

COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

ANTONIO GOMES,

Petitioner-Appellee

v.

PLYMOUTH RETIREMENT SYSTEM AND PUBLIC EMPLOYEE
RETIREMENT ADMINISTRATION COMMISSION,¹

Respondents-Appellants.

CR-14-127

DECISION²

Respondent Plymouth Retirement System (PRB) appeals from a decision of an administrative magistrate of the Division of Administrative Law Appeals (DALA), holding that petitioner Antonio Gomes must make make-up payments in order to receive five years' full-time credit for his prior service as a permanent-intermittent police officer under G.L. c. 32, § 4(2)(b). The magistrate considered the case pursuant to 801 C.M.R. 1.01(7)(g)(3), based on the parties' written submissions. The DALA decision is dated February 5, 2016. The PRB filed a timely appeal to us.

¹ The Public Employee Retirement Administration Commission (PERAC) was joined as a necessary party before the Division of Administrative Law Appeals. PERAC agrees with the holding of the DALA magistrate; it is designated a Respondent-Appellant for convenience.

² We issue a decision in a related case today, *Grimes v. Malden Retirement Bd.*, CR-15-5 (credit for uncompensated service as reserve police officer).

We adopt the magistrate's Findings of Fact 1-11 as our own. We affirm the DALA decision for the reasons stated in its Discussion, clarifying some dates relating to Gomes' prior service.

Background. Gomes is a police officer in the Town of Plymouth. From June 21, 1987 to July 31, 1992, Gomes worked as a permanent-intermittent police officer. He provided actual service and received compensation for each of these years. During a portion of that time, from June 2, 1990 to July 31, 1992, Gomes was specifically appointed to work a regular forty-hour week.³ On July 31, 1992, Gomes was appointed a permanent police officer. The Plymouth Retirement System designated his membership date as October 4, 1992.⁴

In 1998, based on that portion of G.L. c. 32, § 4(2)(b) which allows full-time credit for up to five years' service as a permanent-intermittent police officer, the PRB permitted Gomes to purchase this prior service. In 2003, however, PERAC informed the PRB that Gomes should not have been required to pay for his prior creditable service as a permanent-intermittent officer. The PRB accordingly refunded Gomes' payments with interest.⁵

³ The Police Chief referred to this position as a "Temporary Full Time Police Officer." Exhibit 10. Retirement documents, however, describe its title as "40-hr. Temporary P.I. [permanent-intermittent] Patrolman." Exhibit 11. Although appearing anomalous, the title appears to refer to a permanent-intermittent officer who has been temporarily assigned full-time duties. This position is distinct from that of a regular full-time police officer. *See generally Board of Selectmen v. Civil Serv. Comm'n*, 37 Mass. App. Ct. 587, 587-588 (1994).

⁴ Findings of Fact 1-3, 7; Exhibits 10, 11, 13.

⁵ Findings 6, 7; Ex. 3.

The above transactions were complicated by the PRB's mistaken allowance of membership to Gomes in 1991, prior to his appointment as a permanent full-time police officer.⁶ To correct that error, Gomes' contributions from that date were also returned to him in 2003, and his membership was deemed to have begun on October 4, 1992.⁷

Ten years later, in response to our decision in *MacAloney v. Worcester Regional Retirement System*, CR-11-19 (CRAB amended decision June 21, 2013), PERAC issued several memoranda in which it informed retirement boards that members who have not retired and who wish to be credited with up to five years' full-time service for their service as permanent-intermittent or reserve police officers or firefighters, or as call firefighters, must purchase that prior service pursuant to G.L. c. 32, § 4(2)(c) or other applicable provisions.⁸

The PRB accordingly informed its affected members that they must "remit those funds previously refunded, together with buyback interest from June 21, 2013." Gomes appealed from this decision to DALA.⁹

Before DALA, both Gomes and the PRB argued that Gomes should not be required to pay for his prior service under § 4(2)(b). PERAC, joined as a necessary party, argued that payment was required under the *MacAloney*

⁶ The application may not have clearly identified Gomes' position. See Ex. 13.

⁷ Finding 7, Ex. 3.

⁸ See PERAC Memo. 22/2013 (Aug. 16, 2013); PERAC Memo. 33/2013 (Nov. 20, 2013) (Ex. 4); PERAC Memo. 19/2014 (May 30, 2014) (Ex. 7); Finding 9.

⁹ Findings 10-11; Exs. 5, 21.

decision. From DALA's decision affirming the decision to require payment, the PRB has appealed to us.

Discussion. The PRB urges us to reconsider and reverse our decision in *MacAloney* and hold that the absence of explicit language requiring payment for purchases of certain prior service under G.L. c. 32, § 4(2)(b) is an indication of legislative intent that such payments are not required.¹⁰ For the reasons stated in the *MacAloney* decision, and those stated in our decision released today in *Grimes v. Malden Retirement Bd.*, CR-15-5, we cannot agree. We repeat the relevant section of our decision in *Grimes*:

Payment for the purchase of prior service as a reserve officer. As we have held previously,¹¹ the language quoted above cannot properly be read to waive payment for all purchases of prior service involving reserve, permanent-intermittent, or call police officers or firefighters. Unlike section 4(1), which lists numerous types of service that may (or may not) be counted or purchased as creditable service,¹² section 4(2)(b) addresses *only* how to calculate the creditable

¹⁰ See G.L. c. 32, § 4(2)(b) (in pertinent part):

. . . and provided, further, that the board shall credit as full-time service not to exceed a maximum of five years that period of time during which a reserve or permanent-intermittent police officer or a reserve, permanent-intermittent or call fire fighter was on his respective list and was eligible for assignment to duty subsequent to his appointment;

¹¹ See *MacAloney v. Worcester Regional Retirement System*, CR-11-19 (CRAB June 21, 2013) (fire chief with previous actual duty as call firefighter entitled to five-year credit, but must purchase the portion of his service that occurred prior to becoming a member).

¹² *E.g.*, G.L. c. 32, §§ 4(1)(a) (service as member, deductions); 4(1)(b) (service prior to date system operational, free); 4(1)(c) (unpaid leave over one month, no credit);

service of part-time and similar employees. Thus, the absence of explicit language in section 4(2)(b) regarding payment for the purchase of prior service does not create an inference that prior service may be credited without payment.¹³ Section 4(2)(b) states that retirement boards, subject to approval by the actuary, may “fix and determine how much service in any calendar year is equivalent to a year of service.” In particular, for “part-time, provisional, temporary, temporary provisional, seasonal or intermittent” employees, the section allows retirement boards to “fix and determine the amount of creditable prior service, if any, and the amount of credit for membership service of any such employee who becomes a member”¹⁴

4(1)(d) (service prior to public takeover, free); 4(1)(e) (if previously eligible, must pay); 4(1)(f) (teacher out of state, must pay under § 3); 4(1)(f) (teacher non-public school before 1973, must pay under § 3); 4(1)(g $\frac{1}{2}$) (teacher maternity leave prior to 1975, must pay by 2001); 4(1)(g $\frac{3}{4}$) (teacher maternity leave prior to 1975, current retiree); 4(1)(h) (veteran leave of absence, free); 4(1)(h) (veteran active duty, must pay); 4(1)(h $\frac{1}{2}$) (teacher vocational service, must pay); 4(1)(i) (bank liquidation service, must pay); 4(1)(j) (pre-1946 service, deductions); 4(1)(k) (State Department service, must pay); 4(1)(l) (pre-1988 department of education, federal funds, must pay); 4(1)(l $\frac{1}{2}$) (same, 1988 and later); 4(1)(l $\frac{3}{4}$) (educational collaborative, must pay); 4(1)(m) (workers’ compensation total incapacity, no deductions under §14); 4(1)(n) (pre-1988 Veterans’ Employment Service, must pay); 4(1)(n $\frac{1}{2}$) (same, 1988 and later); 4(1)(o) (no credit after July 1, 2009 if salary under \$5,000); 4(1)(p) (teacher non-public school, state financing, must pay); 4(1)(q) (leave to command veteran organization, must pay); 4(1)(q) (judge who did not vest, must pay); 4(1)(r) (Peace Corps, must pay); 4(1)(s) (contract employee, must pay).

¹³ *Contrast Lawrence Retirement Bd. v. Contributory Retirement Appeal Bd.*, 87 Mass. App. Ct. 1124 at *1-2 (2015) (Rule 1:28 unpublished decision) (upholding CRAB’s determination that, because most of the subsections of G.L. c. 32, § 4(1) expressly require payment for purchase of prior service, the several subsections within § 4(1) that do not must be read as allowing credit without payment).

¹⁴ *Id.*

Section 4(2)(b), however, goes on to impose two limitations on the power of retirement boards to set rules concerning credit for part-time work. The first limitation requires that boards credit seasonal employees with one year of full-time service if the employee works full-time for at least seven months:

provided, that in the case of any such employee whose work is found by the board to be seasonal in its nature, the board shall credit as the equivalent of one year of service, actual full-time service of not less than seven months during any one calendar year

Id. (in pertinent part). The second limitation is that quoted above,¹⁵ which requires boards to credit reserve and permanent-intermittent police officers and firefighters, as well as call firefighters, with up to five years of full-time service for every year in which they were on their list and available for work.

Because section 4(2)(b) is concerned with translating part-time and similar employment into creditable service, and because it applies not only to *prior* creditable service but also to the calculation of membership service for *current* employees, it does not explicitly address the payment for a purchase of prior service. This is in contrast to many of the provisions in the previous section, G.L. c. 32, § 4(1), which apply specifically to credit for prior non-membership service, and which are subject to explicit conditions of payment, such as that “[n]o credit shall be allowed until the member has paid into the Annuity Savings Fund . . . makeup payments of an amount equal to that which would have been withheld as regular deductions for the service . . .”¹⁶ In section 4(2)(b), however, which sets

¹⁵ See note 10.

¹⁶ See, e.g., G.L. c. 32, § 4(1)(s) (contract service).

rules for crediting part-time employment, it would make no sense to include an explicit condition concerning payment for purchase of such credit, since the provision applies equally to current employees who have already paid for their service credit via payroll deductions. Instead, payment for the purchase of prior part-time service is addressed in section 4(2)(c):

(c) In the case of any . . . member . . . , the board may allow credit . . . for any previous period of part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service . . . ; provided, that . . . he pays into the annuity savings fund of the system . . . make-up payments of an amount equal to that which would have been withheld as regular deductions from his regular compensation had he been eligible for membership and been a member of such system during such previous period, together with buyback interest.

Id. (in pertinent part).¹⁷

For these reasons, we do not view the absence of an explicit payment provision in section 4(2)(b) as suggesting that prior part-time service must be credited without the payment required by section 4(2)(c). Indeed, if that were the case, it would apply not only to the five-year credit for being on a police or firefighter list, but also to seasonal employment of seven months or longer and, arguably, to any part-time or similar employment. Moreover, to provide such credit without cost only to those who purchase their service after the fact would have the anomalous effect of creating a disincentive to membership, since members would still be required to pay for their service via payroll deductions

¹⁷ Other sections in the retirement law also provide for purchase of prior service and may also apply to purchase of part-time service. *E.g.*, G.L. c. 32, §§ 3(2)(c), 3(3), 3(5).

pursuant to G.L. c. 32, § 22(1)(b). Hence, as we held in the *MacAloney* case,¹⁸ section 4(2)(b) does not, by virtue of omitting language requiring payment for prior non-membership service, provide that such credit must be provided without payment.

Grimes v. Malden Retirement Bd., CR-15-5 (CRAB).

Here, the PRB argues further that the provisions for purchase of prior creditable service in part-time, temporary, and similar positions under G.L. c. 32, § 4(2)(c) do not apply because the specific positions of “reserve,” “permanent-intermittent,” and “call” firefighter or police officer are not listed by name.

Section 4(2)(c) provides:

In the case of any . . . member . . . , the board may allow credit, upon whatever proportionate basis it shall determine under appropriate rules and regulations which shall be subject to the approval of the actuary, for any previous period of *part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service* rendered by him . . . and while he was not eligible for membership; provided, that after becoming a member or being reinstated as such, and before the date any retirement allowance becomes effective for him, he pays into the annuity savings fund . . . make-up payments of an amount equal to that which would have been withheld as regular deductions from his regular compensation had he been eligible for membership and been a member of such system during such previous period, together with buyback interest.

