

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

John F. Murphy,
Petitioner,

No. CR-20-386

Dated: November 19, 2021

v.

State Board of Retirement,
Respondent.

Appearance for Petitioner:

Luke Rosseel, Esq.
P.O. Box 1136
Berlin, MA 01503

Appearance for Respondent:

James H. Salvie, Esq.
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Boston, MA 02108

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

The petitioner obtained damages from his labor union as a result of the union's failure to prosecute his wrongful termination case. Those damages were not "backpay" within the meaning of *Tarlow v. TRS*, No. CR-10-793 (CRAB Nov. 26, 2013), and the petitioner was not entitled to creditable service for the period between his termination and his resumption of work.

DECISION

Petitioner John F. Murphy appeals from a decision of the State Board of Retirement (board) denying his application to obtain creditable service for the span between his May 2013 termination by a governmental unit and his October 2019 return to work with the same unit. At

Mr. Murphy's request, the hearing was submitted on the papers. 801 C.M.R. § 1.01(10)(b). I admit into evidence Mr. Murphy's appeal letter and exhibits marked 1-16.¹

Facts

The following facts are not in dispute.

1. In 2013, Mr. Murphy was employed by the Trial Court Department as a "facilitator." In April of that year, his supervisor convened a hearing to determine whether Mr. Murphy should be terminated for cause. The allegations aired at the hearing involved, among other things, contentious interactions between Mr. Murphy and the supervisor. On May 15, 2013, Mr. Murphy was terminated. (Exhibits 2, 12, 6-8.)

2. Acting on Mr. Murphy's behalf, his labor union filed a timely grievance, which the Trial Court Department (as Mr. Murphy's employer) denied. The governing collective bargaining agreement imposed a twenty-day deadline within which the union could seek to arbitrate the grievance. The union missed the deadline, resulting in the arbitration's dismissal. (Exhibits 3, 5.)

3. Mr. Murphy filed a claim against the union with the Department of Labor Relations, alleging a breach of the duty of fair representation. A hearing officer found the claim meritorious, and the Employment Relations Board agreed. In December 2019, the Appeals Court affirmed. *Office & Prof'l Emps. Int'l Union, Loc. 6 v. Commonwealth Emp. Rels. Bd.*, 96 Mass. App. Ct. 764 (2019). The union was therefore required "to make Murphy whole for the loss of compensation he suffered as a result of his termination." (Exhibits 6-8.)

¹ Exhibits 1-15 are compiled on a CD submitted by Mr. Murphy and stored in DALA's case file. Exhibit 16 is a document attached to Mr. Murphy's memorandum. The board's memorandum describes another document as Exhibit 16, but that document was not filed, and is not (based on its description) material to the outcome of the appeal.

4. Mr. Murphy also brought suit against the Trial Court Department in federal court. That suit settled in October 2019. As part of the settlement, the Trial Court Department agreed to rehire Mr. Murphy, now as a staff attorney; his former position as facilitator was no longer staffed. Mr. Murphy resumed working in the courts on October 7, 2019. (Exhibits 9-11, 16.)

5. In September 2020, Mr. Murphy submitted an application to “buy back” creditable service for the period from his termination (May 15, 2013) to his recommencement of work (October 7, 2019). The board denied the application on September 28, 2020, and Mr. Murphy timely appealed. (Appeal letter.)

Analysis

A public employee’s retirement benefits derive in part from the duration of his or her “creditable service.” G.L. c. 32, § 5(2). Subject to special provisions inapplicable here, an employee is credited for “service rendered by him as an employee . . . after becoming a member of the [retirement] system.” G.L. c. 32, § 4(1)(a).

A cluster of overlapping definitions unpacks this rule. “Service” is work “as an employee . . . for which regular compensation is paid.” G.L. c. 32, § 1. “Regular Compensation” consists of “wages [received] by an employee for services performed in the course of employment for his employer.” *Id.* “Wages” are the “base compensation . . . paid to [an] employee for employment by an employer.” *Id.* These definitions fixate on the employment relationship: each one emphasizes that, to count, compensation and service must arise from employment work rendered by employee to employer.

This backdrop frames the special treatment that PERAC and CRAB afford to awards of “backpay.” PERAC has recognized since at least 2001 that it may be appropriate for a retirement system to grant creditable service, upon receipt of corresponding contributions, where an employee has been “granted back pay as a result of a wrongful termination.” PERAC

Memorandum No. 28 / 2001 (Apr. 30, 2001). CRAB, in 2009, opined that the retirement law “simply does not address the question of the availability of creditable service to a public employee whose termination or layoff is later rescinded.” *Van Deventer v. State Bd. of Ret.*, No. CR-05-1370, at 3 (CRAB June 12, 2009). Four years later, CRAB held that this statutory gap permits retirement systems to “grant[] creditable service in conjunction with an award of back wages.” *Tarlow v. TRS*, No. CR-10-793, at 1 (CRAB Nov. 26, 2013).

The “backpay” remedy reimburses a wrongfully terminated individual for a period of time during which he or she was not able to earn employment wages. Such an employee did *not* actually provide employment services during the pertinent period. The approach adopted by PERAC and CRAB reflects the theory that, nevertheless, “back pay represents regular compensation.” *Lombardini v. State Bd. of Ret.*, No. CR-18-475, at 6 (DALA July 2, 2021). “The back pay award . . . recognizes that the employee *should have* continued to be ‘regularly employed’ and so the employee receives pay and benefits *as if* she had been so employed.” *Tarlow, supra*, at 5 (emphasis added). Backpay thus is perceived as a kind of regular compensation, belatedly paid, for employment service, constructively performed. Through this lens, the statute’s usual creditable service rule is satisfied.

Mr. Murphy’s case exceeds *Tarlow*’s reach because it is impossible to interpret his damages award as backpay, i.e., belated compensation for constructive service. The damages were ordered against the union, not against Mr. Murphy’s employer, and not against the employer’s agent or stand-in. The legal basis for the damages award was the union’s breach of its representative duties toward Mr. Murphy, not Mr. Murphy’s employment relationship with his employer. And the critical result of the union’s ineffectiveness was that Mr. Murphy never was able to challenge and vacate his original termination. For all of these reasons, Mr. Murphy

has not obtained backpay within the meaning of the *Tarlow* rule. *See also Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008) (“By definition, backpay is an award against an employer . . . [that] necessarily stems from the contract of hire[.]”). The result is that, whatever claims Mr. Murphy may still hold as against the union, he is not entitled to the creditable service he seeks from the board.

Conclusion and Order

The board’s decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate