from Mr. Jochim’s ERIP application and the Board’s decision on his application. Mr. Jochim voluntarily withdrew his application. The June 12, 2015 deadline to apply has passed, so he cannot re-apply to participate in the 2015 ERIP program. The legislature may enact another ERIP but its requirements are unknown and need not mirror the 2015 program. One can only speculate whether the same issue that concerns Mr. Jochim would arise again if he chose to participate in another ERIP program.

 Were I to consider the merits of Mr. Jochim’s appeal, it is not clear whether he would prevail. Acts 2015, c. 19, §1 defines “executive department employee” as “a person employed by an agency” with agency defined as, “the office of the governor, an executive office established in [G.L. c. 6A, §2] or an agency, bureau, department, office or division of the commonwealth reporting to such executive office or under the control of the governor. Acts 2015, c. 19, §1.

There is no question that Mr. Jochim’s position with the Department of Mental Health meets the definition of an executive department employee. However, it is not so clear that an employee of UMass Boston meets the definition. The Department of Higher Education opined that UMass employees are not executive department employees.

Mr. Jochim asserts under the promissory estoppel doctrine that the Board, through Mr. Southerland, led him to believe he would be able to combine the salaries of both positions for purposes of retirement benefits, and he applied for the ERIP under this belief. However, the correspondence between Mr. Jochim and the Board regarding this statement of combining salaries took place in 2012 before the ERIP was established. There is no evidence of correspondence regarding the requirements of the ERIP between Mr. Jochim and the Board. It can, therefore, be logically inferred that the statement made by Mr. Southerland reflected the typical retirement standards under G.L. c.32 and not the ERIP special legislation.

 Mr. Jochim’s appeal is dismissed as moot.

DIVISION OF ADMINISTRATIVE

LAW APPEALS

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Bonney Cashin

Administrative Magistrate

 Dated: October 28, 2016