COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Brian Philpot,
Petitioner

v.

Docket No.: CR-21-0379
Date Issued: Oct. 13, 2023

State Board of Retirement,
Respondent

Appearance for Petitioner:

Brian Philpot, *pro se*

Appearance for Respondent:

Brendan McGough, Esq.
State Board of Retirement
1 Winter Street, 8th floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF DECISION

The Petitioner is not entitled to purchase contract service for his employment at Adept, Inc. and McInnis Consulting working on DESE projects because he was not a "contract employee" pursuant to G.L. c. 32, § 4(1)(s), but instead worked for third-party for-profit private contractors that were not instrumentalities of the Commonwealth, and the work he performed was on specific and defined projects for which his employers were selected. *See* 941 CMR 2.09(3)(c) (2013). Additionally, he is barred from purchasing his Adept, Inc. service because he received retirement benefits for his work. *Id.*

DECISION

Petitioner Brian Philpot timely appeals, under G.L. c. 32, § 16(4), the decision of the State Board of Retirement to deny his application to purchase certain contract service

from July 25, 2000 to November 13, 2010 because he was paid by a third-party contractor.

I held a hearing by Webex video conference on October 4, 2023 at the Division of Administrative Law Appeals, 14 Summer Street, Malden, Massachusetts. It was digitally recorded. I admitted 6 documents into evidence. (Exs. P1-P3, R1-R3.) I also entered Business Entity Summaries for Mr. Philpot's former employers from the Secretary of State's website, with neither party objecting. (Ex. A.) Mr. Philpot testified on his own behalf. The Board called no witnesses. The parties made oral closing arguments, whereupon the administrative record closed.

FINDINGS OF FACT

Based on the record evidence, I make the following findings of fact:

1. Brian Philpot, born in 1971, is employed at the Department of Elementary and Secondary Education (DESE). He began there on November 15, 2010. (Testimony; Ex. R3.)

2. Before he worked for DESE, he worked for two for-profit companies that had contracts with DESE to provide computer consulting services. Under the contracts, DESE paid the companies, and then the companies paid Mr. Philpot a percentage of the contract payment, keeping the difference as profit. (Testimony; Ex. R3.)

3. From July 23, 2000 to August 31, 2005, Mr. Philpot worked for Adept, Inc. He was paid directly by Adept, Inc. through a series of one-year contracts. He worked on several discrete software development projects, including establishing online meetings and developing school software and web applications. (Testimony; Ex. R3.)

4. When he worked for Adept, Inc., Mr. Philpot received health insurance and participated in a 401(k) retirement account. (Testimony.)

5. At the conclusion of those projects for Adept, Inc., he stopped working at DESE and worked full-time for Hewlett Packard for approximately 18 months. (Testimony.)

6. Then, DESE contacted Mr. Philpot to see if he was available to work on some more web applications. Mr. Philpot responded that he was available to come back. DESE directed Mr. Philpot to contact McInnis Consulting Services Corp. to sign a one-year contract to work on the projects. (Testimony; Ex. R3.)

7. Mr. Philpot signed a series of further one-year contracts, continuing to work for McInnis Consulting for a total of 46 months. (Testimony; Ex. R3.)

8. McInnis Consulting was not as generous as Adept, Inc. Mr. Philpot did not receive health insurance or any retirement benefits. (Testimony.)

9. Both Adept, Inc. and McInnis Consulting are registered with the Secretary of State as for-profit businesses. Neither was created by the Legislature. (Testimony; Ex. A.)

10. At the conclusion of his work at McInnis Consulting, he was offered a position working directly for DESE as a full-time state employee. This meant that he would take an approximately 25% pay cut from his consulting job, but he knew he was eligible for better benefits, which he thought might include the purchase of service credit for some of his consulting work for DESE. (Testimony.)

11. When Mr. Philpot started working, he received a letter from DESE informing him that he would receive "creditable service" for his consulting positions.

DESE's use of the term "creditable service" in this context was meant to keep track of years that count toward vacation benefits. DESE decided to credit Mr. Philpot with the years that he worked for the two consultants for the purpose of calculating his vacation benefit. I conclude that DESE did not mean to represent that Mr. Philpot was entitled to "creditable service" as that term is defined under the contributory retirement law, as DESE has no authority to grant retirement benefits. (Ex. R3.)

12. Mr. Philpot worked for DESE for more than 10 years. (Testimony; Ex. R3.)

13. On November 14, 2020, Mr. Philpot applied to purchase service credit under G.L. c. 32, § 4(1)(s) for his employment at Adept, Inc. and McInnis Consulting. The employer portion of the application was filled out by DESE Payroll Director Peggy Mui. (Ex. R3.)

14. In support of his application, Mr. Philpot submitted copies of contracts with his former employers, pay stubs, W-2s, job descriptions, work orders, and correspondence. It took him a considerable amount of time to assemble these records. (Testimony; Ex. R3.)

15. By letter dated September 13, 2021, the Board denied Mr. Philpot's applications. (Exs. P2, R1.)

16. The day after the denial, Ms. Mui sent a letter to the State Board of Retirement, stating the following: "This letter is to confirm that McInnis Consulting functioned as an instrumentality of the Commonwealth of Massachusetts, Department of Elementary and Secondary Education (DESE). Mr. Brian Philpot was instructed to contact Mr. McInnis to [initiate a] work order by DESE on February 6, 2007." (Ex. P3.)

17. On September 15, 2021, Mr. Philpot timely appealed the Board's decision. (Ex. R2.)

CONCLUSION AND ORDER

When a member retires from public service, he may be entitled to a superannuation retirement allowance that is based in part on his years of creditable service. G.L. c. 32, § 5(2)(a). "Creditable service" is defined as "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive." G.L. c. 32, § 1. One form of "other service" that a member may purchase, under certain circumstances, is prior contract service to the Commonwealth. G.L. c. 32, § 4(1)(s) states:

> 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.

(Emphasis added.)

As a general matter, G.L. c. 32, § 4(1)(s) provides a limited opportunity for members to purchase prior contract service when the service was rendered to a department, agency, board, or commission of the Commonwealth. A series of DALA and CRAB decisions establish that it does not allow for the purchase of service based on work for a third-party vendor, even if that work was performed for the Commonwealth. *See, e.g., Hogan v. State Bd. of Retirement*, CR-16-243 (CRAB June 1, 2021); *Seshadri v.*

State Bd. of Retirement, CR-15-62 (DALA Feb. 5, 2016); *Diamantopoulos v. State Bd. of Retirement*, CR-15-253 (DALA Jan. 22, 2016).

In 2011 (amended in 2013), a few years after § 4(1)(s) was enacted, the State Board attempted to clarify what constitutes "contract service" by issuing a regulation. *See* Acts 2006, c. 161, § 1. 941 CMR 2.09(3)(c)[1] provided:

> Service Through a Vendor or Contractor. The contract service being purchased must have been service as a "contract employee" of the Commonwealth. Except only as otherwise set forth in this sub-section members who were employees of a vendor or contractor, which was selected and contracted to provide services to the Commonwealth, are specifically excluded from purchasing contract service as creditable service.
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> The Board may consider as eligible contract service such service provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency. The Board may consider as eligible contract service: (1) such service, as verified by the Board, provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency; or (2) such service, as verified by the Board, provided through a vendor by an individual (a) who was under the supervision and control of a Commonwealth agency or its employees and, (b) which service was performed in the standard and ongoing course of an agency's regular business function, but not including, any such service provided as part of any specific or defined projects of that agency for which a vendor was selected.
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> No credit shall be allowed for any such service provided through a vendor for which the member shall be or is entitled to receive a retirement benefit, allowance, annuity, or pension from any other source.

As an initial matter, the regulation bars the purchase of service credit based on work for a vendor for which the member is entitled to a retirement benefit, annuity, or

[1] Effective March 18, 2022, the Board amended its regulation again. It now limits eligibility for contract service purchases to services provided through a "vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency" (eliminating the provisions of former 941 CMR 2.09(3)(c)(2)). This amendment was adopted after Mr. Philpot submitted his application, so this decision applies the regulation as amended in 2013.

pension from any other source. Mr. Philpot participated in a 401(k) retirement program when he worked for Adept, Inc. Adept made contributions to the retirement account. Therefore, Mr. Philpot is barred from purchasing his Adept, Inc. service.

Next, although the regulation begins with a general prohibition on the purchase of service credit based on work for a vendor or contractor that was selected to provide services to the state, it does provide two exceptions under which the Board may consider such work as "contract service."

The first exception applies if the member's former employer functioned as an instrumentality of the state or one of its agencies. "Instrumentality of the Commonwealth" is not defined in § 4(1)(s) or the Board's regulation. However, CRAB addressed this issue in *Hogan, supra*. There, CRAB ruled that the DALA magistrate's conclusion that the term means a "public agency" or "a public entity created by statute and placed within an existing agency or department of the Commonwealth" was consistent with § 4(1)(s) and was therefore proper. *Id.* at *6.

In the present matter, there is no evidence that Adept, Inc. or McInnis Consulting were created by the Legislature and placed within state government by a provision of the Session Laws or General Laws. In fact, these businesses are no more than garden variety for-profit businesses, registered with the Secretary of State as just that. The businesses' financial arrangements with the Commonwealth support the conclusion that they were not instrumentalities. According to Mr. Philpot, the state paid these businesses under contracts between the businesses and DESE. Then, the business would pay a percentage of that to Mr. Philpot. The business would keep the difference, commonly known as profit. The only evidence Mr. Philpot submitted in support of his instrumentality

argument is a letter from DESE's Payroll Director that stated McInnis Consulting functioned as an "instrumentality of the Commonwealth." This conclusory letter contradicts the case law on this issue and flies in the face of the reality of these businesses. Neither of Mr. Philpot's former employers were instrumentalities of the Commonwealth.

The second exception, which currently is no longer applicable (*see* footnote 1), is service through a vendor where the individual was under the supervision and control of the state and the service was performed in the standard and ongoing course of the agency, but not including service for specific or defined projects of the agency. Both sets of Mr. Philpot's service also fail this exception because he worked on a number of specific computer and web and app development projects under a series of one-year contracts between his employers and the state. When his work under Adept, Inc. was complete his contract was not renewed. His McInnis Consulting work was substantively the same—a series of discrete projects—also performed under one-year contracts. Mr. Philpot's work does not qualify under the second exception.

Mr. Philpot expresses deep frustration over what he considers misrepresentations from DESE, his current employer. When he was presented with the opportunity of becoming a full-time state employee, in late 2010, he was faced with a choice between his consulting job, which paid more but included no benefits, and the state job, which meant a 25% pay cut but would include health insurance and retirement benefits. According to Mr. Philpot, as he was weighing the value of the potential state retirement benefits, someone at DESE told him that he would be able to purchase service credit for some of his "contract work." Now, based on that DESE employee's representations, he

effectively argues that the Board should be estopped from denying his application and an equitable remedy fashioned by DALA. Neither the board nor this tribunal can grant such requests. "Equitable considerations and the doctrine of estoppel do not alter the entitlements that an administrative agency must distribute under an unambiguous statute. The amount of the benefits is governed entirely by G.L. c. 32, and as such may not be enlarged by a [government employee's] error." *Leto v. State Bd. of Retirement*, CR-19-554, at *3 (DALA Nov. 19, 2021) (citations omitted).

For the above stated reasons, Mr. Philpot is not entitled to purchase service credit for his work for either third-party vendor. The Board's decision is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Oct. 13, 2023