

**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.**

**Division of Administrative Law Appeals**

**Robert Rose,**  
Petitioner,

No. CR-22-0405

Dated: February 2, 2024

v.

**Boston Retirement System,**  
Respondent.

**Appearance for Petitioner:**  
Robert Rose (pro se)

**Appearance for Respondent:**  
Timothy J. Smyth, Esq.

**Administrative Magistrate:**  
Yakov Malkiel

**SUMMARY OF DECISION**

The petitioner worked as a licensed electrician for the Boston Water and Sewer Commission. In that capacity, he was not employed by a city or a town, and therefore would not have qualified for the retirement law's group 2 under G.L. c. 32, § 3(2)(g) standing alone. But the commission's enabling act specifically entitles its employees to be governed by the "same laws, rules and regulations as persons entering the employ of the city [of Boston]." Acts 1977, c. 436, § 5. The petitioner is entitled to group 2 classification under that special provision.

**DECISION**

Petitioner Robert Rose appeals from a decision of the Boston Retirement System denying his request to be classified in group 2 under G.L. c. 32, § 3(2)(g). The board moves for summary decision. 801 C.M.R. § 1.01(7)(h). The deadline for Mr. Rose's response has expired, and disposition of the motion without a hearing would best serve the public interest. *Id.*

§ 1.01(7)(a)(2). The summary decision record consists of exhibits marked A-D and 1-3 in DALA’s case file.<sup>1</sup>

**Facts**

The following facts are not in genuine dispute:

1. Mr. Rose became a Massachusetts public employee in 1990. He worked for the Boston Water and Sewer Commission (BWSC) as a licensed electrician. He has been a member of the respondent retirement system throughout. (Exhibits 1, 2.)

2. In April 2022, Mr. Rose applied to retire for superannuation. In his application, consistent with previous advice from board personnel, he asked to be classified in group 2 under G.L. c. 32, § 3(2)(g). The board instead assigned Mr. Rose to group 1. He timely appealed. (Exhibit C.)<sup>2</sup>

**Analysis**

The retirement benefits of a Massachusetts public employee are based in part on the employee’s classification into one of four groups. *See* G.L. c. 32, § 5(2)(a). Group 1 is a catch-all that covers “clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified.” G.L. c. 32, § 3(2)(g). Group 2 includes, among other individuals, “employees of a city or town who are employed as licensed electricians.” *Id.*

The board’s argument is that, because Mr. Rose worked for the BWSC, he was not an employee “of a city or town.” § 3(2)(g). As far as it goes, the argument is correct. The BWSC was established in 1977 to take over Boston’s water and sewer operations. During a transition

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<sup>1</sup> Exhibits A-D are the attachments to Mr. Rose’s notice of appeal, which he did not originally mark. Exhibits 1-3 accompanied the board’s motion for summary decision.

<sup>2</sup> The board’s decision letter is not in the record, and the board has failed to comply with an order directing it to file a copy. Regardless, the letter’s contents are not in dispute.

period, certain workers supervised by the BWSC were still considered “employees of the city.” Acts 1977, c. 436, § 5 (third paragraph). Thereafter, they became “employees of the commission,” as did all new BWSC hirees. *Id.* § 4 (third, fourth, and sixth paragraphs); *id.* § 5 (fifth and seventh paragraphs). Appellate decisions in other contexts have emphasized that the BWSC possesses a “separate corporate existence,” which includes the power to “engage employees.” *Kargman v. Boston Water & Sewer Comm’n*, 18 Mass. App. Ct. 51, 57 & n.7 (1984), *superseded in part by* Acts 1992, c. 343, § 5. *See also Daveiga v. Boston Pub. Health Comm’n*, 449 Mass. 434, 438 (2007); *Boston Water & Sewer Comm’n v. Metro. Dist. Comm’n*, 408 Mass. 572, 573, 576 (1990).

Because Mr. Rose was not an employee of a city, § 3(2)(g) standing alone would not have entitled him to be classified in group 2. *See Zenkus v. Retirement Bd. of Worcester*, 45 Mass. App. Ct. 1105 (1998) (unpublished memorandum opinion). But the BWSC’s enabling act provides that:

All [new] employees of the commission shall be required to become members of the commonwealth or the Boston retirement system in the same manner and subject to the same laws, rules and regulations as persons entering the employ of the city.

Acts 1977, c. 436, § 5 (seventh paragraph). The plain meaning of this provision is perfectly clear. *See Harmon v. Commissioner of Correction*, 487 Mass. 470, 479 (2021). Obviously, the Legislature intended for the BWSC’s employees to continue to experience the same retirement-related rules and consequences as those applicable to the City of Boston’s own employees. It would make no sense to say that BWSC employees are “subject to” the same rules governing Boston employees, but not treated as Boston employees under those rules. That approach would leave the statute without practical consequences. *See Flanagan v. Contributory Ret. Appeal Bd.*, 51 Mass. App. Ct. 862, 867 (2001).

A licensed electrician employed by the City of Boston is entitled to be classified in group 2. Under the BWSC's enabling act, a licensed electrician employed by the BWSC is entitled to the same treatment. That more specific provision creates an exception to § 3(2)(g)'s usual demand for employment by a "city or town." See *Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 461 Mass. 366, 374 (2012).

Group 2 also includes "employees of the South Essex sewerage district who are employed as licensed electricians." G.L. c. 32, § 3(2)(g). See Act 2018, c. 221 (superseding *Paine v. Salem Ret. Bd.*, No. CR-14-538 (DALA Jan. 29, 2016)). It may be tempting to infer that group 2 excludes licensed electricians employed by all *other* water and sewer providers. But that inference would be unsound, because no statute entitles the South Essex sewerage district's employees to be governed by a city's retirement-related laws, rules, and regulations. See Acts 1925, c. 339. It is the absence of such a provision that made South Essex's electricians ineligible for group 2 until the Legislature specifically said otherwise. See *Paine, supra*, at \*4.

On the basis of the summary decision record, the board is thus not "entitled to prevail as a matter of law." 801 C.M.R. § 1.01(7)(h). Further proceedings would be warranted if any additional issues remained in dispute. *Id.* The case file suggests that there are no such issues, and that the board will either implement this decision or take an appeal to CRAB. To the extent that additional disputes do remain to be adjudicated, the board may revive and pursue them by way of a timely motion for reconsideration. *Id.* § 1.01(7)(l).

### **Conclusion and Order**

Mr. Rose is entitled to be classified in group 2 under § 3(2)(g). The board's motion for summary decision is DENIED and its decision is REVERSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate