

**COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD**

JUDITH MARLEY,

Petitioner-Appellee

v.

MASSACHUSETTS TEACHERS' RETIREMENT SYSTEM

Respondent-Appellant.

CR-20-0103

DECISION

Respondent Massachusetts Teachers' Retirement System ("MTRS") timely appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals ("DALA") allowing petitioner Dr. Judith Marley's request to purchase creditable service as she was employed by a charter school. The DALA magistrate held a hearing on August 28, 2020 and admitted fourteen exhibits. The DALA decision is dated July 2, 2021. MTRS filed a timely appeal to us.

After considering the evidence in the record and the arguments presented by the parties, we incorporate the DALA decision by reference and adopt the DALA magistrate's Findings of Fact 1 – 33 as our own. We affirm the DALA decision for the reasons stated in the Discussion adding the following.

Background. Lawrence Family Development Charter School City of New Bedford ("Charter School") is a charter school that was established in 1995 pursuant to M.G.L. c. 71. The Lawrence Family Development Fund, Inc. ("The Fund") is an organization separate from and distinct from the Charter School having its own separate board. The Fund owns the land and buildings used by the Charter School.¹ Through a management agreement with the Charter

¹ FF 4, 5.

School, The Fund provides management services to the Charter School, including administration, facilities, technological and food services, accounting, payroll, and human resources.² Ralph Carrero served as both superintendent of the Charter School and director of The Fund.³

Unlike the Charter School, the Fund is a section 501(c)(3) charitable organization that takes responsibility for raising funds for the benefit of the Charter School. The Fund accepts tax deductible donations, which are passed through to the Charter School to provide services and benefits, including scholarships, for students at the Charter School.⁴

In 2013, Dr. Marley applied for the newly created position of Director of Special Projects and New Initiatives (DSPNI) at the Charter School.⁵ Both Superintendent Carrero and the Charter School's Board of Trustees interviewed Dr. Marley for the position of DSPNI at the Charter School.⁶ Carrero and the Treasurer for the Charter School's Board of Trustees decided to pay Dr. Marley through the payroll of the Fund as they were concerned the Charter School had insufficient funds to make the payments.⁷ That change did not affect her title, her job responsibilities, or her supervisor as had been planned when the first job offer to Dr. Marley was made at the beginning of June 2013.⁸ Despite the funding coming from the Fund, Dr. Marley would continue to be supervised and controlled by Carrero on behalf of the Charter School's Board of Trustees.⁹

On June 3, 2013, Superintendent Ralph Carrero sent an email to MTRS about the new position and included the job description, with the intention of enrolling Dr. Marley back into MTRS.¹⁰ On June 10, 2013, Carrero and John Housianitis, the president of the Charter School's Board of Trustees, sent Dr. Marley a letter on the letterhead of the Fund, with a job description enclosed, offering to hire her immediately for the position of Director of Special Projects and

² FF 5.

³ FF 3.

⁴ FF 6.

⁵ FF 7; 10.

⁶ FF 8.

⁷ FF 9.

⁸ *Id.*

⁹ *Id.*

¹⁰ FF. 10.

New Initiatives.¹¹ Dr. Marley accepted the offer made on behalf of the Charter School and began work immediately.

After reviewing the Superintendent's email and supporting job description sent June 3, 2013, MTRS responded on June 12, 2013.¹² MTRS opined that after reviewing the job description for the new position of Director of Special Projects and New Initiatives, the qualifications required the new hire to be enrolled in the MTRS.¹³ On June 13, 2013, Superintendent Carrero informed MTRS by email of their intention to pay Dr. Marley from the Fund's Management Organization fees rather than from the Charter School's operating budget due to an anticipated shortage of funds. After again reviewing Dr. Marley's materials and the latest email from Superintendent Carrero, MTRS responded on July 17, 2013, formalizing its denial of membership to Dr. Marley.¹⁴ In support of its decision that Dr. Marley was an employee of the Fund, MTRS noted the latest job description, the discussion of July 3, 2013 and that she was hired by the non-profit.¹⁵ While the email invited Carrero to keep MTRS informed of any changes, it did not inform Dr. Marley of her right to appeal the decision.¹⁶

On July 10, 2014, the beginning of Fiscal Year 2015, Carrero and John Housianitis, the president of the Charter School's Board of Trustees, gave Dr. Marley a letter on Charter School Letterhead offering her the position of Director of Special Projects and New Initiatives at the Charter School, which she accepted.¹⁷ In July 2014, when Dr. Marley began getting paid by the Charter School instead of the Fund, almost everything else about her job remained the same.¹⁸ She continued to be supervised, evaluated, and controlled by Carrero and she remained in the Charter School building with the same job title and job description.¹⁹ The two significant changes were, (1) being paid by the Charter School rather than the Fund; and (2) instead of contributing to Social Security, she became a member of MTRS.²⁰

¹¹ FF 11, 12

¹² FF 13.

¹³ *Id.*

¹⁴ FF 15.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ FF 26.

¹⁸ FF 27.

¹⁹ *Id.*

²⁰ FF 28.

On September 12, 2014, Dr. Marley accepted an offer from Carrero and John Housianitis, the president of the Charter School's Board of Trustees, to become Assistant Superintendent for the Charter School.²¹ On July 17, 2019, Dr. Marley submitted an MTRS Retirement Application for her employment with the Charter School, including the period from June 10, 2013 through July 11, 2014.²² On January 23, 2020, Dr. Marley was denied creditable service for the period from June 10, 2013 through July 11, 2014 because, according to MTRS, she did not meet the definition of "employee" outlined in G.L. c. 32, § 1. Rather, MTRS determined that she was an employee of a management company during that period with a 403b retirement plan with Social Security taxes withheld.²³ On January 29, 2020, Dr. Marley timely appealed the decision.²⁴

Discussion. Whether Dr. Marley is able to purchase creditable service between June 10, 2013 and July 10, 2014 when she was paid by the Fund depends on whether she was an employee of a governmental unit, namely the Charter School. CRAB established in *Whipple v. Massachusetts Teachers' Retirement Syst.*, CR-07-1136 (CRAB Dec. 19, 2014) that "The teacher could be considered an 'employee' of the trustees (of the Charter School) if the trustees exercised sufficient control over the teacher's duties and performance." *Whipple* at *14. In *Whipple*, the magistrate concluded that she was an employee of the Charter School and thus, was permitted to purchase creditable service for the period in question. To address this issue, CRAB explained in *Whipple*, "persons not employed by a governmental entity may not join a governmental plan even if they provide a public or governmental service." *Id.* at *11. This is because IRS and ERISA statutes regulating public retirement plans (or governmental plans)²⁵ reflect that members of those plans must be employees of a governmental entity. There would be a violation of federal statutes should Ms. Whipple be permitted membership to MTRS if she was hired, employed, managed, and controlled exclusively by a for-profit private education management company. *Id.* at *10-11. CRAB concluded that MTRS correctly denied Ms. Whipple's application for creditable service because the charter school granted the private management company "virtually all control over the everyday operation of Rising Tide" and "the

²¹ FF 29.

²² FF 31, Exhibit 1.

²³ FF 32, Exhibit 2.

²⁴ FF 33.

²⁵ Governmental plans are defined in 26 U.S.C. Section 414(d). See also 29 U.S.C. Section 1002(32) and 1321(b)(2).

trustees [of Rising Tide] exerted only minimal control over the management company's operation of [Rising Tide]."

In resolving the issue in this matter, the magistrate had to ascertain whether the Board of Trustees of the charter school or whether the Fund exerted control over Dr. Marley to determine whether she was an employee of the charter school. The magistrate concluded based on the evidence in the record, Dr. Marley was controlled by the Board of Trustees of the charter school, eliminating the bar to membership in MTRS and creditable service addressed in *Whipple*. We agree and defer to the magistrate's determination, including his consideration of the testimonies at the hearing. *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass. App. Ct., 85, 99-100 (1982).

The magistrate made the following findings based on the evidence in the record: (1) Superintendent Carrero controlled Dr. Marley's activities on behalf of the charter school's Board of Trustees; (2) Dr. Marley worked closely with the Board of Trustees, including Trustee President John Housianitis, who made both offers of employment to her; (3) The Fund did not hire, control, supervise or evaluate Dr. Marley; and (4) Dr. Marley did not carry out any duties of the Fund with the exception of occasional fundraising.

While Dr. Marley was paid by the Fund during the period in question, the source used to pay her is not the only factor in determining who her employer was. As we indicated above, *Whipple* established that the most important factor to consider is who had sufficient control over the individual's work. *Whipple, supra* DALA Dec. Apr. 12, 2013 Finding of Fact 5 at *3 and adopted by CRAB Dec. 19, 2014 at *4, *Cf. Kathleen Callahan v. Revere Retirement Board*, CR-12-523 at *9 (Div. Admin. Law App. Aug 25, 2017) *citing Crowley v. Contributory Retirement Appeal Board*, 73 Mass. App. Ct. 1103, Memorandum and Order under Rule 1:28 (2008) (source of payroll funds not only factor to consider).

Conclusion. The DALA decision determining that Dr. Marley was an employee of the Lawrence Family Development Charter School is affirmed. She is entitled to purchase creditable service for the period June 10, 2013 and July 10, 2014. **Affirm.**

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



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