

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Kevin Murphy,
Petitioner

v.

Docket No. CR-20-0453
Date Issued: Aug. 18, 2023

Falmouth Retirement Board,
Respondent

Appearance for Petitioner:

Thomas F. Gibson, Esq.
2400 Massachusetts Avenue
Cambridge, MA 02140

Appearance for Respondent:

Nicholas Poser, Esq.
48 Franklin Street
Watertown, MA 02472

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

Petitioner is entitled to full service credit from 2014 to 2023 for his service as the Town of Falmouth's Sealer of Weights and Measures, an appointed position. Under G.L. c. 32, § 4(1)(a), Petitioner is entitled to credit for all service rendered. The case law suggests that a retirement board must grant full-time credit to a member appointed to a statutory position involving a fixed term, fixed compensation, and fluctuating, difficult-to-track working hours. *See Stoneham Retirement Bd. v. PERAC*, CR-12-548 (CRAB May 20, 2019). The Board is prohibited from prorating Petitioner's service credit because its part-time service regulation promulgated under G.L. c. 32, § 4(2)(b) does not provide any formula for calculating a Sealer's creditable service. *See Madden v. Contributory Retirement Appeal Bd.*, 431 Mass. 697 (2000).

DECISION

Petitioner Kevin Murphy appealed timely under G.L. c. 32, § 16(4) the November 12, 2020 decision of Respondent Falmouth Retirement Board, denying credit for his service as the Town of Falmouth's Sealer of Weights and Measures since 2014. On August 17, 2021, DALA ordered the parties to file a joint pre-hearing memorandum. The joint memorandum, submitted on September 2, 2021, included seven exhibits proposed by the Petitioner, which I have entered into evidence as Exhibits 1-7, and two exhibits proposed by the Respondent, which I have marked as Exhibits 8-9.

This is the third of three appeals Mr. Murphy has filed at DALA contesting decisions of the Falmouth Retirement Board. The first DALA decision, *Murphy v. Falmouth Retirement Bd.*, CR-10-701 (DALA Apr. 24, 2015), *aff'd* (CRAB Dec. 2, 2015), has no bearing on this case. The second decision, *Murphy v. Falmouth Retirement Bd.*, CR-15-677 (DALA June 19, 2020), referred to in the joint memorandum as *Murphy I*, determined that Mr. Murphy became an active member again when he was re-elected to a third term on the Falmouth Select Board.

DALA scheduled a hearing. On April 12, 2023, the parties instead agreed to proceed on written submission under 801 CMR 1.01(10)(c). On June 13, 2023, Mr. Murphy filed a supplemental memorandum and two additional proposed exhibits, which I have marked as Exhibits 10-11. That same day, the Board filed its supplemental memorandum.

FINDINGS OF FACT

Based on the exhibits presented by the parties and the findings of fact in *Murphy I*, I make the following findings of fact:

1. Kevin Murphy became a member of the Falmouth Retirement System on May 27, 2003. (*Murphy I.*)

2. Mr. Murphy served on the Falmouth Select Board from 2003 through 2009, two three-year terms. (*Murphy I.*)

3. His Selectmen position was considered part-time, even though he often worked more than 20 hours each week. (*Murphy I.*)

4. His annual salary was \$3,000.00 as a Select Board member and \$3,500.00 when he was Board Chair. (*Murphy I.*)

5. Mr. Murphy's second Selectmen term ended in late May 2009, at which point the Board terminated his active membership status. Accordingly, he was designated a member inactive. (*Murphy I.*)

6. Under G.L. c. 98, § 34, the Town Manager appointed Mr. Murphy to a two-year term as Sealer of Weights and Measures, effective June 30, 2009. (*Murphy I.*)

7. As Sealer, Mr. Murphy was responsible for the calibration and testing of weights and measures developed for all types of commodities. (*Murphy I.*)

8. Mr. Murphy conducted annual inspections of any device used to measure a product by length, weight or volume, including gas pumps, various kinds of scales, cord wood, tape measures, and taxi meters. (*Murphy I.*)

9. The amount of time it took Mr. Murphy to conduct these inspections varied. He typically spent two days inspecting as many as 30 devices at a large retail supermarket. He spent less time at a family market with 14 or so devices, or at a pizza place with 3 devices. (*Murphy I.*)

10. The seal he placed on a device provided his name and phone number, so he was responsible for handling consumer complaints seven days a week. (*Murphy I.*)

11. The Sealer position was considered to be part-time. In *Murphy I.*, Mr. Murphy could not prove by a preponderance of the evidence that he worked more than 20 hours each week. (*Murphy I.*)

12. Mr. Murphy was not expected to work any particular schedule or number of hours. His paychecks listed “0.00” as his hours, as he was not expected to keep track of his hours. (*Murphy I.*; Ex. 7.)

13. Due to Falmouth’s seasonal economy, Mr. Murphy’s hours varied significantly. During the offseason he worked up to 40 hours many weeks. During the summer season he worked 10 to 12 hours per week. (*Murphy I.*)

14. His annual salary as Sealer was \$10,400.00. He was paid \$400.00 every two weeks. (*Murphy I.*)

15. In June 2011, Mr. Murphy was both re-appointed as Sealer and elected to a final three-year term on the Select Board. Advised by town counsel that he could not receive two salaries, he elected to take only the Select Board position’s salary of \$3,000.00. (*Murphy I.*)

16. Mr. Murphy continued working as Sealer after his last term on the Select Board ended in 2014. (*Murphy I.*)

17. After his Selectmen term ended, Mr. Murphy requested that the Board reactivate his retirement system membership status. (*Murphy I.*)

18. On December 21, 2015, the Board denied his request. Mr. Murphy appealed the Board’s decision, commencing *Murphy I.* (*Murphy I.*)

19. On June 19, 2020, DALA reversed the Board's decision, ruling that Mr. Murphy was entitled to active membership when he started his third term as Selectman in 2011 and continued to be an active member after his term ended in 2014 because he continued in his Sealer position. (*Murphy I.*)

20. DALA also pointed out that, under G.L. c. 32, § 4(1)(o), Mr. Murphy was not entitled to service credit during his 2011-2014 Selectman term because he was compensated only \$3,000.00 for that position and elected not to take his much higher Sealer salary. (*Murphy I.*)

21. On June 25, 2020, the Board filed with CRAB a notice of objection to DALA's decision in *Murphy I.*, which it withdrew on August 27, 2020. (Ex. 1.)

22. In July 2020, both Mr. Murphy and his counsel requested that the Board withdraw its appeal of *Murphy I.*, reinstate Mr. Murphy as a member and credit him with appropriate service. (Exs. 8, 9.)

23. On August 26, 2020, the Board advised Mr. Murphy that it intended to comply with DALA's decision and requested that he remit \$6,878.62 in required retirement contributions that the Board had not deducted from his paycheck since 2011. (Ex. 2.)

24. Mr. Murphy remitted \$6,878.62 to the Board by a check dated September 20, 2020. (Ex. 3.)

25. From then on, retirement contributions were withheld from Mr. Murphy's Sealer paychecks. (Ex. 7.)

26. On November 12, 2020, after it had already collected his retirement contributions, the Board advised Mr. Murphy that he was not entitled to credit for any of

his service as Sealer because the Sealer position was part-time, but it was not provided for in the Board’s supplemental regulation regarding part-time municipal officers. (Ex. 4.)

27. In its letter to Mr. Murphy, the Board noted that the regulation provided certain amounts of creditable service for positions listed in the Falmouth Salary Administration Plan, and the Sealer of Weights and Measures was not on the Plan’s list. (Ex. 4.)

28. On November 17, 2020, Mr. Murphy timely appealed the Board’s decision. (Ex. 5.)

29. Mr. Murphy continued in his role as the Town of Falmouth’s Sealer until he resigned in February 2023. (Exs. 6, 10.)

30. In early March 2023, the Town of Falmouth posted the Sealer’s position. In the job description, the Town stated: “position typically works 20-30 hours per week, depending on the workload, and the schedule has some flexibility” and listed the position as full-time. (Ex. 11.)

CONCLUSION AND ORDER

For the following reasons, the decision of the Board is reversed. Mr. Murphy is entitled to full service credit when he served as Sealer of Weights and Measures from 2014 until his resignation in 2023.

This is a dispute over whether Mr. Murphy is entitled to credit for his service as Falmouth’s Sealer of Weights and Measures, and, if yes, how much. It is foundational that “[a]ny 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.” G.L. c. 32, § 4(1)(a). The retirement statute defines “service” as “service as an employee in any governmental unit for which regular compensation is paid.” G.L. c. 32, § 1. An “employee” is any person who received regular compensation from “any political subdivision of the commonwealth” and “who is regularly employed in the service of any such political subdivision, . . . including officials and public officers so paid whether employed, appointed or elected by popular vote for stated terms or otherwise.” *Id.*

As Sealer, Mr. Murphy was an appointed public officer employed and (after 2014) paid regular compensation of more than \$5,000 annually by the Town of Falmouth, a governmental unit and political subdivision of the commonwealth. *See* G.L. c. 32, §§ 1, 4(1)(a). DALA ruled in *Murphy I* that Mr. Murphy regained active membership status in 2011 and maintained that status until he separated from service. *Murphy v. Falmouth Retirement Bd.*, CR-15-677, at *9-11 (DALA June 19, 2020). DALA also ruled, however, that Mr. Murphy is not entitled to service credit from 2011 to 2014 because he did not collect his Sealer salary and his Select Board salary was less than \$5,000.00. *See* G.L. c. 32, § 4(1)(o); *Murphy I*, at *9. Mr. Murphy separated from service when he resigned from his Sealer position in 2023. Therefore, Mr. Murphy was a “member in service” from 2011 to 2023, but he is entitled to service credit from 2014 through 2023 only. G.L. c. 32, §§ 4(1)(a), 4(1)(o).

The Board argues that § 4(1)(a) applies only to full-time employees, and that part-time employees’ service credit is governed only by its supplemental regulation promulgated under G.L. c. 32, § 4(2)(b) (see discussion *infra*) with no guarantee of any credit at all for part-time service. Under this reasoning, Mr. Murphy, who did not work

full-time as Sealer, is not necessarily entitled to service credit for his Sealer work unless it is provided for by the Board's supplemental regulation. There is no support for this argument in the statute or case law. See *Stoneham Retirement Bd. v. PERAC*, CR-12-548 (CRAB May 20, 2019); *Colo v. Contributory Retirement Appeal Bd.*, 37 Mass. App. Ct. 185 (1994). Section 4(1)(a) makes no distinction between full-time and part-time employment; members are entitled to credit for all membership service.

Now that it has been established that Mr. Murphy is entitled to service credit, the remaining question is how much. It is undisputed that Mr. Murphy worked less than a typical full-time employee. G.L. c. 32, § 4(2)(b) authorizes retirement boards to determine the amount of credit part-time employees, like the Sealer, are entitled to for their work. Section 4(2)(b) provides, in pertinent part:

In all cases involving part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service of any employee in any governmental unit . . . the board, under appropriate rules and regulations which shall be subject to the approval of the actuary, shall 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.

In 1986, the Board promulgated a part-time service regulation echoing the language of § 4(2)(b) and prorating creditable service for certain categories of municipal positions:

In all cases involving a part time[,] provisional[,] seasonal or intermittent employment or service of any employee, including such employment or service in a municipal office or position, the Board shall fix and determine the amount of creditable service; provided that one full work week as defined for such position by a collective bargaining agreement, the Town of Falmouth Salary Administration Plan or Department of Education, equal one full work week of creditable service and that any lesser period shall receive the applicable percentage of creditable service

Falmouth Retirement Bd. Supplemental Regulations, Creditable Service (Dec. 19, 1986), <https://www.mass.gov/service-details/falmouth-retirement-board-supplemental-regulations>.

The first difficulty that arises in applying this regulation is that it does not provide a rule for calculating credit in the Sealer position. The Sealer position is not included in a collective bargaining agreement or the Salary Administration Plan. This means that the Board has not “fixed or determined” what a “full work week” is for the Sealer. G.L. c. 32, § 4(2)(b); Supplemental Reg., *supra*. Without a definition of a full work week, it is impossible to say what percentage of a work week the Sealer was compensated for working.

There are other complications, as well. The Sealer is not expected to work any particular schedule or number of hours. Even his paychecks list “0.00” as his hours. Of course, this does not mean that he does not work for his \$400.00 every two weeks. It means that he is compensated for fulfilling the statutory duties as Sealer, and, like many local elected officials, not specifically for the amount of time that he spends completing his duties. *See* G.L. c. 98, §§ 1-57. This is why Mr. Murphy was not required to keep track of his hours. Consequently, when testifying about his hours at the *Murphy I* hearing, he was able to give only vague estimates of his hours that ultimately were not sufficient to prove that he worked at least 20 hours per week. Thus, the administrative magistrate concluded that the Sealer position was part-time. *Murphy I*, at *6.

It is in part because of similar complications surrounding timekeeping that CRAB has ruled that *elected officials* are entitled to full credit for the periods that they hold office. *See Stoneham Retirement Bd.*, *supra*. There, the Stoneham Retirement Board

attempted to promulgate a regulation that would have fixed the service credit for certain statutory elected positions at less than full credit. PERAC rejected the proposed regulation. CRAB agreed with PERAC that elected officials who otherwise are entitled to service credit are entitled to full credit while they serve in office. CRAB's conclusion was based in part on several changes to the retirement law in 2009. *See Stoneham Retirement Bd.*, at *3-4; Acts 2009, c. 21. It was also based on "the common reference to elected officials 'serving' in their offices," as the Sealer does. *Stoneham Retirement Bd.*, at *3.

Further supporting this interpretation are the practical impediments to asking elected officials to keep track of their work hours. As PERAC points out, elected officials, even those who earn \$5,000 or more per year, hold a myriad of positions. Although this case involves elected municipal officials, elected state officials are also subject to § 4(1)(a). Compared to other employees, elected officials are particularly likely to have responsibilities that are unevenly spaced throughout a year, or even a day, and that overlap with their private lives. They may receive phone calls in the evening, be approached at youth sports games or in a restaurant, or work long hours during an emergency. They may hold other employment, attending to their official duties on evenings and weekends. Like the Legislature, their board may not be in session during the entire year. And, where their responsibilities are not defined in terms of a regular work week, there is no set number of hours that is considered "full time" for their office. Thus, *even if elected officials were able to keep a notebook in their possession at all times and were able to record all hours worked, there would be no formula to apply to calculate what percentage of "full time" they were working.* We consider it unlikely that the Legislature intended to impose such a requirement.

Id., at *4-5 (emphasis added).

Of course, the rule from *Stoneham* does not strictly apply to Mr. Murphy because he was not *elected* to the Sealer position, he was appointed, and the *Stoneham* rule addresses only elected officials. However, the applicability of CRAB's *Stoneham* logic to appointed statutory positions for a fixed term at fixed compensation, like the Sealer,

cannot be denied. Particularly salient is the lack of a formula to calculate what percentage of full time Mr. Murphy worked. The Falmouth Board faces the same problem because the Town of Falmouth did not list Sealer on its Salary Administration Plan. Neither did it list similar elected and appointed positions—Town Administrator, Town Clerk, Police Chief, Select Board and School Committee—on the plan. This is understandable because, similar to those positions, the Sealer’s compensation is set at an annual rate and is paid every 2 weeks, the position’s statutory duties are not defined in terms of a regular work week, and there is no set number of hours that is considered full-time for the position. Thus, even if the Sealer could accurately record his time, it would have been impossible to prorate his service credit because there would be no full-time number of hours to use as the denominator.

At first glance, CRAB’s *Stoneham* rule may seem extreme. After all, if it is applied to the instant appeal, then Mr. Murphy is entitled to full credit for a job that he could not prove he worked more than 20 hours per week on average. But not as extreme as the Board’s position. The Board concludes that, even though there is no dispute that Mr. Murphy completed his statutory duties, some weeks working 40 hours per week, he is nonetheless precluded from receiving any credit at all because the position is not covered by a collective bargaining agreement or the Town’s Salary Administration Plan. This conclusion is absurd on its face. It also violates the § 4(1)(a) guarantee that all otherwise qualified members are entitled to be credited with all membership service rendered. *See Stoneham Retirement Bd.*, supra.

Even if I were not inclined to apply the logic of CRAB’s *Stoneham Retirement Bd.* decision to Mr. Murphy’s appeal, I would still come to the same conclusion under the

holding in *Madden v. Contributory Retirement Appeal Bd.*, 431 Mass. 697 (2000), where the Supreme Judicial Court provided guidance on how much credit a member is entitled to when a retirement board has not promulgated an effective part-time service regulation. Chief among the Court's conclusions was that a retirement board cannot prorate a part-time employee's credit unless an appropriate rule or regulation provides for such proration. *Madden*, 431 Mass. 697, 701-02 (2000).

Nancy Madden was a public school teacher who worked part-time before and after 1990. Until 1989, the Teachers' Retirement Board prorated part-time teachers' service under a since repealed regulation. In *O'Brien v. Contributory Retirement Appeal Bd.*, 27 Mass. App. Ct. 1124, 1125 (1989), the Appeals Court had already determined that the repealed regulation did not provide the authority to prorate service credit. "[B]ecause a local retirement board may only prorate part-time service pursuant to a rule or regulation, and the regulation purporting to do so did not provide authority to prorate part-time service, the TRB could not prorate part-time service and was therefore required to credit [Ms. Madden] a full year of service for each year of part-time work." *Madden*, 431 Mass. at 699-700.

The Falmouth Board argues that since the Sealer is not included in its supplemental regulation, the default is to provide zero service credit. This is upside down. Section 4(1)(a) establishes a fundamental rule that all membership service should be credited. Section 4(2)(b) allows boards, through appropriate rules and regs, to set formulas that give part-time employees less than full-time credit. If a proration regulation does not include a particular position, the retirement board cannot prorate and must give full credit for that position's membership service, not the other way around. In

Mr. Murphy's case, the Board has failed to include the sealer position in its part-time creditable service regulation. Under *Madden* and *O'Brien*, since the Board's regulation failed to define the amount of part-time creditable service the Sealer receives, the regulation does not apply to Mr. Murphy. Consequently, as was the case with Ms. Madden, he must receive full credit for his part-time service.

For the above-stated reasons, the Board's decision is reversed, and the Board is ordered to award full service credit to Mr. Murphy for the years he served as Sealer of Weights and Measures for the Town of Falmouth from 2014 through 2023.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton, Esq.
Administrative Magistrate

DATED: Aug. 18, 2023