

COMMONWEALTH OF MASSACHUSETTS  
Division of Administrative Law Appeals

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JOSEPH MCKENNA, <i>Petitioner</i>	:	Docket No. CR-20-0126
	:	
v.	:	Date: March 10, 2023
	:	
PLYMOUTH RETIREMENT BOARD <i>Respondents</i>	:	

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**Appearance for Petitioner:**

Joseph McKenna, *pro se*  
Plymouth, MA 02360

**Appearance for Respondents:**

Michael Sacco, Esq.  
Christopher Collins, Esq.  
Joseph Kenyon, Esq.  
Law Offices of Michael Sacco  
Southampton, MA 01073

**Administrative Magistrate:**

Eric Tennen

**SUMMARY OF DECISION**

The Petitioner is not entitled to purchase his prior service as a call firefighter. DALA lacks jurisdiction to hear this case because the Plymouth Retirement Board did not issue a formal appealable letter. Regardless, the Petitioner is attempting to purchase his prior service from a different system. The Petitioner would only be entitled to creditable service under G.L. c. 32 § 3(5) if a call firefighter were “a temporary, provisional, or substitute position.” But a call firefighter, as opposed to, for example, a reserve firefighter, is not a temporary, provisional or substitute position.

**DECISION**

Pursuant to G.L. c. 32, § 16(4), Petitioner, Joseph McKenna, appeals a decision by the Plymouth Retirement Board (“PRB”) denying him credit for prior service in a different system as a call firefighter.

The parties submitted a prehearing memorandum which included nine exhibits (R1-R8); the Petitioner submitted eight additional exhibits (P1-P8). On November 3, 2022, I issued an order asking the parties to brief a legal issue. Following briefing, on January 20, 2023, I held a non-evidentiary hearing. The Petitioner was notified about the hearing but chose not to attend. At that hearing, I raised an issue regarding jurisdiction—in my assessment, the Board had not issued an appealable letter.

On February 7, 2023, I issued an order staying the matter. The Board indicated it would issue a formal appeal letter with the intention that the Petitioner could then file his notice of appeal. Upon receipt of the new appeal, I would consolidate the matters so that the parties would not need to reproduce their pleadings. The Board sent the Petitioner a formal appeal letter on February 8, 2023. To my knowledge, the Petitioner has not filed a notice of appeal.

I now lift the stay. I enter all the exhibits into the record. Because the parties agree there are no relevant facts in dispute which would require a hearing, I decide this appeal on the written submissions under 801 Code Mass. Regs § 1.01(10)(c).

**FINDINGS OF FACT**

Based upon the Exhibits, I make the following findings of fact:

1. The Petitioner began his government service in 1987 as a call firefighter in the Town of Bourne. (Exhibit R8.)

2. In 1991, he became a full-time firefighter in Bourne. He worked in that position until he was laid off six months later. (Exhibit R8.)
3. When he started as a full-time firefighter, he became a member of the Barnstable County Retirement Association. (Exhibit R8.)
4. After he was laid off, he resumed working as a call firefighter for another 16 months. (Exhibit R8.)
5. However, he was never reappointed as a full-time firefighter in Bourne.
6. Instead, in 1993, he went to work as a firefighter in the town of Plymouth. He became a member of the Plymouth Retirement System and ultimately retired from that position in 2019. (Exhibit R5.)
7. When he joined the Plymouth Retirement System, Barnstable agreed to accept liability for all the Petitioner's time as a call firefighter if he were to purchase it. This included his time as a call firefighter from 1987 to 1991, and then again from 1991 until 1992. The Petitioner timely remitted payment for that service. (Exhibits R7 and P8.)
8. After he applied for superannuation retirement, the Barnstable and Plymouth boards, along with PERAC, engaged in a series of correspondences in which they determined they made a mistake; they concluded that the Petitioner should not have been entitled to credit for his service as a call firefighter after he was laid off (between 1991 and 1992) because he was not appointed a full-time firefighter in Bourne. (Exhibits R1-R3, P2-P5.)
9. They did agree he still was entitled to credit for his call firefighter service from 1987 to 1991, before he was appointed a full-time firefighter in Bourne.

10. Originally, the Boards had determined he was entitled to credit for 5 years and 7 months of prior service. The new calculations reduced his entitlement to 4 years and 1 month of prior service. (Exhibits R2 and R3.)
11. On January 29, 2020, the PRB issued a new retirement certificate which reflected a reduction for his time in Bourne. Now he is entitled to approximately \$3,000 less than what the Boards had originally calculated. (Exhibits P1 and P2.)
12. After receiving the certificate, the Petitioner filed a notice of appeal with DALA on February 11, 2020.

### CONCLUSIONS OF LAW

“The Petitioner has the burden of proving by a preponderance of the evidence that the [Retirement Board] has applied the law and[/]or its regulations incorrectly or has been culpable in perpetrating a correctible administrative mistake.” *Patterson v. State Bd. of Ret.*, CR-20-0324, 2023 WL 415581 (DALA Jan 20, 2023), *quoting Byrne v. Mass. Teachers' Ret. Sys.*, Docket No. CR-15-609 (DALA Jan. 6, 2018). He has not met his burden.

The first problem with the Petitioner’s appeal is jurisdictional. Although not raised by the parties, I *sua sponte* raised the issue of jurisdiction after noticing a possible problem.

“[A] decision by a retirement board . . . is not an appealable ‘decision’ . . . unless it . . . expressly states that it is an appealable decision.” *Mass. Teachers Ret. Sys. v. Blue Hills Reg 11. Ret. Bd, et al*, CR-19-226, 2022 WL 16921463, (DALA Jan. 14, 2022), *quoting Barnstable County Ret. Bd. v. PERAC*, CR-07-163, 2008 (CRAB Feb. 17, 2012). The decision must “(1) expressly inform[] the parties that it is an appealable decision and (2) give[] notice of the parties’ right to appeal, including the time for appeal and to whom the appeal must be sent, pursuant to G.L. c. 32, s. 16(4).” *Barnstable, supra*. After I brought this to the parties’ attention, the Board

agreed it did not send a formal appeal letter. Although I stayed the matter hoping to consolidate it with a perfected appeal, no new appeal was filed. This defect is fatal to jurisdiction.<sup>1</sup>

In any event, even if DALA has jurisdiction, the Petitioner would still lose his appeal.

For the reasons stated in *Shailor v. Bristol Cty. Ret. Bd.*, CR-20-0343, issued today, I find that the Petitioner would be entitled to purchase his prior service—even if from a different retirement system—only under G.L. c. 32, § 3(5). However, unlike *Shailor*, the Petitioner does not qualify under that section.

Like in *Shailor*, the only way the Petitioner would qualify under § 3(5) is if his work as a call firefighter was considered a temporary, provisional, or substitute position. A call firefighter is a very specific position:

A “call” fire fighter is paid by a town for the fire incidents to which he responds. A call fire fighter, who usually has a primary career, is not required to respond to any particular incident, and does not “man” the fire station waiting for a fire. Rather, he or she is paged when an incident occurs and responds if he or she is able to do so. Generally, call fire fighters are required to respond to some monthly minimum of emergency calls.

*Howland v. Bristol Cty. Ret. Bd.*, CR-18-0612, 2021 WL 9697047 (DALA, Oct. 22, 2021), quoting *Carleton v. Commonwealth*, 447 Mass. 791, 794 n.9 (2006).

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<sup>1</sup> The Board suggested, perhaps, that the Petitioner’s appeal could be seen as an appeal of the Board’s failure to act. The problem is that the Petitioner never made a written request to the Board, which is a prerequisite to starting the appeal deadline. See G.L. c. 32, § 16(4) (“may so appeal . . . within fifteen days after the expiration of one month following the date of filing a *written request* with the board. . .”)(emphasis added).

The Board also suggests that the intent of *Barnstable* was “not to dismiss an appeal that was timely filed even though the member was not formally given his right of appeal.” I disagree. I interpret *Barnstable* as creating a bright-line rule that a formal appeal letter is required to establish jurisdiction.

A reserve firefighter, on the other hand, “fills in during the absence of a permanent, full-time fire fighter and receives the regular salary of the permanent, full-time fire fighter. . . The reserve fire fighter fills in for both short absences such as a couple of days and long absences lasting as much as six months or longer.” *Catania v. PERA*, CR-92-0287 (DALA Jan. 12, 1995.)

Therefore, while a reserve firefighter (or police officer) is “a temporary, provisional, or substitute position,” *see e.g. Shailor, supra*, a call firefighter is not. *See Correia v. Fairhaven Ret. Bd.*, CR-17-062 (DALA Aug. 27, 2021). The Petitioner was very clearly a call firefighter, not a reserve firefighter.

Accordingly, PRB’s decision denying the Petitioner credit for his prior service as a call firefighter in the Town of Bourne is **affirmed**.

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

*Eric Tennen*

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Eric Tennen  
Administrative Magistrate