

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Paul M. LaPalme,

Petitioner,

v.

Docket No. CR-19-0461

Worcester Regional Retirement Board,

Date: October 6, 2023

Respondent.

Appearance for Petitioner:

Paul M. LaPalme

Appearance for Respondent:¹

Katherine A. Hesse, Esq.
Madison Harris-Parks, Esq.

Administrative Magistrate:

John G. Wheatley

SUMMARY OF DECISION

It is undisputed that the petitioner is eligible for a waiver of interest charged on his purchase of creditable service, having met the criteria established by G. L. c. 32, § 20(5)(c)(3). The decision of whether to grant or deny such waiver is a matter left to the Board's discretion, and this matter is therefore remanded to the Board to reconsider the petitioner's request for a waiver under the discretionary authority conferred upon the Board by that statute. In addition, the Board is directed to apply its "correction of errors" interest rate to the petitioner's purchase of service credit for the period he was erroneously excluded from membership, i.e., from September 15, 2003, through July 14, 2011, and to refund any resulting overpayment of interest previously received from Mr. LaPalme.

¹ Michael Sacco, Esq. represented the respondent in this proceeding through the conclusion of the hearing, including the parties' post-hearing submission of closing briefs.

DECISION

At issue in this appeal is the interest charged by the Worcester Regional Retirement Board on the petitioner's purchase of service credit for the first eight years of his employment in a full-time position with the Town of Auburn School District. The case was well-briefed by both parties. The petitioner and respondent each filed a pre-hearing memorandum, which I have marked as Briefs 1 and 2, respectively. I held an evidentiary hearing on August 10, 2022. The petitioner, Paul LaPalme, was the only testifying witness. I admitted nine documents into evidence at the hearing (Exhibits A-I). The petitioner filed a closing brief on September 5, 2022 (Brief 3), and the respondent filed its closing brief on September 7, 2022 (Brief 4). The administrative record closed upon my receipt of the parties' closing briefs.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the hearing, I make the following findings of fact:

1. In 2002, Paul LaPalme was hired by the Town of Auburn School District as a part-time (substitute) special education teacher aide/applied behavior analyst (ABA). At the start of his employment, Mr. LaPalme was enrolled in a deferred compensation plan, under the Federal Omnibus Budget Reconciliation Act (OBRA), for employees who are ineligible for membership in the town's public retirement system (i.e., the Worcester Regional Retirement System). (Testimony; see also Exhibits D, F.)
2. On September 15, 2003, the Town of Auburn promoted Mr. LaPalme to a full-time ABA position. He worked at several different schools in Auburn over the ensuing years, including Mary D. Stone Elementary School, Pakachoag Elementary School, Auburn Middle School, and Auburn High School. (Testimony.)

3. Soon after he was hired to a full-time position, on September 23, 2003, Mr. LaPalme completed and signed a “new member enrollment form” for membership in the Worcester Regional Retirement System and submitted it to his payroll department to complete his enrollment. (Exhibit A; Testimony.)
4. A payroll representative completed and signed the enrollment form but failed to send it to the Worcester Regional Retirement Board (“Board”) to complete Mr. LaPalme’s enrollment. The town’s payroll office also failed to commence deductions from Mr. LaPalme’s paychecks for his intended contributions to the retirement system. It instead mistakenly continued Mr. LaPalme’s enrollment in the OBRA plan and continued to take deductions from his paychecks for contributions to that plan. (Exhibit A; Testimony.)
5. Mr. LaPalme believed that he had become a member of the retirement system when he submitted his enrollment form in 2003, and he had thought (mistakenly) that the subsequent payroll deductions for the OBRA plan were for his pension contributions. (Testimony.)
6. On March 26, 2013, the Board received a new member enrollment form for Mr. LaPalme, dated October 25, 2011. The form incorrectly identified his name as “Michael M. LaPalme” and his starting date as July 15, 2011. The Board enrolled Mr. LaPalme as a member effective July 15, 2011, and it received retirement contributions on his account from July 15, 2011, onward. (Exhibit I; see also Exhibits C, D, F.)
7. Mr. LaPalme did not complete or sign the new member enrollment form that the Board received in 2013. He did not know that someone had submitted this form on his behalf until 2019, when he announced his plan to retire and was told that he did not qualify for a retirement allowance because he did not have the required minimum of ten years of service

credit. The Board informed him, however, that he could purchase additional service credit for the period of his employment with Town of Auburn prior to July 15, 2011. (Testimony.)

8. On June 14, 2019, the Board notified Mr. LaPalme that it calculated a “makeup” payment for his service with the Town of Auburn from December 2, 2002, through July 14, 2011, in the amount of \$28,125.48. This amount included \$18,106.25 in make-up contributions plus buyback interest of \$10,019.23 calculated through June 30, 2019.² (Exhibit F.)
9. Mr. LaPalme transferred his contributions from OBRA, which totaled \$20,913.75, and paid the remaining balance of \$7,211.73 to complete the service purchase. (Testimony; Exhibit C.)
10. On July 25, 2019, Mr. LaPalme sent a letter to the Board requesting that it waive the interest charged on the ground that, due to administrative error, he was enrolled as a member as of July 15, 2011, rather than his original start date as a full-time ABA on September 15, 2003. Mr. LaPalme cited G. L. c. 32, § 20(5)(c)(2) in support of his request, reasoning that the Board should take “action to correct this administrative error” concerning his enrollment. (Exhibit D; Testimony.)
11. Mr. LaPalme attached to his letter copies of both his original enrollment form submitted in 2003 as well as the enrollment form that the Board ultimately received nearly a decade later. He noted that the later form that the Board received in 2013 was completed without his knowledge or consent, and that he first discovered the error in his enrollment when he announced his plans for retirement in 2019. (Exhibit D.)

² The Board’s invoice provided the total interest due, without specifying the rate of interest charged. The Board has indicated on appeal, however, that the interest was assessed under G. L. c. 32, § 3(3), which requires “buyback interest” to be paid on purchases of service credit under that subdivision of the statute. (Brief 4, at 5-6; see also Brief 2, at 3.)

12. On August 9, 2019, the Board confirmed that it accepted the rollover contribution and additional payment from Mr. LaPalme “for a makeup of [his] service with the Town of Auburn” for the period of “12/02/2002 through 07/14/2011” (emphasis omitted). (Exhibit C.)
13. Mr. LaPalme retired on superannuation as of August 23, 2019. (Exhibit G.)
14. On August 28, 2019, the Board denied Mr. LaPalme’s request to waive interest, reasoning that it was “precluded by law from doing so in this situation because the error was not of [the Board’s] making.” The Board did not cite to any legal authority for its decision or address the statutory authority raised by Mr. LaPalme. (Exhibit E.)
15. Mr. LaPalme timely appealed the Board’s decision on September 9, 2019. (Exhibit E.)

DISCUSSION

I. Petitioner’s Request to Waive Interest

General Laws c. 32, § 20(5), sets forth the general powers and duties of a contributory retirement system’s board. Among such duties is the obligation to correct errors that affect a member’s benefits, pursuant to G. L. c. 32, § 20(5)(c)(2):

“When an error exists in the records maintained by the system or an error is made in computing a benefit and, as a result, a member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct or had the error not been made, the records or error shall be corrected and as far as practicable, and future payments shall be adjusted so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid. If it is determined that a member has contributed an incorrect amount to the retirement system, the member shall be required to contribute an amount sufficient to correct such error or the board shall pay an amount to the member to correct such error, as the case may be.”

The Legislature enacted this provision in recognition “that, in a complicated system of this type, errors are bound to occur.” *Herrick v. Essex Regional Retirement Bd.*, 465 Mass. 801, 808 (2013). Although the statute refers to errors in recordkeeping and computation of benefits,

the Supreme Judicial Court has construed the statute broadly, consistent with its legislative purpose “to enable a retirement board to correct an honest error by putting members and beneficiaries in the same position they would have been had the error not been made.” *Id.* Accordingly, the statute applies to “all errors made by the board that affect the amount of benefits a member or beneficiary receives, allowing the error to be corrected so that members and beneficiaries receive the actuarial equivalent of the benefits they would have received had the board not erred.” *Id.* at 809.

In addition, when the correction of an error results in a member owing funds to the retirement system, the board has the discretionary authority to waive repayment of all or part of such funds. G. L. c. 32, § 20(5)(c)(3). It logically follows that a board has the authority to waive a member’s obligation to pay interest resulting from the correction of an error. *Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd.*, 483 Mass. 600, 611 n.10 (2019) (board has power to waive interest on member’s purchase of creditable service under § 20(5)(c)(2)&(3)); PERAC Memo # 14/2018, at 9 (Mar. 5, 2018) (noting that “a Board may relieve a member or beneficiary of his or her obligation to pay interest when an error has been made”).

To be eligible for a waiver, the following criteria must be met:

“(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.”

G. L. c. 32, § 20(5)(c)(3).

The Board does not dispute that Mr. LaPalme satisfies the above criteria in this case. The error in Mr. Lapalme's enrollment persisted for eight years (from his start date as a full-time ABA in 2003 until he was enrolled as a member in 2011), the error was not the result of any erroneous information that he provided, and he was not aware of the error until he announced his retirement in 2019. He is therefore eligible for consideration of a waiver under § 20(5)(c)(3).

Having established his eligibility, the decision of whether to grant or deny Mr. LaPalme's request to waive interest is a matter left to the Board's discretion. The Board's authority to grant a waiver is permissive, not mandatory, and neither DALA nor CRAB have the power to force the Board to grant a waiver. *Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451 (2006); *Wright v. State Bd. of Retirement*, CR-16-68, at 5 (CRAB Oct. 18, 2022) (noting that, due to their "lack of equitable powers," DALA and CRAB cannot waive interest payments "on purchases of creditable service, even where a member has been erroneously excluded"). Rather, DALA's review on appeal is limited to the question of whether the Board abused its discretion in denying the petitioner's request to waive interest.³ *Bristol County Retirement Bd.*, 65 Mass. App. Ct. at 451.

In this case, however, the Board did not exercise its discretion in denying the petitioner's request for a waiver of interest. Rather, it concluded that it had no discretion to even consider

³ The Appeals Court questioned whether a board's decision to grant or deny a waiver is reviewable by CRAB (and thus reviewable by DALA). *Bristol County Retirement Bd.*, 65 Mass. App. Ct. at 451. The court proceeded under the assumption that such decisions are reviewable and concluded that "such a review would be limited to the question whether the county board abused its discretion." *Id.* Subsequent DALA decisions have consistently interpreted this decision as establishing an abuse of discretion standard of review, rather than precluding review entirely. See, e.g., *Sullivan v. Brockton Retirement Bd.*, CR-19-0623, 2023 WL 4052393, at *6 (DALA June 9, 2023); *Eduardo v. Boston Retirement Sys.*, CR-17-892 & CR-17-944, at 11 (DALA Sept. 3, 2021); *Gaddy v. Boston Retirement Sys.*, CR-18-0266, at 8 (DALA July 31, 2020); *Brownlee v. State Bd. of Retirement*, CR-14-449, at 6 (DALA Dec. 7, 2018); *Stebbins v. Massachusetts Teachers' Retirement Sys.*, CR-16-205, at 6 (DALA Jan. 3, 2018).

it—specifically, that it was “precluded by law” from granting a waiver because it was not responsible for the error. As the Board concedes on appeal, however, there is no requirement under § 20(5)(c)(3) that the Board be responsible for the error in order for a member to qualify for a waiver. The Board’s decision, therefore, is based on an erroneous interpretation of the law. See *Commonwealth v. Kolenovic*, 471 Mass. 664, 672 n.9 (2015) (noting that “a decision that is based on an erroneous view of the law or a clearly erroneous assessment of the evidence” constitutes an abuse of discretion). Accordingly, this matter is remanded to the Board for reconsideration of the petitioner’s request for a waiver of interest, under the authority conferred by G. L. c. 32, § 20(5)(c)(3). See also *Plymouth Retirement Bd.*, *supra*.

II. Applicable Interest Rate

A further issue implicated in this appeal concerns the appropriate rate of interest to charge on the petitioner’s purchase of creditable service, absent a waiver. The Board contends that “buyback interest” must be assessed, pursuant to G. L. c. 32, § 3(3). I disagree.

Section 3(3), titled “Late Entry into Membership,” permits an employee who “failed to become or elected not to become a member” when eligible to “apply for and be admitted to membership” retroactively. Mr. LaPalme, however, did not fail to become or elect not to become a member when he was hired to a full-time position in 2003. To the contrary, he sought to become a member by completing an enrollment form and submitting it to his employer. His exclusion from membership at that time was not the result of any “failure” on his part, but instead resulted from the Town of Auburn’s failure to send his enrollment form to the Board. Section 3(3) therefore does not apply to Mr. LaPalme’s purchase of service credit for the period that he was erroneously excluded from membership. See *Worcester Regional Retirement Bd. v.*

Contributory Retirement Appeal Bd., 92 Mass. App. Ct. 497, 500 (2017) (concluding that § 3(3) did not apply to employee wrongfully excluded from membership).

A delay in membership caused by an error by the employer’s payroll department falls within the ambit of the Public Employee Retirement Administration Commission’s (PERAC) guidelines for erroneously excluded members. PERAC Memo # 14/2018, at 5 (delay in membership resulting from error by payroll clerk among examples of “members erroneously excluded from membership”). See also *Wright*, CR-16-68, at 6 (deferring to PERAC regarding the appropriate interest rate to charge when a member was erroneously excluded and expressly incorporating pages 4-8 of PERAC Memo # 14/2018 into CRAB’s decision). PERAC instructed retirement boards to apply its “correction of errors” interest rate to creditable service purchases by those who were erroneously excluded from membership. PERAC Memo # 14/2018, at 7-8, 11. CRAB has adopted PERAC’s position, holding that the correction of errors interest rate, rather than buyback interest, applies to a wrongfully excluded member’s purchase of creditable service. *Wright v. State Bd. of Retirement*, CR-16-68, at 7 (CRAB Oct. 18, 2022). Accordingly, as a member who was erroneously excluded from membership through no fault of his own, the Board must apply its correction of errors interest rate to Mr. LaPalme’s purchase of creditable service for the period that he was excluded in error (i.e., from September 15, 2003, through July 14, 2011).⁴

That fact that eligible employees are sometimes inadvertently excluded from membership serves as a reminder that “it is a best practice for the retirement staff to review payroll records on a regular basis.” PERAC Memo # 14/2018, at 8. Had that been done in this case, the error of

⁴ The petitioner does not contend that he was entitled to membership during the period he was employed part-time.

failing to enroll Mr. LaPalme as a member presumably would have been discovered based on his change from a part-time to a full-time position in 2003, the lack of any payroll deductions for contributions to the retirement system following that change, and his continued enrollment in OBRA over the next eight years despite his eligibility for membership in the retirement system.⁵ Under these circumstances, it is logical to apply the correction of errors rate to Mr. LaPalme’s purchase of creditable service for the period he was erroneously excluded, as both PERAC and CRAB have directed.

ORDER

For the foregoing reasons, this matter is remanded to the Worcester Regional Retirement Board for reconsideration of Mr. LaPalme’s request for a waiver of interest, under the authority of G. L. c. 32, § 20(5)(c)(3). The decision to grant or deny such waiver is left to the Board’s discretion. The Board is further directed to apply its “correction of errors” interest rate to Mr. LaPalme’s purchase of creditable service for the period of September 15, 2003, through July 14, 2011, and to refund to Mr. LaPalme any difference between such amount and the amount of interest previously paid by Mr. LaPalme for this service credit.

Division of Administrative Law Appeals

/s/ John G. Wheatley

John G. Wheatley
Administrative Magistrate

⁵ Teacher aides employed for 1,040 hours or more per year have been eligible for membership in the Worcester Regional Retirement System since at least January 26, 1993. Worcester Regional Retirement Board Supplemental Regulations (under “membership”).