

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

**Division of Administrative Law Appeals**

**Justin Lak,**  
Petitioner

v.

Docket No.: CR-21-0384  
Date Issued: Nov. 17, 2023

**State Board of Retirement,**  
Respondent

**Appearance for Petitioner:**

Justin Lak, *pro se*

**Appearance for Respondent:**

James H. Salvie, Esq.  
State Board of Retirement  
1 Winter Street, 8th Floor  
Boston, MA 02108

**Administrative Magistrate:**

Kenneth J. Forton

**SUMMARY OF DECISION**

The Petitioner is not entitled to purchase contract service for his employment at Key Program, Inc. working in residential programs for children in the custody of DSS (now DCF) because he was not a “contract employee” under G.L. c. 32, § 4(1)(s), but instead worked for a third-party, a not-for-profit private contractor that was not an instrumentality of the Commonwealth. *See* 941 CMR 2.09(3)(c) (2013).

**DECISION**

Petitioner Justin Lak appeals, under G.L. c. 32, § 16(4), the decision of the State Board of Retirement to deny his application to purchase certain contract service from September 20, 1995 to March 20, 1997 because he was paid by a third-party contractor.

On November 8, 2021, Mr. Lak notified DALA that he wished to proceed on written submissions under 801 CMR 1.01(10)(c). He attached several documents. On November 16, 2021, DALA ordered the parties to submit any additional argument and papers. On December 10, 2021, Mr. Lak submitted an additional two pages of argument. On January 18, 2022, the Board submitted its proposed findings and memorandum of law, along with 5 proposed exhibits. I hereby enter the Board's 5 exhibits as proposed. (Exs. 1-5.) I additionally mark Mr. Lak's documents Exhibit 6.

**FINDINGS OF FACT**

Based on the record evidence, I make the following findings of fact:

1. Justin Lak, born in 1973, is an active member of the State Retirement System. He has been employed by the Department of Children and Families (DCF) (formerly the Department of Social Services (DSS)) since March 1997. (Stipulation.)
2. Before he worked for DSS, Mr. Lak was employed by The Key Program, Inc. ("Key") from September 20, 1995 to March 20, 1997. (Exs. 1, 2, 6.)
3. Key is a nonprofit corporation that provides social services, including residential programs, to children in need. (Exs. 3, 4.)
4. During the disputed period, Mr. Lak was a caseworker in one of Key's residential programs. Direct care positions such as Mr. Lak's were limited to 18 months of employment at Key. While employed there, Mr. Lak contributed to Social Security. (Exs. 4, 5, 6.)
5. The resident youths with whom Mr. Lak worked were referred to Key by DSS. (Exs. 5, 6.)

6. Mr. Lak conducted intakes, wrote treatment plans, wrote assessments and progress reviews, and provided individual and group counseling. He also provided family support services, therapeutic recreation, milieu management and crisis intervention. (Ex. 6.)

7. DSS did not control Mr. Lak's work. Mr. Lak was under the supervision and control of Key, not DSS. (Ex. 6.)

8. In October 2017, Mr. Lak applied to purchase service credit based on his employment at Key. He mistakenly used the wrong form, so he applied again in October 2020, this time using the correct Contract Service Buyback form. This form listed Key as the "state agency" that employed him. (Exs. 1, 2.)

9. In July 2021, Mr. Lak completed another buyback form that omitted any reference to Key. This is the form that Mr. Lak included in Exhibit 6. (Ex. 6.)

10. In a letter dated September 10, 2021, the Board denied Mr. Lak's request because he had been employed by a private corporation and not by a state agency. (Ex. 6.)

11. On October 13, 2021, Mr. Lak appealed the Board's decision. (Appeal letter.)

### **CONCLUSION AND ORDER**

It is unlikely that Mr. Lak's appeal was timely. The Board's denial letter was dated September 10, 2021. Mr. Lak mailed his appeal letter 33 days later, on October 13, 2021. The Board argues that this appeal should be dismissed for Mr. Lak's failure to file a timely appeal under G.L. c. 32, § 16(4). An appeal must be filed "in writing within fifteen days of notification of such action." G.L. c. 32, § 16(4). The regular course of the

mails is presumed. *See Holiver v. Dep't of Public Works*, 333 Mass. 18, 21 (1955); *Federal Ins. Co. v. Summers*, 403 F.2d 971, 975 (1968) (Massachusetts law does not require evidence or judicial notice of regularity of mails because it is presumed). The presumption may only be rebutted by the presentation of evidence that the mail in question was not received. *See Anderson v. Inhabitants of Town of Billerica*, 309 Mass. 516, 518 (1941).

Mr. Lak claims that he did not receive the Board's decision letter until October 12, 2021, attached to an email from the Board. He claims to have used a Post Office program that monitors his mail and allows him to preview mail sent to his address. While this program is indeed a bona fide Post Office service, Mr. Lak has not provided a user agreement or other documentary evidence of his use of it. Neither has he submitted an affidavit that he did not receive the letter until approximately a month after it was dated. Mr. Lak may have opted to proceed on written submissions, but that choice did not relieve him of the burden of proving his arguments by a preponderance of the evidence. 801 CMR 1.01(10)(c) ("Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses on which a Party has the burden of proof."); *Byrne v. MTRS*, CR-15-609 (DALA Jan. 6, 2018) ("The Petitioner has the burden of proving by a preponderance of the evidence that the [Retirement Board] has applied the law and or its regulations incorrectly or has been culpable in perpetrating a correctible administrative mistake.") The evidence presented is not enough to defeat the presumption of the mail's regularity. Therefore, based on the evidence presented thus far, I cannot conclude that Mr. Lak's appeal was timely, which means that DALA does not have the jurisdiction to decide it.

*Worcester County Sheriff's Office v. State Bd. of Retirement*, CR-08-169, at \*12 (DALA Sept. 30, 2011).

Even if Mr. Lak's appeal had been timely, he still would not be entitled to purchase the service credit that he seeks.

When a member retires from public service, he may be entitled to a superannuation retirement allowance that is based in part on his years of creditable service. G.L. c. 32, § 5(2)(a). "Creditable service" is defined 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 prior contract service to the Commonwealth. G.L. c. 32, § 4(1)(s) states:

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.

(Emphasis added.)

As a general matter, G.L. c. 32, § 4(1)(s) provides a limited opportunity for members to purchase prior contract service when the service was rendered to a department, agency, board, or commission of the Commonwealth. A series of DALA and CRAB decisions establish that it does not allow for the purchase of service based on work for a third-party vendor, even if that work was performed for the Commonwealth.

See, e.g., *Hogan v. State Bd. of Retirement*, CR-16-243 (CRAB June 1, 2021); *Seshadri v. State Bd. of Retirement*, CR-15-62 (DALA Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, CR-15-253 (DALA Jan. 22, 2016).

In 2011 (amended in 2013), a few years after § 4(1)(s) was enacted, the State Board attempted to clarify what constitutes “contract service” by issuing a regulation.

See Acts 2006, c. 161, § 1. 941 CMR 2.09(3)(c)<sup>1</sup> provided:

Service Through a Vendor or Contractor. 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. 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.

Although the regulation begins with a general prohibition on the purchase of service credit based on work for a vendor or contractor that was selected to provide services to

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<sup>1</sup> Effective March 18, 2022, the Board amended its regulation again. It now limits eligibility for contract service purchases to services provided through a “vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency” (eliminating the provisions of former 941 CMR 2.09(3)(c)(2)). This amendment was adopted after Mr. Lak submitted his application, so this decision applies the regulation as amended in 2013.

the state, it does provide two exceptions under which the Board may consider such work as “contract service.”

The first exception applies if the member’s former employer functioned as an instrumentality of the state or one of its agencies. “Instrumentality of the Commonwealth” is not defined in § 4(1)(s) or the Board’s regulation. However, CRAB addressed this issue in *Hogan, supra*. There, CRAB ruled that the DALA magistrate’s conclusion that the term means a “public agency” or “a public entity created by statute and placed within an existing agency or department of the Commonwealth” was consistent with § 4(1)(s) and was therefore proper. *Id.* at \*6.

In the present matter, there is no evidence that The Key Program, Inc. was created by the Legislature and placed within state government by a provision of the Session Laws or General Laws. In fact, Key is no more than a garden variety not-for-profit business. Its financial arrangements with the Commonwealth support the conclusion that it was not an instrumentality. According to Mr. Goodwin, a Key employee, the state paid Key under contracts between itself and DSS. Then, the business would pay regular wages to Mr. Lak. Key was not an instrumentality of the Commonwealth.

The second exception, which currently is no longer applicable (*see* footnote 1), is service through a vendor where the individual was under the supervision and control of the state and the service was performed in the standard and ongoing course of the agency, but not including service for specific or defined projects of the agency. Mr. Lak was a residential caseworker who worked with troubled youth referred to Key residential programs by DSS. Mr. Lak conducted intakes, wrote treatment plans, wrote assessments and progress reviews, and provided individual and group counseling. He also provided

family support services, therapeutic recreation, milieu management and crisis intervention. DSS did not control Mr. Lak's work. DSS referred the youths to Key and they were taken care of by Key. Mr. Lak was under the supervision and control of Key, not DSS.

Finally, Mr. Lak alleges that other former Key employees have been allowed to purchase service from the Board. Mr. Lak provides no names or other details regarding these employees. That colleagues of his may have been able to purchase similar time does not change the outcome of this case. The Petitioner is entitled only to what Chapter 32 provides for. *MacLeod v. Teachers' Retirement Sys.*, CR-16-318, Dismissal at \*2 (DALA May 17, 2019). An error, made in another case, should not be compounded by letting Mr. Lak make a similarly erroneous purchase. The fact remains that to purchase his service, Mr. Lak had to have been employed by the Commonwealth itself or an instrumentality of it. Key is neither.

For the above stated reasons, Mr. Lak is not entitled to purchase service credit for his work for Key. The Board's decision is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

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Kenneth J. Forton  
Administrative Magistrate

DATED: Nov. 17, 2023