COMMONWEALTH OF MASSACHUSETTS

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| Suffolk, ss. | **Division of Administrative Law Appeals** |
| **Claire Niven-Blowers**, Petitioner v.**State Board of Retirement**, Respondent | Docket No. CR-15-61Date Issued: August 5, 2016 |

**Appearance for Petitioner:**

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**Administrative Magistrate:**

Bonney Cashin

**SUMMARY OF DECISION**

The petitioner may purchase her contract service at Bunker Hill Community College as creditable service because she has more than ten years of creditable service with the State Employees Retirement System and her contract position was substantially similar to and immediately preceded her member employment. The State Board of Retirement erred when it determined that she offered insufficient information about her period of contract service and her rate of compensation. G.L. c. 32, § 4(1)(s); 941 CMR 2.09(5)(d).

**DECISION**

 Clare Niven-Blowers appeals, pursuant to G.L. c. 32, §16(4), from a decision of the State Board of Retirement to take no action on her request to purchase contract service as creditable service under G.L. c. 32, §4(1)(s).

I held a hearing at the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts, on July 7, 2015. The parties submitted pre-hearing memoranda. I admitted into evidence twenty-one exhibits. (Exs. 1-21.)

Ms. Niven-Blowers testified on her own behalf. She also offered testimony from David Dow. The Board called no witnesses. I made a digital recording of the hearing. The parties made their arguments at the conclusion of the hearing and otherwise relied on their written submissions.

At the hearing, Ms. Niven-Blowers brought a motion for an expedited decision, seeking a decision before her August 22, 2015 anticipated retirement date. Following a July 23, 2015 telephone conference, the parties submitted memoranda on the motion. I denied the motion on August 13, 2015; a brief discussion of the denial is included below.

**FINDINGS OF FACT**

Based on the evidence in the record and the reasonable inferences from it as well as witness credibility, I make the following findings of fact:

1. Ms. Niven-Blowers was born in 1949. (Ex. 18.)
2. Ms. Niven-Blowers graduated from Bunker Hill Community College (BHCC) in 1978 with an associate’s degree. (Niven-Blowers Testimony.)
3. While at BHCC, Ms. Niven-Blowers completed courses through BHCC’s Learning Center, now known as the Center for Individualized Instruction (Learning Center). (Niven-Blowers Testimony; Dow Testimony.)
4. The Learning Center offers courses for students to complete at their own pace. Students are expected to spend the same amount of time each week on a Learning Center course that they would on a traditional classroom course. Learning Center courses now are conducted online with lecture videos and assessments. When Ms. Niven-Blowers took courses at the Learning Center, they were conducted through audio and video lectures and paper assessments held in a specific facility on the BHCC campus. (Niven-Blowers Testimony.)
5. In 1982, Ms. Niven-Blowers graduated from Tufts University with a bachelor’s degree in psychology. (Niven-Blowers Testimony.)
6. On September 1, 1982, Ms. Niven-Blowers began working part-time at BHCC’s Learning Center. (Exs. 9, 11, 14, 15; Niven-Blowers Testimony.)
7. Ms. Niven-Blowers worked 30 hours per week, with a schedule of 9:00 a.m. to 3:00 p.m. on Monday-Wednesday and Friday, and 3:00 p.m. to 9:00 p.m. on Thursday. She was paid $4.00 per hour for her part-time work. (Ex. 3; Niven-Blowers Testimony; Dow Testimony.)
8. Ms. Niven-Blowers’s duties as a part-time employee working in the Learning Center included:
* Monitoring the Center while students watched videos or listened to audio lectures.
* Keeping track of student attendance.
* Making sure students received test results.
* Performing subject area specialist work in psychology.

(Niven-Blowers Testimony.)

1. On one occasion each week, Ms. Niven-Blowers was required to perform duties in the Learning Center’s testing room, including distributing and grading tests. (Niven-Blowers Testimony.)
2. Ms. Niven-Blowers did not administer departmental challenge examinations or maintain test stock as a part-time employee. (Niven-Blowers Testimony.)
3. According to W-2s she received from the Commonwealth of Massachusetts and BHCC, Ms. Niven-Blowers earned $5,272.75 in 1984 from her employment at BHCC. At a contracted rate of $4.00 per hour, this equals approximately 1,318 hours of work, or roughly 44 weeks at 30 hours per week. (Exs. 3, 20.)
4. Ms. Niven-Blowers’s W-2s show two different employer identification numbers, suggesting multiple sources for her wages in 1984. (Ex. 20.)
5. The funding for the Learning Center’s part-time employees came from three different sources: 1) a part-time general monies account set aside each year by BHCC; 2) funds for day and evening programs from the Department of Continuing Education; and 3) money received as grants. (Niven-Blowers Testimony; Dow Testimony.)
6. On January 20, 1985, Ms. Niven-Blowers began working at BHCC full-time as a Testing Room Coordinator. This position was newly-created when she applied for it. (Exs. 7, 10; Niven-Blowers Testimony.)
7. The job description for the Testing Room Coordinator provides:

The Testing Room Coordinator position requires a mature and responsible person capable of monitoring a steady flow of students, while maintaining tight test security and student discipline while testing. The Testing Room Coordinator is responsible for establishing multiple forms of Tests in the criterion-reference-format, the implementation of tests for revised and new courses, for the administration and scoring of all tests for all Learning Center testing, for scheduling and processing departmental challenge examinations, and for the supervision of all Testing Room support staff. The position also requires a number of associated duties: updating student record cards, maintaining proper test stock, maintaining an orderly test-taken file, and assisting the Director of the Learning Center in any way as needs arise in the operation of programs in the Learning Center.

(Ex. 4.)

1. On February 7, 1985, Ms. Niven-Blowers enrolled with the Board as a member of the State Employee Retirement System (SERS). (Ex. 10.)
2. On June 28, 1985, Ms. Niven-Blowers wrote a memorandum to her supervisor describing her duties as a Testing Room Coordinator as follows:

Monitor students in the testing room while maintaining test security and student discipline.

Implementation of tests for revised and new courses.

Administer and score tests for all Learning Center courses.

Schedule and process departmental challenge examinations.

Supervision of all Testing Room Support staff.

Update student records, maintain appropriate test stock, maintain test-taken file.

Assist Director of Learning Center as needed.

Continue to facilitate Behavioral Science and related courses.

(Ex. 6.)

1. Ms. Niven-Blowers transitioned from her part-time position to her full time position with no interruption. Her job duties overlapped between the two positions and she assumed some additional responsibilities. (Ex. 17; Niven-Blowers Testimony.)
2. On August 31, 1990, Ms. Niven-Blowers ended her employment at BHCC. She began employment at Cape Cod Community College (CCCC) on September 5, 1990, where she was employed until her anticipated retirement date of August 22, 2015. (Exs. 8, 18.)
3. On February 26, 2002, Ms. Niven-Blowers submitted an application to the Board to purchase creditable service for her part-time contract service at BHCC from 1982 to 1985. (Ex. 9.)
4. On March 27, 2002, the Board sent a letter to BHCC requesting verification of Ms. Niven-Blowers’s annual rates of compensation for the period of September 1, 1982 to June 30, 1985. Lillian Mauriello of BHCC verified the following annual rates: $15,678.52 from January 20, 1985 to June 1, 1985; $20,112.00 from June 2, 1985 to September 30, 1985; and $20,514.00 from October 1, 1985 to June 30, 1985.[[1]](#footnote-1) (Ex. 11.)
5. On April 5, 2002, the Board sent Ms. Niven-Blowers a letter approving her purchase of creditable service for her employment with BHCC from January 20 to June 30, 1985. (Ex. 12.)
6. On July 12, 2005, the Board sent Ms. Niven-Blowers a letter notifying her that it could not complete her purchase of service at BHCC from January 1, 1982 to January 19, 1985, because BHCC had failed to respond to the Board’s multiple requests for verification of her service and salary. (Ex. 13.)
7. On October 18, 2006, Ms. Niven-Blowers submitted another request to purchase creditable service for her contract service with BHCC from 1982 to January 1985. (Ex. 14.)
8. On October 17, 2014, Ms. Niven-Blowers submitted a request to purchase creditable service for her contract service with BHCC from January 1982 to December 1985. Section B of the request form was completed by Robin L. Preston, Payroll Manager of BHCC. Ms. Preston indicated that she was “unable to locate information for part-time service prior to January 20, 1985.” (Ex. 15.)
9. BHCC’s records of part-time employees prior to January 20, 1985 were lost or destroyed sometime after June of 2000 when Mr. Dow left his position as Director of the Learning Center. (Dow Testimony; Niven-Blowers Testimony.)
10. Mr. Dow’s responsibilities included payroll record-keeping for part-time employees. He picked up the checks and recorded the employee’s name, check amount and check number in a ledger. He turned over these records to the incoming director when he left his position at the Learning Center in June 2000. (Dow Testimony.)
11. On December 12, 2014, the Board sent Ms. Niven-Blowers a letter notifying her of its inability to process her October 2014 request for creditable service purchase because it had received no contracts, payroll records, or other documentation to establish her creditable service or rates of compensation. (Ex. 16.)
12. On January 15, 2015, Ms. Niven-Blowers responded to the Board, explaining that she was seeking creditable service for January 1982 through January 19, 1985 and neither she nor the IRS had her tax returns for 1982 or 1983. She also described her communications with the Board during 2014. (Ex. 17.)
13. Ms. Niven-Blowers has over 30 years of state creditable service. (Ex. 18; Niven-Blowers Testimony.)
14. On January 16, 2015, Ms. Niven-Blowers submitted to the Board a superannuation retirement application, seeking to retire on March 21, 2015. (Ex. 18.)
15. The Board voted to take no action regarding Ms. Niven-Blowers's request to purchase her contract service and so notified her by letter dated February 3, 2015. (Ex. 1).
16. On February 17, 2015, Ms. Niven-Blowers appealed the Board's decision to the Division of Administrative Law Appeals. (Ex. 2).
17. On March 17, 2015, Ms. Niven-Blowers sent a letter to the Board seeking to withdraw her retirement application, citing her pending appeal. (Ex. 19.)
18. As of July 7, 2015, Ms. Niven-Blowers planned to retire on August 22, 2015.

**DISCUSSION**

After consideration of the evidence presented in this case, the Board’s decision not to include in Ms. Niven-Blowers’s regular compensation the pay she received as a contract employee is reversed.

G.L. c. 32, § 4(1)(s) allows eligible members in service of the SERS to purchase up to four years of state contract service as creditable service, provided they meet certain criteria. G.L. c. 32, § 4(1)(s) provides in pertinent part that:

Any member in service of the state employees' retirement system who, immediately preceding the establishment of membership in that system or re-entry into active service in that system, was compensated for service to the commonwealth as a contract employee for any department, agency, board or commission of the commonwealth may establish as creditable service up to 4 years of that service, if the member has 10 years of creditable service with the state employees' retirement system, and if the job description of the member in the position which the member holds upon entry into service or re-entry into active service is substantially similar to the job description of the position for which the member was compensated as a contract employee.

Ms. Niven-Blowers’s Motion for an Expedited Decision

 At the hearing that I held on July 7, 2015, Ms. Niven-Blowers brought a Motion for an Expedited Decision on the basis that the issue of whether she is eligible to purchase her contract service pursuant to G.L. c. 32, § 4(1)(s) must be resolved before she can retire. She planned to retire on August 22, 2015, following surgery on July 8, 2015 and medical leave.

 Chapter 32, § 4(1)(s) clearly states that “[a]ny *member in service* of the state employees’ retirement system…may establish as creditable service up to 4 years of [contract employee] service....” G.L. c. 32, § 4(1)(s) (emphasis added). The retirement statute defines “member in service” as “[a]ny member who is regularly employed in the performance of his duties....” G.L. c. 32, § 3(1)(a)(i). Ms. Niven-Blowers reads the statute to require that the member be a member in service at the time of the purchase of the creditable service. It is her understanding that once she retires, she can no longer receive additional creditable service, even if she requested to purchase such service prior to her retirement.

 The Board’s regulations at 941 CMR 2.00 provide additional insight and clarification about the mechanics and requirements of purchasing service under c. 32, § 4(1)(s). In particular, 941 CMR 2.09(3)(a) states:

Membership Service Requirement. The individual *seeking to purchase contract service* must currently be a member in service of the MSERS with at least ten years of creditable service arising exclusively from employment with the Commonwealth as a member of the MSERS.

(Emphasis added).

 Additionally, 941 CMR 2.09(2) defines “member in service” as “any member of the MSERS who *at the time of a contract service purchase request* is regularly employed in the performance of his or her duties as detailed in M.G.L. c. 32, § 3(1)(i).” (Emphasis added).

 Taken together, 941 CMR 2.09(2) and (3) clearly provide that it is the member’s status at the time of the purchase request, and not at the time of the purchase itself, that ultimately controls her eligibility to purchase contract service. Therefore, as long as a member is regularly employed in the performance of her duties, as set forth in G.L. c. 32, § 3(1)(a)(i), at the time of her request to purchase creditable service under G.L. c. 32, § 4(1)(s), she is entitled to purchase such service.

 Ms. Niven-Blowers’s requested to purchase creditable service under G.L. c. 32, § 4(1)(s) on October 17, 2014. She was an active member in service at that time, and so is eligible to purchase the desired service, regardless of any subsequent retirement. Therefore, there is no need for an expedited decision; Ms. Niven-Blowers may retire while a final resolution in this case is pending and not lose her claim to the service.

Ms. Niven-Blowers’s Eligibility for Creditable Service Pursuant to G.L. c. 32, § 4(1)(s)

As previously stated, G.L. c. 32, s. 4(1)(s) allows eligible members in service of the SERS to purchase up to four years of state contract service as creditable service, provided they have 10 years of creditable service and the position they held upon entry into service is substantially similar to the job description of the contract position for which the service is being sought.

An eligible member must purchase such creditable service through “makeup payments of an amount equal to that which would have been withheld as regular deductions for the service as a contract employee if the service had been rendered as a state employee and the member had been a member of the state employees' retirement system...plus buyback interest on that amount.” G.L. c. 32, § 4(1)(s).

The Board’s regulations at 941 CMR 2.00 provide additional clarification about purchasing contract service as creditable service:

(5) Purchasing Contract Service as Creditable Service, if the Member is Found Eligible.

. . .

(d) Salary Information Used to Determine Cost to Purchase Service. Board staff may utilize salary information when an individual became a member of the MSERS for purposes of determining a contract service buy back if no satisfactory salary information becomes available.

941 CMR 2.09(5)(d).

The evidence presented shows that Ms. Niven-Blowers has more than the required ten years of creditable service. In addition, I find that Ms. Niven-Blowers has presented sufficient credible evidence that the job description of the part-time position for which she seeks creditable service was substantially similar to her job description as a full-time Testing Room Coordinator and that her part-time contract position immediately preceded her SERS membership. Thus the only remaining issues to be decided are her dates of service as a part-time contract employee and her compensation during that time.

The Board argues that it has not been provided with enough information to verify Ms. Niven-Blowers’s dates of contract service, or even if a contractual employment relationship between she and BHCC ever existed, and it, therefore, is unable to determine whether she is eligible to purchase creditable service under G.L. c. 32, § 4(1)(s). Despite the Board’s arguments, I find that Ms. Niven-Blowers has provided sufficient evidence for the Board to make a determination as to her dates of contract service and the relevant compensation she received.

The testimony of Ms. Niven-Blowers and Mr. Dow confirm that Ms. Niven-Blowers worked 30 hours per week as a contract employee for the Learning Center from January 1, 1982 to January 19, 1985. Her employment is also confirmed by the employment request form from 1984 (Ex. 3) and her W-2s from 1984 (Ex. 20). I therefore conclude that Ms. Niven-Blowers was indeed employed as a contract employee for 30 hours a week from January 1, 1982 to January 19, 1985.

The best available evidence of Ms. Niven-Blowers’s compensation during her period of contract employment is the employment request from 1984, which lists her rate of pay as $4.00 per hour. Ms. Niven-Blowers confirmed that this was her hourly salary as a contract employee. This rate was further confirmed by Mr. Dow, who testified that all part-time contract employees at the Learning Center earned $4.00 per hour. From this evidence, I conclude that Ms. Niven-Blowers earned $4.00 per hour during her contract employment with the Learning Center.

According to her W-2 forms, Ms. Niven-Blowers earned $5,272.75 in 1984 from her employment at BHCC. At a contracted rate of $4.00 per hour, this equals approximately 1,318 hours of work, or roughly 44 weeks at 30 hours per week. This calculation may be used to determine the number of weeks Ms. Niven-Blowers worked in 1982 and 1983. Using this known figure for her yearly salary protects the Board’s fiduciary concerns and allows Ms. Niven-Blowers to purchase her service based on an approximation of the number of weeks she worked in 1982 and 1983. *See Gould v. Teachers’ Ret. Sys.*, CR-09-520 (Div. of Admin. Law App. Apr. 17, 2015).

**CONCLUSION AND ORDER**

In conclusion, the Petitioner is entitled to creditable service for her contract employment from January 1, 1982 to January 19, 1985. The Board’s decision is therefore reversed, and it is ordered to process her application for creditable service.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Bonney Cashin

Administrative Magistrate

DATED: August 5, 2016

1. This date was written as “6/30/85,” but based on the preceding periods listed, it is possible that Ms. Mauriello intended to write “6/30/86.” In any event, the correct reading of this date has no bearing on the outcome of this appeal. [↑](#footnote-ref-1)