COMMONWEALTH OF MASSACHUSETTS

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

John J. McGarry,
Petitioner,

v.

Bristol County Retirement Board,
Respondent.

No. CR-20-409

Dated: January 27, 2023

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Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner retired for superannuation in 2018. Two years later, the respondent retirement board decreased the petitioner's retirement allowance, reasoning that it had erred by allowing him, in 2002, to purchase credit for pre-membership service. The petitioner's credit purchase was permissible under precedents that, to date, have not been overruled. There was therefore no "error" warranting correction by the board under G.L. c. 32, § 20(5)(c)(2), notwithstanding the board's prediction that the case law will soon reverse course.

DECISION

Petitioner John J. McGarry has been retired for superannuation since 2018. He appeals from an October 2020 decision of the Bristol County Retirement Board reducing his retirement allowance by approximately 57%. The appeal was submitted on the papers. PERAC declined to file a brief. I admit into evidence exhibits marked 1-10.

Findings of Fact

I find the following facts.

1. The board administers the Bristol County Retirement System (BCRS), which is the public retirement system pertaining to Raynham. (Memoranda.)

2. Mr. McGarry was elected seven times to serve as a Raynham Sewer Commissioner. His first six terms in office spanned the years 1977 through 1981 and 1990 through mid-2002. During those periods, Mr. McGarry did not establish membership in BCRS. (Exhibits 1, 4.)

3. Mr. McGarry was elected to his seventh term in mid-2002. He then became a BCRS member. Subsequently, he applied successfully to purchase 17.5 years' worth of retirement credit in connection with his prior terms in office. He completed his purchase on December 31, 2002. (Exhibits 3-5, 10.)

4. Mr. McGarry retired effective June 2018. He was awarded a retirement allowance of approximately $38,000 per year. (Exhibits 1, 6-8.)

5. In October 2020, the board determined that it should not have allowed Mr. McGarry's credit purchase of 2002. The board therefore decided to reduce Mr. McGarry's retirement allowance by approximately 57%. He timely appealed. (Exhibits 1, 2.)

Analysis

A retirement board that recognizes an "error" in its records is obligated to correct the error as far as practicable. G.L. c. 32, § 20(5)(c)(2). The consequences of such error corrections can include "extraordinary hardship." *Worcester Reg'l Ret. Bd. v. Public Employee Ret. Admin. Comm'n* (*Vernava II*), 489 Mass. 94, 105 (2022). The question in this appeal is whether Mr. McGarry's successful purchase of service in 2002 was a correctable "error" within the meaning of § 20(5)(c)(2). For the reasons that follow, the answer is no. In brief, it is true that a slowly

evolving body of case law has generated uncertainty about whether the board was right to allow Mr. McGarry's credit purchase in the first instance. But such uncertainty is not the type of "error" that the retirement law intends for boards to "correct."

I

"Creditable service" is an important input into the computation of public employees' retirement allowances. G.L. c. 32, § 5(2). As a rule, employees receive credit only for periods of work during which they were members of pertinent retirement systems. *Id.* § 4(1)(a).

An elected official may become a member of a pertinent system by filing an appropriate application form "within ninety days after . . . assuming office." G.L. c. 32, § 3(2)(a)(vi). In various cases, elected officials have attempted to establish membership after the end of the ninety-day window. Such attempts found early success, as recounted in *Sauvageau v. Worcester Reg'l Ret. Bd.*, No. CR-02-1336 (DALA Dec. 12, 2003). But once CRAB weighed in, it firmly foreclosed end runs around the ninety-day limit. *Levesque v. Essex Cty. Ret. Bd.*, No. CR-95-571 (CRAB Oct. 7, 1996); *Colt v. Essex Ret. Bd.*, No. CR-95-629 (CRAB Oct. 7, 1996). On CRAB's analysis, § 3(2)(a)(vi) overrides any less-specific provisions that might seem to permit later entry into membership. *Awad v. Hampshire Cty. Ret. Bd.*, No. CR-08-621 (CRAB Dec. 19, 2014); *Goode v. Weymouth Ret. Bd.*, No. CR-99-701 (CRAB May 1, 2001).

Each time an elected official takes office, he or she receives a new ninety-day window. *Calabrese v. Hampden Cty. Reg'l Ret. Bd.*, No. CR-08-329, 2010 WL 676236, at *4 (DALA Jan. 8, 2010). As a result, Mr. McGarry successfully became a BCRS member in 2002, during the early days of his last term in office. There is no dispute that he is entitled to credit for service performed after that date.

The parties focus their disagreement on whether, as a new member, Mr. McGarry was entitled to purchase credit for his years of pre-membership service. A period of otherwise non-

countable service may be purchased only if a specific statutory provision authorizes the purchase. *Centola v. State Bd. of Ret.*, No. CR-19-507, at 3 (DALA Aug. 12, 2022). No purchase-authorizing provision now in force applies to the situation in which Mr. McGarry found himself. *Awad*, *supra*, at 6. Today, an official establishing membership only after being reelected cannot buy credit for previous terms in office. *Id.*

The reason this conclusion does not end the analysis is that Mr. McGarry made his successful service purchase before the 2009 amendments to the retirement law. Until those amendments, G.L. c. 32, § 4(1)(a) included the passage emphasized below:

> Any member in service shall . . . be credited with all service rendered by him as an employee in any governmental unit after becoming a member of the system pertaining thereto; *provided, that he shall be credited with a year of creditable service for each calendar year during which he served as an elected official* . . . .

See Acts 2009, c. 21, § 4. Mr. McGarry contends that, as of 2002, this passage entitled him to credit for his pre-membership elected service, accomplished through a corresponding purchase.

Whatever this position's faults may be,[1] it is supported by a series of precedents. In *Levesque*, *supra*, at 3, CRAB wrote: "G.L. c. 32, § 4 provides that a member of a retirement system can purchase creditable service for time prior to his or her membership in the retirement system." The same statement appeared in *Colt*, *supra*, at 2; *Goode*, *supra*, at 2; and *Turner v. Northbridge Ret. Bd.*, No. CR-00-298 (CRAB Jan. 14, 2002). All of these decisions concerned elected officials, and the specific provision CRAB had in mind apparently was the now-defunct portion of § 4(1)(a).

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[1] The pertinent portion of § 4(1)(a) apparently was intended only as a formula for computing the credit earned by officials working less than year-round. *See Rockett v. State Bd. of Ret.*, 77 Mass. App. Ct. 434, 441 (2010).

Citing the foregoing case law, the DALA magistrate in *Sauvageau* ruled that, once an individual has become a member, he or she may purchase prior elected service performed in the same retirement system. She wrote:

> CRAB *does* recognize the ability to gain creditable service if the member is a member of the same retirement system that pertained to the city, town or county in which he served as an elected official. . . . The right to receive creditable service comes from G.L. c. 32, § 4(1)(a) . . . . G.L. c. 32, § 4(1)(a) allows members who had served as elected officials . . . to receive creditable service for their prior service . . . .

Id. at 6, 9-10 (citing *Levesque*, *Goode*, and *Turner*). *Calabrese*, several years later, concerned an elected official who established membership soon after entering his fifth term in office. The dispute focused primarily on a different rule; even so, the bottom line of DALA's decision was that the member was "entitled to . . . purchase[] the creditable service to which he is entitled for his first four elected terms." 2010 WL 676236 at *2, 3, 5.

The case law analyzed thus far lends substantial support to the board's 2002 allowance of Mr. McGarry's purchase request. The board's change of heart draws on CRAB's 2014 decision in *Awad*. *Awad* reconfirmed that elected officials cannot sidestep § 3(2)(a)(vi)'s ninety-day deadline. CRAB also made clear there that no currently in-force statute authorizes purchases of prior service by officials who have achieved membership through reelection. *Id.* at 6. At the tail end of its discussion, CRAB added a footnote:

> We note that both *Levesque* and *Goode* contained [a] dictum to the effect that G.L. c. 32, § 4(1)(a), as it existed prior to its 2009 amendments, allowed purchase by members of a retirement system of their prior service as elected officials . . . . The former version of § 4(1)(a) contained a proviso that arguably was so specific as to allow such credit despite the ninety-day limitation . . . . This dictum was applied by DALA in [*Sauvageau*]. We do not reach this issue since it is not presented here and since the current version of § 4(1)(a) omits this language . . . .

Id. at 6 n.10.

On a fair reading of this footnote, the credit purchases authorized in *Sauvageau*, *Calabrese*, and Mr. McGarry's case are now neither clearly allowed nor clearly forbidden. CRAB did not take the opportunity to endorse *Sauvageau*'s analysis. And it called the statements supporting that decision "dictum." On the other hand, CRAB did not go so far as to overrule *Sauvageau*, or to disavow the pertinent portions of *Levesque* and *Goode* (and *Colt* and *Turner*).[2] Further, CRAB acknowledged that the now-defunct portion of § 4(1)(a) was "arguably . . . so specific as to allow" the type of purchase at issue here.

II

The pivotal question is whether a retirement board's authority to correct errors is triggered by the sort of uncertainty that now attaches to Mr. McGarry's credit purchase. The answer to this question hinges on a careful analysis of G.L. c. 32, § 20(5)(c)(2).

The retirement law's notorious complexity means that errors are bound to occur in its application. *Boston Ret. Bd. v. McCormick*, 345 Mass. 692, 698 n.5 (1963). *See Worcester Reg'l Ret. Bd. v. Contributory Ret. Appeal Bd.* (*Pierce*), 92 Mass. App. Ct. 497, 500 (2017). Recognizing this reality, § 20(5)(c)(2) provides that:

> When an error exists in the records maintained by the system or an error is made in computing a benefit . . . the records or error shall be corrected . . . 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.

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[2] It certainly appears that *Rockett*, 77 Mass. App. Ct. at 438-43, would have supported a conclusion in *Awad* that *Sauvageau* and its predecessors had misread § 4(1)(a). CRAB chose not to draw that conclusion, however. *Rockett* itself is not directly applicable to Mr. McGarry, in the sense that the elected official in *Rockett* was not a member in service at the time of his purchase request. 77 Mass. App. Ct. at 435-36.

The power to correct errors sits at a delicate intersection of competing values. Retirement benefits are defined by rigid statutory directives. *See Clothier v. Teachers' Ret. Bd.*, 78 Mass. App. Ct. 143, 146 (2010). The rule of law calls for those directives to be enforced, with each member receiving precisely the benefits he or she has earned. *See Bergquist v. MTRS*, No. CR-18-456, at 7 (CRAB Dec. 16, 2021). It also would run counter to fairness and compassion for a member to be deprived of proper benefits "because of an honest error which can readily and fairly be corrected." *McCormick*, 345 Mass. at 698. *See Herrick v. Essex Reg'l Ret. Bd.*, 465 Mass. 801, 808 (2013); *Hollstein v. Contributory Ret. Appeal Bd.*, 47 Mass. App. Ct. 109, 111 (1999).

On the other hand, error corrections tend to upset settled expectations. A correction in a member's favor generally reduces the retirement system's funds. A correction in a system's favor may ruin a member's financial security during his or her most vulnerable years. The Supreme Judicial Court discussed this problem in *Vernava II*. Acknowledging that opinion's potential to eliminate some retirees' eligibility for benefits, the Court hypothesized that the retirement boards may possess "statutory discretion to waive recalculations that would result in the total loss of retirement benefit eligibility." 489 Mass. at 105. The Court noted in particular that § 20(5)(c)(2) calls for errors to be corrected only "as far as practicable." *Id.* at 105 n.15. The Court added that retirement boards may not be obligated to "proactively identify" retirees who would suffer severe hardships if their benefits were to be corrected. *Id.*

The language of § 20(5)(c)(2) refers to errors "in the records maintained by the system" and "in computing a benefit." A literal reading might have limited the section's ambit to "errors of fact, and . . . errors of calculation." *Mauger v. MTRS*, No. CR-04-1053, at 7 (CRAB Nov. 18,

2010). *See Bristol Cty. Ret. Bd. v. Contributory Ret. Appeal Bd.* (*Polycarpo*), 65 Mass. App. Ct. 443, 449 (2006).

