

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Marie McDonough,
Petitioner

v.

Docket No. CR-13-357
Date: November 9, 2016

Quincy Retirement Board,
Respondent

Appearance for Petitioner:

John F. Murphy
Teamsters Local 122
348 D Street
Boston, MA 02127

Appearance for Quincy Retirement Board:

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Administrative Magistrate:

James P. Rooney

Summary of Decision

Full-time employee, who is a member of a retirement system and who was granted an opportunity to buy back prior part-time service, must pay interest on the amount charged for the buyback, regardless of whether she was wrongfully excluded from membership during her part-time service.

DECISION

Marie McDonough, a full-time school bus driver in Quincy who was granted membership to the Quincy Retirement System, appeals from the Quincy Retirement Board's decision to deny her request to waive interest payments on the amount it charged her to buy back her earlier part-

time service. I held a hearing on November 19, 2015 at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts. Ms. McDonough testified on her own behalf and also presented testimony from Mark Woods, the shop steward for Quincy bus drivers. I admitted ten exhibits into evidence – seven from Ms. McDonough and three from the Board. I recorded the hearing digitally. I marked Ms. McDonough’s prehearing memorandum as Pleading A and the Board’s prehearing memorandum as Pleading B. The Board submitted a post-hearing brief. I asked the Board in its brief to provide a breakdown of the interest payments it is charging Ms. McDonough. The Board did so. I mark its sheet of calculations as Board Exhibit 4.

Findings of Fact

Based on the testimony and exhibits presented at the hearing and reasonable inferences from them, I make the following findings of fact:

1. Marie McDonough was first employed by the Quincy Public Schools System in September 2008 as a student transportation monitor. In September, 2009, she was promoted to a field trip bus driver. (McDonough testimony; Pleading A.) Field trip bus drivers drive students on field trips and athletic teams to sporting events. Although classified as part-time work, a field trip bus driver may end up working more hours than a full-time driver assigned a bus route. (McDonough testimony.)

2. When Ms. McDonough started her job with Quincy Public Schools, she noted that a portion of her paycheck went into an ING account, which she assumed was a retirement account associated with the Quincy Retirement System. After she learned she was not a member of the Retirement System, she spoke to city officials, but received no response as to whether she was

entitled to membership in the retirement system. She then called Edward Masterson, the Executive Director of the Quincy Retirement Board. When she spoke to Mr. Masterson in 2010, he told her she was not eligible for membership because her employment was part-time. (McDonough testimony; McDonough Ex. 3.)

3. The collective bargaining agreement between the Quincy School Committee and the union representing school bus monitors for 2009 - 2012 and 2012 -2015 provided that, if a monitor worked no less than 20 hours per week, she was entitled to health insurance benefits and that if she was “regularly employed, as determined by the Quincy Retirement Board,” then she “shall be a member[] in the Quincy Retirement System.” (McDonough Ex. 6.)

4. The collective bargaining agreement for the same periods for school bus drivers divided drivers into those who worked 800 hours or more in a given fiscal year and those who worked less than 800 hours. Only those who worked more than 800 hours were eligible for health insurance and retirement benefits. Eligibility requirements for participation in the retirement system were the same as for bus monitors. *Id.*

5. The collective bargaining agreement for school security officials for the same periods provided that “employees who are regularly employed, for 24 or more hours per week, as determined by the Quincy Retirement Board, . . . shall be members in the Quincy Retirement System.” *Id.*

6. In a November 1, 2011 letter, Edward Masterson, the Retirement Board’s Executive Director, informed the Quincy Executive Director of Human Resources that “[e]ffective January 1, 2012, any non-member or member of the Quincy Retirement System who accepts a job that is

regularly scheduled for 24 hours or less is NOT eligible to be a member.” (McDonough Ex. 7.)

7. During the years Ms. McDonough worked as a field trip bus driver, she frequently worked more than 24 hours per week, but not always, particularly in the summer. In the 2009-2010 school year, she worked 1,089.85 hours. The following school year, she worked 1,466.32 hours. The year after that, she worked 1,539.50 hours. (McDonough testimony; McDonough Ex. 1.)

8. On April 18, 2012, Ms. McDonough was assigned a regular bus route and her job was changed from “intermittent CDL [b]us driver” to “provisional part time CDL bus driver.” (McDonough testimony; Board Ex. 3.) The letter from the City of Quincy regarding her new employment status informed her that “regular employees who work twenty-four (24) or more hours per week must become members of the City Retirement System.” (Bd. Ex. 3.)

9. Ms. McDonough completed an application to become a member of the Quincy Retirement System. Her payroll department described her position as full-time and permanent. (Bd. Ex. 2.)

10. The Retirement Board accepted Ms. McDonough as a member and allowed her to purchase the service she had rendered as a field trip bus driver from 2009 through 2012. It informed her in a July 26, 2012 letter that she would be charged \$8,068.01: \$7,568.78 for the payroll deductions that would have been made for this period, plus \$499.23 in interest. (Bd. Exs. 2 and 4)

11. Ms. McDonough responded with an April 3, 2013 letter asking the Board to waive interest because she “should not be penalized when none of this was my error.” She also asked

for more time to make the service purchase payment because she would need to use the funds she had accumulated in her ING account, but would not have access to them until that account had been dormant for two years. Finally, she asserted that the Board had erred by crediting her with only two years and two months of creditable service for the years she worked as a field trip bus driver. She thought the proper figure should be three years and four months. (McDonough Ex. 3.)

12. On June 7, 2013, the Board turned down her request for a waiver of interest payments, noting that the letter appointing her to a bus driver with a route had stated that her prior position was as an intermittent CDL bus driver and that an “[i]ntermittent driver is not required to be a member of the Retirement System.” (McDonough Ex. 4.)

13. Ms. McDonough timely appealed on June 19, 2013 the Board’s refusal to waive interest payments.

Discussion

There is no dispute that Marie McDonough may buy back the time she served as a field trip bus driver in Quincy. Nor is there a dispute about the amount of money Ms. McDonough must pay to buy back this time and receive creditable service for it. The only dispute is over whether she should have to pay interest on the amount the Quincy Retirement Board charged her.¹

¹ In her April 3, 2013 letter to the Board asking for a waiver of interest, Ms. McDonough also asked for more time to make payment and asserted that the Board had miscalculated the amount of creditable service she would receive once the purchase was completed. The Board’s June 7, 2013 response mentions only the interest waive request. It does not appear to have addressed her other two objections. Thus, they still await a Board response.

Ms. McDonough asserts that interest payments should be waived because she was wrongly excluded from participation in the retirement system in the first place. The Board denies that she was wrongly excluded and maintains that neither it nor DALA has the authority to waive interest charges.

From September 2009 through mid-April 2012, Ms. McDonough worked as a field trip bus driver, which was a part-time position. The Public Employee Retirement statute provides that:

In all cases involving part-time . . . employment or service of any employee in any governmental unit, . . . the board shall have and exercise full jurisdiction to determine such employee's eligibility for membership.

M.G.L. c. 32, § 3(2)(d). The Board claims that it has a longstanding policy that part time employees are eligible for membership in the Quincy Retirement System only if they work more than 24 hours or more each week. Ms. McDonough averaged more than 24 hours per week while she was a field trip bus driver, but she did not always work 24 hours or more every week. Hence, if the Board had such a policy in 2009 when Ms. McDonough became a field trip bus driver, she would not have been wrongly excluded from membership.

While DALA has enforced even unwritten Board policies on part-time employee eligibility to participate in a retirement system, *see Abbott v. Plymouth Retirement Bd.*, Docket No. CR-99-496 (Mass. Div. of Admin. Law App., May 16, 2000; CRAB, Dec. 18, 2002), there is no evidence in the record for the existence of such a policy in 2009 other than Board counsel's assertion. The Board did not mention such a policy in its letter to Ms. McDonough turning down her request for a waiver of interest payment. The only Board document mentioning a 24 hour per

week policy comes from a 2011 letter from the Board to the Quincy Executive Director of Human Resources describing a prospective policy that “[e]ffective January 1, 2012, any non-member or member of the Quincy Retirement System who accepts a job that is regularly scheduled for 24 hours or less is NOT eligible to be a member.” (Finding 6.) This is not exactly consistent with counsel’s description of the present policy as granting membership to part-time employees who work 24 hours or more. Nor does it help elucidate what the Board’s policy was before 2012.

The only documents in the record that hint at it are three collective bargaining agreements between the Quincy School Committee and the union, whose terms began in 2009. The collective bargaining agreements for school bus monitors and bus drivers state that it is up to the Quincy Retirement System to determine eligibility, but suggest that bus monitors who work at least 20 hours per week and bus drivers who work at least 800 hours per year may be eligible. The only agreement mentioning 24 hours of work per week is for school safety officials. It provides that any such officials who work 24 hours per week are required to be members of the retirement system. This is some second-hand evidence of the existence of a 24 hour per week policy, at least applying to certain Quincy employees, but the failure of the Quincy School Committee and the union to mention it in the other two collective bargaining agreements, particularly the bus driver contract that applied to Ms. McDonough, suggests that these parties did not understand that a 24 hour policy applied to school bus drivers. Thus, the record does not contain a clear picture of what the Board’s policy on part-time employment of bus drivers was in 2009 through 2011.

This matters because certain prior DALA decisions, many of which were affirmed by the

Contributory Retirement Appeal Board, have held that a public employee who was wrongly excluded from a retirement system does not have to pay interest when buying back that time. *See Abbott, supra., O'Connor v. Quincy Retirement Bd.*, Docket No. CR-92-096 (Div. of Admin. Law App., June 15, 1993; CRAB, Oct. 22, 1993), *Ronan-Jacobson v. State Bd. of Retirement*, Docket No. CR-00-987 (Mass. Div. of Admin. Law App., Sept. 7, 2001; CRAB, Feb. 8, 2002), and *Benedetti v. New Bedford Retirement Bd.*, Docket No. CR-04-192 (Mass. Div. of Admin. Law App., Dec. 2, 2005; CRAB, Mar. 14, 2008) (remand to consider whether employee improperly denied membership). A more recent DALA decision rejected that approach, and held that there is no authority under the retirement statute to waive an interest charge. *See Knightly v. State Bd. of Retirement*, Docket No. CR-10-15 (Mass. Div. Of Admin. Law App., Jan. 14, 2011; no CRAB decision.)

Ms. McDonough would be allowed by the retirement statute to buy back the time she worked as a field trip bus driver, whether or not she had been improperly excluded from membership during that time. If she was ineligible then, she could buy back her time under M.G.L. c. 32, § 4(2)(c), which grants retirement boards the authority to award creditable service to a full time employee for prior part-time service that did not qualify as membership service at the time. If she was eligible during that time, then she could buy back her time under M.G.L. c. 32, § 3(3), which gives such an opportunity to an employee who failed to become a member when first eligible. Both provisions require the employee to pay “buyback interest.”

The earlier decisions that determined that an employee wrongfully excluded from a retirement system may buy back time without paying interest relied on M.G.L. c. 32, § 20(5)(c)(2), a provision that grants retirement boards the authority to correct errors in payments

made to members or contributions made by members, as the basis both to correct the error made in failing to admit the employee to membership and to avoid penalizing the employee for the error by making her pay interest. *See Ronan-Jacobson*, CRAB decision at 2. Chief Magistrate Heidlage, in *Knightly*, thought that this was essentially an equitable remedy and was beyond DALA or CRAB's authority to grant in light of a 2006 Appeals Court holding that CRAB lacks the authority to grant equity. *Knightly*, decision at 5.

The Appeals Court decision dealt with a retired employee who had excess earnings from a second government job she had taken after retirement. The Court rejected the contention that Section 20(5)(c)(2) could be used to relieve her of the statutory obligation to repay excess earnings because the excess payments she received were the fault of others. The Court declared that Section 20(5)(c)(2):

effectively acknowledges that the retirement law is a complicated combination of various legislative efforts occurring at different times and for different purposes, that it is difficult to administer, and that it is inevitable that mistakes in implementation will be made. The language reflects a policy that neither a member nor a retirement system shall be prejudiced by record-keeping or calculation errors, and that, in such circumstances, benefits shall, if "practicable," be adjusted to correct the mistake. General Laws c. 32, § 20(5)(c) (2), is not a forgiveness statute. To the extent the section is applicable at all to the present dispute, it authorizes exactly what has taken place [i.e., the retirement board's order that she repay her excess earnings]

Bristol County Retirement Bd. v. Contributory Retirement Appeal Bd., 65 Mass. App. Ct. 443, 449, 841 N.E.2d 274, 279 (2006).

Although the substance of the dispute in *Bristol County* was over excess earnings, not membership, the holding that Section 20(5)(c)(2) does not grant CRAB equitable power to forgive obligations established by the retirement statute applies to the present situation. While

the retirement statute does not explicitly state how to handle cases in which an employee is wrongfully excluded from membership in a retirement system, it does provide in Sections 3(3) and 4(2)(c) that whether a buy back is by an employee who could have become a member initially, but did not join, or by a now full-time employee who wants to buy back prior part-time service, that employee must pay interest in addition to making up the retirement deductions that otherwise would have been taken from her paycheck. These are the most closely analogous situations to Ms. McDonough's and show a general intention on the part of the legislature to require interest payments when an employee buys back prior service in circumstances similar to hers. Applying this standard to Ms. McDonough is consistent with the legislature's evident intent to have the cost of membership be the same for those who contributed all along and those who bought back time. An employee who buys back prior service is paying retirement deductions that would have been taken from her paycheck earlier, had she been eligible at the time. Interest represents the time value of money and puts the person paying late in the same position as the person who all along was having retirement deductions taken from her paycheck.

I am bound to apply the Appeals Court's holding to this case. Consequently, I affirm the Quincy Retirement Board's decision to require Marie McDonough to pay interest on the time she has been permitted to buy back.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: November 9, 2016