COMMONWEALTH OF MASSACHUSETTS
CONTRIBUTORY RETIREMENT APPEAL BOARD

MYSTIC VALLEY REGIONAL CHARTER SCHOOL (ROBERT KRAVITZ),

Petitioner-Appellant

v.

STATE BOARD OF RETIREMENT
&
PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION,

Respondents-Appellees.

CR-20-0243

DECISION

Petitioner Mystic Valley Regional Charter School ("MVRCS"), through its employee Robert Kravitz (collectively, "the Petitioner"), timely appeals from an order of an administrative magistrate of the Division of Administrative Law Appeals ("DALA"), granting the respondents', State Board of Retirement ("SBR") and the Public Employee Retirement Administration Commission ("PERAC"), cross-motion for summary judgment, thereby affirming SBR's denial of the Petitioner's application to enroll in the Massachusetts State Employees Retirement System ("MSERS"). MVRCS timely appealed this decision to us. Before DALA, SBR moved to add PERAC as a party, which the magistrate allowed.

After considering all the arguments presented by the parties and after a review of the record, we incorporate the DALA decision by reference. We affirm the DALA decision for the reasons set forth in its Order on Cross Motions For Summary Judgment. We agree with the magistrate that Kravitz is not eligible for membership in the MSERS, and the Contributory Retirement Appeal Board ("CRAB") may not expand membership to other charter school employees beyond the explicit language established in G.L. c. 71, § 89(y).

Discussion. This matter involves G.L. c. 71, § 89 which codified the 1993 Education Reform Act's authorization of the creation of charter schools in the Commonwealth. MVRCS

is operated under the standard that charter schools "shall be a public school, operated under a charter granted by the board, which operates independently of a school committee and is managed by a board of trustees. The board of trustees of a commonwealth charter school, upon receiving a charter from the board, shall be deemed to be public agents authorized by the commonwealth." G.L. c. 71, § 89(c). As a "public" school, operated by a board independent of a municipality, MVRCS employees generally may not join a municipal retirement system. Notwithstanding the general ineligibility of charter school employees to obtain public employee retirement benefits, Chapter 71 explicitly provides that, "*Teachers employed by a charter school* shall be subject to the state teacher retirement system under chapter 32 and service in a charter school shall be 'creditable service' within the meaning thereof." G.L. c. 71, § 89(y) (emphasis added).

Kravitz, a nonteaching employee of MVRCS, applied for membership in MSERS in January 2020 pursuant to G.L. c. 32, § 3(5)[1] and c. 71, § 89(y).[2] SBR denied his application for membership, and MVRCS appealed this decision. The magistrate declined to disturb PERAC's opinion and prior DALA decisions that nonteaching employees of charter schools are not eligible for membership in a retirement system. In its appeal of the DALA decision, MVRCS and Kravitz argued that because MVRCS is a "state agency" and as a state agency, its employees are considered public employees for the purposes of tort liability, collective

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[1] G.L. c. 32, § 3(5) (in pertinent part) allows purchase of creditable service by:

"Any member of any system who had rendered service as an employee of any governmental unit other than that by which he is presently employed, for any previous period during which the first governmental unit had no contributory retirement system or during which he had inchoate rights to a non-contributory pension or in a position which was not subject to an existing retirement system, or which was specifically excluded therefrom but which would be covered under the law now in effect…"

[2] G.L. c. 32, § 89(y) provides:

"Employees of charter schools shall be considered public employees for purposes of tort liability under chapter 258 and for collective bargaining purposes under chapter 150E. The board of trustees shall be considered the public employer for purposes of tort liability under said chapter 258 and for collective bargaining purposes under said chapter 150E; provided, however, that in the case of a Horace Mann charter school, the school committee of the school district in which the Horace Mann charter school is located shall remain the employer for collective bargaining purposes under said chapter 150E. Teachers employed by a charter school shall be subject to the state teacher retirement system under chapter 32 and service in a charter school shall be creditable service within the meaning thereof."

bargaining, and the conflict of interest law under Chapter 286A, employees of MVRCS should be allowed membership in a retirement system.[3] Alternatively, MVRCS argues that it has the authority pursuant to G.L. c. 32, § 28(4) to establish its own retirement system.[4]

We agree with the magistrate that Kravitz, a nonteaching employee of MVRCS, is not eligible for membership in a retirement system for several reasons. First, there is no provision in Chapter 32 that allows membership in a retirement system for nonteaching employees of charter schools. The only provision addressing membership in a retirement system for charter school employees is G.L. c. 71, § 89(y). This provision, however, specifically extends membership in MTRS to teachers employed at charter schools. G.L. c. 71, § 89(y) ("Teachers employed by a charter school shall be subject to the state teacher retirement system under chapter 32 and service in a charter school shall be creditable service within the meaning thereof."). Had the legislature intended to include all charter school employees in public retirement systems, there was ample opportunity to do so.[5] The Legislature has amended Section 89 on many occasions since its enactment,[6] and at no point in nearly three decades was G.L. c. 71, § 89(y) revised to either expand or contract the class of employees eligible for membership in a retirement system. In passing legislation and making amendments, the Legislature is aware of existing statutes and has chosen not to extend membership to nonteaching employees of charter schools. *Hadley v. Amherst*, 372 Mass. 46, 51 (1977) (Courts must assume that legislature was aware of existing statutes at time it enacted statute to be construed); *MacLaurin v. City of Holyoke*, 475 Mass. 231, 244 (2016) (the Legislature is presumed to know the preexisting law). As the DALA decision below correctly recognized, "It is a well-settled rule of statutory interpretation that, when a statute…is re-enacted without

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[3] Petitioner Memorandum at 5.

[4] Petitioner Memorandum at 11-12.

[5] *See Commonwealth v. George W. Prescott Pub. Co., LLC*, 463 Mass. 258, 266 (2012) (statute making certain police reports confidential not construed to extend to search warrant affidavits where Legislature did not so provide explicitly).

[6] Amended by St.1995, c. 38, § 102; St.1996, c. 72; St.1996, c. 151, §§ 223 to 225; St.1997, c. 46, § 2; St. 1997, c. 176, § 1; St.1998, c. 99, § 5; St.2000, c. 227, §§ 1 to 6; St.2002, c. 218, § 14; St.2004, c. 352, § 31, eff. Sept. 17, 2004; St.2010, c. 12, § 7, eff. Jan. 19, 2010; St.2010, c. 131, § 51, eff. July 1, 2010; St.2011, c. 199, § 3, eff. July 1, 2012; St.2014, c. 283, § 4, eff. Nov. 9, 2014; St.2017, c. 138, §§ 28 to 32, eff. Feb. 20, 2018; St.2019, c. 41, §§ 36 to 38, eff. July 1, 2019; St.2022, c.126, § 34 as amended by St.2022, c. 268, § 243, eff. July 1, 2022.

material change by the Legislature, it is presumed to have adopted the judicial construction put upon it. The doctrine of *stare decisis* is supported by legislative approval." *Nichols v. Vaughan*, 217 Mass. 548, 551 (1914). "Statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature…" *Commonwealth v. Hatch*, 438 Mass. 618, 622 (2003). The Legislature made a plain choice to limit creditable service to teachers employed by a charter school. We will not read words into the statute that the Legislature did not provide.

> Furthermore, under G.L. c. 32, § 3(5), prior creditable service may be purchased by:
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> Any member of any system who had rendered service as an employee of any governmental unit other than that by which he is presently employed, for any previous period during which the first governmental unit had no contributory retirement system or during which he had inchoate rights to a non-contributory pension or in a position which was not subject to an existing retirement system, or which was specifically excluded therefrom but which would be covered under the law now in effect.

Id. (in pertinent part, emphasis added). In *Whipple v. Mass Teachers' Ret. Syst*., CR-07-1136 (CRAB Dec. 19, 2014), CRAB did not view the phrasing of G.L. c. 71, § 89(y) as modifying § 3(5). CRAB highlighted that the second phrase ("and service in a charter school shall be creditable service") in the applicable portion of § 89(y), is a clarification of what is meant by "subject to the state teacher retirement system," to emphasize that such teachers may both join and receive creditable service for their work in a charter school. CRAB did not infer from the inclusion of that phrase an intent to permit purchase of creditable service outside the requirements of G.L. c. 32, § 3(5). If the Legislature had intended to amend the retirement law's provisions concerning purchase of creditable service, it could have done so explicitly.[7] We do not believe there was any intention on the part of the Legislature to allow the vast array of individuals, in this case nonteaching employees of MVRCS, to be eligible for membership in a retirement system without specifying it. It is CRAB's duty to effectuate the Legislature's intent in enacting the provisions of chapter 32. *Ret. Bd. of Stoneham v. Mass. Tchrs.' Ret. Sys.*, 99 Mass. App. Ct. 1111, *3 (2021) ("CRAB has the authority to address

[7] See *Commonwealth v. George W. Prescott Pub. Co., LLC*, 463 Mass. 258, 266 (2012) (statute making certain police reports confidential not construed to extend to search warrant affidavits where Legislature did not so provide explicitly).

questions of law pertaining to the application of [G.L. c. 32].”). Thus, CRAB concluded in *Whipple* that only teachers who are employed by the charter school's trustees are eligible to join the MTRS or to purchase prior creditable service for charter school teaching under G.L. c. 71, § 89(y).

Additionally, we note that over the past 30 years, the Legislature has consistently afforded teachers credit for past service, including but not limited to out-of-state service and nonpublic school service. (See G.L. c. 32, § 4(1)(f); § 4(1)(f ½); § 4(1)(g ½); 4(1)(g ¾); 4(1)(h ½); 4(1)(l ½); 4(1)(p)). Our decision maintains the consistency of treatment of teachers by the Legislature.

While Section 89(y) is silent as to other employees of a charter school, PERAC determined that this provision explicitly limits membership in a retirement system to teachers of charter schools. [8] PERAC’s interpretation (or its predecessor PERA) has not changed. “Statutory silence, like statutory ambiguity, often requires that an agency give clarity to an issue necessarily implicated by the statute but either not addressed by the Legislature or delegated to the super expertise of agency administrators.” *Goldberg v. Board of Health of Granby*, 44 Mass. 627, 634, 830 N.E.2d 207 (2005). PERAC is the agency that has the general responsibility for the efficient administration of the public employee retirement system under Chapter 32. G.L. c. 7, § 50. “The interpretation of a statute by the agency charged with primary responsibility for administering it is entitled to substantial deference." *Moore v. Boston Retirement Bd.*, CR-12-73, at *9 (DALA Oct. 9, 2015) (citing *Alves 's Case*, 451 Mass. 171, 173 (2008)). The Appeals Court in *Barnstable Cty. Ret. Bd. v. Contributory Retirement Appeal Bd.*, 43 Mass. App. Ct. 341, 345 (1997), explained that “PERA ha[s] considerable leeway in interpreting a statute it is charged with enforcing.” Here, we afford PERAC substantial deference in its interpretation. We have no reason to believe that PERAC’s interpretation of Section 89(y) is unreasonable nor that it should be overturned.

While CRAB has not directly addressed membership in a retirement system for non-teaching employees of charter schools, DALA has dealt with this issue and has concurred with PERAC that membership in a retirement system is extended only to teachers employed by charter schools. *Flanagan v. State Bd. of Retirement*, CR-15-650 (DALA Aug. 11, 2017);

[8] PERAC Letter July 25, 1995.

Jacobson v. State Bd. of Retirement, CR- 06-669 (DALA Nov. 6, 2009); *Sarapas v. Plymouth Cty. Ret. Syst.*, CR-19-616 (DALA Sept. 16, 2022); and *Belanger v. MTRS*, CR-16-120 (DALA Feb. 8, 2019). [9] "The legal rights and obligations of charter schools and their employees are specifically established throughout Section 89. Section 89(y) provides that teachers, and only teachers, will be members of a contributory retirement system and earn creditable service." *Flanagan* at *3.[10] We are hesitant to change the long-standing interpretation of the statute by PERAC and DALA. *Rosing v. Teachers' Ret. Syst.*, 458 Mass. 283, 294. Any change in interpretation is best left for the Legislature to address. *Id*.

Further, we believe that this interpretation to limit membership in MTRS to teachers employed by a charter school maintains the overall statutory purpose of a contributory retirement system. Extending membership to MSERS of nonteaching employees of charter schools creates a financial burden on that retirement system. The burden occurs because that retirement system does not receive a corresponding employer contribution from a previous unit, but nevertheless must provide a superannuation retirement allowance as if it had. Not extending membership to nonteaching employees will maintain the statutory purpose of financial stability of the public pension system. Protecting the fiscal integrity of the contributory retirement system will ensure the availability of a pension for members.

In addressing MVRCS's argument that it should be allowed to establish its own retirement system pursuant to § 28(4),[11] we agree with PERAC that charter schools cannot

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[9] Although these matters were not appealed to CRAB, administrative decisions "have at least some precedential value." *Cain v. Milton Ret. Bd.*, CR-12-573 (Div. of Admin. Law. App. Feb. 19, 2016). *See e.g.*, *MCI WorldCom Communications, Inc. v. Department of Telecommunications and Energy*, 442 Mass. 103, 116 (2004) (regulatory agencies should follow "reasoned consistency") (internal quotation marks and citation omitted).

[10] *See e.g. Whipple supra* note 2; *Jacobson v. State Bd. of Ret.*, CR-06-669 (Div. of Admin. Law App., Nov. 6, 2009); *Sarapas v. Plymouth Cty. Ret. Sys.*, CR-19-616 (Div. of Admin. Law App., Sept. 16, 2022); and *Belanger v. Mass. Teachers' Ret. Sys.*, CR-16-120 (Div. of Admin. Law App., Feb. 8, 2019).

[11] G.L. c. 32, § 28(4) provides (in pertinent part):

"(a) Any district, all or part of which lies within the territory of any city or town which maintains or has adopted a contributory retirement system for its employees under the applicable provisions of sections one to twenty-eight inclusive, or any district which is located in two or more cities or towns, at least one of which has accepted the applicable provisions of such sections or corresponding provisions of earlier laws, or any district the cities and towns of which are located in more than one county, *may provide retirement benefits for its*

utilize this section and petition to establish its own retirement system under Chapter 32. In establishing charter schools, the Legislature intended it to be a blend of the public and private sectors that operate as "laboratories" allowing for "innovation" and "creativity." St. 1993, c. 71, § 55. *See generally Doe v. Secretary of Education*, 479 Mass. 375, 377 (2018). While G.L. c. 71, §§ 89(u) and 89 (y) provide that employees of a charter school are considered public employees for the purposes of tort liability, collective bargaining, and the conflict of interest law under Chapter 268A and that trustees must follow the Commonwealth's open meeting law,[12] Section 89(k)(8) provides that charter schools are "to have such other powers available to a business corporation formed under chapter 156B that are not inconsistent with this chapter." Pursuant to G.L. c. 156B, § 9(1),[13] charter schools may establish its own pension plans since they have that power available to them, rather than petition to establish a retirement system under G.L. c. 32, § 28(4). Moreover, because charter schools are often managed by private companies and its management can vary considerably, the charter schools may not accept the provisions of G.L. c. 32, §§ 1-28 as required by Section 28(4) to establish such a retirement system, further lending support for PERAC's determination that charter schools may not establish its own retirement system.

The other determining factor in denying MVRCS's petition to establish a retirement system pursuant to Section 28(4) is the tax implications placed upon MSERS. We have already determined that private sector employees cannot participate in a public retirement plan. *See Whipple* at *11 ("[P]ersons not employed by a government entity may not join a governmental plan even if they provide a public or governmental service."). As PERAC argued, the public sector plan loses its federal tax qualification status if private sector employees are allowed to join a public sector plan. CRAB previously stated that:

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employees if such district by a vote duly recorded shall accept sections one to twenty-eight inclusive…"

[12] 603 C.M.R. 1.06(2)(d).

[13] G.L. c. 71, § 91(1) provides (in pertinent part) that corporations have the power:

"to pay pensions, establish and carry out pension, profit-sharing, share bonus, share purchase, share option, savings, thrift and other retirement, incentive and benefit plans, trusts and provisions for any or all of its directors, officers and employees, and for any or all of the directors, officers and employees of any corporation, fifty percent or more of the shares of which outstanding and entitled to vote on the election of directors are owned, directly or indirectly, but it…"

> "[g]overnmental plans qualify for pre-tax contributions and deferred federal taxes as long as they meet [the rule that all members of a governmental plan must be employed by a governmental entity] and other requirements. Such plans are free of many rules imposed on non-governmental plans under the IRC and ERISA, including certain restrictions on benefit structures, vesting schedules, funding levels, insurance, employer contributions, and service purchases. Especially as to the exemptions relating to funding levels and insurance to protect members in the case a plan is terminated, the requirement that the employer be an entity of federal, state, or local government helps ensure that the obligations owed to members may be fulfilled, if necessary, through the government's power of taxation."

Whipple at *12 (citing Determination of Governmental Plan Status, 76 Fed. Reg. 69172, 69177-69178 (Nov. 8, 2011). Because charter schools have varying management practices which will affect MSERS's tax qualification, factual issues will most certainly arise in this process for DALA and CRAB to resolve. Here, the Legislature is in the best position to address this particular issue. We, therefore, decline to disturb PERAC's decision to deny MVRCS's request to establish its own retirement system pursuant to G.L. c. 32, § 28(4).

Conclusion. The decision of the DALA magistrate is affirmed.

SO ORDERED.

CONTRIBUTORY RETIREMENT APPEAL BOARD

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