

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Paula McKeen,**  
Petitioner,

No. CR-19-179

Dated: January 14, 2022

v.

**Massachusetts Teachers' Retirement  
System,**  
Respondent.

**Appearance for Petitioner:**

James Racine, Esq.  
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Boston, MA 02108

**Appearance for Respondent:**

Marko Samardzic, Esq.  
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**Administrative Magistrate:**

Yakov Malkiel

**SUMMARY OF DECISION**

The petitioner was entitled to purchase creditable service for several years of employment in the public schools of Guam because, during the pertinent time period, those schools were "overseas dependent school[s] conducted under the supervision of the department of defense." G.L. c. 32, § 3(4).

**DECISION**

Petitioner Paula McKeen appeals from a decision of the Massachusetts Teachers' Retirement System (MTRS) denying her application to purchase creditable service for a period of employment in Guam. An evidentiary hearing took place by WebEx on November 30, 2021,

at which Ms. McKeen testified. I admitted into evidence exhibits marked PX1-PX2, PX4-PX5, and R1-R4.<sup>1</sup> The record closed upon the parties' submission of closing briefs.

### **Findings of Fact**

Having considered the exhibits and the testimony, I make the following findings of fact, supplemented for clarity with applicable legal background.

1. A federal statute enacted in 1950 addressed various issues relating to the educations of children from families connected to federal operations. P.L. 81-874, 64 Stat. 1100 (1950). Section 6 of the statute addressed "children who reside on Federal property." It required the federal government in certain situations to make "arrangements . . . to provide free public education for such children." One such situation was where "no local educational agency is able to provide suitable free public education." *Id.* § 6(2). Education arranged under this provision outside the fifty states was to be "comparable to free public education provided . . . in the District of Columbia." P.L. 83-248, § 8(b), 67 Stat. 530 (1953).

2. Schools providing public education pursuant to section 6 of the 1950 statute came to be known as "Section 6 Schools." The Department of Defense issued directives designed to ensure the provision of satisfactory educations in "DoD Section 6 Schools." The Department of Defense also established a "DoD Section 6 Schools Office," headed by a "Director, DoD Section 6 Schools." This director was instructed to "organize, manage, fund, direct, and supervise the complete operation of the DOD Section 6 Schools." (Exhibit PX1.)

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<sup>1</sup> PX1 consists of two Department of Defense directives, numbered AD-A270 445 (1342.20) and AD-A270 382 (1342.21). I sustained an objection to PX3, a Wikipedia entry. After the hearing, I added "R" prefixes to MTRS's exhibits to minimize confusion.

3. Guam, along with Puerto Rico and eleven other locations, is a United States territory. In the 1990s, Guam was the site of at least three U.S. military bases, two staffed by the U.S. Navy and one by the U.S. Air Force. Children of U.S. military families stationed in Guam attended public schools operated by the Guam Department of Education. Those children made up a sizable portion of Guam's student enrollment, counted at approximately 27% in 1994. (Exhibits PX2, PX4, R3; McKeen testimony.)

4. In January 1988, the Department of Defense determined that the education being provided in Guam's public schools was not "suitable free public education." This determination triggered the federal government's obligation under the 1950 statute to make "arrangements" to ensure suitable public education for affected children. (Exhibit PX4.)

5. Acting through the Navy, the Department of Defense negotiated a series of contracts with the Guam Department of Education. The contracts obligated the Guam Department of Education to offer "public educational services" to Department of Defense dependents. In return, the Department of Defense remitted funds, which totaled \$77.4 million between 1988 and 1994. The Section 6 director took part in executing and funding these contracts. (Exhibit PX4.)

6. The terms of the contracts focused on "raising teachers' qualifications, repairing and maintaining facilities, improving curriculum and quality of instruction, increasing teachers' proficiency in English, and recruiting fully certified teachers from the United States." The Department of Defense ultimately viewed the contracts as "fulfilling their intent to improve the overall quality of education available to [Department of Defense] dependents in Guam." More specifically, the contracts "aided in raising the quality of public education and facilities in Guam to levels comparable to U.S. standards." (Exhibit PX4.)

7. The Department of Defense monitored the execution of the contracts by conducting audits, collecting reports, and approving proposed expenditures. Navy personnel inspected Guam schools in at least 1993 and 1995. The 1995 auditors “visited three Guam public schools,” which they called “Section 6” schools. The auditors “reviewed reports prepared by [the Guam Department of Education]” and “met with Guam [Department of Education] officials to assess the physical condition of the schools and the quality of education.” They noted that the Section 6 director “makes regular visits to [the Guam Department of Education],” “briefs Navy and Air Force commanders on the status of the contract,” and “has provided effective contract oversight.” (Exhibit PX4.)

8. Ms. McKeen, the petitioner, became a teacher in 1988. From 1988 to 1991, she taught in Easton, Massachusetts. Since 1996, she has taught in Marion, Massachusetts. In the intervening period, i.e., from 1991 to 1996, Ms. McKeen taught at the Yigo Elementary School in Guam. (Exhibit R2; McKeen testimony.)

9. Yigo Elementary was a public school operated by the Guam Department of Education. It was located within several miles of the Andersen Air Force Base and an adjacent housing community for military families. Ms. McKeen’s classes of approximately 20-22 students typically included 2-5 students from military families. (McKeen testimony.)

10. From time to time, Ms. McKeen and her colleagues were informed without detail about military “visits” to Yigo Elementary. On those occasions, Ms. McKeen observed uniformed personnel on school grounds. (McKeen testimony.)

11. In 1998, the Department of Defense opened dedicated schools on Guam military bases for military families. The Department of Defense concomitantly stopped funding the Guam public schools. (Exhibit PX2; McKeen testimony.)

12. In 2019, Ms. McKeen submitted an application to purchase creditable service for her period of employment in Guam. MTRS denied the application on March 11, 2019, stating that the retirement law “only allows the purchase of out of state service from one of the 50 states or Puerto Rico.”<sup>2</sup> Ms. McKeen filed a timely appeal. (Exhibits R1, R2.)

### Analysis

A public employee’s retirement benefits depend in part on the length of his or her “creditable service.” G.L. c. 32, § 5(2). Ordinarily, only work for Massachusetts governmental units is creditable service. However, in certain circumstances, teachers are permitted to “purchase” credit for service at schools outside Massachusetts or in the private sector. G.L. c. 32, § 3(4), (4A); *Mackay v. Contributory Ret. Appeal Bd.*, 56 Mass. App. Ct. 924, 925 (2002).

The conditions under which credit is purchasable depend on whether the prior service took place at a public or a non-public school. Service in a public school is governed by G.L. c. 32, § 3(4). *See Kennedy v. Contributory Ret. Appeal Bd.*, 47 Mass. App. Ct. 425, 426-28 (1999). This provision authorizes purchases of service “in any other state,” in “the public schools of the Commonwealth of Puerto Rico,” or in “an overseas dependent school conducted under the supervision of the department of defense.” § 3(4).

It is common ground that the service Ms. McKeen wishes to purchase did not take place in another “state” or in Puerto Rico. As a matter of plain language, “Guam is not a state.” *United States v. Drake*, No. 05-cr-50, 2017 WL 10574242, at \*4 (D. Guam Sept. 1, 2017). And the fact that § 3(4) singles out Puerto Rico for special treatment makes clear that, when the

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<sup>2</sup> Ms. McKeen made her request on a preprinted form designed for purchases of service at public schools “in the United States or Puerto Rico.” (Exhibit R2.) MTRS has not suggested that Ms. McKeen’s choice of form affects the merits of her appeal.

Legislature said “state,” it did not intend to include the U.S. territories. *See Conklin v. TRS*, No. CR-05-505, at 3 (DALA Mar. 12, 2007) (service in the Virgin Islands was not purchasable). If the statute’s distinction between Puerto Rico and other U.S. territories is puzzling, that distinction is nevertheless insusceptible to constitutional or fairness-based challenges in administrative proceedings. *See Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 214 (2014); *Reed v. Essex Reg’l Ret. Bd.*, No. CR-20-124, at 11 (DALA July 2, 2021).

The parties’ dispute focuses on whether, during the relevant period, Ms. McKeen taught at an “overseas dependent school” subject to Department of Defense “supervision.” G.L. c. 32, § 3(4). The retirement statute does not elaborate on the nature of the requisite “supervision.” *See Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549, 565 (2015) (“‘to supervise’ means ‘to oversee, to have oversight of, to superintend the execution of or performance of . . . to inspect with authority’”). The statute also is not explicit about the quantity of enrolled “dependents” that makes an institution an “overseas dependent school.” On the face of the statute, it is not even clear whether the Legislature intended § 3(4) to encompass any institutions outside the “school system for dependents in overseas areas” established by federal law. *See* 20 U.S.C. § 926.

These uncertainties are resolved for present purposes by *Staaterman v. MTRS*, No. CR-03-155 (CRAB Mar. 30, 2004). The teacher in that case taught at a private school in Riyadh, Saudi Arabia, where the Department of Defense did not operate a school. Instead, the Department of Defense “designated the [at-issue school] as the only American school in Riyadh that met the standard of instruction required for children of dependents of the Department of Defense.” *Id.* at 1-2.

CRAB explained in *Staaterman* that the purpose of § 3(4) is “to grant creditable service for prior experience in American public educational institutions.” *Id.* at 2. To that end, the statute “does not require that an eligible overseas school be under ‘exclusive public control and supervision.’” *Id.* at 1 (quoting § 3(4)). What is necessary instead is “some level of supervision.” *Id.* at 2. That hurdle was cleared by the measure of oversight implicit in the Department of Defense’s certification that Ms. Staaterman’s school met pertinent educational standards. *Id.* See also *Schopfer v. TRS*, No. CR-17-1053 (DALA Dec. 18, 2020) (teacher was permitted to purchase service at a school that the Department of Defense “approved” and was otherwise involved in).

Under these principles, the Guam public schools during the pertinent period were within the category of “dependent schools” subject to Department of Defense “supervision.” During that period, dependents of Guam-located military personnel attended only the Guam public schools. The Department of Defense collected information about those schools, as in *Staaterman*, to determine whether they met the requisite educational standards. But the Department of Defense’s supervision of the Guam public schools was much more dramatic: the Department of Defense injected tens of millions of dollars into those schools, monitored the performance of detailed contractual terms governing that funding, approved related expenditures, conducted audits involving in-person assessments, and relayed information about the school system to Navy and Air Force commanders through the Section 6 director.

Other precedents do not alter the analysis. The school that did not satisfy § 3(4) in *Burton v. TRB*, No. CR-99-497 (CRAB Mar. 13, 2001), had ties to other U.S. government components, but not to the Department of Defense. The same was true in *Blondin v. TRB*, No. CR-02-855 (DALA Nov. 26, 2002). And although *Young v. TRB*, No. CR-02-69 (DALA Jan.

23, 2003), concerned Yigo Elementary—Ms. McKeen’s school—the period at issue there predated the Department of Defense’s 1988 intervention in Guam’s educational system.

It may be that *Thomas v. MTRS*, No. CR-08-752 (DALA Feb. 27, 2014), is adverse to Ms. McKeen’s position, because the Taiwan school discussed there had contracted with the Department of Defense “to educate the children of military personnel.” It is not clear, however, what that contract’s particulars were, and in all events, CRAB’s decision in *Staaterman* controls.

### **Conclusion and Order**

Ms. McKeen is entitled to purchase credit for her service at Yigo Elementary from 1991 through 1996. MTRS’s contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate