

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Judy Racow,
Petitioner,

No. CR-20-492

Dated: March 25, 2022

v.

Winthrop Retirement Board,
Respondent.

Appearance for Petitioner:

Judy Racow (pro se)
140 Somerset Avenue
Winthrop, MA 02152

Appearance for Respondent:

Michael Sacco, Esq.
P.O. Box 479
Southampton, MA 01073

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

In light of *Plymouth Ret. Bd. v. Contributory Ret. Appeals Bd.*, 483 Mass. 600 (2019), the respondent retirement board was correct to collect payment from a police officer who sought credit for prior reserve service. This administrative tribunal lacks authority to take up the officer's claim that other officers received similar credit at no cost.

DECISION

Petitioner Judy Racow appeals from a decision of the Winthrop Retirement Board confirming her obligation to pay for credit in connection with her prior service as a reserve officer. The board moves for summary decision. 801 C.M.R. § 1.01(7)(h). Disposition of that motion without a hearing would best serve the public interest. *Id.* § 1.01(7)(a)(1)-(2). The summary decision record consists of exhibits 1-12 attached to the board's motion and exhibits 1-2 (relabeled P1-P2 in DALA's file) attached to Ms. Racow's response.

Findings of Fact

The following facts are undisputed.

1. Ms. Racow served as a Winthrop police officer until her retirement in 2020. For eighteen months, from August 1993 to January 1995, she was a “reserve” officer. Thereafter, she became a permanent, full-time officer. (Exhibits 3, 5, 11.)

2. In 2001, Ms. Racow purchased credit for her prior reserve service, making instalment payments totaling \$1,385.30. The board refunded that amount to Ms. Racow in 2005, having adopted the view that prior reserve service is creditable at no charge. (Exhibits 4-6.)

3. In 2019, the Supreme Judicial Court held that prior reserve service must be purchased in accordance with G.L. c. 32, § 4(2)(c). *Plymouth Ret. Bd. v. Contributory Ret. Appeals Bd.*, 483 Mass. 600 (2019). The board therefore concluded that its refund to Ms. Racow had been erroneous. Ms. Racow reaffirmed her wish to purchase her prior reserve service, and she did so, including interest for the years since her original payment. (Exhibits 7-10.)

4. In November 2020, Ms. Racow contacted the board to complain that other officers, even post-2019, were not charged for credit in connection with their prior reserve service. The board offered Ms. Racow no relief, and she timely appealed. (Exhibits 1, 2, 12.)¹

Analysis

The retirement allowance of a Massachusetts public employee is based in part on the duration of the employee’s “creditable service.” Ordinarily, creditable service spans the employee’s work for governmental units after becoming a member of a Massachusetts retirement

¹ Prior pertinent communications from the board did not state Ms. Racow’s appellate rights. *See Barnstable Cty. Ret. Bd. v. PERAC*, No. CR-07-163 (CRAB Feb. 17, 2012).

system. However, certain statutory provisions permit employees to purchase credit for work that otherwise would not count.

One such provision is G.L. c. 32, § 4(2)(b), which concerns work in “part-time, provisional, temporary . . . seasonal or intermittent” roles. Section 4(2)(b) specifically authorizes purchases of service by reserve police officers who later become permanent police officers. There is no dispute that this rule covers Ms. Racow.

The question in *Plymouth, supra*, was whether an employee purchasing service under § 4(2)(b) is required to make the payments described in § 4(2)(c), namely “make-up payments of an amount equal to that which would have been withheld as regular deductions . . . together with buyback interest.” The Supreme Judicial Court said yes, explaining that § 4(2)(c) establishes a “payment formula” that the Legislature intended “to apply . . . without exemption to police officers for ‘creditable prior service’ as defined by G.L. c. 32, § 4(2)(b).” 483 Mass. at 604-05.

The board was therefore right to conclude that it had erred in refunding Ms. Racow’s original payment for her prior reserve service. The board also acted appropriately in acting to correct that error. *See* G.L. c. 32, § 20(5)(c)(2).

Ms. Racow’s complaint is that the board granted credit free of charge to other former reserve officers. Her case is constitutional in nature: Ms. Racow does not challenge the legality of the board’s decision under the governing statute; she alleges that a broader board practice has violated her right to equality. *See* Mass. Const. art. 1. But administrative tribunals are powerless to take up constitutional challenges to agencies’ practices. Ms. Racow’s claim belongs in the superior court. *See Naranjo v. Dep’t of Revenue*, 63 Mass. App. Ct. 260, 266 (2005); *Baker v. Dir. of Div. of Unemployment Assistance*, 83 Mass. App. Ct. 1105 (2013) (unpublished

memorandum opinion); *Filkins v. State Bd. of Ret.*, No. CR-11-715, at 15-16 (CRAB Jan. 8, 2020); *Sarno v. MTRS*, No. CR-07-253, at 6-7 (DALA Oct. 29, 2010).²

For the foregoing reasons, there is no genuine dispute as to any material fact, namely any fact that could support a decision in Ms. Racow’s favor. *See Liss v. Studeny*, 450 Mass. 473, 482 (2008). The undisputed facts entitle the board to prevail as a matter of law, and summary decision is therefore warranted. 801 C.M.R. § 1.01(7)(h).

Conclusion and Order

The board’s motion for summary decision is ALLOWED and its decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

² Section 4(2)(c)’s formula yields a payment amount of zero dollars as applied to reserve officers who were not compensated for their service. *See Plymouth*, 483 Mass. at 606 n.4. The board reports through counsel that the Winthrop reserve officers who were granted credit at no cost served without pay, or were treated as if they had so served because Winthrop’s incomplete files for those individuals did not include payment data. This explanation would seem to defuse Ms. Racow’s equal protection claim, in the sense that the individuals treated differently from her apparently were differently situated. *See Moore v. Executive Off. of the Trial Ct.*, 487 Mass. 839, 848 (2021); *Fine v. Contributory Ret. Appeal Bd.*, 401 Mass. 639, 641-43 (1988).