Id. (in pertinent part, emphasis added). This subsection is intended to refer to the purchase of part-time, temporary, and similar employment. It does not purport to name particular titles, but is referring to types of “employment or service.” Certainly, reserve, permanent-intermittent, and call employees fall into

¹⁸ *MacAloney v. Worcester Regional Retirement System*, CR-11-19 (CRAB June 21, 2013).

one or more of these employment categories. Moreover, other provisions of the retirement law may apply equally to provide for purchase of prior creditable service.¹⁹ Regardless of whether he purchases his prior service under § 4(2)(c) or another section, Gomes must make make-up payments.

The PRB has briefed both the issue of PERAC's adoption of a \$3,000 assumed annual rate of compensation and the issue of the degree to which PERAC memoranda are binding on the retirement boards. We have addressed these issues in our decision in *Grimes v. Malden Retirement Bd.*, CR-15-5, released today. Neither affects the outcome of this case. The assumed annual rate of compensation, which we have not upheld, had no application to Gomes, who received pay in every year for which he sought prior creditable service. And the PRB cannot be faulted here based on our holding that PERAC memoranda are binding on the retirement boards, since the PRB properly complied with PERAC's directives.

We address two additional issues. First, we note that, in 2009, the Legislature enacted a provision that prohibits the grant of creditable service for positions compensated at less than \$5,000 per year. See G.L. c. 32, § 4(1)(o):

The service of a state, county or municipal employee employed or elected in a position receiving compensation of less than \$5,000 annually, which service occurs on or after July 1, 2009, shall not constitute creditable service for purposes of this chapter.

¹⁹ See, e.g., G.L. c. 32, §§ 3(5) and 4(2)(c) (purchase of prior, non-membership service where employee was not eligible to join retirement system); §§ 3(2)(c) and 3(3) (purchase of prior service where employee was eligible, but did not join).

Id. (added by St. 2009, c. 21, § 25, eff. July 1, 2009). This provision can have no effect on Gomes' case, as his prior service occurred before July 1, 2009. As we have noted in the *Grimes* decision, this provision was enacted to replace two former sections that provided creditable service for certain municipal officers and library trustees who served without pay, based on an assumed salary of \$2,500.²⁰ The 2009 legislation was evidently intended to reform these provisions, which permitted potentially extensive and costly creditable service for local volunteer positions that did not relate to public safety. We need not address here whether the Legislature also intended prospectively to repeal the five years' full-time credit for police officers and firefighters who are on a reserve, permanent-intermittent, or call list under G.L. c. 32, § 4(2)(b). Legislative clarification of this issue, however, would be helpful.

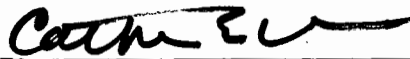
Lastly, we note that the DALA magistrate upheld the PRB's requirement, based on directives contained in PERAC memoranda, that buyback interest on Gomes' purchase of prior service under G.L. c. 32, §§4(2)(b) and 4(2)(c) be imposed only prospectively, beginning as of June 21, 2013, the date of the *MacAloney* decision. The magistrate noted retirement boards' previous practice not to require such payments, which may be for prior service typically occurring many years before a current police officer or firefighter's retirement, as well as the confusion surrounding the issue, as supporting PERAC's directive concerning

²⁰ See G.L. c. 32, § 4(1)(o) (added by St.1971, c. 894, approved Oct. 14, 1971); § 4(1)(o½) (added by St.1998, c. 456, § 1, approved Jan. 14, 1999).

Conclusion. The DALA decision is affirmed. If Gomes wishes to purchase his prior service as a permanent-intermittent police officer from 1987 to 1992, he must make make-up payments based on his wages during this period, together with buyback interest from June 21, 2013.

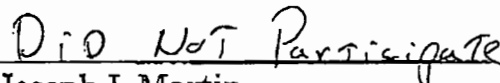
SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD



Catherine E. Sullivan
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Chair
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Public Employee Retirement Administration
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Date: November 18, 2016

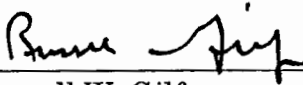
the calculation of buyback interest. No party has appealed to us this aspect of the DALA decision. Accordingly, we do not disturb it.

Conclusion. The DALA decision is affirmed. If Gomes wishes to purchase his prior service as a permanent-intermittent police officer from 1987 to 1992, he must make make-up payments based on his wages during this period, together with buyback interest from June 21, 2013.

SO ORDERED.

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Date: November 18, 2016