The Supreme Judicial Court has instead interpreted § 20(5)(c)(2) as applicable also to errors of law. *Vernava II*, 489 Mass. at 105; *Herrick*, 465 Mass. at 808-09; *DiMasi v. State Bd. of Ret.*, 474 Mass. 194, 204-06 (2016). But it is striking that in the cases so holding, by the time the Court authorized a correction, the board's error of law was as clear and certain as any factual or computational error. In *Vernava II*, the Court's opinion conclusively decided the applicable issue adversely to the retirement boards' prior practices. In *DiMasi*, the board's error always had been either undisputed or beyond dispute. 474 Mass. at 205. And the error in *Herrick* already had been announced by the Appeals Court in a separate proceeding. *See* 465 Mass. at 803. *See also Kenworthy Lewis v. State Bd. of Ret.*, No. CR-16-146, at 11 (DALA Dec. 7, 2018) (discussing an error established by a final, unappealable administrative decision).

III

The Legislature enacted § 20(5)(c)(2) so that identified errors would not remain beyond repair. *Herrick*, 465 Mass. at 808; *McCormick*, 345 Mass. at 698; *Hollstein*, 47 Mass. App. Ct. at 111. The board here seeks to wield § 20(5)(c)(2) for a subtly different purpose: to test out a new legal theory.

The case law concerning the service purchases available to elected officials has evolved over time. The permissibility of Mr. McGarry's 2002 service purchase is supported directly by *Sauvageau*, obliquely by *Calabrese*, and in dicta by *Levesque*, *Colt*, *Turner*, and *Goode*. The board believes that *Awad*'s footnote 10 foretells a change of course. But that remains an educated prediction. Appellate tribunals generally reserve the prerogative to overrule their own precedents. *See 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin.*, 480 Mass. 423, 431 (2018); *Commonwealth v. Russ*, 27 Mass. L. Rptr. 200, 2010 WL 3038946, at *2 & n.6

(Barnstable Super. June 15, 2010); *Briggs v. Worcester Reg'l Ret. Bd.*, No. CR-20-384, 2022 WL 9619041, at *3 (DALA Mar. 11, 2022). CRAB in *Awad* made the deliberate choice to stop short of jettisoning the decisions that support Mr. McGarry's purchase.

The board's authority under § 20(5)(c)(2) arises when "an error exists" or "an error is made." These conditions are not triggered when a retirement board discerns only a likelihood that an appellate tribunal will soon adopt a new rule. Nor would § 20(5)(c)(2)'s combination of legislative purposes, *Lydon v. Contributory Ret. Appeal Bd.*, 101 Mass. App. Ct. 365, 367 (2022), view such an uncertainty as a sufficient reason to devastate a retiree's financial expectations. No "error" warrants "correction" where the authorities supporting a member's benefits remain standing, even if the foundations of those authorities are showing cracks.

PERAC's published memoranda are binding on the retirement boards. *Grimes v. Malden Ret. Bd.*, No. CR-15-5, at 13 (CRAB Nov. 18, 2016). It is therefore likely that a PERAC memorandum proscribing some action that a board has taken would present the board with an "error" requiring correction. During this appeal's pendency, PERAC issued a memorandum that states: "[I]f an elected official opted to become a member upon his or her election to a third term . . . he or she would still be ineligible to buy back the first two terms for which he or she did not elect membership." PERAC Memo No. 28 / 2021 (Oct. 19, 2021). A second look shows this memorandum to be immaterial. The statutory provision that arguably supports Mr. McGarry's service purchase was eliminated in 2009. Writing twelve years later, PERAC did not purport to address the permissibility of actions taken under long-ineffective law.

IV

A difficult question is whether this dispute is the right vehicle for ending the uncertainty that shrouds purchases such as Mr. McGarry's. Perhaps *Sauvageau* et al. should now be either reaffirmed or rejected once and for all. On balance, now is not the time.

Proceedings under G.L. c. 32, § 16(4) serve a targeted role. They are designed to correct actions of the retirement boards that aggrieve members or other persons. Because the board should not have revised Mr. McGarry's benefits, the appropriate remedy is to vacate that action.

Taking this occasion to draw any additional conclusions about Mr. McGarry's benefits would be a departure from § 16(4)'s limited ambit. Appeals to CRAB and DALA are not general-purpose opportunities to audit the member's file. *Cf. Swope v. State Bd. of Ret.*, No. CR-18-370, at 4 (DALA Dec. 10, 2021). They would take on that role if a board could provoke an appellate reevaluation of a member's entitlements by "correcting" records that should have been left alone.

Conclusion and Order

Mr. McGarry's case did not present the board with an error warranting correction under G.L. c. 32, § 20(5)(c)(2). The board's decision is therefore VACATED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate