COMMONWEALTH OF MASSACHUSETTS

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

Donald Rudge,
Petitioner,

v.

State Board of Retirement,
Respondent.

No. CR-24-0316

Dated: February 28, 2025

ORDER OF DISMISSAL

Petitioner Donald Rudge appeals from a decision of the State Board of Retirement (board) denying his application to purchase credit for pre-membership "contract" service. The board moves to dismiss. The deadline for any response to the motion by Mr. Rudge has expired. *See* 801 C.M.R. § 1.01(7)(a).

Mr. Rudge pleads the following facts, which at this juncture are taken as true. *See White v. Somerville Ret. Bd.*, No. CR-17-863, at *5 (DALA Nov. 16, 2018). In June-December 2004, he was employed as a "network assistant" by the Justice Resource Institute (JRI). In June-December 2006, he was employed as a "technical billable" employee by a company called Keane. At both jobs, Mr. Rudge's work was controlled by Commonwealth personnel. At both jobs, he was classified as a "(vendor) contract employee." Immediately after leaving each of the two jobs, Mr. Rudge took positions with the Department of Youth Services.

Creditable service for retirement purposes ordinarily covers only periods when an individual worked for a governmental unit and was a member of a public retirement system. *See* G.L. c. 32, § 4(1)(a). Purchases of credit for certain other periods of work are permissible under scattered statutes. The one relevant here relates to "service to the commonwealth as a contract employee." *Id.* § 4(1)(s). The theory of the motion to dismiss is that Mr. Rudge does not state a claim to have performed such service.

The core circumstances that § 4(1)(s) was intended to address are those of individuals employed directly by the state but on "time-limited contracts." *Young v. Contributory Ret. Appeal Bd.*, 486 Mass. 1, 3-4 (2020). However, an applicable regulation interprets the statutory term "service . . . as a contract employee" as extending to certain more complicated employment arrangements. 941 C.M.R. § 2.09. The current version of that regulation was in place by the time Mr. Rudge filed his purchase application. He does not claim that his case is governed by an older version of the regulation. *See Garg v. State Bd. of Ret.*, No. CR-22-0584, 2024 WL 4345238, at *2 (Div. Admin. Law App. Sept. 20, 2024).

The pertinent portion of today's § 2.09 allows for purchases under § 4(1)(s) of "service provided through a vendor established and operated by, or that functions as an instrumentality of, the Commonwealth or a Commonwealth agency." § 2.09(3)(c). The term "instrumentality" tends to refer to a "means or agency through which a function of another entity is accomplished." *Black's Law Dictionary* 919 (10th ed. 2014). In another context, courts considering whether an entity is a state "instrumentality" have looked to the following factors: whether the entity was formed by a "statute, regulation, or executive order," whether the entity performs an "essentially governmental function," whether the entity "receives or expends public funds," whether the state "controls or supervises" the entity, and whether state is the entity's essential "owner." *Massachusetts Bay Transp. Auth. Ret. Bd. v. State Ethics Comm'n*, 414 Mass. 582, 589-91 (1993). *See also Opinion of the Justices*, 309 Mass. 571, 581-82 (1941); *McMann v. State Ethics Comm'n*, 32 Mass. App. Ct. 421, 425 (1992).[1]

[1] Some decisions have suggested that an "instrumentality" under § 2.09 must be "a public entity that was created by statute and placed within state government." *Camacho v. State Bd. of Ret.*, No. CR-16-243, at *14 (Div. Admin. Law App. Dec. 23, 2022). But that view would tend to leave the regulation's "instrumentality" prong superfluous to the "established and operated" prong. *See generally Commonwealth v. Fleury*, 489 Mass. 421, 427 (2022).

The board is correct that Mr. Rudge's pleadings do not state a viable claim under § 2.09. He does not claim that JRI or Keane were established or operated by the Commonwealth or its agencies. He does not claim that those entities functioned as state instrumentalities. He offers no factual assertions about the entities' corporate forms, the legal formalities that established them, the nature of their operations, their finances, the measure of control exercised over them by state agents, or the essential interests they were built to serve. Taken as true, Mr. Rudge's pleadings do not support a conclusion that his two pre-membership employers were within the category of "vendors" that § 2.09 covers. By extension, there is no basis for a conclusion that Mr. Rudge performed pre-membership "service to the commonwealth as a contract employee." § 4(1)(s).

In view of the foregoing, it is hereby ORDERED that the motion to dismiss is ALLOWED and this appeal is DISMISSED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate