

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Diane Kelley,**  
Petitioner

v.

Docket No. CR-24-0312  
Date: November 7, 2025

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

James H. Quirk, Jr., Esq.

**Appearance for Respondent:**

Brendan McGough, Esq.

**Administrative Magistrate:**

Kenneth J. Forton

**SUMMARY OF DECISION**

The petitioner is ineligible to purchase contract service under G.L. c. 32, § 4(1)(s) for the time she worked at the Executive Office of Health and Human Services as an employee of staffing company PeopleSERVE, Inc. She was not a “contract employee” but rather worked for a third-party for-profit private vendor that was not an instrumentality of the Commonwealth. *See* 941 CMR 2.09(3)(c). Accordingly, the Board’s denial of Ms. Kelley’s application is affirmed.

**DECISION**

Petitioner Diane Kelley timely appealed, under G.L. c. 32, § 16(4), the decision of the State Board of Retirement to deny her application to purchase contract service from December 10, 2010, to October 21, 2012, because, as a vendor’s employee, she was not

a “contract employee” for purposes of Chapter 32. On November 26, 2024, the Board filed a motion to dismiss that Ms. Kelley opposed on January 8, 2025, and the Division of Administrative Law Appeals (DALA) denied on March 20, 2025. On April 16, 2025, DALA ordered the parties to file prehearing memoranda and proposed exhibits. I held and recorded an evidentiary hearing on November 4, 2005, during which I admitted eight exhibits. Ms. Kelley testified on her own behalf. The Board called no witnesses. At the end of the hearing, petitioner and respondent made closing statements.

### **FINDINGS OF FACT**

Based on the evidence in the record and reasonable inferences drawn from it, I make the following findings of fact:

1. Diane Kelley studied to become a computer professional by earning an associate’s degree from the Wentworth Institute of Technology and a bachelor’s degree in computer science from the University of Massachusetts. She then worked for several private companies, including Phoenix Technologies, Lotus Development Corporation, and BlueCross BlueShield of Massachusetts. (Kelley Testimony.)
2. When she was looking for work in 2010, she saw a position advertised on a job board (dice.com) for a quality analyst (QA) that she felt matched her skill set. The posting stated that the work would be done “[u]nder the direction” of the Commonwealth’s Executive Office of Health and Human Services (EOHHS). (Kelley Testimony; Exhibit 7.)
3. After Ms. Kelley applied for the quality analyst position, she first had a telephone interview with a quality assurance manager and then an in-person interview

with several staff from the EOHHS quality assurance group, which was the group with whom she would work. (Kelley Testimony.)

4. On December 17, 2010, the EOHHS quality assurance group's administrator emailed Ms. Kelley offering her the "QA (contract) position" for \$50 per hour. The administrator wrote: "[W]e will pay the vendor you choose \$1.50 for a total rate of \$51.50[] and as discussed, this is a non-W2 rate." The administrator also indicated that she attached to the email a list of several vendors from which Ms. Kelley could choose. (Exhibit 2.)

5. Ms. Kelley accepted the offer that same day in an email and wrote that she chose PeopleSERVE, Inc. as her vendor. Ms. Kelley did not fully understand why she needed to choose a vendor or what the vendor's role would be, but she recognized that she had to choose a vendor to get the job. (Exhibit 2; Kelley Testimony.)

6. PeopleSERVE was a private, for-profit staffing company that provided employees to perform services for its clients. (Exhibits 2, 8.)

7. On or around December 20, 2010, Ms. Kelley drove to the PeopleSERVE office and signed an employment agreement with PeopleSERVE. She also signed employment agreements with PeopleSERVE for state fiscal years 2012 and 2013. (The Commonwealth's fiscal year begins on July 1.) The employment agreements were substantially similar. (Kelley Testimony; Exhibit 2.)

8. Under the employment agreements, EOHHS was PeopleSERVE's client, PeopleSERVE was Ms. Kelley's employer, and Ms. Kelley was PeopleSERVE's employee. (Exhibit 2; Kelley Testimony.)

9. Ms. Kelley worked as PeopleSERVE's employee from December 21, 2010, through October 20, 2012. PeopleSERVE did not offer her benefits or any paid time off. (Kelley Testimony; Exhibit 2.)

10. At EOHHS, Ms. Kelley worked directly with the quality assurance team performing quality testing for EOHHS' enterprise invoice management/enterprise service management (EIM/ESM) system. The EIM/ESM system processed over \$3 billion per year in vendor invoices. Although she ultimately reported to an EOHHS manager, Ms. Kelley and the quality assurance team worked together to move various phases of their projects forward; she did not take direction from one particular person. She did not receive performance reviews. (Kelley Testimony.)

11. Ms. Kelley sent PeopleSERVE time sheets that EOHHS staff signed. PeopleSERVE managed Ms. Kelley's payroll and tax withholding. In 2010, 2011, and 2012, Ms. Kelley received W-2 forms that listed PeopleSERVE, Inc. as her employer. (Kelley Testimony; Exhibit 2.)

12. Ms. Kelley made contributions to Social Security in 2010, 2011, and 2012. She made no contributions to Social Security in 2013. (Exhibit 2; Kelley Testimony.)

13. Ms. Kelley began working as a full-time employee of EOHHS in October 2012, directly after she terminated her arrangement with PeopleSERVE. (Kelley Testimony.)

14. On February 6, 2023, after she had worked the required ten years, Ms. Kelley applied to purchase contract service from December 21, 2010 to October 21, 2012. She supplemented her application on December 15, 2023. (Exhibits 1, 2.)

15. The Board denied her application on April 29, 2024, because she was not a “contract employee” of the Commonwealth, but rather was a vendor’s employee.

(Exhibit 3.)

16. On May 10, 2024, Ms. Kelley timely appealed from the Board’s denial.

(Exhibit 4.)

### **CONCLUSION AND ORDER**

When a member retires from public service she may be entitled to a superannuation retirement allowance based in part on her years of creditable service. G.L. c. 32, § 5(2)(a). Section 1 of 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.” G.L. c. 32, § 1. One form of “other service” that a member may purchase under certain circumstances is “contract service” with the Commonwealth. Section 4(1)(s) of Chapter 32 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.) An employee may not, however, purchase service based on employment for a third-party vendor, even if the employee performed work for the Commonwealth. *See, e.g., Grant v. State Bd. of Ret.*, CR-22-0542 (Div. Admin. Law App.

Dec. 22, 2023); *Hogan v. State Bd. of Ret.*, CR-16-0243 (Contributory Ret. App. Bd. June 1, 2021); *Seshadri v. State Bd. of Ret.*, CR-15-62 (Div. Admin. Law App. Feb. 5, 2016).

The Board's regulations provide additional context:

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. **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.***

941 CMR 2.09(3)(c) (emphasis added). Although this regulation begins with a general prohibition on the purchase of service credit based on work for a vendor or contractor that the Commonwealth selected to provide services, it includes an exception under which the Board may consider such work as "contract service." The member may purchase service if the Commonwealth established or operated the member's former employer, or if the employer functioned as an instrumentality of the state or one of its agencies.

Here, the Commonwealth did not establish or operate PeopleSERVE. Rather, based on the December 17, 2010, email noted above, it appears as though EOHHS contracted with PeopleSERVE, a for-profit corporation, and several other vendors to hire employees like Ms. Kelley who then provided services to EOHHS. Thus, Ms. Kelley cannot purchase her service under the first part of the Board's exception because the Commonwealth did not establish or operate PeopleSERVE.

The Board's regulation also allows for purchase of service if an entity was an "instrumentality of the Commonwealth." Chapter 32 does not define what this means. The word "instrumentality" can refer to a "means or agency through which a function of another entity is accomplished." *Black's Law Dictionary* 919 (10th ed. 2014). Courts considering whether an entity is a state "instrumentality" have looked to the following factors: whether a statute, regulation, or executive order formed the entity; whether the entity performs an "essentially governmental function;" whether the entity "receives or expends public funds[;]" whether the state "controls or supervises the entity; and whether the state is the entity's essential "owner[.]" *Massachusetts Bay Transp. Auth. Ret. Bd. v. State Ethics Comm'n*, 414 Mass 582, 589-91 (1993). *See also Opinion of the Justices*, 309 Mass. 571-82 (1941); *McMann v. State Ethics Comm'n*, 32 Mass. App. Ct. 421, 425 (1992); *Hogan v. State Bd. of Ret.*, CR-16-243 (Contributory Ret. App. Bd. June 1, 2021) ("vendor functioning as an instrumentality of the Commonwealth" means a public entity created by the legislature and placed within state government). In this case, the Legislature did not create PeopleSERVE or place it within state government. There is no evidence in the record to show that the Commonwealth controlled or supervised PeopleSERVE, or that it was PeopleSERVE's "essential owner." Therefore, PeopleSERVE was not an instrumentality of the Commonwealth and did not function as such.

Based on the above analysis, I conclude that Ms. Kelley cannot purchase service based on her time as a PeopleSERVE employee even though she performed work for the Commonwealth. The decision of the Board is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

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Kenneth J. Forton  
Administrative Magistrate

DATED: November 7, 2025