COMMONWEALTH OF MASSACHUSETTS

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

John McDonough,
Petitioner,

v.

Franklin Regional Retirement System,
Respondent.

No. CR-21-188

Dated: November 10, 2023

Appearance for Petitioner:
John McDonough (pro se)

Appearance for Respondent:
Michael Sacco, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner was voted into membership in the respondent retirement system. The vote to admit him was legally permissible and procedurally sound. It therefore was not a correctable "error" under G.L. c. 32, § 20(5)(c)(2).

DECISION

Petitioner John McDonough appeals from a decision of the Franklin Regional Retirement Board rescinding an earlier vote to admit him into membership in the board's retirement system. The appeal was submitted on the papers. 801 C.M.R. § 1.01(10)(c). I admit into evidence exhibits marked A-F and 1-8.

Findings of Fact

I find the following facts.

1. In July 2007, Mr. McDonough was elected by a popular vote to a three-year term as Constable of the Town of Shelburne. The board promptly voted to admit him into

membership in the board's retirement system. At the same meeting, the board also admitted seventeen other individuals into membership. (Exhibits B, 1, 7.)

2. It appears that Mr. McDonough's compensation for his entire service as Constable consisted of a single payment of $73.20. Regardless of the details, the parties agree that he was paid less than $200 during each year. (Exhibit 1; memoranda.)

3. Mr. McDonough later worked in other public-service positions. In January 2021, he applied to retire for superannuation. In April 2021, the board decided to rescind its original vote to admit Mr. McDonough into membership. He timely appealed. (Exhibits 2, 4-6.)[1]

Analysis

The effective date of an employee's membership in a retirement system determines the length of the employee's creditable service and therefore the amount of his or her benefits. *See generally* G.L. c. 32, §§ 4(1)(a), 5(2)(a). The question in this appeal is whether Mr. McDonough became a member of the board's system in mid-2007, or whether his admission then was an "error" subject to correction.

In the case of an elected official, the general rule is that he or she may establish membership by filing an appropriate form within ninety days of taking office. G.L. c. 32, § 3(2)(a)(vi). An exception to that rule grants the boards "full jurisdiction" to determine the membership eligibility of part-time employees. § 3(2)(d). But a proviso to the exception states:

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[1] The computation of Mr. McDonough's creditable service exceeds the scope of the board's decision and therefore this appeal. One point merits attention nonetheless. According to its brief, the board reads its supplemental regulations as allotting no credit at all to individuals who established membership after 2009 and then worked less than 20 hours per week. That position may be contrary to *Murphy v. Falmouth Ret. Bd.*, No. CR-20-0453, 2023 WL 5528749 (DALA Aug. 18, 2023). Also, the regulations as written appear to award specified amounts of credit to employees working up to 4.99, 9.99, 14.99, and 19.99 hours per week. (Exhibit 5.)

> provided, that any person holding a position for which the annual compensation is fixed in an amount of two hundred dollars or less shall not be eligible for membership except by vote of the board . . . .

Id. The Legislature intended for this proviso to "limit the discretion of local retirement boards," eliminating their ability to "refuse to admit elected officials to the system for political or other capricious reasons," while respecting their "legitimate interest in denying membership to individuals whose service is limited in nature." *Rotondi v. Contributory Ret. Appeal Bd.*, 463 Mass. 644, 650 (2012).

In the context of the proviso to § 3(2)(d), "there is no substantive difference between the term '[fixed] annual compensation' and the term '[r]egular compensation.'" *Rotondi*, 463 Mass. at 652. It therefore does not matter whether Mr. McDonough's compensation was "fixed" at any particular amount: the proviso applies to him because his regular compensation during the pertinent period was less than $200 per year. Mr. McDonough's eligibility for membership therefore hinged on a "vote of the board." The board in 2007 in fact took a vote, deciding in Mr. McDonough's favor.

The board's essential argument is that its otherwise permissible vote to admit Mr. McDonough flowed from an erroneous legal analysis. As of the time of the vote, a published PERAC memorandum stated that "a compensated elected official is entitled to membership . . . regardless of the amount of his or her compensation." PERAC Memo No. 20 / 2003 (June 12, 2003). It was not until 2012 that the Supreme Judicial Court weighed in, holding to the contrary that "the $200 threshold applies to 'any person,' including an elected official." *Rotondi*, 463 Mass. at 645. The board infers that it must have voted Mr. McDonough into membership without realizing that it had the discretion to exclude him.

The question is whether the foregoing line of reasoning implicates the board's authority to correct "errors." As described by the retirement law, that authority relates to "an error . . . in

the records maintained by the system or an error . . . in computing a benefit." G.L. c. 32, § 20(5)(c)(2). The case law has allowed boards to correct at least certain types of legal errors, including the error of admitting an ineligible member. *See, e.g.*, *Bailey v. Lowell Ret. Syst.*, No. CR-11-440 (DALA July 10, 2015); *Desjardins v. WRRB*, No. CR-10-622 (DALA Nov. 30, 2012). *See generally McGarry v. Bristol Cty. Ret. Bd.*, No. CR-20-409, 2023 WL 3614628, at *4-5 (DALA Jan. 27, 2023).

The retirement law's overarching purpose is to provide public employees with "security against destitution in their old age." *Opinion of the Justices*, 364 Mass. 847, 858 (1973). The power to correct errors advances that purpose when it remedies mistakes that otherwise would have deprived a member of his or her proper benefits. *Boston Ret. Bd. v. McCormick*, 345 Mass. 692, 698 (1963). The retirement law is also designed to operate through rigid directives, evenly applied. *See Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010). And it is the Legislature's policy "that neither a member nor a retirement system shall be prejudiced by record-keeping or calculation errors." *Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 443, 449 (2006). Still, dramatic, late-breaking adjustments to members' benefits are a problem, not a goal. *See Worcester Reg'l Ret. Bd. v. Public Employee Ret. Admin. Comm'n*, 489 Mass. 94, 105 & n.15 (2022). They run counter to the retirement law's general program. The retirement boards must undertake such adjustments with great care.

It should be obvious that the board's concerns here do not present an "error" warranting correction under § 20(5)(c)(2). For starters, the legal analysis undertaken by the board in 2007 is a mystery. By that time, DALA and CRAB had disagreed with the pertinent PERAC memorandum. *See Rotondi v. Stoneham Ret. Bd.*, No. CR-03-551 (DALA Oct. 25, 2004, *aff'd*, CRAB Feb. 3, 2005). The board did not memorialize its collective reasoning, and no evidence

illuminates the thoughts of its individual members. More fundamentally, Mr. McDonough was in fact eligible for membership, and the board in fact took the requisite vote. It is hard to believe that a legally permissible, procedurally sound board action would ever amount to an "error" within the meaning of § 20(5)(c)(2). The Legislature constructed the error-correction authority as a solution to "clear and certain mistakes, not misgivings or question marks." *Casey v. Bristol Cty. Ret. Syst.*, No. CR-21-351, 2023 WL 5774615, at *3 (DALA Sept. 1, 2023).[2]

Conclusion and Order

For the foregoing reasons, the board's decision is VACATED. Mr. McDonough's original admission into membership is consequently reinstated.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

[2] The board's decision letter to Mr. McDonough quoted § 3(2)(d) as stating that a person earning $200 or less "shall not be eligible for membership." The letter omitted the ensuing qualification, "except by vote of the board." A board must refrain from discouraging colorable appeals through the artful drafting of decisions that naturally project authoritative neutrality.