COMMONWEALTH OF MASSACHUSETTS

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

Eric Mello,
Petitioner,

v.

Massachusetts Teachers' Retirement System,
Respondent.

No. CR-19-0003

Dated: July 7, 2023

Appearance for Petitioner:
Eric Mello (pro se)
Plymouth, MA 02360

Appearance for Respondent:
Ashley Freeman, Esq.
Charlestown, MA 02129

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

The petitioner works in a charter school and is a member of the Massachusetts Teachers' Retirement System. He seeks to purchase credit for a period of pre-membership service in the same position he now holds. The petitioner satisfies the "late entry" provisions of G.L. c. 32, § 3(3), in part because his employment contracts for the pertinent period, reasonably construed, required him to work half-time. The petitioner is therefore entitled to make the purchase at issue.

DECISION

Petitioner Eric Mello appeals from a decision of the Massachusetts Teachers' Retirement System denying his application to purchase credit for a period of pre-membership service. I held an evidentiary hearing on June 15, 2023, at which Mr. Mello was the only witness. I admitted into evidence exhibits marked 1-7.

Findings of Fact

Having considered the exhibits and the testimony, I find the following facts.

1. Mr. Mello works for the Rising Tide Charter School as a part-time business manager. From the date of his hiring in December 2010 through June 2012 (pertinent period), Mr. Mello was not a member of MTRS. (Testimony; Exhibits 2-3.)

2. Mr. Mello's work during the pertinent period was governed by two consecutive employment contracts between him and the school's trustees. A few days separated the end of the first contract and the beginning of the second. Both contracts stated that Mr. Mello was to work a "maximum of 24 hours per week." They added that his work schedule would be "determined by the Head of School." They required Mr. Mello to "work a professional day, which includes such additional time, if any, which may be necessary for the performance of his[] duties." (Exhibits 2-3.)

3. For teachers at Rising Tide, a full-time schedule was 32 hours per week. A half-time schedule was 16 hours per week. During the pertinent period, Mr. Mello worked an average of 22 hours per week. (Testimony; Exhibit 4.)

4. Mr. Mello was paid biweekly. The pertinent period consisted of 41 pay periods. During 37 out of 41 two-week pay periods, Mr. Mello worked 32 or more hours. During 29 out of 41 pay periods, he worked 40 or more hours. (Testimony; Exhibit 4.)

5. In approximately July 2012, Mr. Mello became an MTRS member.[1] In March 2013, he applied to purchase creditable service for his pre-membership work. MTRS denied the application, stating that the retirement law "does not allow a member to purchase non-membership service at a charter school." (Exhibit 5.)

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[1] The parties agree that Mr. Mello continues to be entitled to MTRS membership, though they do not spell out their analysis in this regard. *See generally* G.L. c. 32, § 1 (defining "teacher" as including several other positions).

6. MTRS's decision letter is dated December 13, 2018. A preponderance of the evidence supports the conclusion that Mr. Mello received the letter on December 18, 2018. His notice of appeal, postmarked thirteen days later, was therefore timely. (Exhibits 1, 5, 7; administrative record. *See* G.L. c. 32, § 16(4).)

Analysis

The retirement allowance of a Massachusetts public employee is based in part on the duration of the employee's "creditable service." *See generally* G.L. c. 32, § 5(2). Ordinarily, creditable service spans the employee's work for governmental units after becoming a member of a public retirement system. *See* G.L. c. 32, § 4(1)(a).

In certain circumstances, individuals are permitted to "purchase" credit for work that otherwise would not count. *See generally* G.L. c. 32, §§ 3, 4. purchases may be made only in accordance with specific statutory provisions. *See Centola v. State Bd. of Ret.*, No. CR-19-507, 2022 WL 19762162, at *1 (DALA Aug. 19, 2022).

The purchase-authorizing provision best suited to Mr. Mello's circumstances is G.L. c. 32, § 3(3), which discusses "late entry into membership."[2] This section applies to "any employee who, having had the right to become a member of any retirement system . . . failed to

[2] The parties also identify the retirement law's sections 3(5) and 4(2)(c) as potentially applicable. The fifth clause of § 3(5) authorizes certain purchases of prior "temporary, provisional, or substitute" work. CRAB has construed this provision as restricted to full-time work, *Santos v. MTRS*, No. CR-04-70 (CRAB Mar. 6, 2006), which Mr. Mello undisputedly did not perform. As for § 4(2)(c), it is not clear whether that provision *ever* authorizes purchases by current MTRS members. CRAB has described § 4(2)(c) as covering purchases of "previous periods . . . in the same governmental unit." *Tremblay v. Leominster Ret. Bd.*, No. CR-07-685 (CRAB May 19, 2011). By its terms, § 4(2)(c) is limited to prior periods when the member was "not eligible for membership." During prior periods of ineligibility for MTRS membership, a current MTRS member could not have belonged to the "same governmental unit," i.e., the single, fictional unit that covers only MTRS members and those eligible for MTRS membership. *See* G.L. c. 32, § 1 (definition of "governmental unit"); *Tremblay*, *supra*.

become . . . a member." *Id.* Such an employee may enter membership belatedly. Once having done so, the member may make "make-up payments," and those payments entitle the member to "all creditable service to which he would have been entitled had he joined the system when first eligible to become a member." *Id.*

Mr. Mello has held the same position throughout his tenure at Rising Tide. He became an MTRS member after two years on the job. He maintains that he was eligible for MTRS membership all along (but did not originally so realize). Boiled down to its essence, Mr. Mello's theory is that he became a member through the "late entry" rule of § 3(3), and is entitled to make a § 3(3) purchase.

MTRS's essential response is that, during the pertinent period, Mr. Mello did not yet have "the right to become a member." § 3(3). This argument rests on the statutory and regulatory rule that MTRS membership demands at least "half-time" work. The retirement statute defines teachers as, in part, persons "employed . . . on a basis of not less than half-time service." G.L. c. 32, § 1. An MTRS regulation, as in effect during the pertinent period, made MTRS membership contingent on a "contractual agreement [that] requires not less than half-time service." 807 C.M.R. § 4.02(1)(b) (as in effect until Apr. 15, 2022).[3]

MTRS assumes that half-time in this context means 20 hours per week. The case law suggests that the more appropriate figure may be 16 hours—half of the full-time workload for teachers, both at Rising Tide and at many other schools. *See MacDonald v. MTRS*, No. CR-08-249 (DALA July 19, 2013); *Farricker v. MTRS*, No. CR 16-492 (DALA Aug. 31, 2018). Either

[3] In some circumstances, it may be difficult to discern which version of an evolving regulation governs a member's case. But here it is the earlier version of 807 C.M.R. § 4.02(1)(b) that determines whether, as § 3(3) requires, Mr. Mello "had the right to become a member"—in the past tense—during the period he now seeks to purchase.

way, in terms of his work in practice, Mr. Mello generally exceeded these thresholds. *See Squeglia v. Contributory Ret. Appeal Bd.*, 13 Mass. L. Rptr. 106, 108 (Super. Ct. 2001) (analyzing a teacher's compliance with § 1's demand for half-time work based on the teacher's workload in practice).

MTRS's rejoinder is that, properly construed, the governing regulation is satisfied only when the half-time scope of the employee's work was "required" by the employee's written employment "agreement." 807 C.M.R. § 4.02(1)(b) (as in effect until Apr. 15, 2022). An agency's interpretation of its own regulation is entitled to deference. *See Carey v. Commissioner of Corr.*, 479 Mass. 367, 369 (2018). And MTRS's interpretation here serves a logical purpose: it enables MTRS to assess whether a teacher worked half-time on the basis of readily examinable documents, without resorting to resource-intensive investigative work. *Cf. Kozloski v. Contributory Ret. Appeal Bd.*, 61 Mass. App. Ct. 783, 787 (2004). Still, an overly rigid, formalistic implementation of the required-by-agreement rule would create the risk of arbitrary distinctions between individuals whom the retirement law intended to treat similarly. *See Squeglia*, 13 Mass. L. Rptr. at 108.[4]

Whether Mr. Mello's employment contracts "required" him to work half-time is a close call. On balance, the answer is yes. Literally speaking, the contract established only a "maximum" number of permissible working hours. But that obligation must be read commonsensically, practically, and with allowances for the fact that—as MTRS emphasizes—

[4] In *Squeglia*, MTRS maintained that only the demands imposed on the teacher at "the initial time of employment" determine whether she worked half-time. 13 Mass. L. Rptr. at 108. A Justice of the Superior Court disagreed, looking instead to the teacher's work in practice. *Id.* But *Squeglia* turned on the statutory definition of "teacher," not on the MTRS regulation at issue here, which is differently worded, and which MTRS has more latitude to interpret.

the retirement system's needs and demands often play no part in the negotiations surrounding a member's employment arrangement.

In formal legal documents, terms such as "maximum" or "no more than" may sometimes denote approximate expected amounts. *See, e.g.*, *Pierce v. Lefort*, 200 So. 801, 803 (La. 1948); *Jurisich v. Louisiana Dep't of Wildlife & Fisheries*, 508 So. 2d 588, 591 (La. Ct. App. 1987); *Harries v. Harang*, 23 So.2d 786. (La. Ct. App. 1945). This reading of such terms may make good sense when they appear in the context of a contractual cap on an employee's hours of work. As a matter of logic and practice, an employer has no reason to enjoin an employee from crossing a threshold of hours far greater than the employee's anticipated workload. A contractual "maximum" number of hours may therefore simultaneously communicate an approximation of the workload that will be imposed on the employee.

Some contracts communicating an employee's anticipated workload may still leave the employee free to work significantly less. Mr. Mello's employment contracts made clear that he would not enjoy such freedom. The contracts stated that Mr. Mello's schedules would be "determined by the Head of School." They added that Mr. Mello would need to work "professional" days; his days would include any "*additional* time . . . which may be necessary for the performance of his[] duties" (emphasis added). The reasonable implication of these provisions was that Mr. Mello would not be able to shorten his working hours at will: he would be required to abide by the approximate schedule conveyed by the contracts, including their working-hours caps.

It should be clear that the foregoing analysis is limited to its particular statutory and regulatory context. For purposes of other legal rules, it may be that Mr. Mello would *not* be deemed an employee who was "required" to work half-time. But each statute or regulation must

be interpreted "with reference to [its] purpose." *Friends & Fishers of Edgartown Great Pond, Inc. v. Dep't of Envtl. Prot.*, 446 Mass. 830, 837 (2006). The terms of Mr. Mello's employment contracts communicated enough of a half-time "requirement" to satisfy 807 C.M.R. § 4.02(1)(b)'s goals: those terms sufficed to inform MTRS, without any extra-documentary factfinding, that Mr. Mello's job demanded approximately 24 hours per week of work from him, i.e., that he was at least a half-time employee. *Cf. Florio v. MTRS*, No. CR-18-509, 2021 WL 9697051, at *4 (DALA May 7, 2021).

Conclusion and Order

For the foregoing reasons, Mr. Mello is entitled to purchase credit for his service during the pertinent period. MTRS's contrary decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate