

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Joyce Rodriguez,
Petitioner

v.

Docket No.: CR-21-0366

Date Issued: Feb. 9, 2024

State Board of Retirement,
Respondent

Appearance for Petitioner:

Joyce Rodriguez, *pro se*

Appearance for Respondent:

Yande Lombe, Esq.
State Board of Retirement
1 Winter Street, 8th Floor
Boston, MA 02108

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The petitioner is not entitled to purchase contract service under G.L. c. 32, § 4(1)(s) for her temporary employment at the Massachusetts Rehabilitation Commission. During that period, she was not a contract employee, but was rather an employee of a third-party contracted temp service, ACE Employment Services, Inc., that was not an instrumentality of the Commonwealth. *See* 941 CMR 2.09(3)(c) (2013); *Hogan v. State Bd. of Retirement*, CR-16-243 (CRAB June 1, 2021).

DECISION

Petitioner Joyce Rodriguez timely appeals, under G.L. c. 32, § 16(4), the decision of the State Board of Retirement to deny her application to purchase certain contract

service from August 30, 2004 to December 26, 2004 because she was paid by a third-party contractor.

On October 17, 2022, DALA ordered the parties to file prehearing memoranda. Ms. Rodriguez failed to file her memorandum. Accordingly, DALA ordered her to show cause why the appeal should not be dismissed for her failure to do so. After reviewing her response, on February 23, 2023, DALA suggested that the matter could be decided on written submissions under 801 CMR 1.01(10)(c). Neither party objected. On June 26, 2023, the Board filed a memorandum and 11 proposed exhibits. Ms. Rodriguez filed her memorandum on July 14, 2023 but did not submit any proposed exhibits. I hereby enter the Board's 11 exhibits into evidence as proposed. (Exs. 1-11.)

FINDINGS OF FACT

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

1. Joyce Rodriguez, born in 1946, was employed by the Massachusetts Rehabilitation Commission (“MRC”) beginning on or about December 26, 2004 until September 17, 2021. She became a member of the Massachusetts State Employees’ Retirement System on her first day at the MRC. (Exs. 6, 7, 10; Rodriguez letter Feb. 7, 2023.)

2. Before she was a full-time employee at MRC, Ms. Rodriguez worked at MRC as a temporary employee from August 30, 2004 to December 23, 2004. Her employer was ACE Employment Services, Inc. (“ACE”), a for-profit corporation that provides temporary workers to a variety of employers, including the Commonwealth. She worked 37.5 hours per week for \$15.00 per hour. (Exs. 6, 10.)

3. During the disputed period, Ms. Rodriguez performed the duties of an Accountant I at MRC. Accountant I is the entry-level professional job in the Accountant Series, as defined by the Massachusetts Department of Personnel Administration. Responsibilities of an Accountant I include preparing financial statements, reviewing agency accounting procedures, and conferring with agency personnel. (Exs. 6, 8.)

4. When her temporary position with ACE concluded, MRC hired Ms. Rodriguez to a permanent full-time position. (Ex. 6.)

5. In March 2017, after she had worked at MRC more than ten years, Ms. Rodriguez first requested that her benefit service date (which determines how many vacation days employees get) and her “state date” and “department date” (which determine seniority) be changed to the first date that she worked as a temp: August 30, 2004. (Ex. 2.)

6. On March 23, 2017, MRC informed Ms. Rodriguez that the date changes she requested were granted. The letter also notified her that she may be eligible to purchase her time as a “contracted employee” for retirement purposes. (Exs. 2, 7.)

7. On March 28, 2017, Ms. Rodriguez applied to purchase service credit based on her employment at ACE by filing a “buyback request form.” (Ex. 1.)

8. On October 25, 2017, Ms. Rodriguez submitted another buyback request form for the same service. On February 17, 2021, she filed a “contract service buyback form” to purchase the same service under G.L. c. 32, § 4(1)(s). Then, on June 15, 2021, she filed another contract service buyback form for the same service.¹ On the June 15,

¹ Ms. Rodriguez does not explain why she filed a total of four applications for the same brief period of service.

2021 application she noted, “I was a temporary worker, not a contract worker.” (Exs. 3, 4, 5.)

9. In a letter dated September 17, 2021, the Board denied Ms. Rodriguez’s applications because she was employed by and paid through a vendor, ACE, and was not a “contract employee” of the Commonwealth. (Ex. 10.)

10. On October 1, 2021, Ms. Rodriguez timely appealed the Board’s decision. (Ex. 11; appeal letter envelope.)

CONCLUSION AND ORDER

Ms. Rodriguez is not entitled to purchase the service credit that she seeks. When a member retires from public service, she may be entitled to a superannuation retirement allowance that is based in part on her 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)² 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.

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:

² 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 Ms. Rodriguez submitted her buyback requests, so this decision applies the regulation as amended in 2013.

- (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.

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."

Ms. Rodriguez does not advance any particular argument that she fits either exception. 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. *Hogan, supra*, at *6.

In the present matter, there is no evidence that ACE was created by the Legislature and placed within state government by a provision of the Session Laws or General Laws. ACE's financial arrangements with the Commonwealth support the conclusion that it was not an instrumentality. According to ACE, Ms. Rodriguez worked for ACE on contract at MRC. ACE paid Ms. Rodriguez's wages. It is undisputed that ACE was not an instrumentality of the Commonwealth.

The second exception (which is no longer available under the current regulation (*see* footnote 2) and *Hogan*, *supra*, treats as defunct under its instrumentality analysis) is service through a vendor when 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. The evidence on these points is thin. Even if Ms. Rodriguez performed the duties of an Accountant I during the disputed period, it is unclear who supervised and controlled her work, or whether she was working in the normal course of the agency or was rather working on specific and defined projects for the agency. On the other hand, there is clear evidence that the Commonwealth had a contract with ACE, a general employment agency, to supply workers. ACE supplied Ms. Rodriguez to MRC for approximately four months before she became a full-time employee of MRC. In her application, she even admitted that she was a temporary worker and not a contract worker. She does not qualify for this exception either.

Finally, Ms. Rodriguez alleges that former MRC coworkers informed her that other former temp employees, employed through temp agencies, had been allowed to purchase service from the Board. Ms. Rodriguez provides no names or other details regarding these employees. That colleagues of hers may have been able to purchase similar time does not change the outcome of this case. Ms. Rodriguez is entitled only to what Chapter 32 provides for. *MacLeod v. Teachers' Retirement Sys.*, CR-16-318, Dismissal at *2 (DALA May 17, 2019). A potential error, made in another case, should not be compounded by letting Ms. Rodriguez make a similarly erroneous purchase.

For the above stated reasons, Ms. Rodriguez is not entitled to purchase service credit for her work for ACE. The Board's decision is therefore affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: Feb. 9, 2024