THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Richard Killough, Jr., Ph.D.,

**Petitioner**

v. Docket No. CR-16-441

DATED: March 16, 2018

Massachusetts Teachers’

Retirement System,

**Respondent**

**Appearance for Petitioner:**

Richard Killough, Jr., Ph.D.

53 Pelham Hill Road

Shutesbury, MA 01072

**Appearance for Respondent:**

Salvatore Coco, Esquire

Massachusetts Teachers’ Retirement System

500 Rutherford Avenue, Suite 210

Charlestown, MA 02129-1628

**Administrative Magistrate:**

Judithann Burke

**Case Summary**

The Petitioner, who applied to purchase his non-public school service as a teacher at the non-public Massachusetts publically-funded school, Eastern Mountain Center, and his substitute teaching service in the Pioneer Valley Regional School District is not entitled to purchase any of this service as he submitted his applications in August 2016 after he stopped working on June 30, 2016.

**DECISION**

The Petitioner, Richard Killough, Jr., Ph.D., is appealing from the September 13, 2016 decision of the Respondent, Massachusetts Teachers’ Retirement System (MTRS), denying his requests to purchase credit for non-public school teaching service in a Massachusetts publicly-funded school that was rendered at the East Mountain Center from September 1980 to June 1983 (Exhibit 1), and, to purchase substitute service rendered in the Pioneer Valley Regional School District from September 1997 through June 1998. (Exhibit 2.) The Petitioner filed a timely appeal on September 27, 2016. (Exhibit 3.)

In a letter dated June 14, 2017, the Petitioner indicated his desire to waive his right to a hearing and submit his case on the documents per 801 CMR 1.01(10)(c). His submission contains twenty-nine (29) pages. (Attachment B.) The Respondent submitted its memorandum of law on August 2, 2017 with an attached Exhibit List, thereby closing the record. (Attachment A.)

**EXHIBIT LIST**

**Exhibit No. Document description**

1. -September 13, 2016 letter of MTRS denying service purchase

of non-public teaching

1. -September 13, 2016 letter of MTRS denying purchase of

substitute service

1. -Petitioner’s timely appeal received September 27, 2016
2. -July 29, 2016 letter from Petitioner to MTRS
3. -August 3, 2016 MTRS Service Credit Purchase Application

for non-public teaching service

1. -August 3, 2016 MTRS Service Credit Purchase Application

for substitute teaching service

1. -August 3, 2016 Superannuation Retirement Application
2. -downloaded April 5, 2016 MTRS Web page
3. -downloaded December 17, 2014 MTRS Web page

Attachment B, page 11 - July 15, 2016 letter to Petitioner from Pioneer Valley

Regional School District Payroll and Benefits Administrator

Attachment B, page 12 -July 6 and 7, 2016 emails between Petitioner and Payroll and

Benefits Administrator

**FINDINGS OF FACT**

Based upon the documents submitted by the parties, I hereby render the following findings of fact:

1. From at least December 17, 2014 through April 5, 2016, the MTRS website displayed the following notice directly above the creditable service purchase application forms: **“NOTE: To be eligible to purchase service, at the time you submit your service purchase application, you must be a member in service with the MTRS.** Generally, you are a “member in service” if you are actively teaching; receiving Workers’ Compensation for total incapacity; on a sick leave; or on an unauthorized unpaid leave of less than one year.” (Exhibit 9.)
2. From and after April 5, 2016, the MTRS website displayed the following notice directly above the creditable service purchase application forms: **“NOTE: To be eligible to purchase service (excepting Peace Corps service), at the time you submit your service purchase application, you must be a member in service with the MTRS.** Generally, you are a ‘member in service’ if you are actively teaching, receiving Workers’ Compensation for total incapacity; on a sick leave; or on an unauthorized unpaid leave of less than one year.” (Exhibit 8.)
3. The Petitioner, Richard J. Killough, Jr., Ph.D., was last employed with the Pioneer Valley Regional School District on June 30, 2016. He received his last lump sum paycheck on that date. (Exhibit 7 and Attachment B, page 11.)
4. In an email transmission from the Petitioner to Sues’Anne Jason, Payroll & Benefits Administrator in the Pioneer Valley Regional School District on dated July 6, 2016, the Petitioner inquired about the “Buy Back” form for the MTRS pertaining to his work during the 1997-98 school year. He noted that he had left the form with her in April. On July 7, 2016, Ms. Jason informed the Petitioner that she had the paperwork, but that she had not been able to complete it as yet. (Attachment B, page 12.)
5. In a letter to the Petitioner dated July 15, 2016, Ms. Jason indicated that the Petitioner’s last day of work was June 17, 2016 and that all salary monies owed to him for the 2015-16 school year were paid out on his last sump sum check dated June 30, 2016. She noted that his termination date with the Pioneer Valley Regional School District would be August 23, 2016, the date of his retirement. Jason provided additional information pertaining to the Petitioner’s medical and dental insurance and sick-leave buy-back. (Attachment B, page 11.)
6. On August 3, 2016, the MTRS received the Petitioner’s application for Superannuation Retirement that designated a retirement date of August 23, 2016, a Service Credit Application for substitute, temporary or part-time teaching or tutoring service rendered in the Pioneer Valley Regional School District from September 1997 through June 1998, and a Service Credit Application for non-public school teaching service in a Massachusetts publicly funded school, Eastern Mountain Center, from September 1980 to June 1983. (Exhibits 4-7.)
7. The Petitioner was retired effective August 23, 2016. (Exhibit 7.)
8. In a letter dated September 13, 2016, the MTRS notified the Petitioner that he was ineligible to purchase his substitute service rendered in the Pioneer Valley Regional School District from September 1997 through June 1998, because at the time he applied he was not a “member in service” of the MTRS. (Exhibit 2.)
9. In another letter dated September 13, 2016, the MTRS notified the Petitioner that he was ineligible to purchase his non-public school teaching service in a Massachusetts publicly funded school (Eastern Mountain Center) from September 1980 to June 1983, because at the time he applied he was not a “member-in-service” of the MTRS. (Exhibit 1.)
10. The Petitioner filed a timely appeal of both Service Credit Application denials, and the matter was referred to the Division of Administrative Law Appeals for a hearing. (Exhibit 3.)
11. An Order to Show Cause was issued on May 5, 2017 therein ordering the Petitioner to show cause why his appeal should not be dismissed as a matter of law.
12. On May 15, 2017, the Petitioner requested that he be allowed more time to respond to the Order to Show Cause as he intended to gather and submit additional documents in support of his claim. The request was allowed.
13. The Petitioner submitted his written memorandum and his documents on June 14, 2017. (Attachment B, pages 1-29.)

**CONCLUSION**

The Petitioner, who is required to prove his case by a preponderance of the evidence, has failed to meet that burden. He has not shown that he was actively employed, collecting Workers’ Compensation benefits or on sick leave between his final day of active employment, June 30, 2016 and August 3, 2016, the date that he filed the applications to purchase his non-public school service and his substitute teacher service. Nothing he submitted on June 14, 2017 reflects otherwise. The date provided by the Pioneer Valley Regional School District as his termination date, August 23, 2016, is not controlling or dispositive on this point. The employer cannot bind the retirement board to regard the Petitioner as an active employee between July 1, 2016 and August 23, 2016.

Although the Petitioner has vehemently contended that he was a member in service until the date of his retirement, the evidence reflects otherwise. The uncorroborated self-serving testimony of a witness standing alone is not tantamount to a preponderance of evidence. Cf. *Paul Conway v. Medford Retirement Board,* CR-04-436 (Division of Administrative Law Appeals October 15, 2004) (*affirmed* Contributory Retirement Appeal Board April 12, 2005.)

Further, the Petitioner has not offered any evidence of wrongdoing by the MTRS in the processing of his applications. The MTRS published directives to members beginning in late 2014 that notified the members that they needed to complete any and all applications for prior service while they were still employed. Other than the newsletter to its members, the MTRS does “not have a general fiduciary duty that is breach if they do not inform a member of every potential benefit.” *See Degraff v. State Board of Retirement,* CR-08-449 (Division of Administrative Law Appeals, July 20, 2012; no Contributory Retirement Appeal Board Decision.)

In conclusion, as a “Member Inactive” as that term is defined in G.L. c. 32, 3(1)(ii), the Petitioner was not eligible to purchase his prior service. The decision of the MTRS denying the Petitioner’s applications to purchase his non-public school service and substitute teaching service is affirmed.

So ordered

Division of Administrative Law Appeals,

BY:

Judithann Burke,

Administrative Magistrate

DATED: March 16, 2018